THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2015-CP-10-5000
Appellate Case No. 2019-000640

Jim Washington, ... Appellant.

v.

Trident Medical Center, LLC, ... Respondent.

Initial Brief of Respondent

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IV. **Were Appellant's due process rights violated where he was given notice of the hearing and the opportunity to raise the arguments that he wanted to raise?**

Counter-Statement of the Case and Facts[1]

Appellant Jim Washington ("Appellant") filed this medical malpractice action on September 11, 2015. (Compl.; R. __.) Defendant Trident Medical Center, LLC ("Trident") moved to dismiss, contending that Appellant failed to comply with the presuit requirements for a medical malpractice action detailed in S.C. Code Ann. § 15-79-125(a). (Mot. to Dismiss & Memo. in Supp.; R. __.) The circuit court agreed that Appellant failed to meet these statutory requirements, and entered an Order dismissing Appellant's complaint on that basis. (Order; R. __.)

Appellant moved to reconsider and, after that motion was denied, appealed to the Court of Appeals. After a full round of briefing, this Court issued a per curiam opinion affirming the lower court. (*See* Op. No. 2018-UP-006; R. __.)

Appellant then petitioned the Supreme Court for a writ of certiorari, which the court denied. This Court issued the remittitur on May 30, 2018, ending the matter. (*See* Remittitur; R. __.)

Nevertheless, Appellant proceeded to file what was styled as a "Motion to Reconsider Conclusion" on July 6, 2018. (Mot. to Reconsider; R. __.) Although the court had not ruled on the Motion to Reconsider Conclusion or set a hearing for that Motion, Appellant also filed a "Motion to Vacate Judgment and Motion to Amend the Pleadings" on October 25, 2018. (Mot. to Vacate; R. __.)

On February 7, 2019, the circuit court heard Appellant's motions. On February 14, 2019, it entered an Order denying the motions. (Order, R. __.) The circuit court agreed with Trident that Appellant's motions primarily sought to relitigate whether he sufficiently complied with the pre-suit requirements for a medical malpractice action. (*Id.*) The circuit court explained that it

[1] Trident combines the statement of the case and statement of the facts for ease of reference and to eliminate repetition in this appeal.

lacked jurisdiction to rehear these issues. (*Id.*) Moreover, even if the circuit court could rehear the same issues, the hearing judge could not overrule or modify the prior decision because a different judge issued the dismissal order. (*Id.*) Next, it found that to the extent Appellant was asserting there was a motion to reconsider that the circuit judge failed to address, this argument was abandoned because it was not raised on appeal. (*Id.*) Finally, the circuit court determined that Appellant had not made a particularized showing of any extrinsic fraud on the court warranting setting aside the judgment. (*Id.*)

Appellant moved to reconsider this Order on February 22, 2019. (Mot. to Reconsider; R. __.) Respondent opposed this motion via memorandum in opposition filed March 8, 2019. The circuit court determined that a hearing was not necessary on this motion and ruled on the briefs and record via Order dated March 14, 2019. (Order; R. __.) In its Order, the court rejected Appellant's arguments, noting that Appellant failed to present any novel facts, arguments, or theories in support of his motion to reconsider and denied the motion. This appeal followed.

Standard of Review

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). Therefore, this Court's standard of review "is limited to determining whether there was an abuse of discretion." *Id.* at 18, 594 S.E.2d at 482. "An abuse of discretion arises whe[n] the judge issuing the order was controlled by an error of law or whe[n] the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006).

Argument

I. Appellant's Rule 60 motion improperly sought to relitigate the merits and, in any event, the hearing judge could not overrule or set aside the order of a different circuit judge.

A. Rule 60(b) does not permit relitigation of the merits of Appellant's claim.

The circuit court dismissed this medical malpractice action because Appellant failed to comply with the presuit requirements for bringing a medical malpractice action, namely: (1) failure to file a Notice of Intent to File Suit pursuant to S.C. Code Ann. § 15-79-125(A); and (2) failure to file an expert witness affidavit specifying at least one negligent act or omission claimed to exist pursuant to S.C. Code Ann. § 15-79-125(A) and S.C. Code Ann. § 15-30-100(B). The circuit court also found that Appellant failed to demonstrate that any exception to these requirements applied. That dismissal order was appealed to the Court of Appeals, which affirmed, and later to the Supreme Court, which denied certiorari. The remittitur issued on May 30, 2018.

Hence, the question of whether Appellant sufficiently complied with the statutory presuit requirements has been fully and finally determined. After the remittitur, the circuit court "acquires jurisdiction ***to enforce the judgment*** and take any action ***consistent with the appellate court's ruling***." *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct. App. 2001) (emphasis added); *see also Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 415, 438 S.E.2d 248, 250 (1993) (same). The circuit court does not acquire jurisdiction to rehear issues that it previously considered and ruled on, and that were affirmed on appeal. As this Court has explained, matters decided by the appellate court "***cannot be reheard, reconsidered, or relitigated in the trial court***, even under the guise of a different form," and the "decision of the appellate court is ***final as to all questions decided***." *Ackerman v. McMillan*, 324 S.C. 440, 443,

477 S.E.2d 267, 268 (Ct. App. 1996) (emphasis added). Thus, "[i]t is the ***duty*** of the circuit court to follow the decision of the appellate court." *Id.* (emphasis added).

Therefore, the circuit court had no discretion—it was required to deny Appellant's latest motions since, as the circuit court found after "thorough review," they sought to relitigate compliance with the presuit requirements and the propriety of the circuit court's judgment dismissing this suit on that basis. Appellant's filings are attempting to obtain a second bite at the apple due to dissatisfaction with the original outcome, but there are no more bites available. As the Supreme Court wisely observed many decades ago: "It must be conceded that litigation in any given case must eventually end." *In re Wallace*, 179 S.C. 480, 184 S.E. 849, 851 (1936).[2]

B. The circuit judge lacked authority to modify or set aside Judge Dennis's order.

As the circuit judge explained in its Order denying Appellant's motions, it was also required to deny the motions because it lacked the authority to modify or set aside the order of another circuit judge. Judge R. Markley Dennis entered the original order dismissing this action due to Appellant's failure to comply with the presuit requirements. Appellant's new motions, however, were heard by Judge Deadra Jefferson.

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[2] Much of Appellant's brief operates under a misunderstanding of the difference between "timeliness" and "jurisdiction." Appellant's motions were "untimely" only in the sense that they raised arguments that the circuit court no longer had jurisdiction to hear in light of the remittitur. The circuit court's ruling was that Appellant could not repeat the same arguments that were previously ruled on by Judge Dennis and heard on the merits by the appellate courts.

The circuit court ***did not*** deny the motions on the basis that they were not filed within a "reasonable time, and . . . not more than one year after judgment." Rule 60(b), SCRCP. The case law cited by Appellant on this issue is therefore irrelevant. For example, Appellant heavily relied on *Ex Parte Carter*, 422 S.C. 623, 813 S.E.2d 686 (2018) at the hearing and in his briefing. That case, however, simply found that the family court erred in denying a Rule 60(b) motion as untimely where the motion was filed within a reasonable time after judgment. *Id.* at 631, 813 S.E.2d at 690. That was not the deficiency with Appellant's motion here.

As Judge Jefferson's order explained, "[o]ne Circuit Court Judge does not have the authority to set aside the order of another." *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986). Thus, she lacked the authority to address Appellant's arguments regarding the merits of his malpractice claim and whether he satisfied the statutory presuit requirements, as those same issues were previously ruled on by Judge Dennis. *See also State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985) ("It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.").

For this alternative reason, the circuit court properly exercised its discretion in denying Appellant's motions to vacate the judgment. Appellant's arguments are without merit and this Court should affirm.

II. Appellant provided no evidence of extrinsic fraud warranting relief from the judgment.

Appellant's motions predominantly attempt to reargue the merits of his claims. However, Appellant also requested relief from judgment on the basis of "fraud." To obtain relief from the entry of judgment a party must show that ***extrinsic*** fraud occurred. *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004). Since such requires proving fraud, any such claim "must be accompanied by ***particularized allegations***," *Chewning v. Ford Motor Co.*, 354 S.C. 72, 86, 81 579 S.E.2d 605, 613 (2003), and a showing that the perpetrator "acted with the ***intent*** to defraud, for there is no such thing as accidental fraud," *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003). Extrinsic fraud is that which "induces a person not to present a case or deprives a person of the opportunity to be heard." *Chewning*, 354 S.C. at 81 579 S.E.2d at 610. Intrinsic fraud, on the other hand, is fraud that "misleads a court in

determining issues and induces the court to find for the party perpetrating the fraud." *Id.* at 19, 594 S.E.2d at 483.

Appellant did not provide ***any*** evidence supporting the existence of any fraud aside from making inflammatory, unsubstantiated accusations against defense counsel. Essentially, Appellant argued that defense counsel's legal arguments perpetuated a "fraud" upon the court. Appellant contends that these arguments constituted deliberate misrepresentations because the court agreed with those arguments and dismissed the action without reaching the merits. Appellant's disagreement with the law and Trident's proper arguments about said law, however, in no way constitute fraud. This is a frivolous argument lacking ***any*** factual or evidentiary support.

At most, Appellant set forth unsupported ***allegations*** (unsubstantiated and unwarranted) of ***intrinsic*** fraud. This is fraud that "misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Id.* at 19, 594 S.E.2d at 483. Appellant's contention that Trident misled the court with its legal arguments would fall into this "intrinsic fraud" category. Such an allegation is wholly without merit. Regardless, ***even if*** Appellant had provided evidentiary support for this unsubstantiated and frivolous claim (which he did not), it would ***still*** be insufficient to warrant relief under Rule 60(b). *See Lanier v. Lanier*, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005) ("A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting ***evidence*** entitling him to the requested relief." (emphasis added)).

Therefore, for all these reasons, the circuit court properly exercised its discretion in finding that Appellant failed to meet his burden of making a particularized showing of extrinsic fraud. The

court "thoroughly reviewed" Appellant's filings and agreed with Trident that there was no evidence of fraud. This Court should affirm.[3]

III. The circuit court properly found that Appellant's arguments about Judge Dennis's purported failure to rule on a motion to reconsider were abandoned.

Appellant next appears to argue that the circuit court improperly failed to rule on his motion to reconsider, which he filed after Judge Dennis entered his original form order. As an initial matter, this argument fails because this is not a proper ground for a Rule 60(b) motion. *See generally* Rule 60(b)(1)-(5).

The court issued a form order but expressly stated a formal order would follow. Such a form order does not trigger any deadlines by rule. *See* Rule 203(b)(1), SCACR. A motion to reconsider this form order was filed on January 27, 2016. It is likely it was later than 10 days from the Appellant's receipt of that form order and thus ineffective for that reason, but in any event, the circuit court filed its official formal order on February 5, 2016, and Appellant made no motion to reconsider under Rule 59(e) regarding that formal order. Under these circumstances, the motion to reconsider the form order was ineffective, mooted by the formal order, untimely, or waived. In no way is it grounds for any relief to the Appellant.

Additionally, to the extent the motion was even viable after the circuit court's full, formal order of dismissal, Appellant abandoned this argument in his previous appeal. Appellant never made the Court of Appeals aware of this pending motion relating to the form order, or his desire to obtain a ruling on that motion, prior to appealing. Instead, Appellant ***voluntarily*** chose to file the notice of appeal and proceed with briefing the appeal on the merits. By failing to raise the

[3] Under Rule 269, SCACR, a party may be sanctioned for filing a frivolous appeal. Defendant requests the Court to caution Appellant that any further accusations of misconduct leveled against defense counsel without evidentiary support could result in sanctions.

issue of the pending motion to reconsider the form order during the appeal, it was abandoned. *See, e.g.*, *Cannon v. Cannon*, 321 S.C. 44, 54, 467 S.E.2d 132, 138 (Ct. App. 1996) (holding an issue not argued in the appellant's brief is deemed abandoned on appeal); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding appellant was deemed to have abandoned issues on appeal, where he failed to provide any argument or supporting authority).

If Appellant desired a ruling on the motion to reconsider the form order, he should have filed a motion for limited remand or asked the Court of Appeals to dismiss his appeal without prejudice. *Cf. Washington ex rel. Estate of Washington v. Stewart*, No. 2012-UP-420, 2012 WL 10862432, at *2 (S.C. Ct. App. July 11, 2012) (noting that when a timely post-trial motion is pending before the lower court at the time the notice of appeal is filed, the notice is often "dismissed without prejudice as premature" but that because "[n]either party asked this Court to dismiss the appeal or hold it in abeyance pending the trial court ruling" on the Rule 59(e) motion, "jurisdiction remained with this court"); *Otten v. Otten*, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985) (granting motion to remand/dismiss at appellant's request where appellant filed notice of appeal while his Rule 59(e) motion was still pending).

Once the notice of appeal was served and filed, the lower court was divested of jurisdiction over the order appealed and could only proceed with "matters not affected by the appeal." *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997); *see also* Rule 205, SCACR (same). Appellant's motion to reconsider the form order related entirely to the orders on appeal, as it challenged Judge Dennis's reasons for dismissing the suit. Appellant, however, never asked the Court of Appeals to address the issue of the pending motion to reconsider the form order or to remand for Judge Dennis to rule on the motion (assuming, *arguendo*, he did not do so already via

the issuance of the formal order).[4] Appellant, therefore, must abide by the Court of Appeals' final judgment.

Accordingly, the circuit court properly denied Appellant's motions, as the argument about the initial motion to reconsider the form order was abandoned on appeal, or was ruled upon.

IV. Appellant was not deprived of any procedural due process right.

Appellant has been given multiple opportunities to be heard by the court. Nevertheless, Appellant's final argument contends that he was not given his "due process" right to be heard prior to the circuit court rendering its orders. This argument is without merit.

"Procedural due process requirements are not technical; no particular form of procedure is necessary." *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). However, at a minimum, certain elements must be present: "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *Id.*

"Due Process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands." *State v. Legg*, 416 S.C. 9, 13-14, 785 S.E.2d 369, 371 (2016). "Procedural Due Process contemplates a fair hearing before a legally constituted impartial tribunal." *Id.* "To establish a procedural due process claim, a person must show deprivation of his liberty or property interests due to the government's failure to provide notice, an opportunity to be heard in a meaningful way, or judicial review." *Clemmons v. Lowe's Home Centers, Inc.--Harbison*, 412 S.C. 366, 378, 772 S.E.2d 517, 524 (Ct. App. 2015)).

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[4] At the Feb. 7, 2019 hearing, Appellant acknowledged that he did not provide Judge Dennis with a copy of motion to reconsider as required by Rule 59(g), but instead simply filed it with the Clerk of Court. (Feb. 7, 2019 Hearing Tr. 9:5-18; R. __.)

Quite simply, Appellant had multiple opportunities to be heard in this case. He filed two motions after the Court of Appeals issued the remittitur and the circuit court held a hearing on these motions. The court directed the undersigned to submit a proposed order and copy Appellant. Appellant moved to reconsider this Order and the circuit court duly considered and rejected those arguments. The court was under no obligation to conduct a hearing on the motion on Appellant's motion to reconsider. *See* Rule 59(f), SCRCP.

Appellant was given the opportunity to raise all legal arguments that he so desired and address the court at a hearing. Therefore, Appellant had ample opportunity to be heard. Due process does not guarantee the right to reargue the same points *ad nausem* in hopes of obtaining a different result. Appellant's argument is without merit.

Conclusion

Based on the foregoing, this Court should affirm the circuit court's denial of Appellant's motions seeking to vacate the judgment.

Signature on Following Page

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Trident Medical Center, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal

Served:

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September 27, 2019

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
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RE: Jim Washington v. Trident Medical Center
Case No. 2019-000640
Our File No. 27979/01501

Dear Ms. Kitchings:

Enclosed please find the originals and one copy each of *Initial Brief of Respondent* and *Respondent's Designation of Matter to be Included in the Record on Appeal* in the above referenced matter. Please return clocked copies of each to our firm's courier.

With kind regards, I remain

Very truly yours,

Blake T. Williams

Blake T. Williams

BTW:btw
Enclosure
cc: Mr. Jim Washington