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MAY 25 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER)
)
 Michael J. Wallace,)
)
 Plaintiff,)
)
 vs.)
)
 Kent N. Cunningham,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 C/A NO.: 2022-CP-43-01585

**ORDER GRANTING DEFENDANT'S
 MOTION TO DISMISS WITH
 PREJUDICE**

CERTIFIED TRUE COPY
 OF ORIGINAL FILED

[Signature]
 DEPUTY CLERK OF COURT
 SUMTER COUNTY
 SOUTH CAROLINA

The matter before the Court is Defendant Kent N. Cunningham's Motion to Dismiss filed November 10, 2022. A duly noticed hearing was held on February 24, 2023. Present at the hearing were counsel for Defendant, Alexander W. Atkinson, and *pro se* Plaintiff Michael J. Wallace.

I. Concise Nature of the Case - Procedural History

Plaintiff asserts medical malpractice claims against Kent N. Cunningham, a board-certified physician practicing with Sumter Gastroenterology, LLC in Sumter, South Carolina.

Plaintiff filed the present action against Defendant on October 7, 2022. Plaintiff Wallace has not filed a Notice of Intent pursuant to S.C. Code Ann. § 15-79-125, nor is his complaint in the instant action supported by an expert's affidavit as required by S.C. Code Ann. § 15-79-125 and § 15-36-100.

II. Applicable Law

A. Motion to Dismiss standard of review

South Carolina Rule of Civil Procedure 12(b)(6) governs motions to dismiss for "failure to state a claim upon which relief can be granted." Under 12(b)(6), *SCRCP*, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Heath Alliance*,

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353 S.C. 221, 573 S.E.2d 805 (Ct.App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *see also* *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint).

Additionally, SCRPC 9(c) provides that a denial of the performance or satisfaction of a conditions precedent shall be made specifically and with particularity.

B. South Carolina Substantive Medical Malpractice Law

“**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.” *South Carolina Code* § 15-79-125 (**bold added**). Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, a plaintiff is required to file a notice of intent suit. *Ranucci v Crain*, 409 S.C. 493, 502, 763 S.E.2d 189, 193 (2014). If a medical malpractice plaintiff fails to satisfy the statutory requirements of notice of intent to file suit as a prerequisite to filing an action and/or fails to have an accompanying expert witness affidavit, his claims must be dismissed as a matter of law for failure to state a claim. S.C. Code Ann. §15-79-125; *see Duckett v. SCP 2006-C23-202, LLC*, 225 F.Supp.3d 432 (D.S.C. 2015); *H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E.2d 72 (S.C.App. 2013) (Holding that a failure to file an expert affidavit in support of plaintiff’s professional negligence claims, pursuant to §15-36-100(B), should result in dismissal).

III. Ruling

Plaintiff Wallace's complaint alleges medical negligence, and as such Plaintiff is required to comply with S.C. Code Ann. § 15-79-125 and S.C. Code Ann. § 15-36-100 as conditions of, and as conditions precedent to, filing suit. Plaintiff has neither filed a Notice of Intent to File Suit nor the affidavit of an expert witness as required by S.C. Code Ann. §15-79-125.

Plaintiff argued at hearing that this case falls within the common sense exception to the expert requirement. Counsel for Defendant argued to the contrary under, and distinguishing, *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E.2d 501 (2014), and I agree. Moreover, the common sense exception to the expert requirement does not excuse the necessity of filing a notice of intent under § 15-79-125.

IT IS ORDERED THAT Defendant's Motion to Dismiss Plaintiff's complaint be granted as a matter of law in accordance with S.C. Code Ann. 15-36-100(C) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to comply with §15-79-125(A).

The Court hereby **GRANTS** Defendant's Motion to Dismiss with prejudice.

IT IS SO ORDERED.

[electronic signature to follow]

Honorable George McFaddin, Jr.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

) C/A NO.: 2022-CP-43-01585

Michael J. Wallace,

) Plaintiff,

) **CERTIFICATE OF SERVICE**

vs.

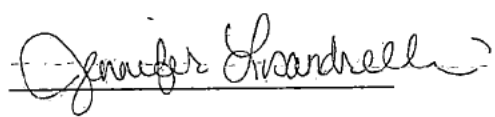
Kent N. Cunningham,

) Defendant.

I, the undersigned employee of the law firm of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that I have this day served the below listed document by personally depositing the same in the United States Post Office, postage prepaid, addressed to the following:

DOCUMENT(S): Proposed Order Granting Defendant's Motion to Dismiss with Prejudice

PARTY(IES): Michael J. Wallace
35 Edwards Rd.
Bishopville, SC 29010



Sumter, South Carolina

March 28, 2023



Sumter Common Pleas

Case Caption: Michael Wallace VS Kent M Cunningham
Case Number: 2022CP4301585
Type: Order/Dismissal

So Ordered

S/George M. McFaddin, Jr., #2759

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