

1 Benjamin L. Anderson  
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4 980 328-5708

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SC Court of Appeals

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6 COURT OF APPEALS  
7 STATE OF SOUTH CAROLINA

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9  
10 Benjamin L. Anderson ) CASE NO: 2015-001932

11 Appellant ) TRANSCRIPT OF

12 ) Appellant Attached

13 v.

14  
15 Davita Upstate Dialysis

16 Respondent

17  
18 The Appellant, Benjamin L. Anderson  
19 submits this transcript pursuant to Rule

20 207 SCAR

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22  
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24  
25 April 5, 2016

Benjamin L. Anderson  
Benjamin L. Anderson  
Appellant Pso Se

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

BENJAMIN ANDERSON, )  
 )  
 PLAINTIFF, )  
 )  
 )  
 -VS- )  
 )  
 DaVITA UPSTATE DIALYSIS, )  
 )  
 DEFENDANT. )  
 \_\_\_\_\_ )

2014-CP-23-06070

TRANSCRIPT OF RECORD

JANUARY 26, 2015  
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE JAMES R. BARBER, III

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

PRO SE

ATTORNEY FOR DEFENDANT:

RICHARD McLAWHORN, ESQ.

SUSAN W. HUDGINS  
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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(No exhibits were produced during this hearing)

1           **THE COURT:** All right. What is this? Mr. McLawhorn,

2           ---

3           **MR. McLAWHORN:** That's correct, Your Honor.

4           **THE COURT:** --- something to say about Mr. Anderson?

5           **MR. ANDERSON:** Yes, sir.

6           **THE COURT:** Good morning.

7           **MR. ANDERSON:** Good morning.

8           **THE COURT:** You pro se, Mr. Anderson?

9           **MR. ANDERSON:** Yes, sir. Benjamin L. Anderson, pro se.

10          **THE COURT:** Sir? I'm sorry.

11          **MR. ANDERSON:** Yes, I'm pro se.

12          **THE COURT:** All right. Tell me what you want to tell  
13 me, Mr. McLawhorn.

14          **MR. McLAWHORN:** Yes, Your Honor. This is a motion to  
15 dismiss for failure to comply with South Carolina code 15-  
16 79-125's requirement that a notice of intent and a expert  
17 witness affidavit be filed prior to the institution of a  
18 claim that sounds medical malpractice.

19           Just to give Your Honor some background ---

20          **THE COURT:** Mr. Anderson, you can have a seat until I  
21 hear from you, okay?

22          **MR. McLAWHORN:** --- about the case, just to kind of set  
23 the stage so you can understand why we're making this  
24 motion. Mr. Anderson was a patient at DaVita Upstate  
25 Dialysis from February of 2013 until December of 2013.

1 During that time he was receiving dialysis treatment two to  
2 three times a week to treat end-stage renal failure.

3 Mr. Anderson alleges that the first incident that  
4 caused this lawsuit to be filed occurred on November the  
5 5th, 2013. He alleges that Brian Hamrick, who was a nurse  
6 employed by DaVita Dialysis, came up to him and told him,  
7 you're not a drug dealer, you have drugs in your body now.  
8 When a girl sits in front of you with her legs wide apart,  
9 she's trying to get money out of you.

10 He then alleges on November the 12th, the 16th and the  
11 19th he was subjected to various forms of verbal abuse at  
12 the hands of the DaVita nurses and staff including racial  
13 slurs, remarks about his genitalia region, remarks about his  
14 going to a lawyer and generalized name calling.

15 But, Your Honor, the incident that I really think  
16 precipitated this lawsuit occurred on November the 16th. On  
17 November the 16th Mr. Anderson had dialysis treatment. And  
18 a very common side effect of dialysis treatment is high  
19 blood pressure, something that's monitored very closely by  
20 dialysis nurses and staff throughout the dialysis treatment.

21 Mr. Anderson's treatment concluded on the 16th. And  
22 later on that day he presented to St. Francis Hospital here  
23 in town complaining of high blood pressure. He was treated  
24 for high blood pressure and then discharged.

25 On November the 18th, 2013, which was the Monday

1 folloiwng the 16th admission Mr. Anderson was seen by DaVita  
2 employees outside the building holding a pink poster board  
3 sign that said DaVita allows its employees to -- or, I'm  
4 sorry, DaVita allows its patients to have high blood  
5 pressure to the point of having a stroke and doesn't do  
6 anything about it.

7 Then on the 19th Mr. Anderson came in for his regular  
8 treatment. His treatment ended. And as he was leaving the  
9 building Dr. Allawah, who is the staff nephrologist, who was  
10 actually coming into the building, the two saw each other in  
11 the lobby and began talking. Mr. Anderson requested a  
12 prescription for Valium. Dr. Allawah refused.

13 Mr. Anderson alleges that Dr. Allawah told him, we  
14 don't have that medication here at the facility. He also  
15 alleges that Dr. Allawah told him that he'd gotten the staff  
16 to back off of their verbal abuse of him.

17 Mr. Anderson then filed this current lawsuit on  
18 November the 5th of 2014. And in the lawsuit the causes of  
19 action that he alleges are intentional infliction of  
20 emotional distress for, I suppose, the verbal abuse that he  
21 sustained, defamation for the remark by Mr. Hamrick about  
22 you're not a drug dealer, you have drugs in your body now,  
23 and then fraud for Dr. Allawah saying that they didn't have  
24 medication at the facility while the website apparently  
25 listed Valium as being available at that facility.

1           Now, Your Honor, South Carolina code 15-79-125 requires  
2           that a notice of intent and an expert witness affidavit be  
3           filed prior to the institution of a medical malpractice  
4           case. Your Honor, this case really is a medical malpractice  
5           action. I know Mr. Anderson has pled it as an intentional  
6           infliction of emotional distress, a defamation, and a fraud  
7           causes of action, but it really sounds in medical  
8           malpractice.

9           And just real quick, the definition of medical  
10          malpractice in South Carolina code 15-79-110(6) is a medical  
11          practitioner doing that which a reasonably prudent  
12          healthcare provider would not do in the same or similar  
13          circumstance.

14          South Carolina Supreme Court recently gave an opinion  
15          in the case of Dawkins v. Union Hospital District. And it  
16          examined South Carolina code 15-79-110(6). And it talked  
17          about how it looks at whether treatment had already begun.  
18          Like in the Dawkins case the patient was suing because they  
19          slipped and fell in the bathroom while in the waiting room  
20          at the hospital prior to being seen by a medical provider.  
21          But it also looked -- it also mentioned that while providing  
22          medical services to a patient a medical professional acts in  
23          the professional capacity and must meet the professional  
24          standard of care as established by expert testimony.

25          Your Honor, this is a medical malpractice action ---

1           **THE COURT:** Well, tell me what acts of negligence he's  
2 alleged.

3           **MR. McLAWHORN:** Well, first, Your Honor, he alleged  
4 that Dr. Allawah should have written him a prescription for  
5 Valium because it was listed on the website. Whether a  
6 doctor has a duty to write a prescription or not to write a  
7 prescription, that really is a medical malpractice claim.

8           **THE COURT:** Well, he's not alleged negligence. He's  
9 alleging fraud. Didn't you say that?

10          **MR. McLAWHORN:** Right, Your Honor. But what I'm saying  
11 is, he claims fraud in the heading, but what it actually is,  
12 it's a medical malpractice action. He can call it, you  
13 know, fraud, or defamation, or whatever, but really because  
14 it relates to medical malpractice and the care he's being  
15 provided by the doctors, nurses, and staff, it's a medical  
16 malpractice action.

17           Additionally, Your Honor, Mr. ---

18          **THE COURT:** It sounds to me like he's alleging that the  
19 doctor lied to him, and that was the fraud.

20          **MR. McLAWHORN:** That's correct, Your Honor. But again,  
21 that's not his only claim. But what he's saying is that a  
22 doctor should have written him a prescription. Whether a  
23 doctor should write you a prescription or not, I think, Your  
24 Honor, it doesn't really -- it's a medical malpractice case  
25 and action.

1           But also, Your Honor, Mr. Anderson claimed in his  
2 complaint that his injuries were medically foreseeable.  
3 Particularly he says the Defendant's evidence of total  
4 disregard for his life, and it was medically foreseeable  
5 that he would sustain harm.

6           Now, when you bring into the equation you're arguing  
7 something was medically foreseeable, he's saying that the  
8 doctor, staff, and nurses should have used their medical  
9 training, knowledge, and expertise ---

10           **THE COURT:** Is this a medical -- are you alleging  
11 negligence on the part of anybody?

12           **MR. ANDERSON:** I allege ---

13           **THE COURT:** Let me get you to ---

14           **MR. ANDERSON:** Yes, sir.

15           **THE COURT:** --- when you address the Court.

16           **MR. ANDERSON:** Yes, Your Honor. I'm alleging tort  
17 claims. And I ---

18           **THE COURT:** So you're alleging negligence, any kind of  
19 negligence that they failed to do something that they should  
20 have or didn't do something -- or they did do something that  
21 they shouldn't have. They were negligent.

22           **MR. ANDERSON:** I discovered Thursday that the  
23 Defendant's ---

24           **THE COURT:** In your pleadings, Mr. Anderson, are you  
25 alleging negligence?

1           **MR. ANDERSON:** Yes, I am.

2           **THE COURT:** All right. Well, what negligence?

3           **MR. ANDERSON:** They failed ---

4           **THE COURT:** They were medically negligent in doing  
5 something?

6           **MR. ANDERSON:** Yes, sir.

7           **THE COURT:** All right. Did you file an affidavit?

8           **MR. ANDERSON:** No, I haven't. I am the expert witness  
9 because of my experience as ---

10          **THE COURT:** You're not an expert witness.

11          **MR. ANDERSON:** As a respiratory therapist.

12          **THE COURT:** You're not an expert witness. You're a  
13 Plaintiff.

14          **MR. ANDERSON:** Yes, sir.

15          **THE COURT:** All right. So intentional infliction of  
16 emotional distress, is that one of the causes of action?

17          **MR. McLAWHORN:** That's correct, Your Honor.

18          **THE COURT:** All right. That doesn't require an  
19 affidavit.

20          **MR. McLAWHORN:** Well, again, Your Honor, ---

21          **THE COURT:** Which causes of action are you alleging  
22 negligence, Mr. Anderson?

23          **MR. ANDERSON:** I'm just alleging intentional infliction  
24 of emotional distress and defamation of character, slander,  
25 per se, and deceit.

1           **THE COURT:** And what?

2           **MR. ANDERSON:** And deceit.

3           **THE COURT:** All right.

4           **MR. McLAWHORN:** And ---

5           **THE COURT:** Hold on. I'm going to order that any cause  
6 of action that is -- which medical negligence is alleged is  
7 dismissed. The causes of action in the alleged intentional  
8 infliction of emotional distress, fraud, and whatever else,  
9 those allegations and elements that relate to those types of  
10 causes of action don't require an affidavit, and they will  
11 continue to go forward at this point.

12           **MR. McLAWHORN:** Okay, Your Honor. In our motion we  
13 provided an alternative for the defamation and the fraud  
14 causes of action to be dismissed under rule 12(b)(6) for  
15 failing to plead sufficient facts to support those  
16 allegations.

17           Particularly, Your Honor, the elements of defamation  
18 are a false and defamatory statement, unprivileged  
19 communication to a third party, fault from the party  
20 publishing the statement. And if the statement is  
21 defamatory *per quod*, the Plaintiff must plead special  
22 damages.

23           Mr. Anderson has alleged the defamatory statement made  
24 by Brian Hamrick on November the 5th was you're not a drug  
25 dealer, you have drugs in your system, when a girl sits in

1 front of you with her legs wide apart, she's trying to get  
2 money out of you.

3 Now, Your Honor, a statement -- defamatory statement is  
4 defamatory per se if you need additional facts or  
5 circumstances, I'm sorry, *per quod*, is if you need  
6 additional facts or circumstances to understand why that  
7 particular statement would be defamatory. That is, we need  
8 the context to understand why that statement is defamatory.

9 And I think that the allegations by Mr. Anderson  
10 regarding the statement by Brian Hamrick, that's not  
11 defamatory on its face. The statement, you're not a drug  
12 dealer, you have drugs in your body now, that could have  
13 been a response to Mr. Anderson saying I'm a drug dealer,  
14 and then he kind of joked and he responds to that. The same  
15 thing goes for ---

16 **THE COURT:** All right. Well, I'm going to deny your  
17 motions to dismiss. And you can take them up with a motion  
18 for summary judgment after you've done some discovery. I'm  
19 going to allow him to pursue those causes of action at this  
20 point in time with respect to the nine negligence causes of  
21 action. So he does not have a negligence cause of action in  
22 this complaint. And your order needs to state that.

23 **MR. McLAWHORN:** Okay. That's fine, Your Honor.

24 **THE COURT:** You understand that, Mr. Anderson?

25 **MR. ANDERSON:** Yes. Yes, Your Honor.

1           **THE COURT:** So you don't have a negligence cause of  
2 action. You are alleging these other causes of action. And  
3 since you're pro se I'm giving you some liberties that I  
4 might not give an attorney who were involved in the case.  
5 But they're going to pursue it through discovery probably at  
6 depositions. And you might be back up here on some of those  
7 causes of action that you have not been able to set forth  
8 sufficient factual basis for your claims.

9           **MR. ANDERSON:** Yes, Your Honor.

10          **THE COURT:** You understand, Mr. McLawhorn?

11          **MR. McLAWHORN:** Yes, Your Honor.

12          **THE COURT:** All right.

13          **MR. McLAWHORN:** And Mr. Anderson has his own motion.

14          **THE COURT:** All right. What's your motion, Mr.  
15 Anderson?

16          **MR. ANDERSON:** My motion is that my claims should not  
17 be dismissed regarding the pleadings, interrogatories that  
18 already ---

19          **THE COURT:** Well, I denied his motion to dismiss.

20          **MR. ANDERSON:** Okay.

21          **THE COURT:** I don't know about the interrogatories.  
22 You are obligated -- if you file a medical cause of action  
23 you're obligated to pre-file an affidavit contemporaneously.  
24 You failed to do that. But you tell me you're not seeking  
25 negligence in this matter, you're seeking fraud, intentional

1 infliction of emotional distress and something -- defamation  
2 of character, which you don't require -- you're not required  
3 to. So those are going to go forward at this point in time.  
4 I'm not dismissing on the rule 12 motion at this time.

5 **MR. ANDERSON:** Yes, Your Honor.

6 **MR. McLAWHORN:** Your Honor, Mr. Anderson did file a  
7 motion to quash.

8 **THE COURT:** Quash what?

9 **MR. McLAWHORN:** We sent subpoenas to his employers  
10 relating to the defamation cause of action. He mentioned  
11 that he was a certified respiratory therapist. And so we  
12 sent subpoenas out to his employers to find out what his  
13 reputation of a certified respiratory therapist was.

14 **THE COURT:** Wouldn't that be their motion? Shouldn't  
15 that be their motion to quash?

16 **MR. McLAWHORN:** Your Honor, honestly I'm not sure.  
17 I've never encountered a situation where a Plaintiff ---

18 **THE COURT:** Well, I'm going to deny your motion to  
19 quash. They have a right to discover. And one of the ways  
20 -- well, this is not discovery. They have a right to send  
21 subpoenas. I'm going to deny that, and they can proceed.  
22 So ...

23 **MR. McLAWHORN:** Additionally, Your Honor, he's filed a  
24 motion to -- I think it was a motion to quash, I couldn't  
25 really tell, regarding records related to the schizophrenia

1 diagnosis.

2 **THE COURT:** Do you have a mental health diagnosis?

3 **MR. ANDERSON:** I discovered it through my medical  
4 records that someone ---

5 **THE COURT:** All right. But somebody has put in a  
6 medical record ---

7 **MR. ANDERSON:** Yes. Yes.

8 **THE COURT:** All right. Well, I'm going to deny that,  
9 but I am going -- I'm going to order that they be turned  
10 over to you pursuant to a protective order that you can't  
11 disseminate any information relating to his mental health  
12 condition other than to the -- for any experts or anybody in  
13 your office in the pursuit of your defense of this claim.

14 **MR. McLAWHORN:** Okay. Just to clarify, Your Honor. I  
15 think that it's definitely something that we're interested  
16 in because ---

17 **THE COURT:** I'm going to let you have it.

18 **MR. McLAWHORN:** Okay. All right.

19 **THE COURT:** But, I mean, I'm going to give it to you  
20 pursuant to a protective order. I don't -- whatever you get  
21 from him is not to be publicly disseminated to anybody.  
22 It's just to be used in your office with your experts or  
23 whoever it is that you're using to assist you in preparation  
24 in any defense in this claim.

25 **MR. McLAWHORN:** Okay. That's fine, Your Honor. I just

1 wanted to be sure that it would be eventually ruled on in  
2 terms of admissibility.

3 **THE COURT:** Well, admissibility will come up at the  
4 time of trial.

5 **MR. McLAWHORN:** Okay. That's fine.

6 **THE COURT:** You're way premature at this time.

7 **MR. McLAWHORN:** Well, his motion did contain a motion  
8 in *limine*. That's kind of why I wanted some clarification.

9 **THE COURT:** They're going to be able to get the  
10 information, Mr. Anderson. They're not going to be -- but  
11 I'm not ruling whether it can come in at trial. That would  
12 come up at the time of the trial, and the trial judge would  
13 take up that matter. Do you understand?

14 **MR. ANDERSON:** Yes, Your Honor.

15 **THE COURT:** But they're going to be able to get this  
16 information and review it and do with it as they need within  
17 the confines of their office and their defending this  
18 matter. They can't -- it's not going to be publicly  
19 disseminated to protect you. All right?

20 **MR. ANDERSON:** Yes, Your Honor.

21 **THE COURT:** All right. Get me an order on that denying  
22 his motions. All right?

23 **MR. McLAWHORN:** All right, Your Honor. Thank you.

24 **THE COURT:** All right, Mr. McLawhorn. If you get it to  
25 us this week, let Mr. Anderson see it. You got email?



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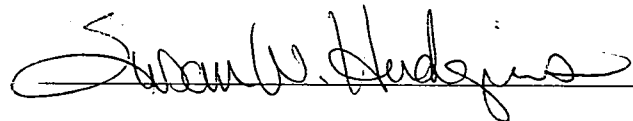
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SC Court of Appeals

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 26th day of January 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 22, 2016



Circuit Court Reporter