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 REPLY BRIEF OF APPELLANT

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I. Appellant Alleged Facts Sufficient to Make Out the Duty and Damages Elements of Her Negligence Claims.

Respondents claim that the lower court properly dismissed Appellant's claims for negligence and gross negligence because Appellant did not sufficiently allege either a legally cognizable duty or appropriate damages. This argument fails as Appellant's Complaint, when read in the light most favorable to Appellant, sufficiently pled a duty owed to Appellant by Respondents, as well as damages and injuries resulting from the breach of said duties by Respondents.

A: Appellant Alleged a Legally Cognizable Duty Under Multiple Theories.

Despite Respondents' various arguments otherwise, and as set forth in Appellant's Memorandum in Opposition to Motion to Dismiss and Appellant's Motion to Reconsider Order Granting Defendant's Motion to Dismiss previously filed with the lower court, Appellant properly pled a duty owed to her by Respondents by way of her position as a patient who sought treatment and other services from Respondents' hospital on December 5, 2015. Such a duty sufficient to support a claim for negligence may be created by statute, a contractual relationship, status, property interest, or other special circumstances. *See Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006). In the instant action, the facts pled by Appellant support creation of a duty owed to Appellant by Respondents under at least three of those theories, which Respondents' brief fails entirely to refute. Based thereon, and despite Respondents' claim otherwise, Appellant most certainly has not and does not

concede that Respondents owed no duty to her.

First, Appellant's Complaint contained alleged facts that support a duty created by way of a contractual relationship between the parties. Specifically, and as pled by Appellant in her Complaint, Appellant reported to Respondents' hospital on December 5, 2015 and requested that Respondents provide her with treatment and other services. (R. p.3, ¶¶ 7-8). Respondents then undertook to provide Appellant with such treatment and other services, which leads to a reasonable inference, when the allegations of Appellant's Complaint are read in the light most favorable to Appellant, that the parties entered into an agreement for Respondents to provide Appellant with the requested services. *See Benedict College v. Nat'l Credit Sys.*, 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012) (noting that in reviewing motion to dismiss pursuant to Rule 12(b)(6), court is to review alleged facts and all reasonable inferences in light most favorable to plaintiff) (emphasis added). Respondents' argument about Appellant not alleging exactly how Respondents were going to be paid under said agreement is completely irrelevant.

Second, Appellant's Complaint contains facts sufficient to establish a duty created by a property interest. Specifically, Appellant's Complaint alleged that Appellant requested[1] that Respondents perform a sexual assault forensic examination to remove bodily fluid and other specimens from her body for safekeeping. (R. p. 3, ¶ 8). In regard thereto, Appellant's Complaint expressly

[1] Of most important note in this case are the central and basic facts that Appellant reported to the hospital as a private patient on December 5, 2015, and that all services performed for her by Respondents were performed at her request and direction and not at the request or direction of any law enforcement agency or other public entity.

alleges that it was only after these services were performed at her request that she consented to Respondents reporting the matter to law enforcement. (R. p. 4, ¶ 9). When read in the light most favorable to Appellant, the facts alleged lead to the reasonable inference that Appellant had a property interest in the items removed from her body by Respondents at her request, creating a duty on the part of Respondents in regard thereto. Respondents fail entirely to identify why Appellant's property interest in the specimens removed at her request do not support creation of a duty on the part of Respondents.

Finally, the facts pled in Appellant's Complaint certainly support a duty on the part of Respondents that was created by other special circumstances. In regard thereto, 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., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (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). State law does not require Respondents to perform sexual assault forensic examinations and they voluntarily

provided such services to Appellant at her request, as alleged in Appellant's Complaint. Accordingly, a legal duty was created by those special circumstances under which Respondents were required to exercise reasonable care in performing the services alleged in Appellant's Complaint.

Respondents' arguments attempt to ignore all such properly pled and reasonably inferable theories of a duty owed to Appellant by Respondents and, instead, argue that the only duty Respondents owed to anyone by way of its agreement to provide treatment and other services to Appellant is a duty to the public. Specifically, Respondents appear to argue that they were acting as a public entity and/or at the direction of a body[2] such that the public duty rule applies and no private duty was owed to Appellant. However, that argument completely fails to take into account the clear fact that the only party that directed Respondents to act on December 5, 2015 in regard to the treatment and/or provision of services to Appellant was the Appellant alone. No public agency or law enforcement body required that Respondents provide said services to Appellant or directed and/or requested that such services be provided to Appellant. In fact, law enforcement was only contacted for the first time after Appellant reported to Respondents' hospital, requested that the services be performed and then decided that she wanted the specimens taken from her to be

[2] Respondents point to guidance provided by the South Carolina Attorney General's office in regard to suggested protocols on how to collect sexual assault forensic examinations and options a hospital can pursue upon direction of a patient who reports a sexual assault. However, absolutely nothing in those protocols actually requires a hospital to perform such examinations or provides that hospitals owe any specific duty to law enforcement or the public in regard thereto. In fact, those same protocols repeatedly and specifically provide guidance on how decisions about examinations and reporting collected evidence rest with the patient. South Carolina Attorney General's Sexual Assault Protocol for the Investigation, Prosecution, and Judgment of Sexual Assault, 2nd Ed., 2015. (R. pp. 30-117).

turned over to law enforcement. Accordingly, it was clear error for the lower court to find that Respondents were acting in a public capacity on behalf of law enforcement so as to create only a public duty in regard to the services provided to Appellant at her specific and private request.

B. Appellant Sufficiently Pled Injuries and Damages Resulting From Respondents' Various Breaches of Duty.

Respondent also argues that the lower court's dismissal of Appellant's negligence claims was appropriate because Appellant failed to allege any cognizable injuries and/or damages resulting from Respondents' conduct. In support of that argument, Respondents focus solely on Appellant's loss of ability to proceed with a criminal action against her rapist, which Respondents refer to as speculative[3], and the lower court's finding that the only properly inferable damages to Appellant were for "purely emotional distress." These arguments are not only offensive, they are wrong and fail to take into account the clear fact that Appellant most certainly alleged facts sufficient to satisfy her pleading requirement of her negligence claims.

Appellant's Complaint specifically alleges that Appellant suffered "actual and consequential damages" as a result of Defendant's negligence. (R. p. 9, ¶ 33). This meets Plaintiff's burden of pleading a "short and plain" statement regarding her damages and is sufficient to overcome a 12(b)(6) motion to dismiss on grounds that Plaintiff's had not alleged any sufficient injury on her claims for negligence. *See* SCRCP 8(a)(2). While the lower court offered findings on what those specific damages might be and whether or not they are appropriate damages

[3] While the ultimate outcome of a criminal trial is no-doubt speculative, the right of an individual to report and make efforts to pursue criminal charges against her rapist is not.

to be sought, the nature and type of Plaintiff's damages are factual issues to be discovered through the normal discovery process and proven at trial. Appellant clearly met her burden of pleading injuries resulting from Respondents' negligence sufficient to satisfy her burden under Rule 12(b)(6) and the lower court's decision otherwise was clear error.

C. Appellant's Negligence Claims are Not Claims for Spoliation of Evidence.

Despite Respondents' continued argument otherwise, the lower court erred in holding that Appellant's various causes of action, including her negligence claims, amount to nothing more than attempts to assert claims for spoliation of evidence. In support of that argument, Respondents cite to *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011) and its refusal to adopt spoliation of evidence as proper tort claim in South Carolina. Respondents further argue that Appellant's claims for negligence are the same as the claims raised and dismissed in *Hobbs*. However, both Respondents' argument and the lower court's Order, which cites to *Hobbs* in dismissing Appellant's various claims for negligence, fail to recognize that the claims at issue in this instant action are clearly distinguishable from those dismissed in *Hobbs* in several material aspects.

In *Hobbs*, the defendant in a pending malpractice action alleged a defense and counterclaims for "negligent spoliation of evidence" due to the loss of a key piece of evidence that the defendant believed to be necessary to his defense. In that case, the only basis for the defendant's claim was the fact that evidence necessary for the pending lawsuit had been lost. That is clearly distinguishable

from Appellant's claims in the instant action, which are not based solely on the loss of evidence necessary for a lawsuit. In fact, and as expressly pled throughout Appellant's Complaint, Appellant alleges that she has "suffered damages, beyond the inability to proceed with criminal action against her attacker." (R. p. 8, ¶ 27, p. 9, ¶ 33, p. 11, ¶ 43, and p.13, ¶ 56). (emphasis added). In fact, as argued before the lower court, Appellant suffered various damages independent of her inability to proceed with criminal action against her attacker, which would be appropriately explored during discovery and not on a 12(b)(6) motion. These damages include, but are certainly not limited to, the mental anguish and suffering suffered by Appellant related to her resulting inability to know with certainty whether she had actually been drugged, whether her attacker had ejaculated inside of her, and what treatment would have been necessary and appropriate given the answers to those questions. These damages, which are wholly independent of spoliation of evidence needed for a lawsuit, are properly inferred from the allegations in Appellant's Complaint when read in the light most favorable to Appellant.

Respondents also argue that Appellant, an individual who reported being drugged before being sexually assaulted, should "already know" whether or not her rapist penetrated her and ejaculated inside of her. However, and beyond such suggestion being entirely offensive and disrespectful, any such argument has no relevance to the fact that Appellant has suffered damages related to the inability to know the answer to those questions and any related medical needs she might have had based on the answer to those questions. Appellant's resulting damages therefrom are entirely distinct from the only damages alleged in *Hobbs*, loss of

evidence necessary for a lawsuit, and her negligence claims are clearly distinguishable from those dismissed in *Hobbs*.

II. Appellant Alleged Sufficient Facts to Make Out All Elements of Claim for Intentional Infliction of Emotional Distress Claim and Respondents Are Not Entitled to Sovereign Immunity Thereon.

Respondent also argues that the lower court properly dismissed Appellant's claim for intentional infliction of emotional distress on grounds that Appellant "failed to make any" allegations that Respondents acted in a manner that was "extreme and outrageous," "exceeding all bounds of decency," "atrocious," and "utterly intolerable." Specifically, Respondents argue that Appellant failed to allege that any of Respondents' employees acted in a manner that was intentional or in a manner that was "substantially certain" to cause Appellant distress. However, and while Appellant acknowledges that her Complaint does not allege that Respondents' employees intended to cause her harm, Appellant's Complaint most certainly includes factual allegations from which a fact-finder should determine that Respondents' employees acted in a manner that they knew or should have known with substantial certainty was likely to cause Appellant extreme emotional distress.

Appellant's Complaint specifically alleges that at least one of Respondents' employees at issue in this case identified herself as a sexual assault nurse examiner (SANE). (R. p. 3,¶ 8). By her very background and experience as a SANE, that employee is specifically trained to provide services to victims of sexual assault, to make reports to law enforcement on behalf of such victims and on the proper transfer of evidence to law enforcement. Appellant's Complaint

goes on to allege that the SANE at issue knew that it was not proper to give Plaintiff her rape kit and ask her to drive it back to Georgia as evidenced by the fact that the SANE nurse got upset with the law enforcement officer she spoke to on the phone who suggested that she do just that. (R. p.4, ¶¶ 10-11. Given that the SANE employed by Respondents was specifically trained on what to do with Appellant's rape kit, expressed concern over the situation indicating that she knew that she was wrong in giving the kit to Appellant instead of law enforcement and most certainly knew that Appellant was already in a highly emotional and distressed state due to her drugging and assault, it is certainly a reasonable inference that she knew or should have known both that it was outrageous to ask the Appellant to drive her own medical evidence back across state lines to the state where she was assaulted. It is also a reasonable inference that the SANE knew that her instructing the Appellant to do so was "substantially certain" to cause Appellant distress. That should ultimately be an issue of fact for a jury. Regardless, and when read in the light most favorable to Appellant, Appellant's Complaint most certainly pleads facts sufficient to make out the "extreme and outrageous" element of her claim of intentional infliction of emotional distress.

Additionally, and despite Respondents' argument otherwise, Respondents are not entitled to sovereign immunity for the acts of the SANE alleged in Appellant's Complaint, even if Respondents were still actually a governmental entity on December 5, 2015. As noted in Respondent's brief, such immunity is provided for acts performed outside of the scope of employees' official duties or which constitute actual malice or intent to harm. Again, however, Appellant does

not allege that Respondents' employee acted with actual malice or intent to harm, but did act in a manner within the exercise of her official duties that was reckless, contrary to what she knew to be appropriate and that she knew or should have known was substantially certain to cause Appellant severe emotional distress.

Finally, Respondents' continued argument that claims for intentional infliction of emotional distress are subject to a "heightened standard of proof" is erroneous and misguided. In support of that argument, Respondents cite to *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710, S.E.2d 67, 74 (2011) and argue that case to mean that Appellant had a "heightened standard of proof" in pleading her claim for intentional infliction of emotional distress. In fact, the lower court relied on Argoe and its alleged "heightened burden of proof" as partial grounds for granting Respondents' Motion to Dismiss Appellant's claim for intentional infliction of emotional distress pursuant to Rule 12(b)(6). That was clear error, however, given that the "standard of proof" refers to the ultimate burden a litigant bears to prove claims they have asserted and not to the sufficiency of a pleading tested under Rule 12(b)(6). In fact, at issue in Argoe was not a motion testing the sufficiency of a pleading pursuant to Rule 12(b)(6), but, rather, a motion for summary judgment after the close of discovery that addressed the litigant's ultimate burden of proof and whether or not the plaintiff could produce sufficient evidence at trial to meet the burden of proof in regard to a claim from intentional infliction of emotional distress.

The only issue currently before the Court is whether or not the lower court erred in granting Respondents' Motion to Dismiss pursuant to 12(b)(6), which

considers not whether or not a litigant can meet their ultimate burden of proof after full discovery, but only whether or not a litigant, considering only the allegations set forth on the face of the complaint, has pled facts sufficient to make out all elements of her claims. *See Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252 (Ct. App. 2002) (noting that 12(b)(6) ruling "must be based solely upon the allegations set forth on the face of the complaint). As set forth above and in Appellant's final brief, Appellant's Complaint certainly contains facts sufficient to make out her claim for intentional infliction of emotional distress and the lower court's dismissal thereof was in error. This is especially true in light of the fact that the lower court misapplied the "heightened standard of proof" argued by Respondents.

III. The Lower Court Did Not Rule on Appellant's Motion to Amend.

As previously argued, Appellant filed a Motion to Amend her Complaint on June 4, 2018, which was still pending at the time the lower court entered its July 9, 2018 Order dismissing the entire action. (R. pp. 258-259). In regard thereto, Appellant contends that it was error for the lower court to dismiss this entire action without first holding a hearing and actually ruling on Appellant's pending Motion to Amend, especially in light of the fact that some Appellant's proposed amendments sought to address various concerns raised in Respondents' Motion to Dismiss. In response, Respondents argue that the lower court did, in fact, "address" that Motion in finding that it could not address the merits of the Motion given the timing of the filing of the Motion, the lack of notice for hearing thereon and the fact that the Motion to Amend was filed without an amended

thereon and the fact that the Motion to Amend was filed without an amended complaint attached. Respondents further argue that it was not an abuse of discretion for the lower court to dismiss this entire action without considering the merits of Appellant's Motion to Amend because the order dismissing the action granted Appellant leave to file a new action[4].

As a first matter, and while the lower court "addressed" Appellant's Motion to Amend in its July 9, 2018 Order, the lower court did not make any substantive ruling thereon. Instead, the lower court's Order only provides mention of the Motion to Amend in a footnote, stating that the merits of that Motion were discussed and not considered by the lower court. Regardless, and given that the Motion to Amend specifically addressed Respondents' claimed insufficiencies with Appellant's Complaint, Appellant contends it was clear error for the lower court to not at least hold Respondents' Motion to Dismiss in abeyance until such time as the lower court could schedule a hearing on Appellant's Motion to Amend to address the merits of same.

CONCLUSION

For all of the reasons set forth above, as well as those already set forth more fully in Appellant's Initial Brief, 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.

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[4] Notably, and while Respondents now attempt to argue that no prejudice occurred because the lower court's July 9, 2018 Order provides that it shall be without prejudice for Appellant to file a new action against Respondents, Respondents have now filed a Motion to Dismiss a new action filed against Respondents by Appellant, partially on grounds of res judicata and/or collateral estoppel related to the lower court's July 9, 2018 Order.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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