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MAR 20 2015

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and  
Tenet HealthSystem Medical, Inc.,

Respondents.

**APPELLANT'S RESPONSE TO  
RESPONDENT'S MOTION TO DISMISS**

Respondent has filed a motion to dismiss this appeal. Appellant hereby responds. Appellant respectfully requests that this Court deny Respondents' motion and uphold the Appellate Court Clerk's determination of compliance with the South Carolina Appellate Court Rules routinely made prior to filing and docketing appeals. "The clerk of the appellate court shall insure compliance with this Rule before accepting any papers for filing." Rule 267, SCACR. In compliance with the SCACR and Form 8, Appendix C, SCACR, the following items were forwarded for filing:

- 1) notice of appeal and a copy,
- 2) proof of service and a copy,
- 3) the filing fee of \$100.00 (check #2489),
- 4) copy of transcript request, and
- 5) copy of the orders filed December 9, 2014, and November 3, 2014.

As to item number 1 above, the notice of appeal, respondents admit in their memorandum that the notice of appeal, which was timely served by mail, was received by respondents on January 20, 2015. See page 4 of respondents' memorandum: "On January 20, 2015, Appellant served Respondents with .... notice of appeal." To the extent respondents are requesting amended notice of appeal, please find attached amended notice of appeal and proof of service.

As to item number 2 above, proof of service does not have to be signed by the attorney. The suggestion that appellant's proof of service is uncorroborated is inconsistent with the acknowledgment of service in respondents' memorandum at page 4, which states, "On January 20, 2015, Appellant served Respondents with .... notice of appeal."

As to item number 3 above, check #2489 was negotiated and applied to the filing fee.

As to item number 4 above, a copy of the transcript request was included. Notice of receipt of the transcript was served on respondents by mail on March 5, 2015. The record reflects the paralegal's proof of service on behalf of the appellant's attorney which certifies that the "correspondence (*requesting the transcript*) with cc" was served on respondents (emphasis supplied). In any case, notice of receipt of transcript has already been served on respondents, corroborating the transcript request. Mr. McQueeney had been representing Respondents, but apparently has left the firm, thus some early documents were served in his name. Ms. Smith-Yancey, who is in the same law firm, has since contacted counsel for the Appellant and notified him that Mr. McQueeney is no longer with the firm. It does not appear that this has had any prejudicial effect on either party.

As to item number 5 above, copies of the orders on appeal were included with the filing.

Respondents have raised an argument, without any factual basis, that the undersigned is, in violation of Rule 11, signing off on documents without having read them as a “Hybrid attorney,” something that has apparently been recognized in certain criminal cases where defendants are writing their own legal arguments and attorneys are signing off on them without really making the document “their own work.” Just as a matter of civility and collegiality, attorneys should not be making unsupported claims like this against one another, and especially not in motions like this. It’s defamatory at the very least and should simply be beneath us as officers of the Court. It is very difficult to see how the undersigned could be accused of this, since the documents he has submitted in this case to date consist of a motion to substitute him as counsel and a notice of receipt of transcript.

The Respondents also seem to have taken a stance that an attorney cannot file a notice of appeal with the Appellate Court where there was another attorney representing that client in the Circuit court, without an Order from the Circuit Court recognizing a substitution of counsel. They are asking this Court to reject the notice of appeal and dismiss this appeal on those grounds. This is simply not a defensible position. It is a very common thing for a litigant to have a separate appeal attorney from the counsel who had represented him or her in Circuit Court. There is an appellate court rule which applies to the withdrawal of counsel of record.

**RULE 264**  
**SUBSTITUTION OF ATTORNEYS OR GUARDIANS**

(a) **Continued Representation.** The attorneys and/or guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given as provided in this Rule.

(b) **Withdrawal.** An attorney of record in a matter pending before an appellate court may not withdraw from **representation** of his client without justifiable cause, or the consent of his client;

and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party.

Respondent seems to be arguing that this rule means that nobody other than the undersigned could rightfully file a notice of appeal for the Appellant. That simply does not follow from the rule. Mr. Goldberg signed a notice of appeal for the Appellant. Mr. Johnson then gave notice of substitution, and Mr. Goldberg asked for leave to withdraw, with consent of the Appellant. This was granted by the Court because it complied with Rule 264(b). There is no restriction in this rule on how many attorneys can be representing a party. A party can have many attorneys as counsel of record. Rule 264 only applies when subtracting attorneys, not adding them.

Respondents claim that the appeal is untimely, but acknowledge receipt of service the by in their memorandum at page 4, which states, "On January 20, 2015, Appellant served Respondents with .... notice of appeal." This is within 30 days of the December 3<sup>rd</sup> Form 4 order rejecting Appellant's request for reconsideration of the 11-13-14 Order. Rule 59(f), SCACR - Time for Appeal. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999) (when there is a final judgment, and a party timely files its notice of intent to appeal from that judgment, the appellate court may review any intermediate order necessarily affecting the judgment not earlier appealed); *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) (an order dismissing some but not all of the claims in a case is immediately appealable); *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992). See Toal *et al*, *Appellate Practice in South Carolina* (2002), pp. 86-88, 98, 143. If the Respondents received a notice of appeal of the December 3<sup>rd</sup> order, which was denying a motion for reconsideration of the November 3<sup>rd</sup>, Order, then the notice received on January 20<sup>th</sup>, would have encompassed both orders.

With respect to section II, the Order issued by Judge Dennis gives, as a ground for denial, "due to the status of this case as closed." Whether the case was properly closed or not and whether

Respondent had the right to engage in a “choice of remedies” which denied the Appellant a jury trial is the basis of this appeal, the initial brief to which will be filed soon. If Respondent’s stance is that the Clerk of Court should have rejected the filing based on the 2009 motion, and it failed to do so, that objection should have been raised in the lower court, if Respondents intended to make it an issue on appeal. The denial of the motion to alter or amend and the underlying order are the subject of this appeal.

Similarly, as to section III, respondents' characterization of that 2009 order is in error. Although it authorizes clerks to reject filings from Appellant, it does not preclude Appellant from signing a document stating that she has served a document on opposing counsel. “Of course, *serving* and *filing* are two separate acts, which are defined by Rule 233.” Toal *et al*, *Appellate Practice in South Carolina* (2002), p. 116. Former Rule 233, SCACR, is currently Rule 262, SCACR:

**(b) Service.** Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the appellate court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this Rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Service requires delivery to the person to be served. The person who certifies mailing or delivery frequently is not an attorney, but a paralegal or other support staff. Rule 262(b), SCACR. In fact, respondents' own proof of service in this matter is not signed by an attorney. No one would seriously contend that the paralegal who signed respondents' proof of service was engaging in the unauthorized practice of law or the filing of an appeal simply by signing proof of service. Such a

stance would lead to absurd results.

The the record does not support respondents' statements denying receipt referenced in section III. The record reflects a paralegal's proof of service on behalf of the appellant's attorney which certifies that the "correspondence (*requesting the transcript*) with cc" was served on respondents (emphasis supplied). Perhaps respondents overlooked and/or mislaid the documents because respondents appear to have admitted receipt of other documents that accompanied the letter. A notice of receipt of transcript has already been served on respondents, corroborating the request for transcript. When the undersigned offered to share the transcript with Respondents' attorney, she confirmed that she already had a copy of the transcript. Whatever the cause of Respondents' belief that it did not receive a notice of the request for transcript, it appears that Respondent obtained a copy of the transcript anyway, well before the filing of the Appellant's initial brief, and before the notice of receipt of transcript filed by Mr. Johnson.

As to section IV, the record in fact refutes respondents' affidavits stating that its attorneys did not receive a notice of appeal. The affidavits are certainly inconsistent with respondents' acknowledgment of service in respondents' memorandum at page 4, which states, "On January 20, 2015, Appellant served Respondents with .... notice of appeal." Proof of service by mail is conclusive. *Toal et al, Appellate Practice in South Carolina* (2002), p. 143. "This presumption is not overcome by a denial (*of receipt*), even though sworn." *Scutieri v. Miller*, 584 So.2d 15 (Fla. App. 3 Dist., 1991) (internal citations omitted) (emphasis supplied). If the undersigned understands Respondent's argument, it appears that Respondents are trying to convince this Court to ignore Appellant's proof of service because Appellant signed it. The 2009 Order may say that Clerks are to reject filings signed by Appellant alone, but it does not say that the Court is to discount her word when she says she mailed a document.

With respect to section V, this Court should uphold the appellate court clerk's determination the appeal is timely. Rule 203(e)(1), SCACR, provides, in pertinent part, as follows:

In appeals from the lower courts, the appeal shall contain the following information:

(C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken.... Rule 203(e)(1c), SCACR.

The notice of appeal herein provides the date of the order from which the appeal is taken. As per Rule 6, SCRCF, the timeliness of the appeal is apparent on its face. Rule 6, SCRCF. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999) (when there is a final judgment, and a party timely files its notice of intent to appeal from that judgment, the appellate court may review any intermediate order necessarily affecting the judgment not earlier appealed).

Turning to section VI, the notice of appeal clearly states that Mr. Goldberg is attorney for appellant. Rule 264 of the SCACR applies to the withdrawal of counsel, and how it should be accomplished, not the addition of counsel. Mr. Goldberg's entry into this case did not require any motion for withdrawal. Mr. Johnson did not object to Mr. Goldberg's signing as an attorney for the Appellant. Neither did Appellant. It does not seem like opposing counsel should have the standing to make any objection. Rule 264 certainly does not grant such a right.


As for VII, the false and unsupported claim of hybrid representation is disputed and citation to inapposite criminal cases is just not applicable here. The undersigned has entered into this case officially, and formally. He has been accepted by the court as the sole counsel of record for Appellant and Mr. Goldberg has been formally and properly allowed to withdraw. The

undersigned, after having received an Order from the Court recognizing his representation of Appellant, has filed a notice of receipt of transcript, and is now working on an initial brief. The undersigned has long ago ceased to take personally the incessant speculation and allegations from Attorney Smith-Yancey about what conversations occur between himself and his client as to the legal arguments to be advanced in Dr. Holmes' cases. Those conversations are attorney-client privileged, and, short of an order from the Court compelling the undersigned to disclose them, will not be discussed here or anywhere else except with the express permission of Dr. Holmes. If the Court believes that the undersigned is somehow in violation of Rule 11, the Court will take action to address it and the undersigned will cooperate and respond accordingly and respectfully. Without waiving or breaching attorney-client privilege, the undersigned assures the Court that his job in this appeal is to present a well thought out argument designed to assert and defend his client's position.

Respectfully submitted,

Dated

3-16-15



Chalmers C. Johnson  
1029 Bay St., #7  
Port Orchard, WA 98366  
425.999.0900

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

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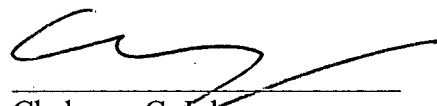
Respondents.

**PROOF OF SERVICE**  
**FOR APPELLANT'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS**

I certify that I have timely served Response to Respondents' Motion to Dismiss on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to the attorney of record, Lindsay Smith-Yancey at 16 Charlotte St., P.O.D. 22247, Charleston, SC 29403.

Dated

3-16-15

  
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**SC Court of Appeals**

March 16, 2015

Fax: 803.734.1839

Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: C. Holmes, M.D. v Tenet et al  
App. Case No. 2015-000187

Dear Madam:

I am faxing a copy of this letter, the Appellant's Response to Respondents' Motion to Dismiss, and Proof of service to you on this date. I am also sending the following via mail to your offices:

- 1) One original and seven copies of the Response,
- 2) Proof of Service and one copy, and
- 3) SASE for return.

Please send me a clocked copy of the Proof of service for my records. Thank you.

Sincerely,

  
Chalmers C. Johnson

cc: Respondents' Counsel  
Lindsay Smith-Yancey  
PTW  
POD 22247  
16 Charlotte St.  
Charleston, SC 29403

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