THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2018-CP-10-01163

Thelma R. Garrick,

Appellant,

v.

Dr. George H. Khoury and
Bon Secours St. Francis West Ashley,

Respondents.

FINAL BRIEF OF RESPONDENTS

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I. **The trial court dismissed this case, finding it is an action for medical malpractice within the purview of S.C. Code Ann. § 15-79-125 and Ms. Garrick had failed to satisfy the prerequisites to filing an action for medical malpractice under § 15-79-125. Has Ms. Garrick[1] met her burden to show reversible error on the part of the trial court?**

   A. **Is it even necessary to consider the trial court's decision on the merits, i.e., is it clear that Ms. Garrick cannot possibly carry her burden of showing reversible error?**

   B. **Assuming, *arguendo*, it is necessary to consider the trial court's decision on the merits, did the court err in dismissing this case for noncompliance with the statutory requirements for filing an action for medical malpractice?**

      1. **Is this an action for medical malpractice within the purview of § 15-79-125?**

      2. **Did Ms. Garrick satisfy the prerequisites to filing an action for medical malpractice under § 15-79-125?**

II. **Did the trial court err in proceeding with the hearing on Defendants'[2] motion to dismiss in Ms. Garrick's absence, and even assuming, *arguendo*, some error in this regard, was it prejudicial?**

STATEMENT OF THE CASE

Proceeding pro se, Ms. Garrick filed this action in Charleston County on March 5, 2018, seeking damages relating to the alleged adverse effects of a surgical procedure Dr. Khoury performed on her at the Hospital on August 20, 2015, a procedure that, according to Ms. Garrick, improperly deviated from the

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[1] "Ms. Garrick" is Plaintiff-Appellant, Thelma R. Garrick.

[2] "Defendants" are Defendants-Respondents, Dr. George H. Khoury ("Dr. Khoury") and Bon Secours St. Francis West Ashley (the "Hospital").

agreed-upon pre-operative plan without her informed consent. (*See generally* R. pp. 6–23.) On March 22, 2018, Defendants filed a motion to dismiss Ms. Garrick's complaint on the ground that it alleged an action for medical malpractice but Ms. Garrick had not satisfied the prerequisites to filing an action for medical malpractice under § 15-79-125, Ms. Garrick having not filed the requisite Notice of Intent to File Suit ("NOI") and expert affidavit. (*See generally* R. pp. 36–37.) On April 3, 2018, Ms. Garrick filed a response to the motion, taking issue with Defendants' characterization of her suit as one for "professional negligence"[3] and

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[3] Specifically, Ms. Garrick's response reads as follows:

> [Defendants' counsel] states that I have not proved professional negligence. (Plaintiff has not used Professional etiquette or legal verbiage but have used verbose).
>
> The only negligence in this case is Dr. Khoury, Defendant, neglected to tell Plaintiff he had changed the operation from a fusion to relieve pressure on the left sciatic nerve to using Plaintiff as a "guinea pig", used in biological experiments. I believe I have proven this and will again in this Rebuttal.
>
> Defendant's actions, again, were without my knowledge or permission. (He knew I would never agree. See Operative Report included in Summons and Complaint.) With premeditation, knowingly, willingly, and with intent to harm (because without Plaintiff being in pain Defendant could not successfully test the distribution port implanted in the Lumbar) proceeded with his experimentation.

(R. p. 40.)

with what she deemed to be the "accu[sation] by [Defendants' counsel] that she did not notify the Defendants that she was going to file suit against Defendants." (*See generally* R. pp. 40–45.)

With Defendants' motion to dismiss set for hearing July 12, 2018, Ms. Garrick wrote the clerk of court requesting a continuance, explaining that "[t]he reason for th[e] . . . request is . . . [that] [t]his case has become much more complicated" and that she needed the hearing continued "for at least three months . . . to do more research." (Supp. R. pp. 1, 4.) No action having been taken by the court on Ms. Garrick's request for a continuance, Defendants' motion to dismiss came on for hearing on July 12, 2018, as scheduled, the Honorable Diane Schafer Goodstein presiding. (*See generally* R. pp. 61–65.) Ms. Garrick did not appear for the hearing. (R. p. 62:1–12.) After confirming that Ms. Garrick had received notice, the court proceeded to hear and grant Defendants' motion. (R. pp. 62:12–64:19.) The order of dismissal was filed July 25, 2018. (R. pp. 67–69.)

This appeal follows.

STANDARD OF REVIEW

On appeal from a dismissal pursuant to Rule 12(b)(6) the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); *Flateau v. Harrelson*, 355 S.C. 197, 201–03, 584 S.E.2d 413, 415–16 (Ct. App. 2003). The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case. *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau*, 355 S.C. at 202, 584 S.E.2d at 416.

ARGUMENT

I. The trial court dismissed this case, finding it is an action for medical malpractice within the purview of § 15-79-125 and Ms. Garrick failed to satisfy the prerequisites to filing an action for medical malpractice under § 15-79-125. Ms. Garrick has not met her burden to show reversible error.

A. It is not even necessary to consider the trial court's decision on the merits because it is clear Ms. Garrick cannot possibly carry her burden of showing reversible error on the part of the trial court.

Despite receiving notice, Ms. Garrick did not appear for the hearing on Defendants' motion to dismiss. (R. p. 62:1–12.) While Ms. Garrick did file a written response to the motion, the circuit court's order of dismissal did not rule on any particular argument that might potentially be gleaned therefrom with any level of specificity, and Ms. Garrick did not seek a ruling via motion under Rule 59(e), SCRCP. Consequently, Ms. Garrick has not preserved for this Court's review any argument that might potentially be gleaned from her written response to Defendants' motion to dismiss. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original). Of course, any other argument, i.e., any potential argument that was not even raised to the trial court to begin with, cannot be raised to this

Court for the first time on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Moreover, the argument in Ms. Garrick's appellate brief is unaccompanied by any citation to legal authority;[4] it is wholly conclusory and should be deemed abandoned. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). An appealed order comes to this Court with a presumption of correctness, and the appellant bears an affirmative burden to upset that presumption by demonstrating reversible error. *See McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error). Ms. Garrick cannot possibly carry this burden here.

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[4] (*See generally* Br. of Appellant.)

B. Assuming, *arguendo*, it is necessary to consider the trial court's decision on the merits, the court did not err in dismissing this case for noncompliance with the statutory requirements for filing an action for medical malpractice.

1. This is an action for medical malpractice within the purview of § 15-79-125.

In pertinent part, § 15-79-125(A) provides, "Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a [NOI] and an affidavit of an expert witness, subject to the affidavit requirements established in [S.C. Code Ann. §] 15-36-100 . . . ." Section 15-79-110(6) defines "'Medical malpractice'" to "mean[] doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances." Without question, this action is one alleging injury as a result of Defendants, a health care provider and a health care institution, respectively,[5] either acting or failing to act as a reasonably prudent health care provider/institution. The entirety of Ms. Garrick's case is about tortious injuries she alleges to have arisen out of acts/omissions of

[5] Dr. Khoury is a "health care provider" under § 15-79-110(3) ("'Health care provider' means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or any similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity."), and the Hospital is a "health care institution" under § 15-79-110(2) ("'Health care institution' means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility.").

Defendants (her medical providers) in relation to the performance of medical services. Her case is one for medical malpractice, as the trial court correctly found. *See Linog v. Yampolsky*, 376 S.C. 182, 187–88, 656 S.E.2d 355, 358 (2008) (declining to recognize a cause of action for medical battery, stating, "We see little need to recognize an additional cause of action related to tortious injuries arising out of interactions with medical providers when the tort of medical malpractice fully covers all acts performed in relation to medical services and when the remaining area of private tort law applies to acts not related to medical services. Accordingly, we . . . hold that no independent cause of action for medical battery exists in South Carolina. We further hold that in order for a patient to pursue a claim stemming from a situation involving lack of or revocation of consent, a physical touching within the medical context, and a resulting injury, the patient must bring this claim under the medical malpractice framework. That is, a patient must show through expert testimony that the physician deviated from the relevant standard of care in failing to obtain proper consent, unless the subject matter lies within common knowledge.") (footnote omitted); *id.* at 376 S.C. at 188, 656 S.E.2d at 358 n.1 ("We express serious doubts as to whether a patient could ever revoke consent to a medical procedure while under anesthesia or some other method of significant sedation. For this reason expert testimony as to the standard of care ought to be critically important in cases of this type.").

2. Ms. Garrick did not satisfy the prerequisites to filing an action for medical malpractice under § 15-79-125.

Without question, § 15-79-125(A) expressly required Ms. Garrick to contemporaneously file (1) a NOI and (2) an expert affidavit "[p]rior to filing" this medical malpractice case, and without question, she did not do this, as the trial court properly found.

II. The trial court did not err in proceeding with the hearing on Defendants' motion to dismiss in Ms. Garrick's absence, but even assuming, *arguendo*, some error in this regard, it was clearly harmless.

To be clear, out of an abundance of caution, the fact that the trial court went forward with the hearing on Defendants' motion to dismiss in Ms. Garrick's absence provides no ground for reversal of the court's decision. First off, as Ms. Garrick's request for continuance itself proves, Ms. Garrick received notice of the hearing,[6] as the court duly confirmed with the clerk during the hearing. (*See* R. p. 62:1–12.) The reason stated in Ms. Garrick's request for a continuance was not that she was unable to attend the hearing, but rather that she needed more time "to do more research,"[7] and, of course, no such research was actually relevant, much less necessary, in respect of Defendants' motion to dismiss, which the court granted pursuant to Rule 12(b)(6), SCRCP. Moreover, even assuming, *arguendo*, some error in this regard, it was patently harmless, as the trial court made clear

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[6] (*See generally* Supp. R. pp. 1–4.)

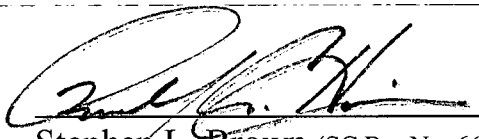
[7] (Supp. R. p. 4.)

upon the record that "this matter was not dismissed on the basis of [Ms. Garrick's] failure to appear,"[8] but on the merits of Defendants' motion to dismiss, which the court duly considered. *Cf. Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict.")

CONCLUSION

For the foregoing reasons, Respondents ask this Honorable Court to affirm the trial court.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

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[8] (R. p. 64, lines 6–18.)

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RESPONDENTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Respondents complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,
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By: _____

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