THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

C.A. No. 2019-CP-37-00271
Appellate Case No. 2019-002009

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Aug 31 2020
SC Court of Appeals

Jane Doe ..... Appellant,

v.

Oconee Memorial Hospital; Greenville Health System; Upstate Affiliate Organization; Kevin Docyk, MD; Mary Beth Hendricks ..... Respondents.

FINAL BRIEF OF RESPONDENTS

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. **Was the Circuit Court correct in holding Appellant's medical malpractice claims were barred by the statute of limitations?**

II. **Were Appellant's medical malpractice claims also barred by the doctrines of res judicata and/or collateral estoppel?**

STATEMENT OF THE CASE

This case involves allegations that Respondents mishandled a sexual assault examination kit on December 5, 2015. Appellant "Jane Doe" has filed three separate civil actions asserting numerous causes of action. The instant appeal is of the circuit court's October 31, 2019 Order dismissing the medical malpractice claims alleged in C.A. Nos.: 2018-NI-37-00010 and 2019-CP-37-00271.[1]

Appellant filed her initial action on December 5, 2017 against Oconee Memorial Hospital[2] and Greenville Health System ("GHS"). That Complaint included the following causes of action, all of which stem from a sexual assault forensic examination performed by a GHS employee at Appellant's request following her allegations that she had been drugged and sexually assaulted in Atlanta: (1) negligence – failure to properly collect and protect evidence; (2) negligence – failure to order necessary tests; (3) gross negligence – failure to properly collect and protect evidence; (4) gross negligence – failure to order necessary tests; (5) negligent supervision; and (6) intentional infliction of emotional distress. (R. 2-15, App. Case No. 2018-001480). GHS filed a motion to

[1] The October 31, 2019 Order also dismissed the tort claims set forth in C.A. No.: 2018-CP-37-00762. Appellant is challenging that dismissal in a separate appeal, 2019-002011. Appellant has chosen to treat this as a distinct and separate appeal; therefore, Respondents will do the same.

[2] Oconee Memorial Hospital is not a distinct entity capable of being sued, but rather is the name of a hospital that at all times relevant to this action was operated by GHS.

dismiss the Complaint on January 10, 2018. (R. 16-22, App. Case No. 2018-001480).

A hearing on the Motion to Dismiss was held on June 4, 2018. Just prior to the start of the hearing, Appellant filed a motion to amend her Complaint. (R. 258-259, App. Case No. 2018-001480). Appellant argued the motion to amend was necessary to add additional defendants and add two new causes of action. (Id.). Appellant's motion to amend did not identify the additional defendants nor did it specify the two new causes of action, nor did the motion include a proposed amended complaint; however, during the hearing, Appellant's counsel stated the two new causes of action would be "breach of contract" and "bailment." (R. 247, App. Case No. 2018-001480). Counsel made no mention of a desire to allege medical malpractice. In fact, counsel specifically confirmed Appellant was not alleging medical malpractice. (Id. at 248).

On June 8, Appellant filed a Memorandum in Opposition to the Motion to Dismiss and GHS filed a reply memorandum. (R. 118-130 and 23-29, App. Case No. 2018-001480). The circuit court issued an Order granting the Motion to Dismiss on July 9, 2018. By way of the Order, the circuit court dismissed with prejudice the six causes of action set forth in Appellant's Complaint. (R. 263-271, App. Case No. 2018-001480). However, the circuit court provided that its ruling was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." (Id.).

The Order addressed Appellant's Motion to Amend by stating the following as a footnote to the "Facts" section:

> "In ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint. The Court notes that approximately one hour prior to the hearing on June 4, 2018, and without any prior notice to Defendant, Plaintiff electronically filed a motion to amend her complaint. While Plaintiff's counsel briefly mentioned the motion to amend during the hearing, the merits of Plaintiff's motion were not properly before the Court and were not discussed. Further, the Court could not consider

> the merits of Plaintiff's motion to amend even if it were inclined to do so, because no proposed amended complaint was ever submitted to the Court." (Id. at 263).

Appellant filed a Motion to Reconsider on July 16, 2018, which was followed by GHS' Memorandum in Opposition on July 18, 2018. (R. 272-279 and 280-281, App. Case No. 2018-001480). The circuit court issued a written order denying Appellant's Motion for Reconsideration on July 19, 2018. (R. 282-283, App. Case No. 2018-001480). Appellant filed a Notice of Appeal of August 8, 2018. (R. 284-296, App. Case No. 2018-001480). That appeal is still pending. See Appellate Case No. 2018-001480.

On December 5, 2018, Appellant filed the Notice of Intent to File Suit ("NOI") of a medical malpractice action, which is the subject of the instant appeal. In the NOI, Appellant essentially made the same factual allegations as she had previously alleged; however, she added Upstate Affiliate Organization ("UAO"), Kevin Docyk, MD, and Mary Beth Hendricks as defendants. (Dec. 5, 2018 NOI, R. pp. 22-30).

Respondents filed a motion to dismiss on December 21, 2018. (Mot. to Dismiss, R. pp. 41-46). Respondents argued Appellant's medical malpractice claims were barred by the doctrines of res judicata and/or collateral estoppel and by the applicable statute of limitations. The motion initially came before the court on March 20, 2019. During the hearing, Appellant's counsel argued there were questions of fact about whether Respondents were subject to the Tort Claims Act. After taking the matter under advisement, the court issued a Form 4 Order on April 11, 2019 denying the motion to dismiss on the basis Respondents' arguments invoked matters outside of the pleadings. (April 11, 2019 Form 4 Order, R. pp. 1-4). Respondents responded by timely filing a motion to reconsider. (Mot. to Reconsider, R. pp. 52-55). On May 8, 2019, the court issued another Form 4 Order whereby it granted a *de novo* hearing on the statute of limitations issue, which it

stated would be treated as a motion for summary judgment under Rule 12(c), SCRCP. (May 8, 2019 Form 4 Order, R. pp. 5-8). The court invited both parties to submit additional materials in furtherance of their arguments related to the statute of limitations issue. (Id.).

Appellant filed the instant Complaint alleging medical malpractice on May 13, 2019. Counsel for Respondents accepted service of the Complaint on June 24, 2019, and Respondents timely answered the Complaint on July 1, 2019. Respondents noted they were answering merely out of an abundance of caution as it was unclear whether they were required to do so pursuant to the Court's May 8, 2019 Order. In answering, Respondents incorporated by reference all arguments raised in their previously filed motions and memorandums. (Answer, p. 1, fn. 1, R. p. 59).

The *de novo* hearing was held on September 23, 2019. In support of their argument that Appellant's tort claims were subject to the two year statute of limitations within the Tort Claims Act, Defendants submitted a memorandum which included an affidavit from Cynthia Cambron. (Supp. Mem. in Support of Mot. to Dismiss, R. pp. 69-76). The affidavit established the following pertinent facts:

- GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act.
- In December 2015, and at all times relevant to this action, Oconee Memorial Hospital was one of numerous hospital facilities within the System operated by GHS.
- In December 2015, and at all times relevant to this action, Kevin Docyk, MD and Mary Beth Hendricks were employees of GHS pursuant to the Tort Claims Act.
- UAO, a 501(c)(3) corporation, had nothing to do with the care rendered to Appellant on December 5, 2015, as it did not exist as an entity at that time.

In response, Appellant did not submit any evidence to the contrary. Rather, Appellant filed a memorandum in opposition in which she argued dismissal was inappropriate, because she had not had adequate time to conduct discovery on the statute of limitations issue, and she believed her new claims should relate back to the filing of her initial civil action. (Mem. in Opp. to Defs. Mot.

to Dismiss, R. pp. 77-157). A few days after the hearing, Appellant filed a supplemental memorandum in opposition in which she continued to argue that she had not had adequate time to conduct discovery. (Supp. Mem. in Opp. to Defs. Mot. to Dismiss, R. pp. 158-231). Respondents then filed a reply memorandum in which they addressed Appellant's discovery arguments. (Reply Mem. in Support of Defs. Mot. to Dis/Mot. for Sum. Judg., R. pp. 232-246).

On October 17, 2019, via a Form 4 Order, the circuit granted Appellants' motion to dismiss. Appellant filed a motion to reconsider on October 25, 2019. The court entered a formal Order on October 31, 2019, which granted Respondents' motion to dismiss Appellant's medical malpractice action in its entirety. The court denied Appellant's motion to reconsider on November 4, 2019. The instant appeal followed.

STANDARD OF REVIEW

The South Carolina Rules of Civil Procedure permit a court to consider a motion to dismiss under Rule 12(b)(6) as a Rule 56 motion for summary judgment if matters outside the complaint are presented to and not excluded by the court, and if the parties are given a reasonable time to present additional evidence according to Rule 56. Rule 12(b), SCRCP. Prior to the court considering the motion as a motion for summary judgment, the parties must be "fairly apprised that the court would look beyond the pleadings." Higgins v. Med. Univ. of S.C., 326 S.C. 592, 598, 486 S.E.2d 269, 272 (Ct. App. 1997) (quoting Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir.1984)); see also Baird v. Charleston Cty., 333 S.C. 519, 528, 511 S.E.2d 69, 74 (1999); Johnson v. Dailey, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995). Parties must also be afforded a reasonable opportunity to introduce evidence pursuant to Rule 56(c) and (e). Crosswell Enterprises, Inc. v. Arnold, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992).

Assuming the circuit court provided sufficient notice, the proper standard of review is that

of a traditional summary judgment analysis. Baird, 333 S.C. at 529, 511 S.E.2d at 74-75. Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Calvert v. House Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994). In ruling on a motion for summary judgment, the evidence should be viewed in the light most favorable to the non-moving party; however, "[i]t is not sufficient [to defeat a motion for summary judgment] that one create an inference which is not reasonable or an issue of fact that is not genuine." Shuler v. Tuomey Reg'l Med. Ctr., 313 S.C. 225, 227, 437 S.E.2d 128, 129 (S.C. Ct. App. 1993). A party opposing a motion for summary judgment may not rest on the mere allegations or denials of her pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500 (2001).

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY FOUND THAT APPELLANT'S TORT CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

Based upon the facts in the record, it is undisputed that GHS is the only proper defendant. It is further undisputed 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), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. Sloan v. Greenville Hosp. System, 388 S.C. 152, 694 S.E.2d 532 (2010); Knox v. Greenville Hosp. System, 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005); Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995), and Benton v Roger C Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)).

In light of the undisputed facts, it is clear Appellant's tort claims are subject to the Tort

Claims Act and the limitations set forth therein. Pursuant to S.C. Code § 15-78-110, the applicable statute of limitations for all tort claims is 2 years. Plaintiff's alleged injuries occurred on December 5, 2015. Plaintiff filed the instant action on December 5, 2018, a full year after the statute of limitations expired in regards to any tort claims. Therefore, any tort claims, including her medical malpractice claims, were barred by the applicable statute of limitations.

A. Appellant's Argument that She Lacked an Opportunity to Conduct Discovery is Disingenuous.

Appellant argues she was not given a full and fair opportunity to conduct discovery on the statute of limitations issue, but that argument is disingenuous. Appellant had plenty of notice of the statute of limitations issue prior to the September 23, 2019 hearing. First, Respondents raised the statute of limitations in their motion to dismiss the NOI. (Mot. to Dismiss, p. 3, R. p. 43). Second, the circuit specifically put Appellant on notice that it would be ruling on the issue in its May 8, 2019 Form 4 Order. Despite the notice, Appellant never attempted to conduct discovery on the issue. In fact, Appellant never attempted to conduct any discovery at all in the instant action.

Appellant contends she served discovery on Respondents on January 17, 2019; however, those discovery requests were served in C.A. No. 2018-CP-37-00762 (hereinafter, the "Contract Action").[3] Appellant never served any discovery requests under the medical malpractice civil action number.

Nevertheless, any suggestion by Appellant that Respondents prevented her from conducting meaningful discovery on the statute of limitations issue is simply inaccurate. Appellant served discovery in the Contract Action on January 17, 2019; however, none of the discovery

[3] As noted in Respondents brief for Appellate Case No. 2019-002011, Appellant abandoned her argument that she did not have an adequate time to conduct discovery in C.A. No. 2018-CP-37-00762. (Respondents' Brief, p. 4).

requests were pertinent to the statute of limitations issue. On April 22, 2019, Appellant's counsel agreed that Respondents would not have to respond to the discovery requests until there was a final ruling on Respondent's motion to dismiss. (See April 22, 2019 email contained within the correspondence submitted to the circuit court during the September 23, 2019 hearing, R. pp. 285-287).

There were no further communications regarding the discovery requests until Appellant filed a motion to compel on August 16, 2019. At which point, Respondents' counsel immediately reached out via email to Appellant's counsel inquiring as to why the motion had been filed. Counsel explained that he believed they had an agreement whereby Respondents would not have to respond to discovery requests until the motion to dismiss was fully decided, which he believed had not yet occurred. In the same email, Respondents' counsel invited Appellant's counsel to let him know if there was anything specific Appellant believed she needed for the statute of limitations issue. (See Aug. 19, 2019 email, R. pp. 288-289). Appellant's counsel responded via email on August 27, 2019 by expressing her opinion that Respondents' discovery responses were well overdue, but she ignored Respondents' invitation to request information related to the statute of limitations issue. (See Rep. Mem. in Support of Defs. Mot. to Dismiss/Mot. for Sum. Judg., Ex. 2, R. pp. 241-246). Despite believing there was an agreement that discovery responses would not be due until the issues raised by the motion to dismiss had been fully decided, and despite the fact that the discovery requests were irrelevant to the statute of limitations issue, Respondents responded to Appellant's discovery requests via email on September 12, 2019. (Id.) There was no further correspondence regarding discovery prior to the September 23, 2019 hearing.

As the circuit court noted in its October 31, 2019 Order, Appellant had plenty of notice of the statute of limitations issue, yet Appellant chose not to send any discovery requests specific to

the issue. (Oct. 31, 2019 Order, p. 5, R. p. 16). Further, on August 19, 2019, Respondents offered to produce anything Appellant felt she needed for the statute of limitations issue, but Appellant chose to ignore Respondents' offer. (Id.). While Appellant now contends she did not have a full and fair opportunity to delve "into the true status of Respondents and, accordingly, whether or not the South Carolina Tort Claims Act and its two-year statute of limitations is applicable to the matter" (App. Br., p. 12), Appellant's lack of opportunity was due solely to her own inactions.

B. Appellant's Medical Malpractice Claims do Not Relate Back to the Filing of Her Initial Complaint.

Appellant argues her medical malpractice claims should have related back to the filing of her original complaint. She cites to Rule 15(c) of the South Carolina Rules of Civil Procedure, but Rule 15(c) is inapplicable to the instant action, because it only applies to amended complaints. The instant action was not filed as an amended complaint. Rather, it was filed as an entirely new action. Respondents are aware of no legal authority, and in fact, Appellant cites none for the proposition that Rule 15 can be used to save a wholly separate, untimely filed civil action from being barred by the statute of limitations.

Rather, Appellant argues equitable principals demanded the circuit court treat her new complaint as an amended complaint. Appellant's argument presupposes that the circuit court erred in its refusal to grant her motion to amend the complaint in her original negligence action; however, that decision is the subject of another appeal. See Appellate Case No. 2018-001480. Respondents contend the circuit court acted within its discretion in that case, but even if the circuit court were inclined to believe it erred in its previous decision, Respondents are not aware of any legal theory whereby the circuit court could essentially *sua sponte* revisit the decision while the order was on appeal.

Further, whether the circuit court erred in refusing to grant Appellant's motion to amend is

irrelevant to the instant action, because Appellant never expressed any desire to amend her complaint to allege medical malpractice. As previously noted, Appellant's counsel was specifically asked in the June 4, 2018 hearing whether Appellant was attempting to make a medical malpractice claim, and she affirmatively stated she was not attempting to make such a claim. The fact is, Respondent had no idea Appellant was going to allege medical malpractice until Respondent received Appellant's NOI in December 2018.

Nevertheless, even if it were legally possible to treat Appellant's instant Complaint as an amended complaint, her medical malpractice cause of action would not relate back to the filing of the original action. As the circuit correctly noted in its Order, it is well established that a complaint cannot be amended to state a new or different cause of action after the statute of limitations has expired. Scott v. McCain, 272 S.C. 198, 202, 250 S.E.2d 118, 121 (1978); Coral Gables v. Palmetto Brick Co., 183 S.C. 478, 191 S.E. 337 (1937) ("[A]n amendment which introduces a new or different cause of action and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed.").

In order to state a cause of action for medical malpractice, a plaintiff must first file a notice of intent with an expert affidavit. S.C. Code 15-79-125. The statute of limitations is tolled only if a plaintiff timely files the NOI and the expert affidavit. Id. Therefore, even if Appellant's June 4, 2018 motion to amend had indicated she wanted to allege medical malpractice, her amendment would have been futile due to her failure to have timely adhered to the requirements of S.C. Code 15-79-125.

Further, Appellant's medical malpractice action named new defendants who were not

parties to her original action. Rule 15(c), SCRCP applies when an existing party is changed, but it is not applicable when a new party is added. Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004). Therefore, even if Rule 15 could somehow preserve the claims against GHS, it would not be applicable as to the claims against Dr. Docyk and Nurse Hendricks.

In summary, given the procedural history and the undisputed facts, the circuit court had no choice but to dismiss Appellant's medical malpractice action, as it was unquestionably filed after the running of the applicable statute of limitations.

II. APPELLANT'S TORT CLAIMS WERE BARRED BY THE DOCTRINES OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL

In dismissing Appellant's medical malpractice cause of action, the circuit court specifically refused to address Respondents' argument that Appellant's tort claims were barred by the doctrines of res judicata and/or collateral estoppel (see October 31, 2019 Order, p. 3, fn. 2, R. p. 14); however, this Court may affirm the dismissal for any reason appearing in the record. Rule 220(c), SCACR. Respondents contend that if Rule 15(c) could somehow be used to save Appellant's medical malpractice claims from the statute of limitations, then her claims should be barred under the doctrines of res judicata and/or collateral estoppel.

Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit, while collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. See Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). In dismissing Appellant's initial civil action, the circuit court reached three legal conclusions which would be applicable to the instant action:

1. GHS owed no legal duty to Appellant in regards to the sexual assault examination kit; rather, the court held GHS was performing a service on behalf of law enforcement. (July 9, 2018 Order, p. 3, R. 263-271, App. Case No. 2018-001480).

2. The circuit court interpreted Appellant's claims as an improper attempt to assert a negligent spoliation of evidence of claim. (Id., p. 5).

3. Appellant failed to allege a cognizable injury. The circuit court held that the only reasonable inference that could be drawn from Appellant's allegations was that she had endured emotional distress, which was not recoverable under the circumstances. (Id., p. 6, citing Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985); Doe v. Greenville County School Dist., 375 S.C. 63, 67-68, 651 S.E.2d 305 (2007)).

Medical malpractice is merely a specific form of negligence. See Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014). Just as with any other form of negligence, to assert a claim for medical malpractice, a plaintiff must allege facts sufficient to establish that a duty was owed, the duty was breached, and the breached proximately caused the plaintiff's injuries. See Willis v. Wu, 362 S.C. 146,154, 607 S.E.2d 63, 67 (2004) (discussing elements of a medical malpractice action while referring to it as "a negligence action against a physician or other health care provider.") Calling it "medical malpractice" instead of "negligence" did not change the fact that the elements were the same, nor did it change the fact that the circuit court had already determined as a matter of law that no duty existed. If no duty existed under a general negligence theory, one was not created just because Appellant chose to refer to her negligence claim as a medical malpractice claim.

Further, the substance of the allegations were the same; therefore, it did not matter whether Appellant cast them as "medical malpractice" or "negligence", because it was still an improper

attempt to assert a negligent spoliation of evidence claim, which is not recognized under South Carolina law. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011); see also Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (refusing to adopt the tort of third party spoliation of evidence where plaintiff sued sheriff's office for destroying evidence that plaintiff alleged prevented her from being able to pursue wrongful death claim against another party).

Finally, in the instant Complaint, Appellant failed to make any new allegations from which the circuit court could reasonably infer she had pled cognizable damages. In Paragraph 43 of her Complaint, Appellant made the conclusory allegation that she had injuries and damages, including "severe emotional distress, an inability to proceed with any investigation into the circumstances around her assault and her attacker." The circuit court rejected her claim for those same damages in her prior action. In the instant Complaint, she adds the allegation that she was further injured by "the ability to know and receive appropriate medical treatment for her injuries and/or physical well-being." It is entirely unclear what Appellant is referring to, but she provides no facts from which one could infer that she was physically harmed by Respondents' acts and/or omissions. The only reasonable inference continues to be that Appellant did not suffer a cognizable injury under South Carolina law.

Wherefore, given the circuit court's holdings in the prior civil action, had Appellant's medical malpractice claim not been barred by the statute of limitations, it would have still been barred by the doctrines of res judicata and/or collateral estoppel.

CONCLUSION

The Court should affirm the circuit court's order dismissing Appellant's medical malpractice action because: 1) despite having plenty of notice, Appellant failed to present any

evidence that her claim was not subject to the Tort Claims Act's two-year statute of limitations; 2) Appellant's medical malpractice action was not filed as an amended complaint and Appellant never sought to amend her original complaint to allege medical malpractice; therefore, Rule 15(c) is irrelevant, and; 3) Appellant's medical malpractice claim is barred by the doctrines of res judicata and/or collateral estoppel.

Wherefore, for the reasons stated herein, Respondents respectfully request this Court affirm the October 31, 2019 Order issued by Circuit Judge R. Scott Sprouse dismissing Appellant's medical malpractice action in favor of Respondents.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com

Attorney for Respondents

Dated: August 31, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents' Final Brief complies with Rule 211(b), SCACR:

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
PO Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com

Attorney for Respondents

Dated: 8/31/2020
Greenville, South Carolina