STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A No.: 2013-CP-10-5351
JACK POWELL,	)	
	)	
Plaintiff,	)	**DEFENDANT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**
	)	
vs.	)	
	)	
MEDICAL UNIVERSITY OF SOUTH CAROLINA (MUSC),	)	
	)	
Defendant.	)	

TO: JACK POWELL, PLAINTIFF, PRO SE:

INTRODUCTION

This is lawsuit brought by the Plaintiff, Jack Powell, Pro Se, alleging causes of action for (1) reckless and gross negligence, (2) slander and libel, (3) intentional infliction of emotional distress, (4) false arrest and imprisonment, and (5) assault and battery. No genuine issues of material fact exist, and MUSC is entitled to summary judgment as a matter of law.

STATEMENT OF FACTS

On June 21, 2012, Plaintiff was transported to the Emergency Department at MUSC by Charleston County EMS after tripping over an exposed and unburied cable line on Folly Road. (Compl. p. 4). Plaintiff claims to have suffered injuries to his head, neck, shoulder, and knee as a result of the fall. (Compl. p. 4). Upon arrival to the Emergency Department, Plaintiff was evaluated and attended to by the ER staff. (Comp. p. 4). X-rays were ordered to evaluate his potential injuries. (Compl. p. 4). Pain medication was ordered for the Plaintiff; however, Plaintiff was also to be transported to

the radiology department for x-rays. (Compl. p. 4). When transport arrived to take Plaintiff to x-ray, Plaintiff asked how long it would take and asked to stay in the ER to wait for his pain medication rather than go to x-ray. The doctor asked Plaintiff if he was sure that he wanted to stay in the ER and wait for his pain medication rather than go to the x-ray department. (Compl. p. 4). Plaintiff replied in the affirmative and then told the doctor "that is about the stupidest question a doctor has ever asked me." (Compl. p. 4). After the x-rays were obtained, Plaintiff contends that the doctor came back into his room, rudely removed his neck brace, and told Plaintiff that he had been discharged. (Compl. p. 4). Plaintiff claimed that he could not move because of pain. (Compl. p. 4).

Plaintiff refused to leave the Emergency Department despite being discharged because he claimed he was in pain. (Compl. pp. 4-5). As a result, MUSC security was called. (Compl. p. 5). Plaintiff contends that security tried to pull him from the bed. (Compl. p. 5). He contends that the MUSC security continued to try to pull him from the bed and finally stopped because he was "yelling from pain." (Compl. p. 5).

MUSC Public Safety was then called and instructed Plaintiff to leave the hospital. (Compl. p. 5). Plaintiff claimed that he could not move, was not going to inflict anymore pain on himself, and asked to be helped from the bed. (Compl. p. 5). Plaintiff then threatened to sue MUSC. (Compl. p. 5). Public Safety then offered to take Plaintiff home, anywhere he wanted to go, or to Roper Hospital. (Compl. p. 5).

Plaintiff next claims that MUSC Public Safety removed him from the ER bed and transported him out of the hospital. (Compl. p. 5). Once outside of the hospital, Public Safety told Plaintiff to get out of the wheelchair and leave the premises. (Compl. p. 5). Plaintiff refused to leave because he claimed that he was in pain. (Compl. p. 5). Again,

Public Safety asked Plaintiff to leave the premises and told him that if he failed to leave, he would be arrested for trespassing. (Compl. p. 5). Plaintiff refused, stated that he would not inflict anymore pain on himself, and asked the officers to help him get out of the wheelchair. (Compl. p. 5). The Public Safety Officers then lifted Plaintiff from the wheelchair and placed him in their police car where he was arrested for trespassing/refusal to leave and transported to jail. (Compl. p. 5).

ARGUMENT

I. Standard of Review

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Wilson v. Moseley, 327 S.C. 144, 146, 488 S.E.2d 862, 863 (1997). In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Id.*

"Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). "[I]n cases applying a preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid–South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc., 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (*citing* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). For the reasons that follow, this Court should grant Defendant's Motion for Summary Judgment as to Plaintiff's claims in this matter.

II. Reckless and Gross Negligence

Under South Carolina law, medical negligence is the failure of a physician to exercise that degree of care and skill which is ordinarily employed by the profession generally under the same or similar circumstances. Jernigan v. King, 312 S.C. 331, 440 S.E. 2d 379 (Ct. App. 1993)(*citing* Welch v. Whitaker, 282 S.C. 251, 317 S.E. 2d 758 (Ct. App. 1984)). In order to establish the requisite element of negligence in a medical malpractice action, the plaintiff must present (1) evidence of the generally recognized and accepted practices and procedures which would be exercised by average competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances; and (2) evidence that the defendant doctor departed from the recognized and generally accepted standard. See David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (2006); Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633, 634 (1986)(*citing* Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985)). In South Carolina, the issue of whether a physician deviated from the applicable standard of care is to be determined by what an ordinary careful prudent physician would have done under the same or similar circumstances. McCourt by and through McCourt v. Abernathy, 318 S.C. 301, 307 457 S.E.2d 603, 607 (1995). In a medical malpractice action, the plaintiff

must present evidence, by expert testimony, to establish the required standard of care and the physician's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge and experience such that no special learning is necessary to evaluate the conduct of the physician. See Pederson v. Gould, 341 S.E.2d at 634; Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997); Cox v. Lund, 334 S.E.2d at 116; Martisan v. Hilton Head Health System, L.P., 364 S.C. 430, 613 S.E. 2d 795 (Ct. App. 2005), *reh'g. denied* (2005); Botehlo v. Bycura, 282, S.C. 578, 320 S.E.2d 59 (Ct. App. 1984).

In support of his negligence claim, Plaintiff alleges that MUSC acted wrongfully and demonstrated willful gross negligence when the physicians and nurses ignored foreseeable harm taking place when the security guards were recklessly allowed to try and take Plaintiff from his ER bed. Specifically, Plaintiff claims that the reckless act occurred after he was medically discharged, but before pain medication was administered to Plaintiff. He further contends that this occurred because he was unable to move from the ER bed. Plaintiff further claims that the ER physician made an improper and negligent decision when he ordered more medication and then allowed security to take him from the ER bed. In his deposition, Plaintiff testified:

> Q: Do you think that the health care providers, then, at MUSC were negligent in the care they provided by not properly discharging you?
>
> **A: I think the doctors and the nurse -- yes. They had a responsibility to make sure that I was discharged properly. And if you're trying to work up one of them things where you can get it dismissed because of this, that, and the other, I'll just file it again.**

Q: Tell me in your words or your opinion how was MUSC recklessly and grossly negligent?

A: How they're reckless and grossly negligent?

Q: Yes, sir.

A: You're talking about any specific person at MUSC?

Q: It's your Complaint. You allege recklessness and gross negligence. I need to know who was reckless and grossly negligent.

A: The physicians and nurses ignored forseeable harm taking place when the security guards were recklessly allowed to take me and try to take me from the bed when I was injured, yelling and screaming in pain.

Q: That's from your Complaint. What I want to know is what specific standard of care did the doctors and nurses violate or what statute or what regulation, protocol, procedure -- anything -- you maintain that they violated that would make them reckless and/or grossly negligent.

A: I can't give you nothing fancy right now, but I'm sure we'll be able to later.

Q: This is my only chance to talk to you about this, so I need to know everything you intend to offer.

A: It says right here: Officer McKinnie stopped trying to assist me from lying to a seated position and stopped because I stated I'm not putting any more pain on myself, but yet the doctor allowed him to do it again. Even the Public Safety said that. They said that

Mr. Powell complained the pain was unbearable, and then they turn right around and start -- the doctors let him do it again.

[Dep. J. Powell, pp. 152-154].

There is no question that the decision of whether to discharge a patient and whether to order additional pain medication fall outside the ambit of common knowledge and experience such that no special learning is necessary to evaluate the conduct of the physician. Plaintiff has alleged a cause of action for medical negligence due to the actions of the Emergency Department physician, but has failed to offer expert testimony establishing a deviation from the standard of care.

Therefore, Plaintiff's cause of action for reckless and gross negligence must be dismissed to the extent that he asserts that the negligence resulted from the actions of the physician and other medical personnel working in the Emergency Department during his admission.

III. Slander and Libel

Under South Carolina law, the standards governing a claim of defamation are well-established:

> The tort of defamation allows a complaining party to recover for injury to his reputation as the result of a false communication to others about him, made by the defendant. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). "Slander is a spoken defamation, while libel is a written defamation or one accomplished through actions or conduct." *Id.* In order to prove defamation, a party must show: (1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

See Williams v. Lancaster Cty. Sch. Dist., 369 S.C. 293, 302-03, 631 S.E.2d 286, 292-93 (Ct. App. 2006).

Depending upon the nature of the allegedly defamatory statement, Plaintiff will be required to make different showings regarding damages to support his claim:

> [A] statement may be actionable *per se* or not actionable *per se*. [Citation omitted.] "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." [Citation omitted.] When the statement is classified as actionable *per se*, the defendant is presumed to have acted with common law malice, and the plaintiff is presumed to have suffered general damages. [Citation omitted.] When the statement is not actionable *per se*, "the plaintiff must plead and prove both common law malice and special damages." [Citation omitted.] "Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, i.e., with conscious indifference of the plaintiff's rights." [Citation omitted.] "Slander is actionable *per se* when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001).

See McBride v. School Dist. of Greenville Cty., 389 S.C. 546, 560-61, 698 S.E.2d 845, 852 (Ct. App. 2010) (*citing* Erickson v. Jones Street Publishers, *LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006)); see also Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E.2d 305 (2012)(statements were not capable of any defamatory construction); Smith v. Phoenix Furniture Co., 339 F. Supp. 969 (D.S.C. 1972)(words spoken were not actionable *per se*).

Plaintiff has testified as to what he believes comprised the Defendant's defamatory statements about him. All statements that Plaintiff cites in support of his defamation claim are statements that were made by MUSC medical personnel in his medical record. (See Medical Record of Plaintiff attached hereto as Exhibit "A"). Specifically, in his deposition, Plaintiff testified:

> Q: How about what evidence do you have of slander and liable by MUSC?

A: Well, to start with, like I said, I didn't know -- at the time I didn't know that any of those things were said to me, but that came right there. You just read it a little while ago that Nurse Pentz stated right here on this document -- I can paraphrase. She said -- right here it says "verbally abusive to EMS."

Q: And how did that slander you or libel you?

A: Because she just wrote it down right here, and it's not true.

Q: What damages did that cause you by her writing that there?

A: You mean other than individuals reading this? Well, slander caused me a lot of damage because what it caused was by her repeating that to other people caused them to have a bad attitude towards me and then just decide right off the bat that I'm some combative drunk, wino, or some homeless guy, especially since I don't have any insurance....that now by her making these statements or writing it down actually does hurt me because they've got an attitude towards me.

Q: Where in her notes does it say that you're a combative drunk, wino, or that you have no insurance?

A: Well, it's got something to do with the way they look at people. Because see, just like it said right there a little while ago -- remember, they was talking about the way I appeared? What did they say? Do you remember?

Q: Something about "poorly groomed."

A: Yeah.

Q: You acknowledge you were covered in dirt; right? And you said you very might well have appeared that way; right?

A: Right. But they're saying "poorly groomed."

Q: Where in her notes does it say that you were a combative drunk, wino?

A: It doesn't say that, but everybody knows that they deal with those kind of problems there at the ER there all the time.

Q: Let me just short circuit this. You admit you cussed and yelled at the staff at the hospital; correct?

A: After they yanked and pulled on me and trying to pull my arm out of the socket, hurting me, yes.

Q: And you acknowledge and admit -- you would agree that both Nurse Pentz and the doctor and EMS separately stated in their respective notes that you were verbally abusive toward them? Is that fair? Is that accurate?

A. Yes. They said that.

Q, Because you did cuss and yell at them; correct?

A. Well, if their name is asshole then I guess I was talking to them. Because anybody that gets abused and attacked like that -- just like they did this 75 - year- old woman right here and then punch her in the chest -- what do you expect people to do?

[Dep. J. Powell, pp. 154-156].

Q. Did you let them know that you were fearful that they were a bunch of nuts and going to do this again to you?

A. Yeah. I called them a bunch of assholes and crazy assholes and everything else. Okay. Let's put the horse in front of the cart. The yanking and pulling came before the cussing.

[Dep. J. Powell pp. 101-103]

"Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages." See Erickson, 368 S.C. at 465 n.6, 629 S.E.2d at 664 n.6.

It is obvious, that the allegedly defamatory statements are not defamatory *per se*. MUSC did not accuse Plaintiff of committing a crime of moral turpitude. It did not state that he contracted a loathsome disease. It did not accuse him of adultery or of being unchaste and it did not state that he was unfit to engage in his business or profession. Consequently, the alleged defamation, if actionable, will require Plaintiff to prove both special damages and malice. Because there is no evidence of either element, MUSC is entitled to judgment as a matter of law.

A. Any Communications Made by MUSC Regarding Plaintiff are True and Therefore are Not Actionable Because Truth is a Complete Defense to Defamation.

Under South Carolina law, "truth of the matter is a complete defense to an action based on defamation." See WeSav Financial Corp. v. Forest Hills Homes, Inc., 316 S.C. 442, 450 S.E.2d 580)(citing Ross v. Columbia Newspaper, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976)); see also Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E.2d 305 (2012)(statements were true, therefore, respondent had a complete defense to defamation

and summary judgment was proper). With regard to any statements documented by MUSC about Mr. Powell in the medical record concerning his behavior in the Emergency Department, those statements are true and Plaintiff has even admitted that he made the egregious remarks to the MUSC staff in the ER.

B. Any Communications Made by MUSC Regarding Plaintiff were Qualifiedly Privileged and were Insufficient to Support a Defamation Claim.

Even if the statements are defamatory, which they are not, MUSC is entitled to a qualified privilege as a matter of law. The essential elements of a conditionally privileged communication are "good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and *publication in a proper manner and to proper parties only."* See Fountain v. First Reliance Bank, 398 S.C. at 444, 730 S.E.2d at 310 (citing Manley v. Manley, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987)(quoting Conwell v. Spur Oil Co. of W.S.C., 240 S.C. 170, 178, 125 S.E.2d 270, 274-75 (1962)).

"When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion." See McBride v. School Dist. of Greenville Cty., 389 S.C. at 562, 698 S.E.2d at 853(*citing* Bell v. Bank of Abbeville, 208 S.C. 490, 493-94, 38 S.E.2d 641 (1946)). ("The publication of defamatory words may be under an absolute, or under a qualified or conditional privilege . . . One publishing defamatory words under a qualified or conditional privilege is only liable upon proof of express malice."). The statement must be such that the occasion warrants, and must be made in good faith to

protect the interests of the one who makes it and the persons to whom it is addressed. *Id.* at 562, 853. Communications between employees of an organization are qualifiedly privileged if made in good faith and in the usual course of business. *Id.*

Here, any alleged statements made by MUSC about Mr. Powell were made in the medical records and to medical personnel. The medical records are used to document factual information regarding a patient and the formation in the records is only communicated or shared with other medical personnel in the course of providing care to him. The information and records are further protected from publication to third parties who do not have a corresponding interest in the subject matter by federal privacy laws, namely the Health Insurance Portability & Accountability Act of 1996 (HIPAA). Thus, MUSC would be precluded from disclosing or publishing any information about Plaintiff's health condition except to health care providers and other individuals with a corresponding interest in the subject matter. In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. In addition, it is for the court to determine whether there are facts demonstrating abuse of the privilege. See Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E. 2d 305 (2012)(Fountain failed to show a scintilla of evidence that defendants abused their qualified privilege, thus, summary judgment was appropriate).

Here, Plaintiff cannot demonstrate that MUSC abused the scope of the privilege, and, therefore, summary judgment is appropriate as a matter of law.

IV. The Court Should Grant Summary Judgment as to Plaintiff's Outrage (Intentional Infliction of Emotional Distress) Claim

A. Plaintiff's Intentional Infliction of Emotional Distress Claim is Prohibited by the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-30(f)

Section 15-78-30(f) of the South Carolina Tort Claims Act specifically excludes a cause of action for intentional infliction of emotional distress against a governmental entity. Section 15-78-30(f) specifically provides:

> (f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for **negligence, but does not include the intentional infliction of emotional harm.**

See S.C. Code Ann. §15-78-30(f)(emphasis added); see also Densmore v. City of Greenville, 2011 WL 11733107 (Ct. App. 2011)(unpublished)(trial court properly granted summary judgment to respondents on the cause of action for intentional infliction of emotional distress under the Tort Claims Act).

B. Plaintiff's Intentional Infliction of Emotional Distress Claim Fails Because He Cannot Proffer Any Evidence That the Defendants' Conduct Was So Extreme and Outrageous As to Exceed All Bounds of Decency or Caused Actual Severe Emotional Distress

In the alternative, the Court should enter summary judgment against Plaintiff on his claim for outrage/intentional infliction of emotional distress, because there is no evidence of conduct sufficient to warrant liability for that tort.

Under South Carolina law, the standards governing the tort of outrage are well-settled and require proof that the Defendants engaged in extremely culpable conduct:

> In order to recover for intentional infliction of emotional distress, a plaintiff must establish the following:

(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;

(2) the conduct was so "extreme and outrageous" so as to exceed "**all possible bounds of decency**" and must be regarded as "**atrocious, and utterly intolerable** in a civilized community;"

(3) the actions of the defendant caused plaintiff's emotional distress; and

(4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007); Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (emphasis added); accord Bell v. Dixie Furniture, Inc., 285 S.C. 263, 265, 329 S.E.2d 431, 433 (1985) (citing Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981)).

"[I]t is for the trial court to determine whether the defendant's conduct may be considered so extreme and outrageous as to permit recovery, and only where reasonable minds might differ should the issue be submitted to the jury." See Williams v. Lancaster Cty. Sch. Dist., 369 S.C. 293, 306, 631 S.E.2d 286, 293 (Ct. App. 2006) (citing Hainer v. Am. Med. Int'l, Inc., 320 S.C. 316, 324, 465 S.E.2d 112, 117 (Ct. App. 1995), *aff'd as modified*, 328 S.C. 128, 492 S.E.2d 103 (1997)).

"The majority of cases finding outrageous conduct generally require 'hostile or abusive encounters' or 'coercive or oppressive conduct.'" Fleming v. Rose, 338 S.C. 524, 538, 526 S.E.2d 732, 739 (Ct. App. 2000), *rev'd on other grds.*, 350 S.C. 488, 567 S.E.2d 857 (2002) (quoting Gattison v. South Carolina State College, 318 S.C. 148, 456 S.E.2d 414 (Ct. App. 1995); Wright v. Sparrow, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989)).

Where a defendant's actions have a reasonable basis, they generally cannot support an outrage claim. See Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 476, 710 S.E.2d 67, 74 (2011) ("We hold that Appellant could not, as a matter of law, maintain a claim for intentional infliction of emotional distress against Respondent as Respondent's conduct towards Appellant was reasonable and in accordance with the valid probate court orders."). In Todd v. South Carolina Farm Bur. Mut. Ins. Co., 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct. App. 1984), *rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985), the South Carolina Court of Appeals held the tort of intentional infliction of emotional distress is not a "panacea for wounded feelings rather than reprehensible conduct."

Courts of this state have repeatedly held that various forms of bad conduct — even severely culpable conduct — are not sufficient to warrant liability for the tort of outrage; to the contrary, only the most despicable and offensive conduct will support such a claim. See *e.g.*, Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) (affirming summary judgment where defendant "insensitive[ly]" terminated treatment of patient shortly prior to surgery); Save Charleston Found'n v. Murray, 286 S.C. 170, 180, 333 S.E.2d 60, 66 (Ct. App. 1985) ("Merely converting someone's promissory note and maliciously bringing against the person a civil action based on the note is not conduct that, as a matter of law, 'exceeds all possible bounds of decency' and is 'atrocious and utterly intolerable.'"); Corder v. Champion Road Mach. Int'l Corp., 283 S.C. 520, 324 S.E.2d 79 (Ct. App. 1984) (holding that retaliatory discharge for filing a workers' compensation claim, absent claims of verbal assaults or hostile, abusive encounters, did not rise to level required for outrage); compare Bergstrom v. Palmetto

Health Alliance, 358 S.C. 388, 401, 596 S.E.2d 42, 48-49 (2004) ("If Hospital recklessly or intentionally made repeated and coercive efforts to separate a mother from her newborn infant, that might well constitute outrageous conduct that we would find utterly intolerable in a civilized community."); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) (finding sufficient outrageous conduct where home buyer subjected plaintiff to repeated public browbeatings, obscenities, and threats over a two-year period and even entered her home without permission and verbally attacked her in front of guests).

Here, there is no evidence of conduct that exceeded all possible bounds of decency and was atrocious, and utterly intolerable in a civil society. To the contrary, granting the Plaintiff the benefit of every doubt, he claims that MUSC acted in an unprofessional manner in attempting to manage his behavior on the night of June 21, 2012. There is no evidence of any threats of violence. There is no evidence of hostile confrontations. There is no evidence of oppression or coercion. There is no evidence that MUSC abused Plaintiff. Simply put, there is no evidence of anything that could conceivably be characterized as outrageous.

This Court should grant summary judgment because "[t]here is simply nothing in [Defendants'] actions that could be characterized as extreme and outrageous; as exceeding possible bounds of decency; or which might be regarded as atrocious and utterly intolerable in a civilized community." See Williams v. Lancaster Cty. Sch. Dist., 369 S.C. 293, 306, 631 S.E.2d 286, 293 (Ct. App. 2006) (affirming entry of summary judgment). At most, assuming Plaintiff's allegations to be true, the facts he alleges "may demonstrate unprofessional, inappropriate behavior, [but] they fall short of conduct" required to support an outrage claim. See Gattison v. South Carolina State College, 318

S.C. 148, 157, 456 S.E.2d 414, 419 (Ct. App. 1995). Plaintiff seeks to use the tort of outrage as a panacea to seek a remedy for wounded feelings.

Plaintiff's outrage claim also fails because he cannot proffer any corroborating evidence to support his claims of damage. The only evidence supporting Plaintiff's allegation that he suffered severe emotional harm is his own self-serving testimony. This is insufficient under South Carolina law:

> In [Hansson v. Scalise Builders of S.C., 374 S.C. 352, 650 S.E.2d 68 (2007)], our supreme court found that the plaintiff's testimony he lost sleep and developed a habit of grinding his teeth was not sufficient to survive summary judgment:
>
> > To permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something 'more'—in the form of third party witness testimony and other corroborating evidence—in order to make a prima facie showing of 'severe' emotional distress.
>
> 374 S.C. at 358–59, 650 S.E.2d at 72.
>
> Here, Levon Dunn testified that Respondents' actions caused him to develop high blood pressure and digestive problems. He also testified that his nerves were "shot" and that he took medication for his high blood pressure and nervousness. Pamela Dunn testified that she had been "emotionally ill" and that she had lost twenty pounds. Like in *Hansson*, we find this evidence, even when viewed in the light most favorable to the Dunns, is not sufficient to survive a motion for summary judgment.

See AJG Holdings, LLC v. Dunn, 392 S.C. 160, 169, 708 S.E.2d 218, 223-24 (Ct. App. 2011).

Therefore, for the foregoing reasons, this Court should grant Defendant's Motion for Summary Judgment as to Plaintiff's outrage claim.

C. The Conduct Alleged by Plaintiff May Not Serve as the Basis for an Outrage Claim, Because Another Tort Cause of Action Encompasses the Claim

In addition to the foregoing, Plaintiff's outrage claim fails because his remedy, if any, for MUSC's alleged misconduct in making false statements regarding him lies in a claim for defamation, not intentional infliction of emotional distress.

The South Carolina Court of Appeals has held that the tort of intentional infliction of emotional distress is not intended to cover conduct already potentially within the ambit of other causes of action. To the contrary, it was intended to apply, as a cause of action of last resort, where no potential remedy could exist for certain conduct:

> The tort of outrage was designed not as a replacement for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct where no remedy previously existed. Here, an action for defamation, which is the usual remedy to be employed against one who has published falsehoods, is available to Todd.

See Todd v. South Carolina Farm Bur. Mut. Ins. Co., 283 S.C. 155, 173, 321 S.E.2d 602, 613 (Ct. App. 1984) (reversing jury verdict on outrage claim), *quashed in part on other grds.*, 287 S.C. 190, 336 S.E.2d 42 (1985), quoted in 11 S.C. Jur., *Damages* § 21; *accord* Levine v. Walterboro City Police Dep't, 2006 WL 2228993, at *2 (D.S.C. Aug. 3, 2006) ("Intentional infliction of emotional distress is a claim of last resort. In this context, plaintiff could have pursued a defamation claim against newspaper. Since that alternative remedy was available, Todd suggests that a claim for intentional infliction of emotional distress cannot lie.") (granting summary judgment) (attached hereto as Exhibit B).

Here, Plaintiff's intentional infliction of emotional distress claim centers around claims that MUSC made false statements about him in the medical records. Such claims are appropriately brought under a theory of defamation and should be adjudged within the rubric of that tort. The tort of outrage is not a panacea that Plaintiff can use to layer on theories of liability when other causes of action exist to conceivably redress his

alleged harm. If MUSC's conduct impermissibly harmed Plaintiff such that he is entitled to relief, he must assert that claim under the tort of defamation. If, as is the case here, he cannot prove the elements of that tort, he is simply not entitled to any recovery under the law. The tort of outrage is intended to provide relief in those rare circumstances where an existing cause of action cannot conceivably reach a defendant's conduct; that is not the case in the instant lawsuit.

Therefore, for the foregoing reasons, this Court should grant Defendant's Motion for Summary Judgment as to Plaintiff's outrage claim.

V. Plaintiff's Cause of Action for False Arrest and Imprisonment is Barred by the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60(5)

Plaintiff's claim for false arrest and imprisonment is barred by the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60(5). Subsection 15–78–60(5) of the South Carolina Code (2005) precludes liability by a governmental entity for a loss resulting from the exercise of discretion or judgment by a governmental employee, or the failure to perform any act or service that is in the discretion or judgment of the employee. See Horton v. City of Columbia, 408 S.C. 27, 757 S.E.2d 537 (Feb. 26, 2014).

Plaintiff's false arrest and imprisonment claim centers on the fact that once he was discharged from the Emergency Department at MUSC after being evaluated on June 21, 2012, he had to be escorted from the Emergency Department by MUSC Hospital Security and Public Safety because he refused to leave. Once outside of the hospital, Plaintiff continued to refuse to leave the premises. As Plaintiff correctly alleges in his Complaint, the Security Officers offered to take Plaintiff home, to Roper Hospital, or anywhere he wanted to go. In his deposition, Plaintiff testified that once outside of the hospital, MUSC Security told him that he was free to leave the premises. [Dep. J. Powell,

pp. 158-159]. He admitted that he did not leave the premises and was therefore arrested and convicted of trespass. Id.

The decision to arrest Plaintiff clearly falls within the scope of S.C. Code Ann. § 15-78-60(5) because it involved the exercise of discretion and judgment by government employees. Thus, Plaintiff's false arrest and imprisonment claims are barred by the Tort Claims Act and summary judgment is appropriate as a matter of law. In addition, because the arrest was lawful, summary judgment is appropriate as a matter of law. See Densmore v. City of Greenville, 2011 WL 11733107 (Ct. App. 2011)(unpublished).

The actions of MUSC in arresting Plaintiff clearly demonstrate the exercise of discretion or judgment by MUSC Public Safety and Hospital Security.

VI. Plaintiff's Cause of Action for Assault and Battery is likewise Barred

A cause of action for assault has two elements. First, it involves conduct on the part of the defendant that puts the victim in reasonable apprehension of a harmful or offensive touching. Second, the defendant must intend the conduct involved. See Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 222, 317 S.E.2d 748 (Ct. App. 1984). The circumstances of whether a sufficient threat has been made are viewed from the perspective of a "reasonable victim."

> There must be just and reasonable ground for the fear; hence a vain or idle threat is not sufficient. It 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 that the person against whom [the threat] is made was peculiarly susceptible to fear, and that the person making the threat knew or took advantage of the fact that he could not stand as much as an ordinary person.

See Brooker v. Silverthorne, 111 S.C. 553, 558-559, 99 S.E.350, 352 (1919); see also, Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995).

Likewise, to establish a claim for civil battery, the Plaintiff must establish (1) a harmful or offensive touching without consent, and (2) an intent to commit the touching or to cause an apprehension of such touching. See 6 Am. Jur.2d Assault and Battery § 111 (1963). Any alleged touching is privileged if it was done in the defense of others. See State v. Hayes, 121 S.C. 163, 113 S.E. 362, 363 (1922).

Plaintiff bases his claim for assault and battery on the fact that MUSC removed him from the stretcher in the Emergency Department after he refused to leave the hospital once he was medically discharged and MUSC Security had to physically lift him into the police car once outside the hospital because he refused to leave the hospital premises. [Dep. J. Powell, pp. 162-163].

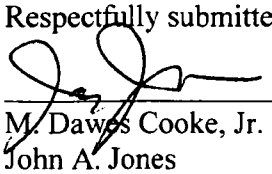
Plaintiff cannot establish a reasonable apprehension of a harmful or offensive touching or that a harmful or offensive touching occurred such that he suffered harm. See Incident Report. Plaintiff has admitted that his behavior in the ER was argumentative and combative toward the MUSC staff. [Dep. J. Powell, pp. 154-156; pp. 101-103]. Furthermore, he has admitted that he refused to leave the hospital and hospital premises even though he was medically discharged. Any action by MUSC to remove him from the premises was absolutely necessary and justified and should have been anticipated by Plaintiff.

CONCLUSION

Based on the foregoing, MUSC is entitled to summary judgment as to Plaintiff's assault and battery causes of action.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT MUSC

Charleston, South Carolina
July 16, 2014

13-5351

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of July, 2014, a true copy of the **Defendant Medical University of South Carolina's Memorandum in Support of its Motion for Summary Judgment** has been served upon Plaintiff by mailing a copy via U.S. Mail and addressed as follows:

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