

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Honorable R. Markley Dennis, Jr.
Circuit Court Judge

C.A. No. 2013-CP10-00090
Ct. App. No. 2013-001682

Arthur Peter Rowe,

Appellant,

v.

Bon Secours-St. Francis Xavier Hospital, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours St. Francis Health System, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours Health System, Inc., d/b/a Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Roper St. Francis Foundation, d/b/a Roper St. Francis Healthcare, Bon Secours-St. Francis Health System Foundation, Inc., d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., d/b/a Roper St. Francis Healthcare, Byron N. Bailey, M.D., Christine C. Thompson, M.D., a/k/a Christine Thompson, M.D., Charleston Neurosurgical Associates, LLC, Mt. Pleasant Anesthesia Associates, PA, Charleston Surgery Center Limited Partnership, d/b/a Charleston Surgery Center, Tammy McGraw, CRNA, also known as Tammy McGraw Speicher, CRNA, Nurse Anesthesia of South Carolina, LLC, Jeffery S. Wager, CRNA, Tricoastal Healthcare Billing and Management, Inc., and Steven Heath Cobb,

Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

The Plaintiff/Appellant has improperly stated two issues that allege error in the dismissal of his Wife's Notice of Intent to File Suit for medical malpractice, which is the subject of a separate appeal.

I. To the extent that the Plaintiff/Appellant makes a conclusory statement that the Trial Court erred in the dismissal of his loss of consortium action and fails to make any argument on that issue in the body of his brief, the issue is not preserved and should be deemed abandoned.

In the alternative, the Defendants/Respondents would restate the issues on appeal as follows:

II. Did the Trial Court properly dismiss the Plaintiff Husband's loss of consortium claim, which arises from his Wife's medical malpractice claim, on the ground that he did not file a Notice of Intent to File Suit before filing his Complaint in compliance with S.C. Code 15-79-125(A)?

III. Did the Trial Court properly dismiss the Plaintiff Husband's loss of consortium claim, which arises from his Wife's medical malpractice claim, on the ground that he filed his Complaint without an expert affidavit as required by §15-36-100?

IV. Did the Trial Judge properly exercise his discretion in dealing with the Plaintiff's informal, *ex parte* request for him to recuse himself?

STATEMENT OF THE CASE¹

Preface

The Plaintiff Arthur Peter Rowe is the husband of Beverly Moore-Rowe. In this action, he attempts to assert a loss of consortium claim against various healthcare providers based on their alleged medical malpractice in treating his Wife. The Wife filed a Notice of Intent to File Suit asserting her own, separate medical malpractice action. These actions were not officially consolidated below, and the Trial Court issued separate orders dismissing both actions. Husband and Wife have filed separate appeals, which have not been consolidated. However, to the extent that the relevant procedural history and the Plaintiffs/Appellants' arguments overlap, the Defendants/Respondents are providing a comprehensive procedural history below.

Husband's Loss of Consortium Action

The Plaintiff Husband, proceeding *pro se*, filed a Summons and Complaint on January 7, 2013, alleging one cause of action for loss of consortium based on the alleged medical negligence arising out of cervical spine surgery performed on his wife at Bon Secours St. Francis Hospital on January 7, 2010. [ROA 20; Complaint, C/A No. 2013-CP-10-00090.] The Plaintiff Husband had not, prior to filing his Complaint, complied with S.C. Code Ann. §15-79-125(A), in that he had not filed a Notice of Intent to File Suit with the requisite expert affidavit. In addition, the Complaint was not accompanied by an expert affidavit meeting the requirements of S.C. Code Ann. § 15-36-100.

¹This appeal comes from an order of dismissal on a Rule 12(b)(6) motion and the issues involve only procedural facts and thus, the underlying facts of the medical treatment are not relevant and no separate Statement of the Facts is necessary.

Named as defendants are a laundry list of entities allegedly affiliated with the Hospital, but improperly named, to wit: Bon Secours-St. Francis Xavier Hospital, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours St. Francis Health System, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours Health System, Inc., d/b/a Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Roper St. Francis Foundation, d/b/a Roper St. Francis Healthcare, Bon Secours-St. Francis Health System Foundation, Inc., d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., d/b/a Roper St. Francis Healthcare. (“The Hospital Defendants.”)

Also named as Defendants are:

- Byron N. Bailey, M.D., a neurologist, along with his practice group, Charleston Neurosurgical Associates, LLC;
- Christine C. Thompson, M.D, an anesthesiologist;
- Charleston Surgery Center Limited Partnership and Mt. Pleasant Anesthesia Associates, P.A., alleged to be Dr. Thompson’s “groups;”
- Jeffery S. Wager, a Certified Registered Nurse Anesthetist;
- Tricoastal Healthcare Billing and Management, Inc., alleged to be Wager’s group;
- Tammy McGraw a/k/a Tammy McGraw Speicher, a Certified Registered Nurse Anesthetist;
- Nurse Anesthesia of South Carolina, LLC, alleged to be McGraw’s Group; and
- Steven Heath Cobb, an MUSC student nurse anesthetist.

The Hospital Defendants filed a motion to dismiss on March 13, 2013. [ROA 45; Motion.] Bon Secours Health System, Inc., Bon Secours St. Francis Hospital, and Bon Secours St. Francis Health System Foundation, Inc., which were parties to the motion to dismiss filed by the Hospital Defendants on March 13, also filed a separate motion to dismiss on March 25, 2013, as there existed some dual representation of the Hospital Defendants, which counsel for the parties did not appreciate at the time of filing. [ROA 59; Motion to Dismiss.] Steven Heath Cobb filed a motion to dismiss on March 15, 2013.² [ROA 55; Motion.] The Defendant Charleston Surgery Center Limited Partnership d/b/a Charleston Surgery Center filed an answer and motion to dismiss on March 27, 2013. [ROA 64, 75; Answer, Motion.] Dr. Bailey and his practice group filed an answer and a motion to dismiss on April 3, 2013. [ROA 91, 102; Answer, Motion.] Dr. Thompson filed a motion to dismiss on April 22, 2013. [ROA 107; Motion.] Each of these Defendants based their motion to dismiss on the grounds that the Plaintiff Husband had not complied with §§ 15-79-125(A), and 15-36-100.

Defendants Nurse Anesthesia of South Carolina LLC, Wager, and McGraw filed a motion to dismiss on May 28, 2013, pursuant to Rule 12(b)(4) & (5) on grounds of insufficiency of process and insufficiency of service of process. [ROA 110; Motion.]

Mt. Pleasant Anesthesia Associates, P.A. and Tricoastal Healthcare Billing and Management Group, Inc. have not appeared.

² This Defendant also raised an issue arguing that MUSC, as the state agency employer, would be the proper party defendant under the S.C. Tort Claims Act, S.C. Code Ann. §15-78-70. [ROA 56, Motion; see also ROA 121-22, Tr. 7-8.]

The motions to dismiss were set for a hearing on May 31, 2013. On May 25, 2013, prior to the hearing date, the Plaintiff's Wife mailed a letter directly to the Trial Judge's law clerk asking that the Judge recuse himself from hearing the pending motion in both their cases. The Judge wrote to the Plaintiff, informing her that her letter was considered an *ex parte* communication and must be shared with all parties. The Trial Judge had the correspondence filed with the Court and copies sent to all counsel of record. [ROA 149-55; Letters.]

The Trial Court granted the motions and dismissed the Husband's Complaint as to all Defendants on the grounds: (1) Plaintiff failed to file a Notice of Intent to File Suit and an expert prior to filing his Complaint as mandated by § 15-79-125; and (2) Plaintiff failed to file an expert affidavit with this Complaint as mandated by § 15-36-100. [ROA 11; Order, filed July 3, 2013.] The Trial Court also ruled that the dismissal rendered moot the Motion of Nurse Anesthesia of South Carolina LLC, Wager, and McGraw. The Plaintiff Husband timely filed a Notice of Appeal. [ROA 129.]

The Wife's Notice of Intent to File a Medical Malpractice Suit

On the same day that the Plaintiff Husband filed his loss of consortium action, the Wife, also proceeding *pro se*, filed a Notice of Intent to File Suit under §15-79-125(A). [ROA 83; Notice, C/A 2013-CP-10-00088.] She did not file an expert witness affidavit with her Notice as required by §15-79-125(A). Instead, she asserted that an affidavit was not required because her statute of limitations was expiring and "due to time constraints, an affidavit of an expert could not be prepared," relying on §15-36-100(C)(1). [ROA 88; Notice, p. 6 ¶4.]

The Wife named all the same parties as Defendants. Those Defendants, as noted above, moved to dismiss the Notice of Intent on the ground that the Plaintiff had not complied with §15-75-125(A).³ These motions came to be heard on May 31, 2013, at the same time as the motions to dismiss the Plaintiff Husband's action. By order filed July 3, 2013, the Trial Court granted the motions, finding that the Wife's Notice of Intent to File Suit was defective because it was not filed contemporaneously with an expert affidavit, and the exceptions under § 15-36-100(C)(1) were not applicable. [See ROA 13, fn. 1.] The Wife timely appealed. [Appeal Case No. 2013-0001673.]

SUMMARY OF ARGUMENT

In his Statement of the Issues on Appeal, the Plaintiff Husband asserts that the Trial Court erred in granting the Defendants' motions to dismiss both his Wife's Notice of Intent to File Suit and his loss of consortium action. However, throughout his argument, he argues only about the dismissal of his Wife's Notice, an issue which is raised separately in his Wife's appeal. In the absence of any substantive argument challenging the dismissal of his action, the Trial Court's order should be summarily affirmed.

Notwithstanding the Plaintiff Husband's failure to preserve any issue challenging the dismissal of his loss of consortium action, the Defendants submit that the order should be affirmed because the Plaintiff Husband did not file a Notice of Intent to File Suit before filing his Complaint in compliance with § 15-79-125(A), and he filed his Complaint without an expert affidavit as required by §15-36-100.

³ Defendants Wager and McGraw withdrew their motion to dismiss, reserving the right to move for dismissal on the grounds they were not served.

As to the Plaintiff Husband's complaint that the Trial Judge erred in refusing to recuse himself, the Defendants submit that this issue is not preserved for appellate review. Moreover, the substance of the Plaintiff's letter does not present evidence of bias or prejudice to justify recusal. Under all of the circumstances, the Trial Judge properly dealt with the Plaintiff's improper letter by advising all counsel of record regarding the *ex parte* communication and filing the correspondence in the official court record.

ARGUMENT

I. The Plaintiff has not preserved any issues on the merits of the Trial Court's order of dismissal.

Rule 208(b)(1)(B), SCACR, provides that the appellant's brief must contain: "A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."

The statement of an issue must be sufficiently clear and specific to allow the Appellate Court to readily comprehend the precise issue. *Solley v. Weaver*, 247 S.C. 129, 146 S.E.2d 164, 165 (1966) ("We have held in many cases that every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue. The object of an exception is to present some distinct principle or question of law which the appellant claims to have been violated by the Court in the trial of the case from which the appeal is taken, and to present it in such form that it may be properly reviewed.").

When a claim is not supported by appropriate argument within the body of the brief, it is deemed abandoned. *Crawford v. Cent. Mortgage Co.*, 404 S.C. 39, 744 S.E.2d 538, 541 (2013); *Glasscock Inc., v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct.App.2001); *see also Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161, 164 (2012) (citing *In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory)); *State v. Burton*, 356 S.C. 259, 265, 589 S.E.2d 6, 9 n. 5 (2003) (finding a *pro se* litigant has full responsibility for complying with substantive and procedural requirements of the law).

In his Statement of the Issues on Appeal, the Plaintiff Husband asserts that:

A. The Trial Court Erred In Granting Defendants' Motions To Dismiss The Appellant's Wife's Notice Of Intent To File Suit On Basis That Plaintiff Failed To Contemporaneously File An Affidavit Of An Expert Witness, And The Dismissal Of The Appellant's Action For Loss Of Consortium.

B. The Trial Court Erred In In Granting Defendants' Motions To Dismiss The Appellant's Wife's Notice Of Intent To File Suit Due To The Failure To Apply The Exception To Contemporaneous Filing Of The Affidavit Of An Expert Witness Under Section 15-36-100(C)(1) Of The South Carolina Code Laws Of 1976, As Amended.

While the Husband does make a cursory mention of the dismissal of his action for loss of consortium, throughout his arguments he argues only about the dismissal of his Wife's Notice, an issue which is raised separately in his Wife's appeal. In the absence of any substantive argument challenging the dismissal of his action, any issues should be deemed abandoned, and the Trial Court's order should be summarily affirmed.

II. The Trial Court properly dismissed the Plaintiff Husband's loss of consortium claim because he did not file a Notice of Intent to File Suit before filing his Complaint in compliance with S.C. Code § 15-79-125(A).

Section 5, 2005 S.C. Acts 32, as codified at S.C. Code Ann. § 15-79-125, provides, in pertinent part that:

(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action.

The Plaintiff Husband acknowledges that § 15-79-125(A) provides requisites that must be met before a plaintiff can file a lawsuit for professional medical malpractice. [Brief, p. 9.] However, he offers no explanation or argument as to why this requirement does not apply to his loss of consortium action.

While the Plaintiff Husband's loss of consortium claim is an independent action, he still must prove the Defendants' liability for medical malpractice. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 119, 512 S.E.2d 510, 522 (Ct. App. 1998). Accordingly, he was required to comply with the provisions of § 15-79-125(A). It is undisputable that he did not file a Notice of Intent in compliance with § 15-79-125(A), and therefore, the Trial Court properly dismissed his loss of consortium action.

III. The Trial Court properly dismissed the Plaintiff Husband's loss of consortium claim because he filed his Complaint without an expert affidavit as required by §15-36-100.

Apart from the Plaintiff Husband's failure to comply with § 15-79-125(A), the Plaintiff also failed to contemporaneously file an expert affidavit with his Complaint as required by §15-36-100, which provides in pertinent part:

(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) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by 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.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

Plaintiff's Complaint is an action for damages based on professional negligence, and all of the Defendants are professional health care providers. Accordingly, Plaintiff was required to comply with §15-36-100 in filing his Complaint.

The Plaintiff attempted to invoke the exception in §15-36-100(C)(1) in his Complaint:

54. That the Plaintiff is informed and believes that the applicable statute of limitations on one or more claims alleged in this Complaint will expire within ten (10) days of the date of the filing of this Complaint, and that due to time constraints, an affidavit of an expert could not be prepared, and that Section 15-36-100(C)(1) of the South Carolina Code of Laws of 1976, as amended ... is applicable to enable the Plaintiffs Wife to supplement the pleadings with the required affidavit. [ROA 32.]

However, the exception – or perhaps more properly – the extension of time in 15-36-100(C)(1) still required that the Plaintiff supplement his Complaint with a proper expert affidavit within 45 days. The Complaint was filed on January 7, 2013, and as of the hearing date on May 31, 2013, the Plaintiff had not submitted any expert affidavit.

The reality of Plaintiff's situation, as revealed by his Wife who spoke for them both at the hearing, is that she could not get an affidavit: "I tried to get an affidavit of merit and I tried to get a medical expert and I was unable to do that." [ROA 126; Tr. 12:12-14.] She complained that it was too expensive: "[T]he Legislature has established a law that makes it almost impossible for a regular citizen to make a medical malpractice case regardless of their injuries, because of the twenty to thirty thousand dollar payout that has to go to pay an expert witness." [ROA 124; Tr. 10:14-20.] However, § 15-36-100(C)(1) simply does not provide for any exception for a plaintiff's financial limitations in securing an expert affidavit. And, ultimately, if the Plaintiff could not find an expert to offer an opinion of even one negligent act or omission by any of these Defendants, the statute operates to provide for prompt dismissal of the Complaint for failure to state a claim. Accordingly, the Trial Court properly dismissed the Plaintiff's Complaint for failure to timely submit an expert affidavit within the provisions of § 15-36-100(C)(1).⁴

⁴Plaintiff attempted to argue that the common knowledge exception of § 15-36-100(C)(2) applied and he did not need an affidavit as to his claims against the Defendant MUSC Student, Steven Heath Cobb. [ROA 33, Complaint ¶ 55; ROA 126, Tr. 12.] The Trial Court did not address this argument in the Order, although at the hearing, he stated "I don't think that it's going to be common knowledge, from what I've read." [ROA 126; Tr. 12:4-11.] The Plaintiff did not file any motion for reconsideration, and does not raise any issue or even mention §15-36-100(C)(2) in his argument. *See Browder v. Browder*, 382 S.C. 512, 675 S.E.2d 820, 826 (Ct. App. 2009) (issue not preserved for appellate review where it was not ruled upon by the trial court and no Rule 59(e) motion was made); *see also* The discussion and cases cited above in Argument I on error preservation.

IV. The Trial Judge properly exercised his discretion in dealing with the Plaintiff's informal request for him to recuse himself.

As a threshold matter, the Defendants maintain that the Plaintiff has not preserved any issue related to Trial Court's handling of the recusal issue. First, the Plaintiff did not properly file a motion for recusal, but attempted an inappropriate *ex parte* communication with the Trial Court through a letter directly to his law clerk as "Personal and Confidential." Second, the Plaintiff did not raise any objection to Judge Dennis presiding when she appeared at the hearing on May 31st. See Rule 7(b)(1), SCRCF (motion shall be in writing or made in open court); see also *Hundley v. Rite Aid of South Carolina Inc.*, 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct.App.2000) (finding motions must be made on the record to be preserved for review by an appellate court)). Third, if the letter could be considered a proper motion, the Trial Court did not make any ruling on it and the Plaintiff did not file any Rule 59(e) motion. See footnote 4, *supra*. Ultimately, however, the Plaintiff's letter did not show any evidence of bias or prejudice to disqualify the Trial Judge.

A presiding judge should disqualify himself if his impartiality might reasonably be questioned where he has a personal bias or prejudice against a party. *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39, 42 (1995). The party seeking recusal must show some evidence of bias or prejudice that stems from an extrajudicial source and results in decisions based on information other than what the judge learned from his participation in the case. *Roper v. Dynamique Concepts, Inc.*, 316 S.C. 131, 447 S.E.2d 218, 223 (Ct.App.1994). A judge's failure to disqualify himself will not be reversed on appeal in

the absence of any such evidence of judicial prejudice. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856, 857 (1993).

The Plaintiff's Wife asserted in her letter that Judge Dennis was prejudiced against her because he presided in an action she brought against her church in 2007. [ROA 151-52. Referencing C/A No. 2007-CP-10-243]. More specifically, she alleged that her attorney in that action had informed her that Judge Dennis had sua sponte issued a Protective Order sealing the Church's records produced in discovery. However, she goes on to allege that the Clerk's Office records show that the Protective Order was, in fact, a consent order signed by Judge Young at the end of the case. Thus, the letter, on its face, did not state any plausible grounds for Judge Dennis to recuse himself. *See Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 321 S.E.2d 179, 183 (Ct. App. 1984) (recusal not required where party received adverse ruling from a judge in a prior proceeding).

CONCLUSION

The Plaintiff Husband filed this loss of consortium action founded on allegations of medical malpractice without first filing a Notice of Intent to File Suit as required by §15-79-125(A), and without timely filing an expert affidavit as required by §15-36-100. Accordingly, the Trial Court's dismissal of the Complaint for failure to state a claim should be affirmed.

Respectfully submitted,




James B. Hood

For All Respondents with Permission as Listed Below

October 28, 2014

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.


James B. Hood

October 28, 2014

Certificate of Service

I certify that on this 28th day of October 2014, a copy of the foregoing Final Brief was served on the Appellant by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to him as listed below:

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