THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2018-001480

Jane Doe

Appellant,

v.

Oconee Memorial Hospital, Greenville Health System

Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of the circuit court's July 9, 2018 Order dismissing Appellant's Complaint, along with each and every claim alleged therein by Appellant Doe, in favor of the Respondents Oconee Memorial Hospital and Greenville Health System.

Appellant Doe instituted this action by filing her Complaint on December 5, 2017, alleging that Respondents were negligent in failing to order necessary tests, in failing to properly collect and protect medical evidence of a sexual assault and in failing to ensure that the chain of custody for said evidence was maintained. Appellant also alleged a claim against Respondents for intentional infliction of emotional distress. Appellant's claims all arise out of a visit Appellant made to Oconee Memorial Hospital after she was sexually assaulted in Atlanta, Georgia and sought testing and assistance from Respondents the following morning.

Respondents filed a Motion to Dismiss Appellant's Complaint on January 10, 2018, arguing that Appellant had failed to plead facts sufficient to make out both the duty and damage elements of her various claims of negligence. Respondents also argued that Appellant's claim for intentional infliction of emotional distress could not be recognized under the facts of this case. Appellant filed a Motion to Amend her Complaint on June 4, 2018 and a hearing on Respondents' Motion to Dismiss was held later that same day. Following that hearing, both Appellant and Respondents filed supplemental Memoranda regarding Respondents' Motion to Dismiss on June 8, 2018.

Having reviewed Respondents' Motion to Dismiss, read all submissions

from the parties and heard extensive argument from all counsel at the hearing on June 4, 2018, but without ever addressing Appellant's Motion to Amend, the circuit court filed an Order on July 9, 2018, granting Respondents' Motion to Dismiss Appellant's Complaint, including all claims set forth therein. Appellant then filed a Motion for Reconsideration of that Order on July 16, 2018, which was summarily denied by the circuit court on July 19, 2018. Appellant filed a Notice of Appeal on August 10, 2018.

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id.*; *see also Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Doe v. Marion,* at 395, 645 S.E. 2d at 248; *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014).

When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well

pled facts must be presumed true. *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). Questions of law are reviewed de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

The circuit court erred in granting Respondents' Motion to Dismiss because (1) Appellant's Complaint properly pleads claims for negligence and intentional infliction of emotional distress against Respondents, (2) the lower applied the wrong standard in considering Respondents' Motion, and (3) the grant of Respondents' Motion to Dismiss Appellant's Complaint, effectively dismissing the entire action, was in error given that Appellant's Motion to Amend was still pending when the circuit court's Order was filed.

I. The Circuit Court Erred in Dismissing Appellant's Negligence Claims.

Appellant's Complaint included six causes of action. The first five causes of action are 1) negligence, failure to properly collect and preserve evidence; 2) negligence, failure to order necessary tests; 3) gross negligence, failure to properly collect and preserve evidence; 4) gross negligence, failure to order necessary tests; 5) negligent supervision. The circuit court granted Respondents' Motion to Dismiss the first five causes of action in Appellant's complaint, pursuant to Rule 12(b)(6) SCRCP, on the basis that 1) "no legal duty was owed to [Doe] in regards to the sexual assault examination kit"; and 2) Doe "failed to allege any cognizable damages." The circuit court erred as to both grounds.

A. The Respondents Had a Duty to the Appellant.

The circuit court incorrectly found that "GHS owed no duty to Plaintiff in regards to the sexual assault examination kit. Rather, the circuit court f[ound] that Respondents were performing a service on behalf of law enforcement in collecting evidence for a criminal investigation." (R. pp. 265-266). Specifically, the circuit court ruled that GHS "was acting pursuant to statutes, ordinances, and regulations which protect the public at large, but provide no duty of care to individuals." (R. p. 266), (citing *Wells v. City of Lynchburg*, 331 S.C. 296, 308, 501 S.E.2d 746, 752 (Ct. App. 1998) and *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31, 659 S.E.2d 122 (2008)).

The circuit court concluded that the Respondents are exempt from liability pursuant to the public duty rule. In reaching this conclusion, the circuit court erred as a matter of law. Under South Carolina's public duty doctrine, public officials are not liable to individuals for their own negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually. *Arthurs v. Aiken County*, 338 S.C. 253, 261. 525 S.E.2d 542 (Ct. App. 1999); *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). Thus, where the duty is owed to the public in general, the official is not liable to an individual who may have been incidentally injured by the failure to perform the duty. *Arthurs*, 338 S.C. at 263. An exception to the general rule of non-liability exists when a duty is owed to specific individuals rather than the public only. *Id.* In this case, the Respondents' duty was not to the general public, but to the Respondents' patient, Jane Doe.

The public duty rule presumes the existence of statutes that create or define

the duties of a public office and have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. In this case, there is no statute that defines the duties of a hospital with regard to the treatment of rape victims. There is no statute that mandates that a hospital must conduct a sexual assault forensic examination that would subject the hospital's actions to the public duty rule. As such, the circuit court's ruling that, pursuant to the public duty doctrine, Respondents had no duty to the Appellant – an individual patient the hospital agreed to treat in exchange for compensation – is incorrect as a matter of law and must be reversed.

Next, the circuit court ruled that the Respondents are not liable because GHS "was not rendering medical services or treatment to Plaintiff". (R. p. 266). As an initial matter, this outrageous statement – that a hospital emergency department is not providing medical care when it treats a rape victim who reports thereto for medical treatment, including the collection of evidence – involves questions of fact, which are not before the court's consideration when ruling on a motion to dismiss pursuant to S.C.R.C.P. 12(b)(6). *See Spence v. Spence,* 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (200). Doe's Complaint alleges that she was receiving medical treatment from the Respondents, that she presented to the emergency department of the hospital, and that "the Hospital and GHS owed a duty to Plaintiff to ensure that she received proper medical attention." (R. pp. 6, ¶ 20 and 9, ¶ 35). The notion that Respondents are not liable because "providing medical care for alleged or suspected injuries is a wholly separate function from gathering evidence for a sexual assault examination kit" is directly contrary to the facts

asserted by the Appellant, and as such, should have been be disregarded by the circuit court.

The circuit court's order further concludes that Respondents had no legal duty to Appellant because GHS was gathering evidence for the sexual assault examination kit "like the law enforcement agency it was acting on behalf of". (R. p. 266). There is no factual basis for this argument. Appellant's Complaint does not state that Respondents were acting on behalf of law enforcement. To the contrary, the Complaint specifically avers that Doe told GHS employees that *she* "wanted the Hospital to perform a sexual assault forensic examination and get law enforcement involved". (R. p. 3, ¶ 8). Appellant later alleges that, following the examination, Doe "affirmatively consented to the Hospital reporting the assault to law enforcement." (R. p. 4, ¶ 9). There is no allegation in the complaint that Respondents were deputized by, or acting on behalf of, the Dekalb County Sheriff's Office or any other law enforcement agency. To the contrary, the complaint reveals that the kit was collected at Doe's request alone. Only after Doe later agreed to have the assault reported to law enforcement, was law enforcement even made aware of the rape kit for the very first time.

Similarly, there is no support for the circuit court's erroneous conclusion in any statute or regulation. There is no statute or regulation that commands the Respondents to provide these services on behalf of a law enforcement agency. In fact, the South Carolina Attorney General's Sexual Assault Protocol for the Investigation, Prosecution, and Judgment of Sexual Assault, 2nd. Ed., 2015, specifically provides that "[a]ll patients should receive a comprehensive

medical/forensic evaluation by a Sexual Assault Nurse Examiner (SANE).... If a SANE is not available, an emergency room physician or registered nurse may conduct the **medical**/forensic evaluation and evidence collection." *Id.* (emphasis added). "The **medical** forensic evaluation consists of obtaining information necessary to make the appropriate decisions regarding **medical care**, forensic evidence collection and appropriate referral and follow up information." *Id.*, at 19.

Most important for this case, and for competent adults such as Jane Doe, it is the *patient* who "has the right to choose whether or not she/he would like to report the assault to law enforcement." *Id.* Thus, the hospital is conducting the medical forensic evaluation and evidence collection for the *patient* who may later choose to involve law enforcement. The patient then has the right to report the assault to law enforcement, to decline to report the assault to law enforcement, or to report the assault anonymously. Should the patient choose to report the assault or report the assault anonymously, the evidence is to be "released to the appropriate law enforcement agency." *Id.*, at 22. In fact, for a competent adult such as Jane Doe, pursuant to the requirements of HIPAA, the federal Violence Against Women Act, the South Carolina Violence Against Women Compliance Act, S.C. Act, 59, and the South Carolina Victim's Bill of Rights, the medical/forensic evaluation and evidence collected during treatment of a sexual assault victim cannot be shared with law enforcement unless and until the patient consents and affirmatively chooses to share this information using their own identity or anonymously. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), Codified at 42 U.S.C. § 300gg and 29 U.S.C § 1181 et

seq. and 42 USC 1320d *et seq*; 42 U.S.C. §3796gg-4.b.D.d.1 ("Nothing in this section shall be construed to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such exam or both."); S.C. Code § 16-3-1520). Thus, the circuit court's conclusion that Respondents were gathering evidence "[l]ike the law enforcement agency [they were] acting on behalf of", is incorrect as a matter of law.

As a matter of fact and law, the services rendered by Respondents to Doe were done at Doe's request as a patient before she decided whether or not to exercise her right to report the sexual assault to law enforcement. Doe's private health information, including the evidence collected as part of the sexual assault forensic examination that she personally requested, must remain private unless and until she chooses to disclose that information to law enforcement. Thus, the *private* nature of Appellant's personal health information completely undermines the notion that Respondents were acting on behalf of any law enforcement agency or pursuant to a public duty in following Doe's request for a forensic medical examination.

In South Carolina, a legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstances. *See Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). The circuit court incorrectly stated that the "Plaintiff identified no statute, regulation, rule, ordinance or standard which clearly established a duty owed to her in regards to the handling of the sexual assault examination kit." (R. p. 266). To the contrary,

as Appellant explained in her memorandum submitted to the circuit court, the Respondents owed a duty to Doe as a result of: 1) a contractual relationship; 2) a property interest; and 3) a special circumstance, namely, that the Respondents assumed a duty to the Appellant when they volunteered to provide the services rendered for compensation when performing the Sexual Assault Forensic Examination requested by Appellant.

The parties entered into a contractual relationship wherein the hospital agreed to provide services, including a sexual assault forensic examination, in exchange for compensation by the Appellant and/or her agents.[1] As such, the Respondents had a contractual duty to Appellant.

In addition to the contractual duty owed to Doe by GHS, Doe also had a property interest in the contents of the rape kit. The Appellant's bodily fluids and other specimens removed from her body are her private personal property. These items were collected from her body at her request and were entrusted to the care of the hospital, but do not belong to the hospital. The hospital was compensated by the Appellant and/or her agents in exchange for the safekeeping of her property until such time as Appellant could determine whether or not she wanted it properly handed over to law enforcement. *See, e.g., Hadfield v. Gilchrist,* 343 S.C. 88, 96

[1] Respondents contended at oral argument that they were compensated by the state's victim's assistance fund. This allegation was not alleged in the complaint and is outside the scope of consideration for the 12(b)(6) motion filed by the Respondent. Whether Respondents were paid by the Appellant directly or by a third-party payor on Appellant's behalf does not obviate the contractual relationship. While hospitals are frequently compensated for their services by third-party payors, the manner in which Respondents were compensated in this case is a disputed issue of fact. Moreover, although counsel for the Respondents argued that the Respondents are always compensated by the victim's assistance fund, the Appellant vehemently contested this statement and pointed the court to a separate action then currently pending in Greenville County, wherein it was alleged that the Respondents have a pattern and practice of billing individual victims for the provision of sexual assault forensic examinations in violation of state and federal law. *See Jane Doe v. Greenville Health System*, C.A. No. 2017-CP-23-07961.

538 S.E.2d 268 (S.C. Ct. App. 2000) ("a bailment for mutual benefit of the parties arises when one party takes the personal property of another into his or her care or custody in exchange for payment or other benefit."). *See* South Carolina Attorney General's Sexual Assault Protocol for the Investigation, Prosecution, and Judgment of Sexual Assault, 2nd. Ed., 2015, attached as Exhibit A to Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss. (R. pp. 30-117).

Finally, it "has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." *Madison v. Babcock Ctr.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (S.C. 2006); *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); *Roundtree Villas Assn. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984). In addition, "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." *Restatement (Second) of Torts* §323 (1965).

Respondents were <u>not</u> obligated to provide a sexual assault forensic examination for Appellant. There is no statutory requirement that a hospital provide these services. In fact, Respondents openly state on their own website that not all hospitals owned and operated by the Respondents provide these services at all times. *See* Pl. Mem. in Opposition to Def. Motion to Dismiss, Ex. B. (R. pp.

221-222). In this instance, Respondents chose to offer these services, including a sexual assault forensic examination, as part of the services provided to patients in the emergency department at the hospital. Equally as important, Respondents did not provide these services gratuitously, but were compensated for the work performed. Thus, the facts in this case are akin to any other service offered by a hospital for which the hospital receives compensation. Respondents offered to provide these services in exchange for compensation. As a result of Respondents' offering to render services, Respondents assumed a duty of care to those for whom it provides services and is liable for any harm caused as a result of any failure to take reasonable care in performing this undertaking.

For all those reasons set forth above, the circuit court erred in holding that Appellant failed to plead any duty owed to her by Respondents.

B. The Appellant Has a Cognizable Injury.

The circuit court also concluded that the complaint failed to allege a cognizable injury. Here too, the circuit court has erred. Appellant's Complaint states that Doe has suffered "damages, in addition to the loss of her ability to proceed with criminal action against her attacker, entitled Plaintiff to an award of actual and consequential damages" as a result of Respondents' negligence. *See* Complaint ¶¶ 27, 33, 43, 51, 56. (R. p. 8, ¶ 27, p. 9, ¶33, p. 11, ¶ 43, p. 12, ¶ 51 and p. 13, ¶ 56). The circuit court ruled that the "only reasonable inference the Court can draw from Plaintiff's allegations is that she has endured emotional distress." (R. p. 268). To the contrary, this is not the only reasonable inference the court can draw. The Complaint is silent as to the exact nature of Doe's injuries as

a result of Respondents' negligence, however, when ruling on a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the court is constrained to consider only the allegations set forth in the complaint, construed "in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011). The circuit court did not construe the facts in the light most favorable to the plaintiff. Appellant does not narrowly state that her injuries are purely emotional in nature. The nature of Appellant's injuries is a factual question that the circuit court cannot resolve at the 12(b)(6) stage. The circuit court erred in finding that Appellant failed to assert a cognizable injury and this error necessitates reversal and remand.

C. Appellant Did Not Assert a Claim for Spoliation of Evidence.

The circuit court interpreted Appellant's negligence claims "as an attempt to allege a negligent spoliation of evidence claim" and dismissed these claims on the grounds that South Carolina does not recognize an independent tort for spoliation of evidence. (R. p. 267). The circuit court incorrectly characterized Appellant's claims. Appellant did not allege a cause of action for negligent spoliation of evidence.

The circuit court is correct that "South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party, or otherwise." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011). However, the *Cole Vision* case cited by the circuit court is distinguishable from the action at bar in multiple notable respects.

In *Cole Vision,* the defendant asserted a defense and counterclaim for negligent spoliation of evidence against Cole Vision and Sears stemming from the loss of a key piece of evidence necessary to the defense of a malpractice claim. Thus, the only basis for the claim was the contention that the evidence necessary for a lawsuit had been lost. In this action, the Appellant's claim is not based solely on the loss of evidence necessary for a lawsuit. In fact, Appellant expressly states in her Complaint that "[a]s a direct and proximate result of [Defendant's negligence], Plaintiff has suffered damages, *beyond the inability to proceed with criminal action against her attacker*, entitling Plaintiff to an award of actual and consequential damages from Defendants." Complaint ¶¶ 27, 33, 43, 56 (emphasis added). (R. p. 8, ¶ 27, p. 9, ¶33, p. 11, ¶ 43 and p. 13, ¶ 56). For example, Appellant has suffered significant other damages, which would have been specifically enumerated through the discovery process, including but not limited to mental anguish and suffering, manifested in physical and mental symptoms for which she has received medical treatment, as a result of the Respondents' negligence, which resulted in her inability to officially confirm the identity of her attacker; the nature and extent of the rape, including whether her attacker achieved penetration or ejaculated while raping her; whether she had, in fact, been drugged by her attacker; and, if she had been drugged, with what substance. None of these damages relate to spoliation of evidence for use in a lawsuit. In fact, Appellant specifically disavowed a spoliation of evidence claim in her complaint. Complaint ¶¶ 27, 33, 43, 56 ("[a]s a direct and proximate result of [Defendant's negligence], Plaintiff has suffered damages, *beyond the inability to proceed with criminal action against her*

attacker, entitling Plaintiff to an award of actual and consequential damages from Defendants.") (R. p. 8, ¶ 27, p. 9, ¶33, p. 11, ¶ 43 and p. 13, ¶ 56). The Appellant is asserting a claim that, as a result of the Respondents' negligence, she has lost valuable property – the rape kit – which would have provided information important to her about an event that was arguably the most traumatic event in her life. Therefore, the circuit court erred in granting Respondents' motion to dismiss Appellant's claims based on a mischaracterization of these causes of action as simply negligent spoliation of evidence claims. This error necessitates remand.

II. The Circuit Court Erred In Dismissing Appellant's Claim for Intentional Infliction of Emotional Distress.

A. The Circuit Court Erroneously Required Appellant to Plead Facts Sufficient To Establish A "Heightened Standard of Proof" When Evaluating Respondents' Motion to Dismiss Pursuant to Rule 12(b)(6).

Appellant's complaint includes six separate causes of action. The sixth cause of action is for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a plaintiff must show that the defendant: (1) "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct"; (2) that the conduct was so outrageous it exceeded "all possible bounds of decency" and so "atrocious" it was "utterly intolerable in a civilized community"; (3) such actions actually caused plaintiff's emotional distress; and (4) the emotional distress was so severe "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)(citing *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981)).

The allegations of Appellant's Complaint state facts sufficient to constitute a cause of action for intentional infliction of emotional distress. Appellant's Complaint alleges that Respondents acted "intentionally and recklessly". (R. p. 13, ¶ 58 and p. 14, ¶ 59). Appellant alleges that the Respondents' staff, including the specially trained sexual assault nurse examiner (SANE), were trained in the collection of medical specimens for inclusion in a rape kit and "were well aware of their duties, as communicated by federal and state authorities, in regard to the collection and preservation of evidence from victims of sexual assault". (R. p. 14, ¶ 60). The Complaint plainly alleges that Respondents knew or should have known that the evidence collected was to be securely maintained and should not have been given to the Appellant. Nonetheless, in spite of their training and knowledge of the proper manner in which Doe's medical evidence was to be handled, and despite protesting the law enforcement officer's request that the kit be given directly to the Appellant, Respondents handed the kit, including Appellant's medical evidence, directly to Doe and advised her that she would have to drive it back to Georgia. (R. pp. 4-5, ¶¶ 10-12). Appellant's Complaint further alleges that Respondents' conduct was "so extreme and outrageous as to exceed all possible bounds of decency", and that, as a direct result of Respondents' conduct, Appellant suffered "severe emotional distress" that was "so severe that no reasonable person could be expected to endure it." (R. p. 14, ¶¶ 61 & 62).

Appellant's Complaint pleads all of the necessary elements of the tort of intentional infliction of emotional distress. Nonetheless, the circuit court erroneously dismissed Appellant's claim on grounds that Appellant "failed to plead

facts sufficient to establish the heightened standard of proof required for an intentional infliction of emotional distress claim." (R. p. 268) (emphasis added)(citing *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011). In reaching this conclusion, the circuit court erroneously applied the wrong standard. There is no "heightened standard of proof" required when evaluating the allegations contained in a plaintiff's complaint at the motion to dismiss stage.

Respondents moved to dismiss Appellant's claims pursuant to South Carolina Rule of Civil Procedure 12(b)(6). Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. *Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.* Further, the complaint should not be dismissed merely because the court

doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

In the instant action, the circuit court added an additional requirement to its review of Appellant's complaint, erroneously requiring Appellant to meet a "heightened standard of proof". In fact, the circuit court's order specifically refers to the South Carolina Supreme Court's decision in *Argoe*, wherein the Court applied a heightened standard of proof at the summary judgment stage. (R. p. 268) (citing *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011). This is the standard applicable at the summary judgment or directed verdict stage. This is not the standard the Court should apply when considering a motion to dismiss based only upon the adequacy of the pleadings. There is no requirement of "proof" when considering only the allegations of the Appellant's complaint, much less a "heightened standard of proof".

The circuit court's error requires remand. Appellant was only required to allege facts sufficient to entitle her to recovery for her claim of intentional infliction of emotional distress. As outlined above, Appellant has more than satisfied this burden and the circuit court erred in granting Respondents' Motion to Dismiss pursuant to Rule 12(b)(6).

B. The Circuit Court Erred in Dismissing Appellant's Claim for Intentional Infliction of Emotional Distress On Grounds that Respondents Are Entitled to Immunity Pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60(17).

The circuit court also granted Respondents' Motion to Dismiss Appellant's claim for intentional infliction of emotional distress on the basis that "GHS has immunity for employee conduct outside the scope of his official duties or which

constitutes actual malice or intent to harm." (R. p. 270). The circuit court's conclusion was incorrect and requires reversal.

The South Carolina Tort Claims Act provides immunity for a governmental entity[2] for "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 Ann. § 15-78-60(17) (2018); *see also Murphy v. Richland Mem. Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995). As an initial matter, there is no allegation in Appellant's complaint that any employee of Respondents acted outside the scope of his or her official duties. Nor is there an allegation that any employee acted in a manner that constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. At the 12(b)(6) stage, the circuit court must look only to the facts contained in or inferred from the pleadings. The circuit court acknowledged this in its order, noting that "in ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint." (R. p. 263, n. 2). As there is no allegation in Appellant's complaint that any of Respondents' employees acted outside the scope of their official duties or acted with actual malice, actual fraud, intent to harm, or committed a crime involving a crime of moral turpitude, the circuit court erred in dismissing the Appellant's claim for intentional infliction of emotional distress on the basis that Respondents are

[2] Respondents contend that GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-10, et seq. (1976), as amended). Appellant disputes Respondents' contention that GHS is a governmental entity. Specifically, Appellant notes Respondents' admission that GHS "entered into an agreement with Upstate Affiliate Organization ("UAO"), whereby UAO took over the operations of all GHS hospitals and other healthcare facilities.... It is true that UAO is not a governmental entity." (R. p. 28). Whether GHS is a governmental entity is, therefore, a fact that will need to be determined prior to any court ruling on any claim of immunity pursuant to the South Carolina Tort Claims Act.

immune from liability.

III. The Circuit Court Erred In Dismissing Appellant's Complaint When Appellant's Motion to Amend her Complaint Was Still Pending.

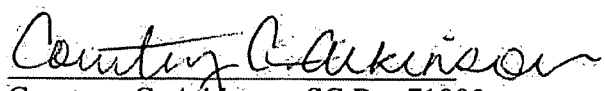
Appellant filed a Motion to Amend her Complaint on June 4, 2018 prior to the hearing on Respondents' Motion to Dismiss later that same day. This Motion was still pending on July 9, 2018 when the circuit court entered its Order granting Respondents' Motion to Dismiss. Given that Appellant's Motion to Amend and her proposed Amended Complaint sought to address some of the concerns raised by Respondents regarding the sufficiency of the allegations set forth in Appellant's Complaint, Appellant believes that the circuit court should have considered and ruled on Appellant's Motion to Amend before dismissing this entire action. Regardless, no such consideration was ever undertaken and no hearing was ever scheduled prior to entry of the circuit court's July 9, 2018 Order dismissing the entire action. Accordingly, Appellant contends that the circuit court erred in dismissing the entire action without holding a hearing and ruling on Appellant's Motion to Amend.

CONCLUSION

For all of the reasons set forth above, Appellant respectfully requests that this Court grant Appellant's appeal in this matter and reverse the circuit court's July 9, 2018 Order granting Respondents' Motion to Dismiss.

(Signatures on following page)

Respectfully submitted,



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The Honorable R. Scott Sprouse, Circuit Court Judge

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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