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.

REPLY

Pursuant to Rule 240(j), SCACR, Appellant files and serves this Reply. Any party aggrieved by an order of an individual justice or judge may seek review of that order by the appellate court. Rule 240(j), SCACR. *See* Toal *et al., Appellate*

Practice in South Carolina (2002), p. 259, regarding former Rule 224(j), SCACR, currently Rule 240(j), SCACR. Appellant has sought a review of the individual order filed May 8, 2015. This was a motion, rather than a Petition for Rehearing. Respondent has failed to recognize this, and has therefore argued under the incorrect standard of review in its response.

The Appellant asks the Court to note that the Clerk of Court has made a determination as to the adequacy of the notice of appeal. Determination of compliance with the South Carolina Appellate Court Rules routinely made prior to filing and docketing all appeals. "The clerk of the appellate court shall insure compliance with this Rule before accepting any papers for filing." Rule 267, SCACR. Respondents have admitted timely notice of appeal in their memorandum stating: "On January 20, 2015, Appellant served Respondents with .... notice of appeal." To the extent respondents have requested amended notice of appeal, amended notice of appeal is filed and served. This Honorable Court should uphold the Clerk of Court's initial determination and deny Respondents' motion to dismiss.

There are currently three counterclaims pending for which Appellant has demanded trial by jury. Controlling precedent provides, "It has been decided by this Court too often to require citation of the cases that a plaintiff cannot, by framing his complaint so that his action would, under the old procedure, be one

cognizable only by a court of equity, select the forum in which the issue shall be tried, and thereby defeat a defendant's constitutional right of trial by jury." *Southern Ry v. Howell*, 89 S.C. 391, 71 S.E. 972 (S.C., 1911). Appellant's main concern, in this appeal, spelled out in the Initial Brief of Appellant, which has already been filed, is addressing her right to a jury trial on counterclaims which were never actually dismissed by any Order of the Court in this case.

Respondents' assert they **elected** to deprive the Appellant of the right to trial by jury. There is no record of the Respondents ever actually making any such election. There is no Order in the record allowing such a thing. Appellant's demand for jury trial in the Circuit Court was timely made. The SCFCPSA does not specifically mention any such election. Appellant is unaware of any Judicial Opinion interpreting the statute as saying any such thing. If there is an issue of statutory construction and interpretation here, it is a novel one, and one that would be important to clarify for future litigants and judges in South Carolina.

Respondents, in their Reply, did not address the case of *Pond Place Partners*, which establishes controlling precedent recognizing trial by jury on the FPA counterclaim which Respondents themselves pled. "We subsequently affirmed the trial court in our unpublished opinion Poole, *et. al v. Pond Place Partners, Inc., et. al,* Op. No. 1997-UP-129 (S.C. Sup.Ct.App. filed Feb. 12, 1997), *cert. denied* (Jan. 12, 1998). (*Remittitur was sent down.*) Thereafter, the Pond Place group

prosecuted their actions for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act (*FPA*). After a multi-day trial, the jury found only Poole liable for slander of title and awarded actual and punitive damages to Pond Place Partners and Edwin P. Collins. Poole appeals. We reverse." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C. App., 2002) (emphasis supplied). After remittitur in that case, the pending counterclaims (including the FPA counterclaim) were heard by the jury. Based on this fact pattern, it appears that there is some precedent for a party's right to a jury trial on counterclaims existing after a remittitur.

Respondents assert that Appellant's case was dismissed on Summary Judgment. Appellant points out that it was actually dismissed for lack of subject matter jurisdiction, under Rule 12(b). Although the case was dismissed "at the summary judgment stage" it was not actually a Rule 56 dismissal. Should this be an issue upon which the decision regarding a motion to dismiss may turn, the Record on Appeal, which would include the trial court's order of dismissal expressly explaining the dismissal for lack of subject matter jurisdiction, seems like something that should be reviewed before a decision is made. Case law directs substance over form. Rule 41(b), SCRCP, provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, **other than a dismissal for lack of jurisdiction**, operates as an adjudication on the merits." Rule 41(b),

SCRCP (emphasis supplied). Dismissal is in the nature of a discontinuance and is not an adjudication on the merits. *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983). "If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the court should treat the motion as if it were a Rule 12(B)(1) motion." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993). Again, if this issue is deemed to be integral to the Court's decision on a motion to dismiss, at this point, a record on Appeal would be beneficial and the motion to dismiss should be denied.

CONCLUSION

The Appellant respectfully requests that the Court review the Order dismissing this case and reverse it or remand the issue so that the Plaintiff can be provided with an opportunity to be heard on the issues in the Order which were not raised in the Respondents' motion before the Court.

Respectfully submitted,

Dated 7-30-15

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July 30, 2015

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

Re: CHolmes v Tenet et al
App. Case No. 2015-000187

Dear Clerk of Court:

I am faxing you a copy of this letter, the proof of service, and the Reply, all of which I am mailing today. Enclosed for filing is the original Reply to Respondent's Response to Appellant's Motion. Also, enclosed are the following:

1) Seven copies,
2) Proof of Service and a copy, and
3) SASE for return.

Would you please file the Reply, and return a clocked copy of the Proof of Service to me? Thank you.

Sincerely,

Chalmers C. Johnson

cc:
Lindsay Smith-Yancey
16 Charlotte St.
P.O.D. 22247
Charleston, SC 29403

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PROOF OF SERVICE

I certify that I have served the attached on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to the attorney of record at 16 Charlotte St., P.O.D. 22247, Charleston, SC 29403, and also by email to Counsel for Respondents at Lindsay Smith-Yancey <lsy@p-tw.com>.

Dated 7-30-15

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COPY

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