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SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 JACK POWELL,)
)
 Plaintiff,)
)
 -versus-)
)
 CAROLINA CENTER FOR)
 OCCUPATIONAL HEALTH,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 C.A. NO.: 2013-CP-10-6567

**ORDER GRANTING
 SUMMARY JUDGMENT
 (Case Ending)**

FILED
 2014 NOV -5 PM 12:47
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

This matter came before the Court on October 27, 2014, upon Defendant Carolina Center for Occupational Health's motion for summary judgment as to Plaintiff's sole remaining cause of action for common law assault. Present at the hearing was *pro se* Plaintiff, and Peden Brown McLeod, Jr. and G. Wade Cooper for Defendant. For the following reasons, the motion for summary judgment is granted.

I. PROCEDURAL BACKGROUND

Plaintiff filed this action on November 14, 2013, asserting five causes of action against Defendant arising out of the medical care Defendant provided to Plaintiff while detained in the Charleston County Detention Center. Plt. Compl. ¶ 3. The five causes of action were for: (1) "gross negligence;" (2) "assault;" (3) "breach of duty;" (4) "intentional infliction of emotional distress;" and (5) "civil conspiracy."

On February 28, 2014, Defendant filed a motion to dismiss on the grounds that Plaintiff failed to file a Notice of Intent to File Suit and an expert Affidavit per South Carolina Code Sections 15-36-100 and 15-79-125 for medical malpractice claims. Defendant's motion to dismiss came

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before Judge J.C. Nicholson, Jr. on July 21, 2014. Judge Nicholson filed an Order dismissing all causes of action except for common law assault. Thus, the sole remaining cause of action against Defendant is common law assault.

II. MATERIAL FACTS

Plaintiff alleges that on June 21, 2012, "Plaintiff was knocked unconscious after tripping over an unburied cable line around 9:00 pm in front of the Folly Oaks Center located at 930 Folly Road." Plt. Compl. ¶2. As a result, Plaintiff injured his head, neck, shoulder, and knees and was transported by Charleston County EMS to the Medical University of South Carolina. Id. Plaintiff further alleges that he was subsequently arrested for "Trespassing; Refusal to Leave" MUSC. Id. Plaintiff goes on to allege that he was transported by MUSC Public Safety to the Al Cannon Detention Center and was met by a male nurse from CCOH. Id. at ¶ 3. Plaintiff alleges that the Defendant's nurse "angrily told Mr. Powell he just talked to MUSC Dr. [sic] and then threatened Mr. Powell to get out of the wheelchair or else because you want be needing one here." Id.

According to the Plaintiff's testimony, he was arrested at the Medical University of South Carolina ("MUSC") for trespassing and for failing to leave the hospital after receiving treatment. Plt. Response to Motion for Summary Judgment, p. 3. Plaintiff was taken to the Charleston County Detention Center by MUSC Public Safety. Id. While waiting to be screened at the detention center by Defendant, a nurse of Defendant ordered Plaintiff out of one of the detention center's wheelchairs. Id., p. 3 - 4. The alleged common law assault occurred when Defendant's male ordered Plaintiff to get out of the wheelchair. Depo. of Jack Powell, 49:21 - 50:25 (Aug. 27, 2014). Defendant's male nurse did not raise his hand in a threatening manner when he ordered Plaintiff out of the wheelchair. Id. at 109:6 - 112:16. Defendant's male nurse was not carrying anything in his hand that could have

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been thrown at Plaintiff when he ordered Plaintiff out of the wheelchair. Id. Defendant's male nurse merely angrily ordered Plaintiff out of the wheelchair, without any actual offer of physical violence towards Plaintiff. Id.

III. SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland School Dist. One, 534 S.E.2d 275, 277 (S.C. 2000). "In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." Id. "When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." Singleton v. Sherer, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008).

"The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. The State Record Co., Inc., 499 S.E.2d 824-25 (S.C. Ct. App. 1998). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case.'" Id. at 825. "The moving party need not 'support its motion with affidavits or other similar materials negating the opponent's claim.'" Id.; see Milligan v. Liberty Life Ins. Co., 443 S.E.2d 381, 382 (S.C. 1994) (nothing that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton, 659 S.E.2d at 203.

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“It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.” Thompkins v. Festival Centre Group, I, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. Id. at 330-31, 673 S.E.2d at 803.

IV. CONCLUSIONS OF LAW

An assault is an attempt or offer, with force or violence, to inflict bodily harm on another or engage in some offensive conduct. Mellen v. Lane, 377 S.C. 261, 276, 659 S.E.2d 236, 244 (Ct. App. 2008). The elements of assault are: (1) conduct of the defendant which places the plaintiff, (2) in reasonable fear of bodily harm. Id. The conduct must be of such nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness, so as to influence his conduct; or it must appear the person against whom the threat is made was peculiarly susceptible to fear, and the person making the threat knew and took advantage of the fact he could not stand as much as an ordinary person. Id.

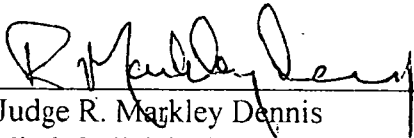
Here, as noted above, the Plaintiff was arrested at the Medical University of South Carolina (“MUSC”) for trespassing and for failing to leave the hospital after receiving treatment. The Plaintiff was taken to the Charleston County Detention Center by MUSC Public Safety. While waiting to be screened at the detention center by Defendant, a male nurse employee of Defendant ordered Plaintiff out of one of the detention center’s wheelchairs. Plaintiff contends that he was assaulted when Defendant’s male nurse ordered Plaintiff to get out of the wheelchair. The

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Defendant's male nurse, however, did not raise his hand in a threatening manner when he ordered Plaintiff out of the wheelchair according to the Plaintiff. The Defendant's male nurse was not carrying anything in his hand that could have been thrown at Plaintiff when he ordered Plaintiff out of the wheelchair. Rather, the Defendant's male nurse merely angrily ordered Plaintiff out of the wheelchair, without any actual offer of physical violence towards Plaintiff.

South Carolina courts have announced the rule in numerous cases that in the absence of statute, mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault or battery, unless accompanied by an actual offer of physical violence. Id. The Plaintiff admits that Defendant's male nurse simply angrily told Plaintiff to get out of the wheelchair without any actual offer of physical violence. Depo. of Jack Powell, 109:6 - 112:16. The Court finds since there is no genuine issue of material fact as to whether an actual offer of physical violence was made (there was none), the Defendant is entitled to summary judgment as to the cause of action for common law assault pursuant to the holding of Mellen, supra. Having considered the motion, the parties submissions to the Court, and the arguments of counsel, the Court grants Defendant's motion for summary judgment.

AND IT IS SO ORDERED.



Judge R. Markley Dennis
Ninth Judicial Circuit

October 31, 2014.
Charleston, South Carolina

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