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Aug 28 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge
Civil Action No. 2021-CP-10-01343

Appellate Case No. 2023-001779

Andrew Pampu; Amanda Pampu; and John Pampu, Appellants

v.

Clawson Fargnoli, LLC; Samuel R. Clawson, Jr., Esq.; Christina R.
Fargnoli, Esq.; Barrett R. Brewer, Esq.; and Brewer Law Firm, LLC Respondents

**RESPONDENTS' JOINT
PETITION FOR REHEARING**

INTRODUCTION

Respondents Clawson Fagnoli, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fagnoli, Esq.; Barrett R. Brewer, Esq.; and Brewer Law Firm, LLC (“Respondents”), pursuant to Rule 221, SCACR, respectfully and jointly petition the Court for Rehearing of Respondents’ arguments in this matter. Specifically, pursuant to Rule 221(a), Respondents petition the Court to reconsider its decision that the expert affidavit filed by Appellants was timely pursuant to S.C. Code Ann. § 15-36-100 and, instead, hold that the affidavit was untimely.

BACKGROUND

The relevant background of this Petition concerns Appellants’ failure to contemporaneously file with their original Complaint an expert affidavit pursuant to S.C. Code Ann. § 15-36-100. The Record on Appeal confirms Appellants did not file an expert affidavit with the original Complaint. R. p. 35-56. Appellants do not contest this point. Section 15-36-100 provides an exception to the contemporaneous filing rule but requires the following:

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing ***and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared.***

S.C. Code Ann. § 15-36-100(C)(1) (emphasis added). In their original Complaint, Appellants did not allege that, because of the time constraints, an affidavit of an expert could not be prepared. *See* R. p. 35-56.

ARGUMENT

Rehearing is appropriate when the Court has “overlooked or misapprehended [the petitioners’] argument,” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), or when a “material fact or principle of law has been either overlooked or disregarded.” *State v.*

Haygood, 413 S.C. 239, 240, 776 S.E.2d 262, 263 (2015); *see Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011). Here, the Court should grant rehearing and reverse its decision that Appellants timely filed the Expert Affidavit pursuant to S.C. Code Ann. § 15-36-100.

The Circuit Court issued two (2) Orders dismissing the Amended Complaint in this action. R. pp. 6-31. In each order, the Circuit Court addressed the timeliness of Appellants' expert affidavit filed pursuant to South Carolina Code Annotated 15-36-100. Specifically, the Circuit Court found in response to the Motion to Dismiss filed by Respondents Barrett Brewer and the Brewer Law Firm:

Plaintiffs now argue that simply by filing the initial Complaint only three (3) days before the expiration of the statute of limitations for their legal malpractice claims, the Brewer Defendants should have presumed an affidavit of an expert witness could not be filed due to time constraints. However, Plaintiffs failed to allege such time constraints in the initial filing of the Complaint which blatantly fails to comply with the requirements of S.C. Code § 15-36-100(B)-(C). Therefore, Plaintiffs' claims against the Brewer Defendants are dismissed because their expert witness affidavit was untimely filed.

R. pp. 7-8. In response to the Motion to Dismiss filed by Respondents Clawson Fargnoli, LLC, Christina R. Fargnoli, and Samuel R. Clawson, the Circuit Court found:

However, this argument does not address their original failure to file an expert witness affidavit. It merely suggests that, based on the filing date of the original Complaint, the Clawson Fargnoli Defendants should have presumed that there were time limitations to obtaining an expert witness affidavit. However, Plaintiffs failed to allege such time constraints in the initial filing of the Complaint, which blatantly fails to comply with the requirements of S.C. Code § 15-36-100(B)-(C). Therefore, Plaintiffs' claims against the Clawson Fargnoli Defendants are dismissed because their expert witness affidavit was untimely filed.

R. p. 26. Respondents argued on appeal that Appellants' failure to allege that time constraints prevented the filing of the expert affidavit was fatal to their claims.

In its Opinion, this Court found:

We hold Appellants' expert affidavit was timely filed and sufficient. Appellants' original complaint cited section 15-36-100(C)(1) of the South Carolina Code (Supp. 2024) and stated Appellants would file an amended complaint with the required affidavit within forty-five days. Additionally, Appellants' second amended complaint alleged the affidavit could not be prepared prior to the expiration of the statute of limitations due to time constraints. We find this adequately met section 15-36-100(C)(1)'s exception to the filing requirement. *See* S.C. Code Ann. § 15-36-100(B) (Supp. 2024) (requiring in an action for legal malpractice, the contemporaneous filing with the complaint of "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 based on the available evidence at the time of the filing of the affidavit"); § 15-36-100(C)(1) ("The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire . . . within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared.").

Opinion at 3. Appellants concede the statute of limitations ran on their claims on March 21, 2021. R. p. 129, ¶ 103. Appellants did not file any expert affidavit until April 30, 2021, more than thirty (30) days after the expiration of the statute of limitations. And Appellants did not allege until June 16, 2021, more than 88 days after filing the original Complaint, that, because of time constraints, a contemporaneous expert affidavit could not be filed. R. p. 129, ¶ 103.

The Circuit Court correctly held that Appellants' proffered affidavit of Justin Dillon was untimely as a matter of law. "If a plaintiff fails to file an affidavit as required by [§ 15-36-100], and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the 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." S.C. Code Ann. § 15-36-100(F).

When Appellants filed their initial Complaint on March 19, 2021, they did not include the required expert witness affidavit. R. pp. 35-56. Instead, Appellants alleged that pursuant to § 15-36-100(C)(1), the Complaint was being filed without the required affidavit because there was “a good faith basis to believe the expiration of the statute of limitations is imminent or that the Lawyers may argue that the expiration of the statute of limitations may expire.” R. p. 55, ¶ 103. Appellants then amended their Complaint 42 days later to include an expert witness affidavit. *See* R. pp. 58-78. In response to Respondents’ respective motions to dismiss, which raised Appellants’ untimely expert affidavit as one of several grounds for dismissal, Appellants amended their Complaint a second time to add further allegations related to expert affidavit issue. R. pp. 129, ¶ 103. Specifically, Appellants claimed that the statute of limitations expired on March 21, 2021 (two days after the filing of the initial Complaint) and alleged—for the first time—that because of time constraints, the expert affidavit could not be prepared in time to file it before that date. *Id.* Appellants further claimed that they were filing their Second Amended Complaint under § 15-36-100(E), which they contend permitted them to file an amended pleading to cure the alleged defects. *Id.* Appellants have argued that the trial court ignored these allegations, which they contend establish that the expert affidavit was timely filed. *See* Appellants’ Brief, pp. 28-29.

As an initial matter, by its plain language, § 15-36-100(E) only applies where a plaintiff has filed an expert affidavit that is alleged to be insufficient, not where a plaintiff has failed to file any expert affidavit. *See* S.C. Code Ann. § 15-36-100(E). Stated differently, this section allows a plaintiff to cure an alleged defect in the affidavit by amending the affidavit within a certain amount of time. *See id.* It does not permit a plaintiff to cure his failure to file any affidavit at all by amending the pleadings to include an affidavit. *See id.* Accordingly, Appellants’ reliance on § 15-36-100(E) is misplaced.

Next, § 15-36-100(C)(1) provides, in part, that the contemporaneous filing requirement “does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, *because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared.*” § 15-36-100(C)(1) (emphasis added). Simply put, Appellants made no such allegation in their initial Complaint. *See generally* R. pp. 35-56. And they did not cure this defect in their First Amended Complaint. *See generally* R. pp. 57-87. Moreover, allowing Appellants to circumvent the clear requirements of § 15-36-100 would effectively extend the statute of limitations for professional negligence claims, contrary to the public policy behind the statute. Accordingly, the trial court did not err in holding that Appellants’ expert affidavit was untimely as a matter of law, which provided an independent basis to dismiss Appellants’ legal malpractice claims. *See* S.C. Code Ann. § 15-36-100(F) (“If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation . . .”).

CONCLUSION

This Court’s opinion should be amended pursuant to Rule 221(a) because the Court overlooked or misapprehended Respondents’ argument on the applicable statute. Appellants did not comply with S.C. Code Ann. § 15-36-100(C)(1) because they did not allege in their initial Complaint that, due to time constraints, an expert affidavit could not be prepared. The statute requires Appellants to allege this fact. Their failure to do so is fatal to their legal malpractice claims. As a result, the Circuit Court properly dismissed the Second Amended Complaint.

Respondents request this Court amend its opinion and affirm the Circuit Court on this issue as well.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rules 240(c)(1) and 262(b) of the South Carolina Rules of Appellate Procedure, the undersigned hereby certifies that on August 28, 2025, copies of Respondents' Joint Petition for Rehearing were served on all counsel of record via e-mail as follows:

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