

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM RICHLAND COUNTY

AUG. 17 2017

COURT OF COMMON PLEAS

SC Court of Appeals

Robert E. Hood, Circuit Court Judge

RICHLAND COUNTY
FILED
2017 JUL 17 AM 10:02
JENNIFER W. ASBRIE
C.C.P. & C.S.

Case number: 2016-CP-40-2528

Richard Ridley,

Appellant,

v.

South Carolina Dept. of Mental Health,

Respondent.

NOTICE OF APPEAL

Richard Ridley appeals the order of the Honorable Robert E. Hood, Circuit Court Judge, dated May 16, 2017, and Filed by The Clerk on June 1, 2017. Appellant received notice on June 5, 2017.

June 25, 2017

Richard Ridley
Richard Ridley
1700 St. Andrews Terr.
CES, Bldg. A
Columbia, SC 29210-5412
APPELLANT, Pro-se

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

RICHLAND COUNTY
FILED
2017 JUL 17 AM 10:02
JENNETTE W. MCBRIDE
CLERK, C.P. & S.

ROBERT E. HOOD, Circuit Court Judge

Case No.: 2016-CP-40-2528

RECEIVED

Richard Riley,

AUG 17 2017

SC Court of Appeals

Appellant,

v.

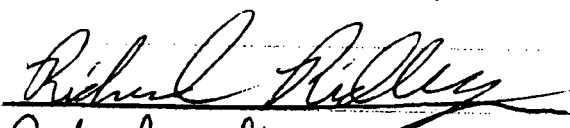
S.C. Dept. of Mental Health,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Charles A. Kinney, Counsel for Respondent, and The Richland County Clerk of Court, by depositing a copy of it in the U.S. mail, postage prepaid, on this date at P.O. Drawer 7217 and P.O. Box 2766, Columbia, SC 29202, respectively.

June 25, 2017


Richard Ridley
Appellant, Pro-se

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002528

Richard Ridley

South Carolina Dept Of Mental Health

RECEIVED

AUG 17 2017

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

SC Court of Appeals

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

JEN
 2017 JUN 17 PM 4:11
 RICHLAND COUNTY
 CLERK OF COURT

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk :

The Defendants Amended Motion to Dismiss is granted

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

R. Hood

Judge Code

2164

Date

5/16/17

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 1 day of June, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Richard Ridley

Charles A. Kinney Jr.

Daniel R Settana Jr.

Richard Ridley

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

PHM

IN THE STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Richard Ridley,

Plaintiff,

v.

South Carolina Department of Mental
Health,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-2528

ORDER

RECEIVED

AUG 17 2017

SC Court of Appeals

2017 JUN - 19 PM 1:34
JEANETTE T. HARRIS
CLERK OF COURT
RICHLAND COUNTY
FILED

This matter came before this Court upon Defendant South Carolina Department of Mental Health's Amended Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP. Richard Ridley appeared *pro se*. Charles A. Kinney, Esquire, appeared for Defendant. This matter was heard on April 25, 2017, wherein each party presented their positions. After reviewing the pleadings, exhibits attached to the Complaint, Defendant's amended motion and memorandum, and copies of documents submitted by Defendant from Plaintiff's other law suits,¹ Defendant's Amended Motion to Dismiss is hereby GRANTED for the reasons set forth below:

FINDINGS OF FACT

Plaintiff, Richard Ridley, is an individual involuntarily committed to the Sexually Violent Predator Treatment Program ("SVPTP") at the South Carolina Department of Mental Health ("Defendant"). Plaintiff brings this action pursuant to the South Carolina Tort Claims Act ("SCTCA"), S.C. Code Ann. §§15-78-10, *et seq.*, seeking monetary relief for breach of confidentiality, negligence/gross negligence, defamation, a violation of the Health Information

¹ Defendant provided copies of public records from Plaintiff's two (2) prior lawsuits in which affidavits were provided employees of Defendant, which forms the basis for the present matter. The Court may take judicial notice of matters of public record. *Sec'y of State for Def. v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007).

Portability Accountability Act (“HIPAA”), a violation of S.C. Code Ann. §40-55-60, “moral turpitude,” and “ministerial neglect.” See generally Compl. Defendant filed a Motion to Dismiss on July 19, 2016, and then an Amended Motion to Dismiss on July 28, 2016, pursuant to Rule 12(b)(6), SCRCPP, contending Plaintiff failed to state a cause of action upon which relief can be granted.

Plaintiff’s Complaint alleges that employees of Defendant, Dr. Kelly Gothard and Dr. Rozanna Tross, breached a duty of confidentiality purportedly owed to Plaintiff as a resident of the SVPTP. Compl. 1-3. Dr. Gothard and Dr. Tross previously provided affidavits in two (2) prior law suits filed by Plaintiff: Ridley v. McGill, C/A No. 1:15-cv-01612-MBS (“Ridley I”) and Ridley v. McGill, C/A No. 2015-CP-02-1900 (“Ridley II”). Plaintiff alleges that these affidavits contained confidential information regarding his mental health treatment within the SVPTP without Plaintiff’s permission and in violation of state and federal law. Compl. 1-3.

In Ridley I, Plaintiff sued four (4) individual employees of the SVPTP in the U.S. District Court for the District of South Carolina for violations of his First, Fourth, Eighth, and Fourteenth Amendment Constitutional rights. Among the numerous causes of action were claims that Plaintiff must participate in treatment and that he received “inadequate group treatment” in violation of his First and Fourteenth Amendment rights.

In Ridley I, Dr. Gothard provided two (2) affidavits. The first, dated December 11, 2015, was submitted in response to Plaintiff’s attempt to gain access to the Diagnostic and Statistical Manual, 5th Edition (DSM-5), a manual used by trained clinicians for assessment and research, which includes use in diagnosing psychiatric disorders. It is commonly used by individuals that evaluate and treatment residents of the SVPTP. In that affidavit, Dr. Gothard declared that the DSM-5 is not suitable for residents of the SVPTP, including Plaintiff, for various reasons,

including the potential for abuse in malingering symptoms or attempting to mask symptomology. In addition, Dr. Gothard stated access to the DSM-5 could detract and distract in Plaintiff's, and other resident's, treatment by creating confusion in the treatment process.

In the second affidavit, dated January 7, 2016, Dr. Gothard responded to Plaintiff's Motion to Strike the initial affidavit as Plaintiff claimed Dr. Gothard had no personal knowledge of Plaintiff. Dr. Gothard averred she was familiar with Plaintiff as she reviews all evaluations and treatment reports for all residents, including Plaintiff.

Also in Ridley I, Dr. Tross provided an affidavit, dated January 7, 2016. Therein, Dr. Tross agreed that Plaintiff should not have access to the DSM-5. In addition, Dr. Tross made counterarguments to allegations made in Plaintiff's motion to strike Dr. Gothard's affidavit, which included counterpoints to treatment-related participation scores that Plaintiff inaccurately reported to the court. Ultimately, the court agreed with Dr. Gothard and Dr. Tross and denied Plaintiff's attempt to gain access to the DSM-5. The District Court further dismissed all Plaintiff's claims, with prejudice, in granting the defendants' motion for summary judgment.²

In Ridley II, a state Habeas Corpus Petition,³ Plaintiff brought claims that he was improperly diagnosed, which lead to his commitment to the SVPTP, he no longer met the statutory criteria under the Sexually Violent Predator Act, S.C. Code Ann. §§44-48-10, et seq., and he received inadequate treatment from the SVPTP and its staff, among others. During the pendency of that matter, Plaintiff filed a motion to obtain a copy of the DSM-5 manual. Dr. Gothard provided an affidavit in Ridley II that mirrors her first affidavit in Ridley I, and which

² Ridley v. McGill, C/A No. 1:15-cv-01612-MBS, ECF No. 98 (Feb. 23, 2017).

³ Judge Dickson granted the defendant's Motion to Dismiss the Petition on August 23, 2016. Judge Dickson later denied Plaintiff's Motion to Reconsider.

advised the court of the reasons why Plaintiff should not gain access to the DSM-5. Ultimately, Judge Manning agreed with Dr. Gothard and denied Plaintiff's motion.

Plaintiff now brings the current action for Dr. Gothard and Dr. Tross submitting affidavits to the District Court and Aiken County Court of Common Pleas to advise the court why Plaintiff should not gain access to the DSM-5 manual, which both courts concluded would not be proper for Plaintiff to possess. For the following reasons, Defendant's Amended Motion to Dismiss is Granted, and Plaintiff's Complaint is dismissed with prejudice.

RULE 12(b)(6), SCRPC, MOTION TO DISMISS STANDARD

"A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed 'to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." Williams v. Condon, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001) (citing Rule 12(b)(6), SCRPC); Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citing Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999)). "The trial court's ruling on a Rule 12(b)(6) motions must be bottomed and premised solely upon the allegations set forth by the plaintiff." Williams, 347 S.C. at 233, 553 S.E.2d at 499. "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." Id.

Rule 8(a)(2), SCRPC, provides that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although the court must liberally construe a *pro se* pleading, the United States Supreme Court has made clear that a plaintiff must do more than make conclusory statements to state a claim. See Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 1943 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964 (2007). The mandated liberal construction afforded to *pro se* pleadings means

that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a district court may not rewrite a complaint to include claims that were never presented, Barnett v. Hargett, 174 F.3d 1128 (10th Cir. 1999), construct the plaintiff's legal arguments for him, Small v. Endicott, 998 F.2d 411 (7th Cir. 1993), or "conjure up questions never squarely presented" to the court, Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985). Rather, the pleading must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face, and the reviewing court need only accept as true the pleading's factual allegations, not its legal conclusions. Ashcroft, 556 U.S. at 678-79, 129 S.Ct. at 1944. Further, allegations that are no more than conclusions are not entitled to the assumption of truth. Id. at 681, 129 S.Ct. at 1951.

CONCLUSIONS OF LAW

Failure to Allege Facts Sufficient to State a Cause of Action

As an initial matter, Plaintiff fails to provide sufficient allegations to support any of his causes of action, which are all reliant on the affidavits of Dr. Gothard and Dr. Tross providing private and confidential mental health treatment information and/or records. See generally Compl. A review of the Complaint, however, shows that Plaintiff provides no allegations as to what information averred in the affidavits was protected health or treatment information. Id. The affidavits of Dr. Gothard generally discuss the negative impact that obtaining a diagnostic manual could have on Plaintiff or other residents of the SVPTP. The affidavit of Dr. Tross provides treatment scores of Plaintiff in direct contradiction to information that Plaintiff inaccurately provided to the court in Ridley I. Neither affidavit provides details of Plaintiff's mental health treatment within the SVPTP. Without any actual dissemination of Plaintiff's

treatment information, there is no evidence to support any of the causes of action alleged by Plaintiff. Therefore, Plaintiff's Complaint is dismissed for failure to state a claim.

The Court further addresses the individual causes of action as follows:

Breach of Confidentiality

Plaintiff alleges Dr. Gothard breached a duty of confidentiality in each of the three (3) instances she provided an affidavit to the court in Plaintiff's prior lawsuit because such affidavits included information regarding Plaintiff's "treatment and confidentially-protected information." Compl. 1-2. Plaintiff also brings one (1) such claim against Dr. Tross for the affidavit she provided in Ridley I. Compl. 3.

S.C. Code Ann. § 44-22-90, provides that "[c]ommunications between patients and mental health professionals including general physicians, psychiatrists, psychologists, psychotherapists, nurses, social workers, or other staff members employed in a patient therapist capacity ... are considered privileged...." In addition, an actionable tort lies for a physician's breach of the duty to maintain the confidences of his or her patient in the absence of a compelling public interest or other justification for the disclosure. McCormick v. England, 328 S.C. 627, 640, 929 S.E.2d 431, 437 (Ct. App. 1997).

However, under South Carolina law, "[p]atient' means an individual undergoing treatment in the department [of mental health]; however, the term does not include a person committed to the department pursuant to Chapter 48 of Title 44 [the Sexually Violent Predator Act]." S.C. Code Ann. §44-22-10(11). Furthermore, "[p]hysician' means a doctor of medicine or doctor of osteopathic medicine licensed by the South Carolina Board of Medical Examiners." S.C. Code Ann. §40-47-20(35).

Here, Plaintiff is committed to the SVPTP and the SCDMH pursuant to the SVPA. Therefore, "patient rights" are specifically excluded by the legislature. The McCormick court found a duty of confidence for the physician-patient relationship. McCormick, at 640, 929 S.E.2d at 437. Under South Carolina law, Plaintiff is not a patient, and Dr. Gothard and Dr. Tross are not physicians. As such, there is no duty of confidentiality owed to Plaintiff by Defendant or its employees, Dr. Gothard and Dr. Tross. In addition, no South Carolina court has ever found a duty of confidentiality for psychiatrists or psychologists and has not extended the duty beyond physicians. See Evans v. Rite Aid, Corp., 324 S.C. 269, 478 S.E.2d 846 (1996) (finding no duty of confidentiality for pharmacists).

Even assuming a duty of confidentiality did exist; such duty would be overcome by the public interest exception as stated in McCormick. As stated in Dr. Gothard's and Dr. Tross' affidavits, if Plaintiff or other residents were to gain access to the DSM-5 manual, these individuals could use it to mask symptomology, which could result in an inaccurate diagnosis, which could then lead to the premature release of a sexually violent predator that may engage in repeated acts of sexual violence if not treated for his mental conditions. See S.C. Code Ann. §44-48-20.

In addition, Plaintiff waived any such privilege or confidence when he filed Ridley I and Ridley II, which both put into issue the allegedly inadequate treatment he receives as a resident of the SVPTP. See Felder v. v. Wyman, 139 F.R.D. 85, 87 (D.S.C. 1991) ("[w]here, as here, plaintiff has attacked the quality of decedent's medical treatment and placed decedent's medical condition into contention, any privilege that might exist to prevent disclosure with respect to decedent's medical condition is waived"); see also Gallipeau v. Correct Care Solutions, No. 3:10-2017-JFA-JRM, 2011 WL 4502043, at *3 (D.S.C. Sept. 29, 2011) (any duty of

confidentiality was waived by the plaintiff by his placement of his medical condition and treatment at issue in his prior law suits).

As addressed above, Plaintiff put his allegedly inadequate treatment at issue in Ridley I and Ridley II. As such, any privilege or confidentiality owed to Plaintiff by Defendant or its employees would have been waived. Plaintiff's claims are dismissed.

Libel/Slander/Defamation

Plaintiff next alleges separate causes of action for libel, slander, and defamation regarding the affidavits of Dr. Gothard. Comp. 3-4. "The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). In order to prove defamation, a plaintiff in South Carolina must show: "(1) a false and defamatory statement was made; (2) the unprivileged statement was published 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). Failure to prove any one of these elements is fatal to a defamation claim. See e.g., Williams v. Lancaster County Sch. Dist., 369 S.C. 293, 304, 631 S.E.2d 286, 292-93 (Ct. App. 2006) (defamation claim failed as a matter of law where the plaintiffs could not establish that the defamatory statement was actually published to a third party).

Plaintiff contends Dr. Gothard providing three (3) affidavits is itself libel. Compl. 3. He next alleges Dr. Gothard slandered him when she averred she was "familiar" with Plaintiff in the December 11, 2015, affidavit. Id. Finally, Plaintiff states he was defamed by Dr. Gothard when

she made “statements that were false and misleading pertaining to Plaintiff.” Compl. 4. All of these instances allegedly harmed Plaintiff’s reputation. Compl. 3.

Plaintiff fails to allege what statements by Dr. Gothard were false and defamatory. “[W]here the claims in a complaint are insufficiently supported by factual allegations, these claims may be properly dismissed by summary dismissal.” Harper v. U.S., 423 F.Supp. 192, 196 (D.S.C. 1976). Allegations that are no more than conclusions are not entitled to the assumption of truth. Iqbal, 556 U.S. at 681, 129 S.Ct. at 1951.

The only statement actually referred to by Plaintiff was that Dr. Gothard claimed she was familiar with Plaintiff in her first affidavit. Compl. 3. Plaintiff brought up this position in his motion to strike Dr. Gothard’s affidavit, to which Dr. Gothard provided the January 7, 2016, affidavit that clarified she was familiar with Plaintiff by reviewing his evaluations and records. Plaintiff’s motion to strike was dismissed by the court in Ridley I. As such, Plaintiff fails to satisfy the first element of a defamation cause of action, and his claims for defamation are dismissed.

Additionally, Plaintiff fails to provide any facts whatsoever that his reputation was actually damaged or that the claim is actionable irrespective of harm. Plaintiff merely states his reputation was harmed. The focus of defamation is not on the hurt to the defamed party’s feelings, but on the injury to his reputation. See Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984). Again, Plaintiff must do more than make conclusory statements to state a claim. See Iqbal, 556 U.S. at 677-78, 129 S.Ct. at 1943; Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964 (2007). Rather, the pleading must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face, and the reviewing court need only accept as true the pleading’s factual allegations, not its legal conclusions. Iqbal, 556 U.S. at 678-

79, 129 S.Ct. at 1944. Plaintiff's defamation claims are dismissed.

Negligence/Gross Negligence

Plaintiff next alleges causes of action for negligence and gross negligence against Defendant. Compl. 4. However, the only duty referenced by Plaintiff is that of confidentiality, which has already been addressed above. Assuming Plaintiff did properly bring a cause of action for professional negligence or gross negligence due to the purported breaches of duty of Dr. Gothard and Dr. Tross, Plaintiff claims still fail as he failed to satisfy S.C. Code Ann. §15-36-100.

Pursuant to S.C. Code Ann. §15-36-100(B):

Except as provided in Section 15-79-125, in 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.

S.C. Code Ann. §15-36-100(G)(19) identifies psychologist as a profession that requires Plaintiff to comply with the pre-suit requirements of Section 15-36-100.

While Plaintiff does not specifically allege any allegations against Defendant or any of its employees regarding therapeutic treatment or the denial thereof, Plaintiff's conclusory claim ostensibly alleges professional negligence by claiming Dr. Gothard and Dr. Tross breached a duty of confidentiality owed to Plaintiff in their positions as licensed psychologists. Here, Plaintiff failed to satisfy pre-suit requirements by not filing a Notice of Intent to Sue or attaching an expert affidavit as required by South Carolina law regarding any potential claims for professional negligence. As such, Plaintiff's negligence and gross negligence are dismissed.

Violation of HIPAA

Next, Plaintiff brings a claim against Dr. Gothard and Dr. Tross for a violation of HIPAA. Compl. 4-5. However, the law is clear that there is no private cause of action under HIPAA. See Gallipeau, *supra*, 2011 WL 4502043, at *3; Williams v. Jones, No. 9:07-CV-3437-MBS-GCK, 2008 WL 948285, at *1 (D.S.C. Apr. 4, 2008); Hopkins v. Bethe, C.A. No. 3:06-3467-MBS-JRM, 2007 WL 1231652, at *5 (D.S.C. April 23, 2007); Suggs v. N. Strand OB/GYN, P.C., No. CIV 07-3911-TLW-TER, 2009 WL 113445, at *5 (D.S.C. Jan. 14, 2009). Plaintiff's HIPAA claims are dismissed.

Violation of S.C. Code Ann. §40-55-60

Plaintiff then contends that S.C. Code Ann. §40-55-60 creates a duty to Plaintiff that enables him to bring a private cause of action against Defendant.

The board may adopt the code of ethics for psychologists to govern the practices and conduct of psychologists licensed under this chapter. Whenever important aspects of a case fall outside the boundaries of the psychologist's competence, the psychologist shall consult appropriate specialists. A psychologist may not attempt to diagnose, prescribe for, treat, or advise a client with reference to complaints which are outside the limits of psychological practice as determined by the board. The board shall determine areas of specialization of the applicant to practice psychology and inform the applicant of its decision. The board shall publish a list of licensed psychologists which indicates areas of practice authorized by the board.

S.C. Code Ann. §40-55-60.

“Ordinarily, the common law imposes no duty on a person to act.” Murray v. Bank of America, 580 S.E.2d 194, 197 (Ct. App. 2003); Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). However, an affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Id. A “special duty” exists when:

- (1) an essential purpose of the statute is to protect against a particular kind of harm;
- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
- (3) the class of persons the statute intends to protect is identifiable before the fact;
- (4) the plaintiff is a person within the protected class;
- (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
- (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Jensen v. Anderson County Dep't of Social Services, 304 S.C. 195, 199-200, 403 S.E.2d 615, 617 (1991) (citing Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625 (1940)).

Plaintiff fails to show where any private right of action is created by the S.C. Code Ann. §44-55-60, or any anywhere else in Chapter 55, Title 44. A review of this statute shows there is no private cause of action created therein, only disciplinary actions available to the board of examiners in psychology. S.C. Code Ann. §44-55-60. In addition, Plaintiff has failed to satisfy or allege any of the six-part test announced in Jensen to show the existence of a special duty. Plaintiff's claims are dismissed.

South Carolina Tort Claims Act

The South Carolina Tort Claims Act ("SCTCA"), S.C. Code Ann. §§ 15-78-10, et seq., generally waives its sovereign immunity for torts, but also provides exceptions to that waiver under the Act. Under S.C. Code Ann. § 15-78-60, Defendant is immune from suit for the actions carried out by its employees involving Plaintiff. This Code section provides many exceptions to a governmental entity's waiver of immunity, most notably §§ 15-78-60 (5) and (25).

S.C. Code Ann. § 15-78-60(5) states that Defendant is immune from suit for the exercise of discretion within the course and scope of its employees' employment. Discretionary immunity is applicable when the government entity (or its employees), when faced with

alternatives, made a conscious choice utilizing professionally accepted standards appropriate to resolve the issue before it. Strange v. S.C. Dep't of Highways and Pub. Transp., 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). In this case, Dr. Gothard and Dr. Tross at all times exercised appropriate discretion when dealing with Plaintiff. Defendant's employees provided affidavits to the court in pending litigation in response to Plaintiff's attempt to obtain the DSM-5 manual. The affidavits provided did not delve into personal details regarding Plaintiff's treatment or provide copies of his treatment records. Providing the courts needed information regarding the DSM-5 and why it would be improper, and potentially detrimental to the public, was a conscious choice using the training and experience of Dr. Gothard and Dr. Tross as licensed psychologists. Plaintiff's claim should be dismissed as Defendant is immune from suit.

S.C. Code Ann. § 15-78-60(25) states Defendant is immune from suit for any "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." As addressed above, Plaintiff has failed to show any duty owed by Defendant to Plaintiff. However, even if Plaintiff could establish a duty owed, Plaintiff has failed to establish that Defendant's employees acted without giving at least slight care in their actions. See Etheredge v. Richland Sch. Dist. I, 341 S.C. 307, 534 S.E.2d 275 (2000); Jackson v. S.C. Dep't of Corr., 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989).

Other Claims

Plaintiff also alleges causes of action for "moral turpitude" and "ministerial neglect." Compl. 4, 5-6. This Court is not aware of any such cause of action for either term of art, and no South Carolina court has recognized such a cause of action exists in either instance. These

claims are dismissed.

Punitive Damages

Finally, Plaintiff's Complaint seeks punitive damages as one measure of relief. Compl. 7. However, punitive damages are not permitted pursuant to the SCTCA. "No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment." S.C. Code Ann. §15-78-120(b). As such, Plaintiff's punitive damage relief claim is dismissed.

CONCLUSION

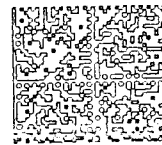
For these reasons, Defendant's Amended Motion to Dismiss is hereby GRANTED, and Plaintiff's Complaint is dismissed with prejudice.

IT IS SO ORDERED.

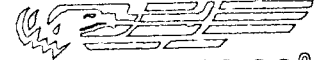


Robert E. Hood
Presiding Circuit Court Judge
Fifth Judicial Circuit

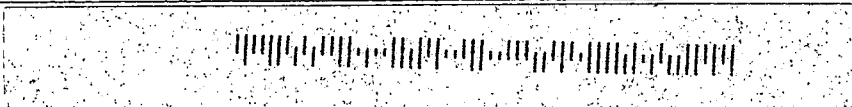
May 16, 2017
Columbia, South Carolina



U.S. POSTAGE PITNEY BOWES



ZIP 29204 \$ 002.03⁰
02 1W



Jeanette W. McBride
CLERK OF COURT
RICHLAND COUNTY
P.O. Box 2766
Columbia, SC 29202-2766

Return to sender if not
Delivered in five (5) days

South Carolina Court of Appeals
P.O. Box 11629
Columbia SC 29211