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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge
Case No.: 2022-CP-46-03676

Appellate Case No. 23-000859

Nathaniel Shell,.....Respondent,

v.

Law Office of Neil T. Phillips, LLC and
Neil T. Phillips.....Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

I. Whether the Circuit Court erred in failing to dismiss the Respondent's Complaint with prejudice due to Respondent's failure to file an affidavit of an expert witness as part of his Complaint pursuant to South Carolina Code § 15-36-100, *et seq.*

STATEMENT OF THE CASE

A. Respondent's Factual Allegations against Appellants

This case arises out of Appellants, Law Office of Neil T. Phillips, LLC's and Neil T. Phillip's representation of Respondent, Nathaniel Shell, in a civil lawsuit. **Compl. at ¶¶ 5, 15.** Respondent alleged that Appellants never contacted him with the date and time of the trial, and the circuit court held the trial without his presence. **Compl. at ¶ 13.** Respondent further alleged Appellants breached their duty to him, causing a judgment to be entered against the Respondent. **Compl. at ¶ 17.** Respondent's Breach of Contract cause of action arises out of the same allegations contained in Respondent's Negligence cause of action. **Compl. at ¶¶ 14-28.** The Complaint does not allege or otherwise reference any pending expiration of the statute of limitations or that an affidavit of an expert could not be prepared prior to filing the Complaint.

B. Procedural Posture

Respondent filed this action on or about December 8, 2022. On January 6, 2023, Appellants filed the Motion to Dismiss Respondent's Complaint on the grounds that he failed to file as part of the Complaint, an affidavit of an expert witness pursuant to S.C. Code § 15-36-100, *et seq.* **Appellants' Motion to Dismiss at p. 1; Memorandum in Support of Motion to Dismiss pp. 1-4.** On February 9, 2023 (62 days after Respondent filed the Complaint), Respondent filed a Motion to Extend Time, which requested an Order from the Circuit Court extending the time for Respondent to file an affidavit of an expert witness, and on March 7, 2023, Appellants submitted their opposition to the same. **Respondent's Motion to Extend Time pp. 1-2, Appellants' Memorandum in Opposition to Respondent's Motion to Extend Time pp. 1-2.** On March 9, 2023, a hearing was held before the Circuit Court on the Motion to Dismiss and Motion to Extend Time. **Transcript pp. 4-22.**

On March 28, 2023, the Circuit Court entered an Order, which granted Appellants' Motion to Dismiss without prejudice and denied Respondent's Motion to Extend Time. **Order (March 28, 2023); Transcript p. 22.** In its Order, the Circuit Court specifically found that S.C. Code § 15-36-100 *et seq.* identifies two (2) exceptions to the contemporaneous filing requirement found in Subsections (B), and that Respondent did not show that either exception was applicable in this case. **Order (March 28, 2023) p. 2.** Accordingly, the Circuit Court found that Respondent did not establish any grounds to justify an extension of time to file an expert affidavit, and the Complaint was dismissed *without* prejudice for failure to state a claim pursuant to S.C. Code § 15-36-100. **Order (March 28, 2023) pp. 2.**

Thereafter, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Appellants timely filed a Motion to Reconsider the Circuit Court's Order dated March 28, 2023, which requested that the circuit court amend the language of the Order to allow for the dismissal of Respondent's Complaint with prejudice pursuant to Rule 12(b)(6), SCRPC and South Carolina Code § 15-36-100, *et seq.* **Appellants' Motion to Reconsider p. 1; Memorandum of Law in Support of Motion to Reconsider pp. 3-7.** Respondent did not file any opposition to the Appellants' Motion to Reconsider. On April 25, 2023, the Circuit Court denied Appellants' Motion to Reconsider on the grounds that the dismissal of Respondent's Complaint "was not on the merits and thus was properly without prejudice." **Form 4 Order (April 25, 2023) p. 1.**

After the Court's denial of the Appellants' Motion to Reconsider, on May 25, 2023, the Respondent filed a Notice of Appeal, which was later amended to clarify that Respondent was appealing the circuit court's order dated March 28, 2023, which became final upon entry of the circuit court's denial of the Motion to Reconsider on April 25, 2023. **Notice of Appeal; Amended Notice of Appeal.** On June 2, 2023, Appellants filed their Notice of Cross-Appeal, which was later

amended to clarify when the Appellants were served with Respondent’s Notice of Appeal. **Notice of Cross-Appeal; Amended Notice of Cross-Appeal.** On June 30, 2023, this Court granted Respondent’s request to withdraw his appeal, amended the caption to reflect said change, and ordered a partial remittitur regarding the appeal by Respondent as provided by Rule 221(b), SCACR. **Order (June 30, 2023).**

STANDARD OF REVIEW

In reviewing a motion to dismiss, an appellate court applies the same standard of review as the trial court. *See Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876 (2012) (citing *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245 (2007)). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. If the complaint states a valid claim for relief, dismissal is improper. *Id.* “Questions of law may be decided with no particular deference to the trial court.” *Wiegand v. U.S. Auto. Ass’n*, 391 S.C. 159, 163, 705 S.E.2d 432 (2011).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO DISMISS RESPONDENT’S COMPLAINT WITH PREJUDICE PURSUANT TO SOUTH CAROLINA CODE SECTION 15-36-100.

The circuit court correctly dismissed Respondent’s Complaint for his failure to contemporaneously file an expert affidavit as required by S.C. Code. § 15-36-100. However, these Appellants respectfully assert that the circuit court erred in holding that the dismissal of Respondent’s Complaint be *without* prejudice, as dismissal with prejudice is required pursuant to the statutory language and intent of Section 15-36-100.

It is imperative that Respondent's claims be dismissed with prejudice. Without a dismissal with prejudice, the intent of the statute is not met. South Carolina Code § 15-36-100(B) requires a plaintiff to "file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim," and only two (2) specific exceptions to this "contemporaneous filing requirement" are provided by the statute. *See* S.C. Code § 15-36-100(B).

The first exception exists in Section 15-36-100(C)(1), which permits plaintiffs in actions that are filed within ten (10) days prior to the expiration of the statute of limitations, to file the expert affidavit within 45 days of the filing of the complaint upon pleading that there is a good faith basis to believe the statute of limitations will expire on a claim stated in the complaint and that an expert affidavit could not be prepared due to the time constraints. The statute then provides that if the "affidavit is not filed within the period specified in this subsection . . . , the complaint is subject to dismissal for failure to state a claim." *See* S.C. Code § 15-36-100(C)(1). Here, Respondent's Complaint does not plead any good faith basis for the belief that the statute of limitations may expire within ten (10) days of the filing of the Complaint or that because of this, an expert affidavit could not be prepared.

The second exception allows for an "amended affidavit" pursuant to S.C. Code § 15-36-100(E). The statute does not allow for a *new* affidavit to be filed. Instead, it only allows for an "amendment" to the initial timely filed contemporaneous affidavit. That is not the situation here, where Plaintiff did not file an affidavit, and thus, there can be no amendment to an existing affidavit. Section 15-36-100(E) explicitly states:

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is

subject to dismissal for failure to state a claim, except that *the plaintiff may cure the alleged defect by amendment* within thirty days of service of the motion alleging that the affidavit is defective.

See S.C. Code § 15-36-100(E) (emphasis added).

“The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” See *Sumter Police Department v. Blue Mazda Truck*, 330 S.C. 371, 275, 498 S.E.2d 894 (Ct. App. 1998). “All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute.” *Id.* “Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.” *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492 (Ct. App. 1997). Statutes “should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462 (1995) (citation omitted).

The legislature provided express time constraints to the exceptions requiring contemporaneous filing of the Complaint and “the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that a plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake.” See S.C. Code § 15-36-100(F). If the dismissal of a complaint for failure to file an expert affidavit pursuant to S.C. Code § 15-36-100 is without prejudice, the legislative intent of the exceptions to the contemporaneous filing requirements would be rendered meaningless.

For example, Section 15-36-100(E) gives a plaintiff thirty (30) days to file an *amended* affidavit. However, if dismissal of a complaint is without prejudice under S.C. Code § 15-36-100,

a plaintiff could easily choose to ignore the deadline for the filing of an amended affidavit and refile its complaint with the amended affidavit upon dismissal without prejudice. Moreover, the lack of a comparable provision to Section 15-36-100(E) for when a Plaintiff fails to file an expert affidavit is indicative of the importance of the contemporaneous filing requirements. If a dismissal under S.C. Code § 15-36-100 is without prejudice, plaintiffs can choose to ignore the requirements of Section 15-36-100(B) altogether because a plaintiff can refile its complaint with an expert affidavit upon dismissal.

Indeed, the statute lacks meaning if a plaintiff is allowed to remedy any deficiencies related to the affidavit, including the failure to file an affidavit altogether, at a later date than the statute sets forth. Pursuant to S.C. §§ 15-36-100(C)(1), (E), the Respondent's time to cure his failure to file an affidavit has expired. In addition to the plain language of Section 15-36-100 requiring the contemporaneous filing of an expert affidavit, the very purpose of the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act") is to limit litigation in situations where the plaintiff lacks the basis for a claim. A dismissal with prejudice when an expert affidavit is not filed with a complaint is consistent with both South Carolina law and the intent of the Act.

Georgia has a virtually identical statute, and its courts have determined that dismissal of a complaint for failure to file the required affidavit is with prejudice. The Georgia Civil Practice Act, O.C.G.A. § 9-11-9.1, requires an expert affidavit to be filed contemporaneously with the filing of a complaint alleging professional malpractice, and the courts there have held that:

In construing the statute as amended, it would be unreasonable to hold that the legislature intended for complaints to be dismissed *with* prejudice when a defective affidavit is not timely corrected, and dismissed *with* prejudice when an affidavit is not filed within a certain number of days after the eleventh-hour filing of a complaint, but that complaints are to be dismissed *without* prejudice when the plaintiff fails to file any affidavit whatsoever. No part of the statute provides that a complaint is subject to dismissal without prejudice.

Construing the statute as a whole, we conclude that the legislature intended that dismissals for complete failure to file an affidavit would have the same effect as dismissals for failure to file a proper affidavit: each of these dismissals is for failure to state a claim. Not only is this construction consistent with common sense, it is consistent with the long line of decisions rendered by this Court holding that dismissal for failure to file an expert's affidavit is with prejudice.

See Jordan, Jones & Goulding, Inc. v. Balfour Beatty Const., Inc., 246 Ga. App. 93, 94-95, 539 S.E.2d 828 (2000) (emphasis in original).

The same should be found here as the circuit court has already correctly determined that the Respondent has failed to file the expert affidavit pursuant to S.C. Code § 15-36-100(B), and that no exceptions apply. Additionally, the circuit court has correctly held that the Respondent has not established any grounds to justify an extension of time to file an expert affidavit under the statute. Therefore, the dismissal of Respondent's Complaint should be with prejudice.

In sum, this Court should dismiss the Respondent's Complaint with prejudice as a dismissal without prejudice does not align with the purpose and intent of South Carolina Code § 15-36-100, *et seq.*

CONCLUSION

For the aforementioned reasons, Appellants respectfully request that this Court partially reverse the Circuit Court's Order and dismiss the Respondent's Complaint *with* prejudice.

This 15th day of September, 2023.

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Nathaniel Shell,..... Respondent,

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Law Office of Neil T. Phillips, LLC and
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PROOF OF SERVICE

I certify that I have served *Initial Brief of Appellants*, upon the parties below by electronic mail on September 15, 2023, addressed as follows:

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This 15th day of September, 2023.

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Re: Nathaniel Shell v Law Office of Neil T. Phillips, LLC; and Neil T. Phillips
York County Case No.: 2022-CP-46-03676
Appellate Case No.: 23-000859
CSVL File No: 5457-64793

Dear Ms. Kitchings:

Enclosed please find Appellants Law Office of Neil T. Phillips, LLC, and Neil T. Phillips's *Initial Brief and Designation of Matter to be Included in the Record on Appeal* in this case, together with Proof of Service. By copy of this letter, and we are providing copies of the same to Repondent's counsel. If anything further is required from Appellants at this time, please advise

Sincerely,

s/Douglas W. MacKelcan

DOUGLAS W. MACKELCAN
TAYLOR L. CARY

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enclosure: *Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal*
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