THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2015-001331

Trial Court Case No. 2013-CP-10-05351

Jack Powell ..... Appellant,

v.

Medical University of South Carolina ..... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Are Plaintiff's claims barred by S.C. Code § 15-78-60(5), which precludes claims against governmental entities for losses resulting from the exercise of discretion or judgment?

Suggested Answer: ***YES.***

2. Did the trial court properly disregard evidentiary materials included in Plaintiff's second motion for reconsideration in this matter, to the extent it included evidence that was not "newly discovered"?

Suggested Answer: ***YES.***

3. Did the trial court properly grant summary judgment on Plaintiff's gross negligence and recklessness claim where such claim raised medical malpractice issues and Plaintiff failed to attach an expert affidavit to his Complaint?

Suggested Answer: ***YES.***

4. Did the trial court properly grant summary judgment on Plaintiff's gross negligence and recklessness claim where such claim raised medical malpractice issues and Plaintiff failed to present any expert testimony supporting his claims?

Suggested Answer: ***YES.***

5. Did the trial court properly grant summary judgment on Plaintiff's slander and libel count where the statements at issue are not defamatory *per se* and where Plaintiff has not presented any evidence of special damages or common law malice?

Suggested Answer: ***YES.***

6. Did the trial court properly grant summary judgment on Plaintiff's slander and libel count where the statements at issue were true?

Suggested Answer: ***YES.***

7. Did the trial court properly grant summary judgment on Plaintiff's slander and libel count where MUSC was entitled to a qualified privilege?

Suggested Answer: ***YES.***

8. Did the trial court properly grant summary judgment on Plaintiff's intentional infliction of emotional distress claim where the South Carolina Tort Claims Act bars such a claim?

Suggested Answer: ***YES.***

9. Did the trial court properly grant summary judgment on Plaintiff's intentional infliction of emotional distress count where Plaintiff presented no evidence of outrageous conduct?

Suggested Answer: ***YES.***

10. Did the trial court properly grant summary judgment on Plaintiff's intentional infliction of emotional distress count where another tort (defamation) provided a potential remedy?

Suggested Answer: ***YES.***

11. Did the trial court properly grant summary judgment on Plaintiff's false arrest/imprisonment count where Plaintiff can present no evidence that MUSC lacked probable cause?

Suggested Answer: ***YES.***

12. Did the trial court properly grant summary judgment on Plaintiff's assault and battery count under S.C. Code § 15-78-60(17)?

Suggested Answer: ***YES.***

13. Did the trial court properly grant summary judgment finding that Plaintiff could not present a scintilla of evidence supporting hi assault and battery count?

Suggested Answer: ***YES.***

14. Did the trial court properly grant summary judgment despite Plaintiff's suggestion that he needed to conduct additional discovery?

Suggested Answer: ***YES.***

15. Did the trial court properly grant summary judgment despite Plaintiff's argument that he was not given proper advance notice of the hearing?

Suggested Answer: ***YES.***

16. Did Plaintiff fail to preserve for appellate review his challenges to the trial judge's failure to recuse himself?

Suggested Answer: ***YES.***

17. Has Plaintiff failed to carry his heavy burden of showing that the trial judge should have recused himself?

Suggested Answer: ***YES.***

STATEMENT OF THE CASE

A. Procedural History

Plaintiff filed this lawsuit on September 12, 2013 in the Court of Common Pleas of Charleston County, South Carolina. (*See generally* 9/12/13 Pl.'s Compl.). Plaintiff has alleged claims against MUSC sounding in: (a) recklessness and gross negligence; (b) slander and libel; (c) intentional infliction of emotional distress; (d) false arrest and imprisonment; and (e) assault and battery. (*See id.*). On October 28, 2013, Defendant Medical University of South Carolina ("MUSC") answered Plaintiff's Complaint, denying liability to Plaintiff. (*See generally* 10/28/13 MUSC's Answ.).

On July 14, 2014, MUSC filed a Motion for Summary Judgment, urging that judgment should be entered against Plaintiff on all of his claims. (*See generally* 7/14/14 MUSC Mot. Summ. J.). On July 17, 2014, MUSC further detailed the bases for its motion in a Memorandum in Support of Its Motion for Summary Judgment. (*See generally* 7/17/14 MUSC Mem. Supp. Mot. Summ. J.). A hearing was held on MUSC's Motion for Summary Judgment — as well as motions filed in other cases that Plaintiff filed against other defendants — before the Honorable R. Markley Dennis on July 30, 2014. (*See generally* 7/30/14 Transcr.).

On August 4, 2014, Judge Dennis filed a Form 4 Order granting MUSC's Motion for Summary Judgment, indicating "formal order to follow." (*See* 8/4/14 Form 4 Order). On August 8, 2014, Plaintiff filed a Motion for Reconsideration ("First Motion for Reconsideration") seeking to supplement the record with information that he had not presented in opposition to MUSC's Motion for Summary Judgment. (*See generally* 8/8/14 Pl.'s Mot. for Reconsid.). Such First Motion for Reconsideration was premature, since the Form 4 Order expressly indicated that a formal order would be forthcoming. It does not appear that this Motion was ever specifically ruled upon.

On September 25, 2014, Judge Dennis filed a detailed Order Granting Medical University of South Carolina's Motion for Summary Judgment, setting forth ten pages of

his explanation for his grant of summary judgment to MUSC. (*See generally* 9/25/14 Order Granting MUSC Mot. for Summ. J.).

On November 7, 2014, MUSC filed a Supplemental Memorandum in Support of Motion for Summary Judgment addressing whether Plaintiff had violated a specific criminal statute during his actions on the night in question. (*See* 11/7/14 MUSC Suppl. Mem. Supp. Mot. Summ. J.). On November 12, 2014, Plaintiff filed a Response to Defendant's Supplemental Memorandum. (*See generally* 11/12/14 Pl.'s Resp. to Def.'s Suppl. Mem.).

On May 6, 2015, Plaintiff filed a Motion to Amend Reconsideration (sic) ("Second Motion for Reconsideration"). This motion, presented under South Carolina Rule of Civil Procedure 60, presented alleged "newly discovered" evidence, including:

A, B	March 20, 2015 Order Reversing Appellant's Conviction for Trespassing (Hon. J.C. Nicholson, Jr.)
C	One page from an unidentified discovery response in an unidentified "first MUSC case"
D	Page 4 of Plaintiff's Complaint in this matter
E	A single page apparently from MUSC's discovery response in this lawsuit
F, G	Pages from Plaintiff's medical records at MUSC
H	A single page apparently from MUSC's discovery response in this lawsuit
I	One page Detailed Activity Report without Officer Times printed on 3/28/13
J	Incident report
K	A single page apparently from MUSC's discovery response in this lawsuit
L	A single, undated minuscript transcript page apparently from the case *State/Public Safety v. Jack Powell*
M.	One page document apparently containing parts of a 11/15/12 response to a FOIA request and part of a single page apparently from MUSC's discovery response in this lawsuit

N, O Plaintiff's Request for Production of Documents directed to MUSC in this lawsuit, served on December 13, 2013 by mail

(*See generally* Pl.'s 5/6/15 Mot. to Am. Recon.). On May 19, 2015, Judge Dennis filed an Order denying Plaintiff's Second Motion for Reconsideration. (*See* 5/19/15 Order).

Plaintiff then filed the instant appeal.

B. Factual Background

On June 21, 2012, Plaintiff was transported to the Emergency Department at MUSC by Charleston County emergency medical services after tripping over an exposed and unburied cable line on Folly Road. (*See* Pl.'s Compl. p. 4). Plaintiff claims to have suffered injuries to his head, neck, shoulder, and knee as a result of the fall. (*See id.*). Upon arrival to the Emergency Department, MUSC's emergency room staff evaluated and attended to Plaintiff. (*See id.*). X-rays were ordered to evaluate his potential injuries. (*See id.*). Pain medication was ordered for the Plaintiff; however, Plaintiff was also to be transported to the radiology department for x-rays. (*See id.*). 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. (*See id.*). Plaintiff replied in the affirmative and then told the doctor "that is about the stupidest question a doctor has ever asked me." (*See id.*). 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. (*See id.*). Plaintiff claimed that he could not move because of pain. (*See id.*).

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

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

Plaintiff next claims that MUSC Public Safety removed him from the ER bed and transported him out of the hospital. (*See id.*). Once outside of the hospital, Public Safety told Plaintiff to get out of the wheelchair and leave the premises. (*See id.*). Plaintiff refused to leave because he claimed that he was in pain. (*See id.*). Again, Public Safety asked Plaintiff to leave the premises and told him that if he failed to leave, he would be arrested for trespassing. (*See id.*). Plaintiff refused, stated that he would not inflict anymore pain on himself, and asked the officers to help him get out of the wheelchair. (*See id.*). 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. (*See id.*).

C. Plaintiff's Brief

Plaintiff's Brief in this appeal is convoluted and disjointed, making it difficult for MUSC to identify the issues raised on appeal and frame an appropriate response. Rather than make arguments in narrative form with headings organizing the argument, Plaintiff instead makes arguments in numbered paragraphs, each with its own heading. Plaintiff's numbered paragraphs seem to correspond with the following arguments:

> 1.: Judge Dennis erred in granting summary judgment (as to false arrest, outrage and gross negligence) because Judge J.C. Nicholson, Jr. reversed Plaintiff's trespassing conviction under S.C. Code § 16-11-620.
>
> 2.: Judge Dennis should have recused himself because he was somehow biased against Plaintiff.
>
> 3.: Judge Dennis erred because MUSC's counsel (accurately) stated Plaintiff's alleged statement to a doctor that "that's the stupidest question I've ever heard"

(*see* 7/30/14 Transcr., at 7:24-25), even though Plaintiff alleged in his Complaint that "told the doctor that is about the stupidest question a doctor has ever asked me." (*See* Pl.'s Compl., at p.4).

4.: Judge Dennis erred in demanding that Plaintiff submit evidence or affidavits disputing any alleged "false" facts.

5., 6., 9., 10., 11., 12., 13., 15., 17.: Judge Dennis improperly accepted MUSC's evidence regarding various issues (the nature of Plaintiff's discharge from MUSC, whether further pain medication was pending, whether Plaintiff refused to leave, Plaintiff's abusiveness toward EMTs and MUSC personnel, the alleged touching of Plaintiff by MUSC personnel, whether MUSC discharged Plaintiff in accordance with proper procedure), despite the fact that Plaintiff did not present evidence or affidavits disputing those statements of fact.

7., 8.: The trial court erred in dismissing Plaintiff's gross negligence/recklessness claim because he was alleging misconduct not merely involving physicians at MUSC, but also involving security guards and public safety officers.

14.: Judge Dennis erred in dismissing Plaintiff's assault and battery claims on the grounds that any touching of Plaintiff was defensive and privileged.

16.: Judge Dennis failed to consider a "pattern of untruths" by MUSC.

18.: Judge Dennis erred in failing to consider evidence (not initially presented in response to MUSC's Motion for Summary Judgment) of MUSC's alleged failure to follow discharge procedures.

19.: Judge Dennis permitted MUSC to be evasive in responses to discovery.

20., 22., 23., 26.: Judge Dennis did not properly explain why he granted summary judgment. It appears that Plaintiff's contention is that Judge Dennis granted summary judgment solely for a procedural reason: that Plaintiff did not file a Memorandum in Opposition to Motion for Summary Judgment.

21.: The Clerk improperly scheduled MUSC's Motion for Summary Judgment for oral argument on July 30, 2014.

24.: Judge Dennis did not permit Plaintiff to present evidence.

25.: The Clerk somehow erred in the manner in which it clocked in Plaintiff's motion for Judge Dennis to recuse himself.

27.: Judge Dennis overlooked the issue of the proper discharge of Plaintiff.

(*See generally* Pl.'s Brief).

MUSC has made a good faith effort to identify all of the key issues in this appeal

from Plaintiff's Brief. MUSC requests the Court's understanding (and an opportunity to file a supplemental brief) if it determines that Plaintiff's Brief raises any issue not discussed herein.

ARGUMENTS

I. Standard of Review

> Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

> It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine [or material].

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (citations omitted). "'[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.'" *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010) (citation omitted).

When the underlying action requires proof by a preponderance of the evidence, the non-movant must submit a "scintilla of evidence" to survive summary judgment. *See Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). This Court "may affirm the grant of summary judgment on any ground found in the record." *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (*citing* Rule 220(c), S.C.A.C.R. ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")); *accord* Rule 208(b)(2) ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).").

II. The South Carolina Tort Claims Act Bars All of Plaintiff's Claims

The South Carolina Tort Claims Act (the "Act" or the "Tort Claims Act") bars Plaintiff's claims. South Carolina Code Section 15-78-60(5) insulates a governmental entity from liability for a loss resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." *See also Horton v. City of Columbia*, 408 S.C. 27, 757 S.E.2d 537 (2014).

> "To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." [Citation omitted.] "Furthermore, 'the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.'" [Citations omitted.]

Graham v. Town of Latta, S. Carolina, ___ S.E.2d ___, 2016 WL 1239752, at *9 (S.C. Ct. App. Mar. 30, 2016).

Plaintiff's claims all center on how MUSC exercised its discretion in treating and discharging him after being evaluated on June 21, 2012. At that time, Plaintiff was escorted from the Emergency Department by MUSC hospital security and public safety because of his demeanor and refusal to leave. Once outside of the hospital building, Plaintiff still refused to leave the premises. As Plaintiff correctly alleges in his Complaint, MUSC's Security Officers offered to take Plaintiff home, to Roper Hospital, or anywhere else he wanted to go. Plaintiff testified at his deposition that, once outside of the hospital, MUSC Security told him that he was free to leave the premises. (*See* 7/17/14 MUSC Mem. Supp. Mot. Summ. J., at 20-21). He admitted that he did not leave the premises; as a consequence, he was arrested and charged with trespass. (*Id.*).

All of the alleged misconduct of MUSC, most especially the decision to arrest Plaintiff, clearly falls within the scope of S.C. Code § 15-78-60(5) because it involved the government employees' exercise of discretion and judgment. Plaintiff's Complaint is replete with allegations that MUSC exercised *discretion* in selecting a course of action among competing alternatives:

- "MUSC Doctors, Nurses, Public Safety and Security Guards *weighed competing considerations* and intentionally failed to exercise proper protection for the Plaintiff . . . ." (*See* Pl.'s Compl., at 1 (emphasis added)).

- "When the patient is under complete control, dominance and mercy of the hospital staff to make the proper due process of slight care to stop foreseeable harm. Then after *weighing competing considerations* intentionally inflict emotional and physical harm when attempting to discharge patient." (*See* Pl.'s Compl., at 2 ¶ 3 (emphasis added)).

- "The public safety *did not weigh the competing situations properly* and apply *proper discretion* to act in a good faith manner." (*See* Pl.'s Compl., at 17 (emphasis added)).

- "The MUSC ER staff had the authority and reasonable time to *weigh all options* to act properly in these circumstances." (*See* Pl.'s Compl., at 18 (emphasis added)).

- "The MUSC staff *weighed competing considerations* and made a conscious choice to ignore foreseeable harm being inflicted upon the Plaintiff/Patient." (*See*

Pl.'s Compl., at 19 (emphasis added)).

Under such circumstances, it is apparent that the South Carolina Tort Claims Act bars Plaintiff's claims. For this reason, the trial court properly granted summary judgment as to all of Plaintiff's claims. In the alternative, this ground is sufficient to support the entry of summary judgment to the extent Plaintiff's claims involve his false arrest or imprisonment.

III. Plaintiff's Second Motion for Reconsideration Improperly Presented Additional Evidence

Much of Plaintiff's Brief in this appeal focuses on evidence that he attached to Plaintiff's Second Motion for Reconsideration — filed more than six months after the formal order granting MUSC's Motion for Summary Judgment. For the reasons that follow, the Second Motion for Reconsideration (apparently filed under Rule 60) is improper to the extent it presented evidence that could (and should) have been proffered much earlier, at the time the parties argued MUSC's Motion for Summary Judgment. Instead, Plaintiff used his Second Motion for Reconsideration as an effort to improperly make arguments and submit evidence that he should have provided the court months earlier.

In order to obtain relief under Rule 60, Plaintiff must show that the newly discovery evidence: "(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *See Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (*quoting* James F. Flanagan, South Carolina Civil Procedure 484 (2nd ed. 1996). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *See Rodriguez v. Gutierrez*, 391 S.C. 323, 331, 705 S.E.2d 94, 99 (Ct. App. 2011) (*citing Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991)).

Plaintiff's Second Motion for Reconsideration sought to introduce numerous items of additional evidence that he had not previously presented to the Court in opposition to MUSC's Motion for Summary Judgment. However, aside from an order entered by Judge Nicholson reversing Plaintiff's trespassing conviction (which was entered on March 20, 2015, several months after the entry of summary judgment), Plaintiff has not shown that any of that evidence was "newly discovered." He has not shown when he obtained that evidence or when he knew about that evidence. He has not shown that he could not have previously acquired that evidence. Far from presenting "newly discovered evidence," Plaintiff's Second Motion for Reconsideration simply attempted to direct the trial court to evidence that he should have proffered months before. Thus, aside from Judge Nicholson's Order (which ultimately has no bearing on the merits of Plaintiff's claims), this Court should decline Plaintiff's invitation to consider any of the evidence attached to his Second Motion for Reconsideration.

IV. Plaintiff Cannot Succeed on the Merits of His Claims

A. Plaintiff's Claim of Recklessness and Gross Negligence Is Without Merit

1. Plaintiff Has Failed to Provide the Required Affidavit Attached to His Complaint in This Matter

Under South Carolina law, in an action for professional negligence, Plaintiff *must* include with his Complaint an expert affidavit supporting the claim:

> *[I]n an action* for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) . . . the plaintiff must file *as part of the complaint* an affidavit of an expert witness which *must specify at least one negligent act* or omission claimed to exist *and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.*

See S.C Code § 15-36-100(B) (emphasis added). This statute applies to lawsuits filed against attorneys. *See* S.C. Code § 15-36-100(G)(2). "If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant

against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim." S.C. Code § 15-36-100(C)(1).

That statute is supplemented by South Carolina Code Section 15-79-125. Under Section 15-79-125 a plaintiff is required, prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, to "contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15–36–100, in a county in which venue would be proper for filing or initiating the civil action." *See* S.C. Code § 15–79–125(A). In that context, "'[m]edical malpractice' means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances." *See* S.C. Code § 15-79-110(6).

Numerous Courts have dismissed professional negligence claims where the plaintiff has failed to attach the required affidavit to his complaint. *See e.g., Sims v. Snyder*, 2011 WL 3794156, at *5 (D.S.C. Aug. 12, 2011) ("Sims has failed to file an expert affidavit with his Complaint, and therefore he cannot proceed with a state law claim of negligence or medical malpractice . . . ."), *report and recommendation adopted in*, 2011 WL 3794151 (D.S.C. Aug. 25, 2011) (dismissing federal claims and declining to exercise jurisdiction over state law claims); *Gallipeau v. Correct Care Solutions*, 2011 WL 4502062, at *3 (D.S.C. Aug. 5, 2011) ("Plaintiff failed to provide an expert affidavit as required for an allegation of damages for professional negligence"), *report and recommendation adopted in*, 2011 WL 4502043 (D.S.C. Sept. 29, 2011); *Allen v. Gaskins*, 2010 WL 1010014, at *3 (D.S.C. Feb. 18, 2010) ("As to any state law claim against Gaskins for negligence, to the extent one is alleged it would be barred under state law, as Allen has failed to provide any medical expert testimony showing a lack of due

care by Gaskins."), *report and recommendation adopted*, 2010 WL 1009966 (D.S.C. March 16, 2010); *Eaglin v. Metts*, 2010 WL 1051177, at *8 (D.S.C. Feb. 16, 2010) ("Eaglin has failed to file an expert affidavit with his Complaint, and therefore he cannot proceed with a state law claim of negligence or medical malpractice . . . ."), *report and recommendation adopted in*, 2010 WL 1051155 (D.S.C. March 22, 2010); *Bardes v. Magera*, 2009 WL 3163547, at *31 (D.S.C. Sept. 30, 2009) ("As a result of the Plaintiff's failures to secure an expert affidavit, the Plaintiff cannot press a state law cause of action for medical malpractice against this defendant.").

Where the Plaintiff fails to include the required affidavit, the Court *must* dismiss the claims:

> Plaintiffs argue that dismissal pursuant to § 15–36–100 is discretionary and that the purpose of the statute is not lost without an expert witness affidavit because Plaintiffs' claims are valid. This argument is not convincing. The plain language of the statute provides that "the plaintiff *must file as part of the complaint* an affidavit of an expert witness" and that "if an affidavit is not filed ... the complaint *is subject to dismissal* for failure to state a claim." There is no language in the statute that indicates that the requirement to file an expert affidavit is optional. Section 15–36–100 appears to have been enacted in order to prevent the filing of frivolous lawsuits against certain professionals in South Carolina, including attorneys. The expert witness affidavit serves to ensure that claims of professional negligence made against attorneys have some validity before filing and alerts the professional to the merits of the claim. The purpose of the statute is not served if the requirement of an expert witness affidavit is optional.
>
> Courts interpreting § 15–36–100 in connection with a motion to dismiss raised by a defendant have dismissed complaints filed without an expert witness affidavit *without consideration of whether the allegations of the complaints have merit or whether there are equitable arguments weighing against dismissal.*

See In re Steinmetz, 2011 WL 4543894, at *3 (Bankr. D.S.C. March 18, 2011).

Plaintiff does not dispute that he has not filed an affidavit in accordance with this South Carolina statute. Rather, his argument seems to be that an affidavit is not required because his gross negligence claim, at least in part, is not a *professional* negligence

claim.

MUSC recognizes that not every claim against a hospital is a "professional" negligence claim under the statute:

> Thus, we emphasize that not every action taken by a medical professional in a hospital or doctor's office necessarily implicates medical malpractice and, consequently, the requirements of section 15-79-125. While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony. However, at all times, the medical professional must "exercise ordinary and reasonable care to insure that no unnecessary harm [befalls] the patient." *Papa v. Brunswick Gen. Hosp.*, 132 A.D.2d 601, 517 N.Y.S.2d 762, 763–64 (1987). The statutory definition of medical malpractice found in section 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence.
>
> Here, we find that Appellant's claim sounds in ordinary negligence and is not subject to the statutory requirements associated with a medical malpractice claim. Appellant's complaint makes clear that she had not begun receiving medical care at the time of her injury, nor does it allege the Hospital's employees negligently administered medical care. Rather, the complaint states that Appellant's injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care.

See Dawkins v. Union Hosp. Dist., 408 S.C. 171, 178-79, 758 S.E.2d 501, 504-05 (2014).

Plaintiff contends that his gross negligence claim was not a professional negligence claim requiring expert testimony, because he complains of conduct not merely by medical personnel, but also actions of security guards and public safety officers. In particular, Plaintiff states in his Brief:

> Appellant submitted on p.16 L.7-12 of Tran. "I couldn't get an expert to say they could testify under oath why these officers kept trying to pull me off the bed when I was screaming in pain" which is a deviation from the standard of care and Appellant did not need the testimony to establish his claim because jurors can easily evaluate the facts and law exercising common knowledge and understand that the second attempt to pull the Appellant who was not under arrest a second time was not a medical decision but purely gross negligence, intentional infliction of emotional distress and assault & battery.

(*See* Pl.'s Br., at 9). However, although the alleged actors at times might have been non-medical personnel, all of the claims relate to the manner in which MUSC treated and discharged Plaintiff. All of the alleged conduct occurred while Plaintiff was being treated at MUSC and being discharged. In fact, the specific allegation above refers to how MUSC supposedly maltreated Plaintiff while he was in a hospital bed and was complaining of pain. In other words, all of MUSC's alleged gross negligence stemmed from the treatment of Plaintiff. Unlike *Dawkins*, Plaintiff does not assert a general *pre-treatment* premises liability claim; but for MUSC's alleged actions in the treatment of Plaintiff (and cessation of that treatment), Plaintiff would not have filed this lawsuit. As such, even though Plaintiff complains about actions taken by some non-medical MUSC personnel, his claims are still malpractice claims that require an expert affidavit.

At oral argument the trial court noted that Plaintiff had failed to file the required affidavit with his Complaint and rejected the suggestion that this was somehow not a professional malpractice action:

> THE COURT: Inflammatory opinion has nothing to do with it. First of all, where is your affidavit that is required in a medical negligence case concerning the standard of care?
>
> MR. POWELL: I didn't file a medical negligence case.
>
> THE COURT: Yes, you did. That's what you filed when you alleged negligence on the performance of a medical -- some medical provider. You're asserting a medical negligence case.
>
> MR. POWELL: Well, I checked into it, and I couldn't get anybody expert to say they could testify under oath why these officers kept trying to pull me off the bed when I was screaming in pain.
>
> THE COURT: Thank you, sir. The medical negligence case is dismissed. The negligence case is dismissed.

(*See* 7/30/14 Transcr., at pp.15:24-16:12). Judge Dennis correctly concluded that Plaintiff was required to submit an affidavit from an expert to his Complaint in this matter.

Therefore, this Court should affirm the trial court's grant of summary judgment to MUSC as to plaintiff's gross negligence claim.

2. Plaintiff Fails to Support His Claims with Expert Testimony

In addition to his failure to submit an affidavit with his Complaint, Plaintiff's gross negligence claims also fail because he did not submit any expert testimony in opposition to MUSC's Motion for Summary Judgment.

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. *See 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)). 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, *inter alia*, 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 him. 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 (sic) 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.

(*See* 7/17/14 MUSC Mem. Supp. Mot. Summ. J., at 5-7).

Plaintiff cannot dispute that MUSC's decision of whether and how to discharge a patient and whether to order pain medication fall outside the ambit of common knowledge and experience of the average layperson. Plaintiff has alleged a cause of action for medical negligence due to the actions of MUSC's 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.

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment as to Plaintiff's gross negligence claim.

B. <u>Plaintiff's Claim of Slander and Libel Is Without Merit</u>

For the reasons that follow, Plaintiff cannot succeed upon his slander and libel

(defamation) claims.

1. Plaintiff Cannot Show Special Damages

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) (emphasis added) (*citing Erickson v. Jones Street Publishers, LLC*,

368 S.C. 444, 629 S.E.2d 653 (2006)); *accord Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012) (statements not capable of defamatory construction); *Smith v. Phoenix Furniture Co.*, 339 F. Supp. 969 (D.S.C. 1972) (words not actionable *per se*).

Plaintiff has presented no evidence — or even made any argument — that MUSC made any statement about him that could constitute defamation *per se*. He has presented no evidence that MUSC stated that he had committed of a crime of moral turpitude. He has presented no evidence that MUSC stated that he had contracted a loathsome disease. He has presented no evidence that MUSC made a statement accusing him of adultery or unchastity. He has presented no evidence that MUSC stated that he was unfit for his business or profession. In fact, he has not even presented any evidence of what his profession might be. In other words, Plaintiff has not presented a scintilla of evidence as that MUSC ever made an allegedly defamatory statement that could constitute slander *per se*.

To the contrary, Plaintiff's only testimony has been that the allegedly defamatory statements that MUSC medical personnel made statements about him in his medical record concerning his appearance and demeanor on the night in question.

> 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?

(*See* 7/17/14 MUSC Mem. Supp. Mot. Summ. J., at 8-10). Plaintiff further testified with regard to his demeanor on the night in question:

> 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.

(*See* 7/17/14 MUSC Mem. Supp. Mot. Summ. J., at 11).

Because Plaintiff has not presented a scintilla of evidence of a statement that is defamatory *per se*, he must prove special damages and malice. He has not presented a scintilla of evidence of either, which is fatal to his defamation claims.

"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. To date, Plaintiff has not shown — by expert testimony, documentary evidence or otherwise — that he lost an identifiable amount of money from tangible losses as a result of MUSC's alleged defamation. He presents no evidence of lost business opportunities or loss of employment. In fact, he has not even shown that MUSC even published the alleged defamatory statements outside of his medical records or that MUSC ever disseminated his medical records improperly to any person or entity.

Additionally, Plaintiff has not presented any evidence of common law malice, *i.e.*, that MUSC acted with ill will toward Plaintiff or with conscious indifference of Plaintiff's rights. There is no evidence that anyone at MUSC harbored ill feelings toward him; moreover, to the extent they did, the South Carolina Tort Claims Act would bar Plaintiff's claims. Moreover, there is no evidence that anyone at MUSC acted in *conscious* disregard of his rights. To the contrary, Plaintiff was being treated as a patient at MUSC's emergency room in a competent and proper fashion.

For the foregoing reasons, this Court should affirm the trial court's grant of

summary judgment to MUSC on Plaintiff's defamation claims.

2. Plaintiff's Libel and Slander Claims Fail Because Any Alleged Statements Were True

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) (affirming summary judgment where statements were true and provided complete defense to defamation).

As set forth above, Plaintiff claims that MUSC made defamatory statements in his medical record concerning his demeanor or appearance on the night in question. However, as set forth above, Plaintiff has admitted that his appearance was dirty and ungroomed and that he made abusive statements to MUSC personnel. In other words, the claimed defamatory statements were true and, consequently, not actionable in defamation.

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment to MUSC on Plaintiff's defamation claims.

3. Plaintiff's Libel and Slander Claims Fail Because MUSC Is Entitled to Conditional Privilege

Even if MUSC's statements are capable of being defamatory, summary judgment was proper in this case because MUSC is entitled to a 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.*

The allegedly defamatory statements that MUSC made about Plaintiff were contained in his medical records and were directed to other medical personnel. Plaintiff cannot dispute that those medical records are used to document factual information regarding Plaintiff, a patient at MUSC's emergency room. The information contained in those records is *only* communicated or shared with other medical personnel in the course of providing care to Plaintiff. Plaintiff presents no evidence that MUSC ever disclosed the statements in his medical records to anyone without the need to know that information in connection with his treatment at MUSC. The information in Plaintiff's 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. 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.

Moreover, information about Plaintiff's appearance and demeanor are appropriate

items to document in his medical record for that evening. Plaintiff cannot dispute that this information was included in the records in good faith. This is the sort of information that is regularly recorded in medical records during the course of MUSC's ordinary business.

In determining whether or not the communication was qualifiedly privileged, the Court must consider the occasion and the parties' relationship. 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) (summary judgment proper where Fountain failed to present scintilla of evidence that defendants abused qualified privilege). Plaintiff has presented no evidence that MUSC abused the scope of the privilege. There is no evidence that MUSC exceeded the purpose for creating the medical records or that it disclosed them to any unauthorized person.

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment to MUSC on Plaintiff's defamation claims.

C. Plaintiff's Claim of Intentional Infliction of Emotional Distress Is Without Merit

1. The Tort Claims Act Bars Plaintiff's Intentional Infliction of Emotional Distress Claim

Plaintiff's claim of intentional infliction of emotional distress is barred under the South Carolina Tort Claims Act.

The Act's provisions "establishing limitation[s] on an exemption to the liability of the state . . . must be liberally construed in favor of limiting the liability of the state." S.C. Code Ann. § 15-78-20(f) (emphasis added). A "loss" under the Act includes "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 § 15-

78-30(f) (emphasis added). Additionally, a governmental entity is immune to liability for a loss resulting from "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." See S.C. Code § 15-78-60(17) (emphasis added). Thus, by its express terms, the Act prohibits Plaintiff's claim for intentional infliction of emotional distress.

The trial court's grant of summary judgment was consistent with courts that have concluded that the Act bars outrage/intentional infliction of emotional distress claims. *See Ward v. City of N. Myrtle Beach*, 457 F. Supp. 2d 625, 646-47 (D.S.C. 2006) ("[T]he South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of 'loss' for which a government may be liable under the Tort Claims Act."); *Trask v. Beaufort Cty.*, 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm.'").

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment to MUSC on Plaintiff's intentional infliction of emotional distress claim.

2. Plaintiff Cannot Show Outrageous Conduct

In the alternative, the trial court's grant of summary judgment against Plaintiff on his claim for outrage/intentional infliction of emotional distress was proper, 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 MUSC engaged in highly 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).

Plaintiff has not presented a scintilla of evidence that MUSC engaged in conduct that exceeded all possible bounds of decency and was atrocious and utterly intolerable in

a civil society. Resolving all doubts in Plaintiff's favor, there is no evidence that MUSC engaged in 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.

"There 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 affirm the trial court's grant of MUSC's Motion for Summary Judgment as to Plaintiff's outrage claim.

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

Summary judgment was also proper on Plaintiff's outrage claim 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).

Plaintiff's intentional infliction of emotional distress claim centers around claims that MUSC made false statements about him in his medical records. Such claims are actionable, if at all, 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 that might 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. 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 affirm the trial court's entry of summary judgment as to Plaintiff's outrage claim.

E. Plaintiff's Claim of False Imprisonment Is Without Merit

The trial judge properly granted MUSC summary judgment as to Plaintiff's false arrest/false imprisonment claims, because he cannot present a scintilla of evidence that MUSC lacked probable cause for its actions. The elements of false imprisonment are well-settled:

> "False imprisonment is the deprivation of one's liberty without justification." *Jones by Robinson v. Winn–Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct. App. 1995). "In order to recover under a theory of false imprisonment, the complainant must establish (1) the defendant restrained him; (2) the restraint was intentional; and (3) the restraint was unlawful." *Id.*

See Argoe v. Three Rivers Behavioral Health, LLC, 392 S.C. 462, 473, 710 S.E.2d 67, 73

(2011).

"'The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest. Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious man, under the circumstances, to believe likewise. Although the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion.'" *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 567, 698 S.E.2d 845, 856 (Ct. App. 2010) (*quoting Law v. South Carolina Dep't of Corrections*, 368 S.C. 424, 440-41, 629 S.E.2d 642, 651 (2006)).

Plaintiff can proffer no evidence that MUSC lacked probable cause for his arrest. The evidence is undisputed that Plaintiff was abusive and unruly. Moreover, it is undisputed that Plaintiff was discharged from MUSC and asked to leave the premises. It is further undisputed that MUSC offered to take Plaintiff wherever he wanted to go, but that he refused MUSC's offer.

Plaintiff was arrested and charged with trespass under S.C. Code § 16-11-620, which provides in relevant part:

> Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

MUSC had, at the very least, probable cause to believe that Plaintiff violated that statute, since he remained on the premises of MUSC after being asked to depart. In fact, Plaintiff was initially convicted at trial of violating that statute.

Plaintiff seems to argue that his false imprisonment claim survives summary

judgment because, on appeal, his conviction for trespassing under S.C. Code § 16-11-620 was reversed because Plaintiff "Powell was charged and convicted under the wrong statute." (*See* Pl.'s 5/6/15 Mot. to Amend Reconsid. Exs. A & B). In his opinion reversing the conviction, the Hon. J.C. Nicholson, Jr. stated that while "the facts and the testimony make it plausible that the Appellant *could have been convicted for a number of other offenses*, such as disorderly conduct, it is clear that the Appellant should not have been convicted of trespassing." (*See id* (emphasis added)). He concluded that a conviction under S.C. Code § 16-11-620 was not proper because "a person cannot trespass on public property." (*See id.* (*citing State v. Hanapole*, 255 S.C. 258, 268, 178 S.E.2d 247, 250-51 (1970) (finding that predecessor statute only applied to private property)). In reaching this conclusion, Judge Nicholson noted that Plaintiff "was causing a disturbance in the emergency room area, and appeared irate and potentially intoxicated," and refused to leave after being given a choice to leave under his own free will. (*See id*).

Judge Nicholson's reversal of Plaintiff's conviction did not revive his false arrest claim. First, even Judge Nicholson recognized that Plaintiff likely could have been convicted of *something*; he just believed that he could not be convicted of violating S.C. Code § 16-11-620. He noted Plaintiff's creation of a disturbance at MUSC and stated that he likely could have been charged with disorderly conduct.

Second, Judge Nicholson's reversal was only under Section 16-11-620. Another section of the criminal code provides that:

> Any person who, during those hours of the day or night when the premises owned or occupied by a state, county or municipal agency are regularly closed to the public, shall refuse or fail, without justifiable cause, to leave those premises upon being requested to do so by a law enforcement officer or guard, watchman or custodian responsible for the security or care of the premises, shall be deemed guilty of a misdemeanor and upon conviction, be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

See S.C. Code § 16-11-630. Plaintiff likely could have been convicted of violating this statute. MUSC is generally open to the public from 6:00AM to 6:00 PM. (*See* MUSC 11/7/14 Suppl. Mem. Supp. Mot. Summ. J. Ex. A). After 6:00 PM, MUSC public safety officers are instructed to patrol MUSC grounds, ensure that entrances and exits are locked, and control who accesses sensitive areas (including the Emergency Department). (*See id.*). Plaintiff refused to leave the Emergency Department after being disruptive and verbally abusive toward the staff and physicians, and after being medically discharged from the Emergency Department. Public Safety was called as a precautionary measure pursuant to hospital policy. Once Plaintiff left the Emergency Department, he had no legitimate reason to be on MUSC grounds after normally operating hours; MUSC asked him to leave several times (and even offered him transportation), but Plaintiff refused to leave the premises. As a result, there was at least probable cause to believe that Plaintiff had violated S.C. Code § 16-11-630.

In any event, Plaintiff cannot logically show that MUSC lacked probable cause for his detention where: (a) a jury initially convicted Plaintiff of trespassing and (b) despite reversing that conviction, Judge Nicholson made clear that it was plausible that Plaintiff could have been convicted of a number of other crimes. In addition, it is undisputed that Plaintiff was causing a disturbance in the emergency room and was potentially intoxicated. He was combative, abusive and disruptive to MUSC's critical work. While a judge might have ultimately concluded that a conviction under that particular statute was not appropriate, Plaintiff presents no evidence that MUSC lacked probable cause to detain him under the circumstances. The mere fact that MUSC turned out to be incorrect does not mean that it falsely imprisoned Plaintiff.

Judge Dennis correctly recognized that, where there was sufficient evidence for the underlying trespass charge to go to trial (and initially produce a guilty verdict), Plaintiff's false imprisonment claim cannot pass muster: "You were convicted, and all they have to prove is probable cause. *Clearly they had probable cause because it*

resulted in a trial . . . ." (*See* 7/30/14 Transcr., at p.17:6-8 (emphasis added)). There was sufficient cause for the charge against Plaintiff to go to trial (and initially produce a verdict against him). The fact that Judge Nicholson later reversed that conviction does not undermine the fact that MUSC had, at the very least, probable cause to arrest Plaintiff in the first instance.

Therefore, for the foregoing reasons, this Court should affirm the trial court's grant of MUSC's Motion for Summary Judgment as to Plaintiff's false arrest/imprisonment claim.

F. Plaintiff's Claim of Assault and Battery Is Without Merit

1. The Tort Claims Act Bars Plaintiff's Assault and Battery Claims

The trial court properly granted summary judgment as to Plaintiff's assault and battery claims because those claims are not cognizable under the South Carolina Tort Claims Act. Specifically, those claims are barred by the Act's prohibitions in South Carolina Code Section 15-78-60(17):

> Landrum's Fourth and Fifth causes of action in the Amended Complaint allege that the County is liable to Landrum based upon the common law intentional torts of assault and battery inflicted upon Gray. South Carolina defines an assault as the placement of a person "in reasonable fear of bodily harm by the conduct of the defendant." *Jones by Robinson v. Winn–Dixie Greenville, Inc.*, 318 S.C. 171, 175, 456 S.E.2d 429, 432 (Ct.App.1995). Battery is "the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree." Id. at 432. Both of these torts outline intentional conduct rather than negligent conduct.
>
> South Carolina Code § 15-78-60(17) states that a "governmental entity is not liable for a loss resulting from .... (17) employee conduct .... which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." The South Carolina Tort Claims Act provides a limited waiver of immunity for tort actions against the state, but the state has not waived its immunity for intentional torts. *See* S.C. Code § 15–78–60(17). The County has immunity for the claims made against it for the intentional torts of assault and battery; therefore, the County is entitled to summary judgment on these claims.

See Landrum v. Spartanburg Cty., 2011 WL 3652291, at *5 (D.S.C. Aug. 18, 2011); *Gilyard v. Benson*, 2013 WL 5495566, at *9 (D.S.C. Oct. 2, 2013), *aff'd*, 587 F. App'x 37 (4th Cir. 2014) ("The court assumes, for purposes of this case, that an assault and/or battery are offenses involving an intent to harm . . . .").

Therefore, for the foregoing reasons, this Court should affirm the trial court's grant of MUSC's Motion for Summary Judgment as to Plaintiff's assault and battery claims.

2. Plaintiff Cannot Present Evidence of the Elements of Assault or Battery

In addition, the trial court properly granted summary judgment because Plaintiff cannot present a scintilla of evidence supporting those claims.

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); *accord 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 assault and battery claim 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. (*See* 7/17/14 MUSC Mem. Supp. Mot. Summ. J., at 22). However, Plaintiff consented to such touching, even admitting in his Complaint that he had *asked* for such contact:

- Plaintiff alleges that he said while in the bed to public safety " I can't move and I'm not going to inflict anymore pain on myself, you will have to help me off the bed." (*See* Pl.'s Compl., at p.5).

- Plaintiff further claims that, once outside the hospital, he stated "I will not inflict anymore pain on myself for you and you will have to help me out of the wheelchair." (*See id.*).

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. Plaintiff has admitted that his behavior in the ER was argumentative and combative toward the MUSC staff. (*See id.*). Furthermore, he has admitted that he refused to leave the hospital and hospital premises even though he was medically discharged. Plaintiff should have anticipated any action by MUSC to remove him from the premises, which would have been absolutely necessary and justified.

Therefore, for the foregoing reasons, the trial court properly granted MUSC summary judgment on Plaintiff's assault and battery claims.

V. Plaintiff's Argument That Judge Dennis Erred in Granting Summary Judgment Without Complete Discovery is Without Merit

Plaintiff next argues that this Court should reverse the grant of summary judgment because he was not permitted to complete discovery in this matter. MUSC does not deny that "summary judgment must not be granted until the opposing party has had a full and

fair opportunity to complete discovery." *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Under South Carolina Rule of Civil Procedure 56(f), "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." "A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) (*citing Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003)).

Plaintiff filed this lawsuit on September 12, 2013. (*See generally* Pl.'s Compl.). MUSC filed its answer on October 28, 2013. (*See generally* MUSC's Ans.). MUSC filed its Motion for Summary Judgment on July 14, 2014, and the trial court conducted a hearing on that Motion on July 30, 2014 — more than ten months after Plaintiff commenced this lawsuit. (*See generally* 7/14/14 MUSC Mot. Summ. J.; 7/30/14 Transcr.). During that time, Plaintiff does not dispute that he served written discovery upon MUSC, which MUSC responded to. Plaintiff does not present any evidence that he attempted to depose any witnesses or seek any discovery from third parties. Plaintiff presents no evidence that he was deprived of the ability to conduct any discovery. At most, Plaintiff complains that he did not like what MUSC had to disclose to him in discovery, because it was at odds with his allegations in this case:

In any event, Plaintiff has failed to show — by affidavit or other means — *what* he expected to obtain in discovery that would justify denial of MUSC's summary judgment motion. He has not made the showing required to postpone the adjudication of

summary judgment. Instead, he simply states (incorrectly) that he was not permitted to engage in any discovery in this case. Respectfully, Plaintiff cannot defeat summary judgment in that fashion.

In the court below, Judge Dennis aptly observed that, in order to justify delaying the adjudication of MUSC's Motion for Summary Judgment, Plaintiff would be required to show what he believes MUSC would produce in discovery that would be helpful to him in defeating summary judgment:

> THE COURT: What is it that they have that you think would help you? Not what you hope they have. What is it you think they have that would be helpful in your case and make it survive a motion for summary judgment? Did you file any affidavits in response to the motion for summary judgment?
>
> MR. POWELL: No, sir.
>
> THE COURT: Okay. Well, you have to.

(*See* 7/30/14 Transcr., at p.14:15-21). To date, Plaintiff has not stated what, exactly, he believes he would obtain through more discovery that would justify the denial of MUSC's Motion for Summary Judgment.

Therefore, for the foregoing reasons, the trial court properly held that it was not premature to rule upon MUSC's Motion for Summary Judgment.

VI. Plaintiff's Complaints About the Scheduling of Oral Argument on MUSC's Motion for Summary Judgment Are Without Merit

Plaintiff also argues that the trial court erred in granting MUSC's Motion for Summary Judgment because of the scheduling of the hearing on that motion.

South Carolina Rule of Civil Procedure 56(c) provides that "[t]he [for summary judgment] motion shall be served at least 10 days before the time fixed for the hearing." MUSC's Motion for Summary Judgment recites — and Plaintiff does not dispute — that it was served on Plaintiff by mail on July 11, 2014. (*See* MUSC Mot. Summ. J. Certif. of Service). "Service by mail is complete upon mailing of all pleadings and papers

subsequent to service of the original summons and complaint." *See* S.C.R. Civ. P. 5(b)(1). Service of MUSC's Motion for Summary Judgment was effected nineteen (19) days before the hearing on that motion. This is in compliance with Rule 56 and is not a basis for the reversal of the entry of summary judgment. Although Plaintiff complains that he did not receive MUSC's Memorandum in Support of Its Motion for Summary Judgment — which was served by mail on July 16, 2014 — until July 24, 2014, there is nothing in the rules that required MUSC to file a memorandum in support of its motion (or that required a formal memorandum in opposition from Plaintiff). In any event, even accepting Plaintiff's accusations as true, he still had several days to review MUSC's Memorandum in Support and prepare for oral argument.

Going beyond matters includable in the record, Plaintiff seems to complain that he was burdened by the Clerk's addition of MUSC's Motion for Summary Judgment to the argument roster for July 30, 2014, when there were already a number of motions pending in various *other* baseless lawsuits that Plaintiff had filed. However, Plaintiff cannot point to anything in the record suggesting that he ever objected to the hearing being set for that reason or that Judge Dennis ever ruled upon such an objection. Therefore, any such objection has not been preserved for appellate review. *See Bestobell Seals v. Valtrol, Inc.*, 309 S.C. 552, 554, 424 S.E.2d 560, 562 (Ct. App. 1992) ("First we note that, although Valtrol complained at the hearing on its motion to vacate that it did not receive timely notice of the summary judgment hearing, it did not raise this issue at the summary judgment hearing and, without objection, accepted the judge's decision to consider the motion without argument."). Moreover, aside from generic claims that this posed a difficulty on him as a *pro se* party, Plaintiff does not specifically show any prejudice to him from the scheduling of MUSC's Motion for Summary Judgment on July 30, 2014.

For the foregoing reasons, the trial court did not err in including MUSC's Motion for Summary Judgment in the oral argument roster on July 30, 2014.

VII. Plaintiff's Argument That Judge Dennis Should Have Recused Himself Is Without Merit

A. This Issue Has Not Been Preserved for Appellate Review

Plaintiff also argues in this appeal that the trial judge erred in not recusing himself from this lawsuit.

It appears that Plaintiff filed a Motion to Recuse Judge Dennis for Cause on or about May 6, 2015. (*See* Pl.'s 5/6/15 Mot. to Recuse Judge Dennis for Cause). However, the record is devoid of any suggestion that Judge Dennis ever ruled upon that Motion, which was filed after he had already granted MUSC summary judgment.

"[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been *both* raised to *and ruled upon* by the trial court." *Hill v. South Carolina Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (emphasis added) (*citing Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998)). "[A] party *must file a motion to alter or amend* when an issue has been raised, but not ruled upon, in order to preserve it for review." *See id.*, 389 S.C. at 21, 698 S.E.2d at 623 (emphasis added). The record establishes that Judge Dennis did not rule ont hat motion to recuse and that Plaintiff did not file a motion to obtain a ruling on that motion. Because Plaintiff did not obtain a specific ruling on his request that Judge Dennis recuse himself, that issue has not been properly preserved for appellate review.

B. Plaintiff's Request for Recusal Is Without Merit

Even if properly before this Court, Plaintiff's argument that Judge Dennis was so biased that he should have recused himself is without merit. The standards governing the recusal of a judge are well-established:

> [A] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. *See also Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995). It is not enough for a party seeking disqualification to simply allege bias; the party must show some evidence of that bias or prejudice. *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is no evidence of

> judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993). A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. *Id.*

See Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 84-85, 504 S.E.2d 311, 316 (1998). "'The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings.'" *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009) (*quoting Mallett*, 323 S.C. at 147, 473 S.E.2d at 808).

In order to support his recusal motion, Plaintiff must go beyond mere accusations and innuendo; he must present actual evidence demonstrating bias or partiality. *See Mortgage Elec. Sys., Inc.*, 384 S.C. at 616, 682 S.E.2d at 503 ("The Whites' only evidence of bias is the special referee's ruling denying their right to a jury trial and the judgment in favor of Mortgage Electronic. The fact the referee ruled against them is insufficient to show actual prejudice. Our review of the record reveals no indication of any actual bias on the part of the special referee. Accordingly, we find no error in the referee's refusal to disqualify himself."); *Christensen v. Mikell*, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) ("Appellant offered no evidence to support his claim of partiality. Accordingly, the trial judge properly denied the Motion to Recuse."); *State v. Hawkins*, 310 S.C. 50, 55, 425 S.E.2d 50, 53 (Ct. App. 1992) ("The claim of appearance of impartiality based upon a potential financial interest has no foundation in the record."); *Florence Cty. Democratic Party by Moore v. Johnson*, 281 S.C. 218, 223, 314 S.E.2d 335, 338 (1984) ("Johnson has presented no evidence which would indicate the circuit judge was not impartial or gave the appearance of partiality."). Plaintiff has not done so here.

To the contrary, Plaintiff's Motion to Recuse Judge Dennis for Cause — unsupported by affidavit or other evidence — is rife with speculation and innuendo. At its heart, Plaintiff's argument seems to be that he believes that Judge Dennis is biased

because he has ruled against Plaintiff on numerous occasions. Moreover, many of the allegations in the motion for recusal relate to *another* lawsuit filed against *another* party (Knology) relating to the events of the night in question. The motion also makes unsupported accusations concerning Judge Dennis' alleged refusal to permit Plaintiff to proceed *in forma pauperis* in other additional cases. The disposition of these motions does not, however, provide any evidence suggesting that Judge Dennis was biased against Plaintiff or could not impartially preside over this matter. He presents no evidence of a personal animus, a financial interest in the outcome of this litigation or any other reason that Judge Dennis could not fairly decide MUSC's motions.

Therefore, even if Plaintiff had properly preserved this issue for appeal, he has not shown any facts supporting his contention that Judge Dennis should have recused himself from this case.

VIII. Plaintiff's Accusations of "Untruths" Do Not Warrant the Reversal of the Grant of Summary Judgment to MUSC

Much of Plaintiff's Brief is devoted to allegations that MUSC or its counsel stated "untruths" in obtaining summary judgment. However, Plaintiff does not present actual evidence — via affidavit or other record evidence — supporting his accusations. Instead, Plaintiff relies solely on his own unsworn words to support his accusations of untruths. Judge Dennis correctly observed that Plaintiff's *ipse dixit* is insufficient at this stage to contradict the evidence put forth by MUSC:

> MR. POWELL: I thought I could discuss his statements because he's entered false statements in this Court.
>
> THE COURT: I don't know about false statements.
>
> MR. POWELL: I can prove it right here. It's his document. It's on the summary judgment, Your Honor.
>
> THE COURT: That's fine. He doesn't have to – you don't have to prove it. It speaks for itself. For you to say it's false, that's just your position. I don't have anything that contradicts it by way of affidavit.

(*See* 7/30/14 Transcr., at p.15:11-19). This Court should not permit Plaintiff to simply state in a conclusory fashion that MUSC misstated any facts; rather, it must require Plaintiff to present evidence supporting such contentions.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below granting summary judgment to Respondent Medical University of South Carolina.

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Dated: June 30, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2015-001331

Trial Court Case No. 2013-CP-10-05351

Jack Powell ..... Appellant,

v.

Medical University of South Carolina..... Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on Appellant Jack Powell by depositing a copy of it in the United States Mail, postage prepaid, on June 30, 2016, addressed to him at Jack Powell, 1402 Camp Road Unit 8-A, Charleston, South Carolina 29412.

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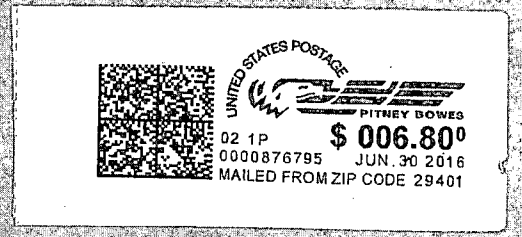

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SC Court of Appeals

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