Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-261

MARCH TERM, 2020

Cheryl J. Brown* v. Verne Backus, M.D.	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 441-5-19 Cncv
		Trial Judges: Helen M. Toor; Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from the dismissal of her suit and the denial of her motion to recuse the judge who presided over her case. We affirm.

The record indicates the following. After plaintiff was rear-ended in stop-and-go traffic by a Vermont State Police officer, she brought a personal injury suit against the State. The defendant in the instant case, Dr. Backus, conducted an independent medical examination (IME) of plaintiff in connection with that suit at the request of the Attorney General's Office. Plaintiff recovered no damages in her suit against the State; a decision this Court affirmed on appeal. See Brown v. State, 2018 VT 1, 206 Vt. 394.

Plaintiff then sued Dr. Backus. She alleged that he committed medical malpractice in connection with his IME. According to plaintiff, Dr. Backus should have told her that, eight years earlier, he had examined her in connection with a different automobile-accident suit. Plaintiff alleged that, had she known, she would have advised the State to provide a different doctor to conduct the IME. Plaintiff couched her claim against Dr. Backus as "intentional medical negligence to force the [l]ack of informed consent decisions." Plaintiff also alleged that defendant "changed" her medical records because he testified in her suit against the State to having learned that the officer who hit plaintiff had a dog in his car. Plaintiff cited 12 V.S.A. § 1909(a)(1) (defining "lack of informed consent" for purposes of medical malpractice claim) and 21 V.S.A. § 667 (addressing IMEs in workers' compensation cases).

Dr. Backus moved to dismiss the compliant for failure to state a claim. He explained that the plain language of 12 V.S.A. § 1909(a) required a doctor-patient relationship, which was undisputedly absent here. It was also undisputed that he provided plaintiff no treatment for which he was required to explain reasonably foreseeable risks and benefits under § 1909. Instead, Dr. Backus explained that he examined plaintiff solely for the purpose of evaluating her claimed injuries in his role as a non-treating expert for the State. Plaintiff had executed a document in

connection with the IME that specifically provided that the IME was "not a comprehensive medical examination" and it would "not provide advice of treatment or substitute for evaluation or treatment by [her] regular treating doctor." The signed document further provided that "[a] patient-physician relationship is not established between the evaluating physician and [plaintiff]." (Emphasis omitted.) With respect to the claim about the dog in the police car, Dr. Backus asserted that it had nothing to do with informed consent and, in any event, this Court had previously ruled that plaintiff's allegations about alleged prejudice from learning at trial about a dog in the car were meritless and plaintiff could "not show why the medical examiner's information about the dog was material to [the] medical examination." Brown, 2018 VT 1, ¶ 26, 206 Vt. 394. Dr. Backus also argued that 21 V.S.A. § 667, which applies exclusively to workers' compensation claims, was irrelevant here. For these and other reasons, he asked the court to dismiss plaintiff's claims.

The court granted defendant's motion to dismiss. The court found it undisputed that defendant simply performed an IME of plaintiff. He was not plaintiff's treating doctor and no doctor-patient relationship was created. It thus concluded that plaintiff's claim for lack of informed consent under 12 V.S.A. § 1909 failed. The court agreed with Dr. Backus that 21 V.S.A. § 667, which related only to worker's compensation claims, did not apply here. The court thus dismissed plaintiff's suit. Plaintiff then moved to recuse the trial judge, reconsider the dismissal, and "strike" the decision on the motion to dismiss. These motions were denied. This appeal followed.

In her brief, plaintiff recites her version of the underlying motor-vehicle accident. She contends that this Court "should recognize the Common Law requirements for an Independent Medical Examination." (Emphasis omitted.) Her core argument appears to be that had she known that Dr. Backus examined her previously, she would not have agreed to having him perform the IME at issue here. She asks the Court to look to language in the workers' compensation laws for guidance. Plaintiff further contends that the trial judge should have been recused.

The only questions before us are whether the trial court erred in granting defendant's motion to dismiss or her post-judgment motion to recuse. We do not address plaintiff's arguments concerning the nature of underlying motor-vehicle accident or issues relating to her suit against the State as they have already been reviewed by this Court and decided.

We review the trial court's dismissal decision de novo to determine if "the bare allegations of the complaint are sufficient to state a claim." Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 7, 186 Vt. 605 (mem.); see also Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420. We agree with the trial court that plaintiff fails to state a claim here.

Section 1909(a)(1) of Title 12 defines "informed consent" for purposes of a medical malpractice suit in relevant part as:

> the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have

> disclosed, in a manner permitting the patient to make a knowledgeable evaluation . . . .

(Emphasis added.); see also Short v. United States, 908 F. Supp. 227, 238 (D. Vt. 1995) ("A prerequisite to liability under § 1909 is a finding that a reasonable patient would not have given consent to the medical procedure had he fully known of the risks [of treatment].").

Plaintiff's claim against Dr. Backus does not fit within the plain language of the statute. See Doyle v. City of Burlington Police Dep't, 2019 VT 66, ¶ 10 ("Where the meaning is clear according to the plain language of the statute, we will enforce it according to its terms." (quotations omitted)). Dr. Backus did not provide plaintiff "professional treatment or [a] diagnosis," 12 V.S.A. § 1909(a)(1), and plaintiff underwent no medical procedure for which risks or alternatives needed to be disclosed. Dr. Backus conducted an IME of plaintiff for purposes of a lawsuit and, as plaintiff acknowledged in writing, the IME did not provide "advice of treatment" or establish a "patient-physician relationship." We note, moreover, that plaintiff failed to show that Dr. Backus had any obligation to disclose that he had conducted a prior IME of plaintiff, particularly given that plaintiff—the subject of that examination—was obviously aware, or should have been aware, that it had occurred.

None of plaintiff's arguments persuade us otherwise. Plaintiff fails to show that she raised her argument about "common law requirements" for an IME below, and thus, we do not address this assertion. See Bull v. Pinkham Eng'g Assocs., Inc., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."); see also V.R.A.P. 28(a)(4)(A) (appellant has burden of showing how issues raised on appeal were preserved). Plaintiff similarly fails to show that she argued below that Dr. Backus violated "the confidentiality of the [a]ppellant's records without a valid medical authorization in place." Her arguments concerning testimony about a dog in the police officer's car are meritless, as we previously held in plaintiff's automobile suit. See Brown, 2018 VT 1, ¶ 26 (concluding that plaintiff could "not show why the medical examiner's information about the dog was material to [the] medical examination"). The laws governing workers' compensation claims are clearly irrelevant here. We have considered all of plaintiff's arguments and find them all without merit. Her complaint was properly dismissed for failure to state a claim.

We similarly find no error in the denial of plaintiff's motion to recuse Judge Toor, the judge who presided over this matter. In her recusal motion, plaintiff focused on pretrial rulings made by Judge Toor in plaintiff's prior automobile case against the State. The recusal motion was referred to Judge Teachout, who denied it. Judge Teachout found that plaintiff failed to make any affirmative showing, based on specific facts, of bias or prejudice sufficient to overcome the presumption of the judge's honesty and integrity. See State v. Zorn, 2013 VT 65, ¶ 29, 195 Vt. 381 (identifying standards applicable to motions to disqualify); Ball v. Melsur, 161 Vt. 35, 39, 45 (1993) (stating that judges are presumed to have acted honestly and with integrity; "bias or prejudice must be clearly established by the record"; and "contrary rulings alone, no matter how numerous or erroneous, do not suffice to show prejudice or bias"), abrogated on other grounds by Demag v. Better Power Equip., Inc., 2014 VT 78, 197 Vt. 176. As Judge Teachout explained, the fact that a judge made rulings in another case involving related facts was not, by itself, sufficient to demonstrate bias or prejudice. She examined the rulings in the prior case and found them all

supported by explanations of law pertinent to the specific cases; she found nothing suggestive of bias or prejudice toward any party or outcome. Judge Teachout found the ruling at issue in this case to consist of straightforward conclusions based on legal analysis.

We agree with Judge Teachout that plaintiff fails to make any affirmative showing of bias or prejudice sufficient to overcome the presumption of honesty and integrity accorded to the trial judge.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice