THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2016-001376
Lower Court Case No. 2015-CP-23-07324

Benjamin L. Anderson.....Appellant,

v.

Barksdale Medical Center.....Respondent.

INITIAL BRIEF OF THE RESPONDENT

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October 12, 2016
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III. Did the lower court correctly conclude that the Complaint failed to allege the necessary elements for each cause of action pled?

STATEMENT OF THE CASE

Plaintiff/Appellant, Benjamin L. Anderson (*hereinafter* "Appellant" or "Anderson"), filed *pro se* a Complaint against Barksdale Medical Center (*hereinafter* "Respondent" or "BMC") on December 14, 2015. Anderson asserted three causes of action centered on Dr. Rebecca F. Barksdale's (*hereinafter* "Dr. Barksdale") provision of medical care and her inclusion of certain statements in the medical records. (Complaint). Appellant's causes of action included intentional infliction of emotions distress, defamation of character/libel, and fraud. (Complaint). Appellant did not file a Notice of Intent to File Suit or an expert affidavit pursuant to S.C. Code Ann. Section 15-79-110. Instead, he simply filed a Complaint.

Respondent filed a Motion to Dismiss. The hearing on the Motion to Dismiss was heard on April 25, 2016. The Honorable Letitia H. Verdin issued a May 4, 2016 Order (*hereinafter* the Order) holding that (1) Anderson failed to adhere to the requirements for a medical malpractice lawsuit; (2) Anderson failed to assert any allegations against the named Defendant; and (3) the Complaint failed to allege the necessary elements for each cause of action pled. (Order at 2-5). On June 2, 2016, Appellant requested the transcript of the hearing on Respondent's Motion to Dismiss. (Transcript Request). On June 24, 2016, Appellant filed a Notice of Appeal. (Notice of Appeal). Respondent received Appellant's brief on September 19, 2016.

STATEMENT OF THE FACTS

On January 25, 2013, Anderson was treated and evaluated by Dr. Barksdale at BMC in Greenville, South Carolina. Dr. Barksdale made an entry regarding that office visit in the medical records. In the subjective section of the office note, she documented as follows: "He is also complaining of having trouble getting to sleep and staying asleep. He is hearing voices. He

thinks he is being watched and spied on by the government." Included in her assessment was a diagnosis of paranoia. (Compl., Exhibit C thereto).

Dr. Barksdale treated Anderson again on December 2, 2013. She completed an entry regarding that office visit in Anderson's medical chart. In the subjective section of the office note, Dr. Barksdale noted: "He has been under a lot of stress. Has not been sleeping well. He feels that he is being spied on by the military in California through satellites. The [sic] says they are transmitting noises during the night that keeps him from sleeping." Included in the record was a diagnosis of paranoia and anxiety. (Compl., Exhibit C thereto).

LEGAL ARGUMENTS AND AUTHORITIES

I. Appellant failed to adhere to the requirements for filing a medical malpractice lawsuit.

For medical malpractice actions arising after July 1, 2005, the South Carolina General Assembly adopted reform legislation designed to provide certain protections and safeguards to hospitals and healthcare providers as defined in the statute (hereinafter the "Act"). *See* S.C. Code Ann. § 15-79-110, et seq. Section 15-79-125 of the Act specifically provides that "prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the Plaintiff must file a Notice of Intent to File Suit and, aside from limited exceptions, an affidavit of an expert witness . . . ." S.C. Code Ann. § 15-79-125(A). The Act further provides specific requirements for the content of the Notice of Intent to File Suit, requires that the notice be served on the named defendants, and requires that it answer standard interrogatories. *Id.* Once the aforementioned has been accomplished, the Act further provides that within 120 days from the service of the Notice of Intent to File Suit, the parties must engage in a mediation conference. *Id.* at 15-79-125(C). It is only after conclusion of the mediation conference that a plaintiff may initiate a lawsuit against a health care provider or institution. *Id.* at -125(E).

The Act provides that these protections are only extended to a "health care institution" or "healthcare provider" as defined by section 15-79-110(2)[1] and section 15-79-110(3)[2]. Moreover, these requirements only apply to cases involving medical malpractice. Section 15-79-110(6) of the Act defines "medical malpractice" as follows:

> "Medical malpractice" means doing that which the reasonably prudent healthcare provider or healthcare institution would not do or not doing that which the reasonably prudent healthcare provider or healthcare institution would do in the same or similar circumstances."

S.C. Code Ann. § 15-79-110(6).

Appellant instituted this action against BMC without adhering to the statutory requirements for a medical malpractice action. He filed a Complaint, rather than a NOI accompanied by an expert affidavit. BMC constitutes either a "health care institution" and/or a "healthcare provider" and, therefore, should be afforded the protections and safeguards established by the medical malpractice reform legislation. Moreover, this is a medical malpractice case. The allegations are centered on the provision of medical care and relate to the inclusion of certain information in the medical records. While the Complaint sounds in intentional infliction of emotional distress, defamation, and fraud (rather than negligence), the crux of the matter is whether a reasonably prudent healthcare provider or institution would do the same as BMC in the same or similar circumstances. Because this is a case alleging medical

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[1] A "health care institution" includes a hospital, which is defined by the Act as "a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty-four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and I which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina." S.C. Code Ann. § 15-79-100(2), (4).

[2] The definition of a "health care provider" includes a "nurse. . . or any similar category of licensed health care provider . . . ." S.C. Code Ann. § 15-79-100(3).

malpractice, Appellant's Complaint was rightfully dismissed as he failed to follow the statutory requirements of filing a Notice of Intent and expert affidavit prior to filing a Complaint.

II. Appellant did not assert any allegations against the named Defendant.

A motion to dismiss may be granted by the circuit court when a defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *See Sloan Const. Co. v. Southco Grassing, Inc.*, 368 S.C. 523, 525, 629 S.E.2d 372, 373 (Ct. App. 2006). In considering a motion to dismiss, the court may take judicial notice of well-known facts and principles of law,[3] and in "[v]iewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Chewning v. Ford Motor Co.,* 346 S.C. 28, 32-33, 550 S.E. 2d 584, 586 (Ct. App. 2001). Here, Appellant failed to state the facts sufficient to constitute a cause of action.

Appellant filed his Complaint against BMC. However, all of the factual allegations were against Dr. Barksdale, who was not a named Defendant in the lawsuit. Nowhere in the Complaint did Appellant assert a relationship between BMC and Dr. Barksdale. Appellant did not allege that BMC provided medical care and treatment to him, or that BMC made the alleged fraudulent and defamatory entries into the medical record. Instead, Appellant repeatedly referred to Dr. Barksdale and "she" as the perpetrator of the alleged intentional infliction of emotional distress, defamation, and fraud. Nowhere in the Complaint did Appellant allege facts sufficient to

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[3] *See* S.C.R.Evid. 201(b)-(d) (recognizing that a judicially noticed fact is one that is not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.); *see also Moss v. Aetna Life Ins. Co.,* 267 S.C. 370, 228 S.E.2d 108 (1976) (court may admit into evidence and consider, without proof of the facts, matters of common and general knowledge); *Bowers v. Bowers*, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002) (court may take judicial notice of a fact only if sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof—also the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability.)

constitute a cause of action against BMC, as he failed to allege any relationship between BMC and Dr. Barksdale, and all factual allegations were made against Dr. Barksdale (who was not a Defendant). As such, the Complaint failed to state facts sufficient to constitute a cause of action against BMC, and thus, was rightfully dismissed.

III. The Complaint failed to allege the necessary elements for each cause of action pled.

As indicated above, Appellant pled three causes of action: intentional infliction of emotional distress, defamation, and fraud. Appellant failed to plead all necessary elements of each cause of action.

A. Intentional infliction of emotional distress

In order to establish a cause of action for intentional infliction of emotional distress, a plaintiff must allege and prove that: 1) the defendant intentionally or recklessly inflicted serious emotional distress or was certain or substantially certain that such distress would result from her conduct; 2) the conduct was so "extreme and outrageous" 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 the plaintiff's emotional distress; and 4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. *Ford v. Huston*, 276 S.C. 157, 162, 276 S.E.2d 776, 778-9 (1981). Here, Appellant failed to allege all necessary elements of intentional infliction of emotional harm, specifically failing to allege that the actions of BMC resulted in emotional distress, or that such emotional distress was severe so that no reasonable man could be expected to endure it. As such, the lower Court correctly dismissed this cause of action.

B. Defamation

In order to recover for defamation, a plaintiff must allege and prove that the defendant made a false statement that: 1) has a defamatory meaning; 2) was published with actual or implied malice; 3) was false; 4) was published by the defendant, 5) had a message which concerns the plaintiff; and 6) resulted in legally presumed damages or special damages to the plaintiff. *Parker v. Evening Post Publishing Co.*, 317 S.C. 236, 243, 452 S.E.2d 640, 644 (Ct.App. 1994).

The Complaint simply indicated that Dr. Barksdale (again, not the Defendant in this lawsuit) made false allegations about Appellant which were "out in the local communities." (Complaint, Second Cause of Action). Appellant failed to allege that the allegedly false statements had a defamatory meaning, were published with actual or implied malice, were published by the defendant, or resulted in damages to the plaintiff. As such, the lower Court correctly dismissed this cause of action.

C. Fraud

South Carolina courts require that the following elements be pled and proven to establish fraud: 1) a representation; 2) its falsity; 3) its materiality; 4) either knowledge of its falsity or a reckless disregard of its truth or falsity; 5) intent that the representation be acted upon; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance of its truth; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury. *Kahn Construction Co. v. South Carolina Nat'l Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

In his Complaint, Appellant alleged that Dr. Barksdale (again, not the Defendant) made false entries in the medical records; that Appellant relied on Dr. Barksdale's "prior physician-patient trust to deal with Plaintiff in good faith"; that Appellant relied on this relationship to his

detriment; and that Appellant has been hurt in his attempt to return to work due to false representations made by Dr. Barksdale to him. (Complaint, Third Cause of Action). However, Appellant failed to allege multiple required elements, including that any representation was material; that the defendant had knowledge of its falsity; that the defendant intended that a representation be relied upon; that someone received (the hearer) the representation; that the hearer was ignorant of its falsity; that the hearer relied upon its truth; that the hearer had a right to rely thereupon; or that the hearer was injured. Appellant appears to suggest that he was the "hearer" in this matter, but that defies logic, as the patient about whom the alleged fraudulent medical entries were made could not be expected to be ignorant of the falsity of the representation, rely on the truth of the representation, or be damaged due to that reliance. While Appellant alleged that he relied upon the physician/patient relationship, he did not allege that he relied upon the allegedly false statements made in the medical records. Moreover, if the alleged statements were about him, certainly he would know whether or not they were true. In fact, his lawsuit was predicated upon the allegation that such statements were not true. Thus, Appellant could not possibly rely upon the alleged statements to his detriment (and in fact, failed to allege that he did so). As such, the lower Court correctly dismissed this cause of action.

Conclusion

The allegations pled against BMC sounded in medical malpractice and Appellant failed to file a Notice of Intent and expert affidavit per the statutory requirements. The Complaint failed to state any type of claim against BMC, as all allegations were actually against Dr. Barksdale, who was not a defendant. Finally, key elements of all three causes of action were absent from the pleadings. For these reasons, the lower court rightfully granted the Defendant's Motion to Dismiss.

For the reasons set forth above, the Circuit Court's Order of May 4, 2016 should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Initial Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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October 12, 2016

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Benjamin L. Anderson v. Barksdale Medical Center
Appellate Case Number: 2016-001376
RCCP 1171.0060

Dear Ms. Kitchings:

Enclosed for filing, please find the original and one copy of the Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal. Please file both in your office and return the filed copy to me in the envelope provided herein. By copy of this letter, we are serving *Pro Se* Appellant with a copy of same.

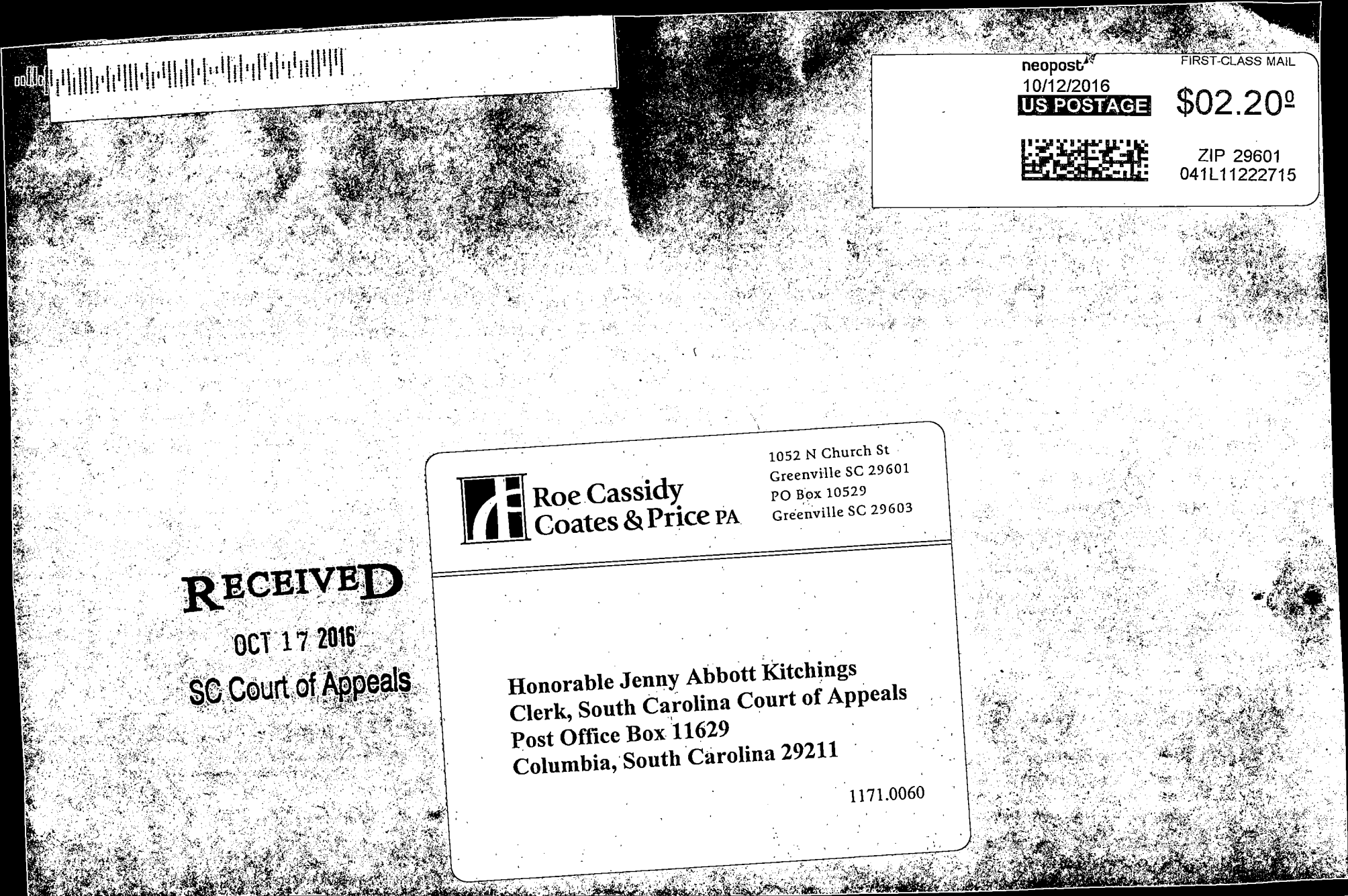
Sincerely,

ROE CASSIDY COATES & PRICE, P.A.

Fred W. "Trey" Suggs, III

Enclosure: (as stated above)

Cc: Benjamin L. Anderson, *Pro Se* Appellant (w/enclosures)



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