

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

C.A. No.: 2013-CP-22-0817
Ct. App. No.: 2015-000674

Elizabeth Ribelin, Respondent,

v.

Waccamaw Chiropractic & Wellness
Center, LLC and Jeff Evans, Appellants.

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in finding the expert affidavit filed by Plaintiff was sufficient under the provisions of S.C. Code Ann. §§ 15-79-125 and 15-36-100?

2. Did the Trial Court err in denying Defendants' Motion to Dismiss in the face of evidence that Plaintiff failed to timely comply with the pre-suit mediation requirements of S.C. Code Ann § 15-79-125?

STATEMENT OF THE CASE

This medical malpractice action arises out of chiropractic treatment provided to Elizabeth Ribelin ("Plaintiff" or "Respondent") from August 11, 2010, through September 9, 2010, by Dr. Jeff Evans. Elizabeth Ribelin filed a Notice of Intent to File Suit pursuant to S.C. Code Ann. § 15-79-125 on August 9, 2013, naming as defendants Waccamaw Chiropractic & Wellness Center, LLC and Jeff Evans, DC. [Transcript, p. 2, Notice of Intent C/A No 13-CP-22-0817.] Contemporaneous with this Notice of Intent, Plaintiff filed an expert affidavit of John D Davila, DC, and responses to standard interrogatories.

Counsel for Waccamaw Chiropractic & Wellness Center, LLC, and Jeff Evans, DC (collectively, "Defendants" or "Appellants") sent a Notice of Appearance on behalf of Defendants on August 30, 2013, which was filed on September 3, 2013 [Transcript, p. 2; Notice of Appearance]

Counsel for Defendants notified Plaintiff's counsel via telephone call and letter on December 16, 2013, that the affidavit of Plaintiff's expert, Dr. Davila, was based on an incomplete set of patient records and, therefore, was insufficient. Defense counsel provided at that time a complete copy of Plaintiff's chart to Plaintiff's counsel. [Memo in Support of MTD, Exh. C.] Defense counsel received no response from Plaintiff's counsel and sent an additional letter on February 7, 2014, indicating that the entire patient chart had now been provided, it being Defendants' understanding that Plaintiff's counsel would allow Plaintiff's expert to review the entire chart to determine if this was a case they intended to pursue. Defendants requested Plaintiff contact them to discuss the next steps if the case was to go forward. [Memo in Support of MTD, Exh D.]

Defendants received no response. No mediation was held by the statutory deadline of January 1, 2014, pursuant to S.C. Code Ann. § 15-79-125(C). In fact, Plaintiff took no action to set a mediation for approximately 330 days. Defendants filed a Motion to Dismiss Plaintiff's Notice of Intent to File Suit, asserting that Plaintiff had failed to file a sufficient expert affidavit pursuant to S.C. Code Ann. §§ 15-36-100 and 15-79-125, as well as on the basis that Plaintiff had failed to comply with the applicable time frame in which to conduct mandatory mediation pursuant to S.C. Code Ann. § 15-79-125(C). [Motion to Dismiss, filed August 26, 2014.]

The motion came for hearing on October 3, 2014. [Hearing Transcript] A Form 4 Order was filed on October 3, 2014, notifying of denial of the motion [Form 4 Order, filed October 3, 2014.] Defendants filed a Notice of Appeal of the Trial Court's ruling on October 31, 2014. [Notice of Appeal, filed October 31, 2014.] This appeal was denied and remanded back to the Trial Court due to no final order having been issued in on the matter. [Court of Appeals Order of Dismissal, filed November 18, 2014.] Mediation resulting in an impasse was held at the Trial Court's request on November 17, 2014 [Mediation Results Report, filed November 24, 2014] Subsequently, the Trial Court issued its final Order denying Defendants' Motion to Dismiss and continuing the action. [Order Denying Motion to Dismiss, filed February 17, 2015.] Defendants timely filed their Notice of Appeal on March 17, 2015 [Notice of Appeal, filed March 17, 2015.] Defendants timely requested a transcript of the hearing on their Motion to Dismiss and received the same on March 20, 2014. Defendants timely file this Initial Brief in accordance with the South Carolina Appellate Court Rules

Factual Timeline

- 8/9/2013 Notice of Intent filed.
- 8/30/13 Entry of Appearance for Defendants.
- 12/16/13 Defendants provided Plaintiff with a full set of medical records and the following correspondence noting that Plaintiff's expert did not have the entire file from Dr. Evans' office, thus the expert affidavit was incomplete. Defendants requested Plaintiff contact them after review to discuss the case.
- 1/1/14 120 days passed – no mediation is requested by Plaintiff.
- 2/7/14 Defendants sent Plaintiffs a follow-up letter as to expert affidavit and status of case. Specifically, Defendants stated "[P]lease accept this letter as a follow up to our correspondence of December 16, 2013. Along with that correspondence we forwarded you a complete copy of your client's medical records from Dr Evans' office. It is our understanding you were going to take these documents to your expert and determine whether or not this is a case you intend to pursue. Since providing you with those records some time ago, we have not received any indication from you as to your plan moving forward. Once you have and an opportunity to discuss this case with your expert, please contact our office and let us know where you stand with regard to this matter."
- 2/26/14 180 days passed - still no response from Plaintiff regarding mediation or status.
- 4/28/14 240 days passed – still no response from Plaintiff regarding mediation or status.
- 6/26/14 300 days passed – still no response from Plaintiff regarding mediation or status.
- 8/26/14 Defendants filed their Motion to Dismiss on the grounds that Plaintiff has failed to timely comply with mediation requirements of S.C. Code Ann. § 15-79-125.
- 10/2/14 Plaintiff finally asked for the case to be mediated through filing a Motion to Compel Mediation, approximately 420 days after filing and approximately 274 days after the deadline for mediation to occur.

SUMMARY OF ARGUMENT

It is undisputed that S.C. Code Ann. § 15-79-125(A) requires that an affidavit which satisfies S.C. Code Ann. § 15-36-100 must be filed contemporaneously with a Notice of Intent To File Suit. It is further undisputed that S.C. Code Ann § 15-79-125(C) mandates the parties must participate in a mediation conference within 120 days from the filing of the Notice of Intent to File Suit, unless an extension is granted by the court for an additional 60 days. In the instant matter, Plaintiff's expert affidavit was insufficient to meet the statutory requirements, no mediation was held within 120 days, no extension was granted by the Court, and Defendants received no response from Plaintiff for eight (8) months following the filing of the Notice of Intent. Plaintiff argues that this is not unreasonable and it is within the Court's discretion to allow the mediation process to continue beyond the statutory guidelines. The intended purpose of the statute is to effectuate expeditious litigation of meritorious matters and cull frivolous litigation – allowing Plaintiff to prolong the mediation process through willful non-response is inapposite to the legislative intent. Because Plaintiff took no actions to have this case mediated for almost eleven (11) months following the deadline for mediation, Plaintiff has failed under § 15-79-125 and Plaintiff's Notice of Intent should be dismissed with prejudice.

Applicable Statutory Provisions

S.C. Code Ann. § 15-79-125:

(A) 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, in a county in which venue would be proper for filing or initiating the civil action. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts

showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosure required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.

(B) After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure

(C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to the mediation pursuant to his section.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure. The action must be filed:

- (1) within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end; or
- (2) prior to expiration of the statute of limitations, whichever is later.

(F) Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution after the civil action is initiated. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of the summons and complaint to initiate a civil action in the matter.

S.C. Code Ann. § 15-36-100:

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion.

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must 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 based on the available evidence at the time of the filing of the affidavit.

(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 a 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. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period of filing an answer to the Complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

Applicable Law – Standard of Review

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Issues of statutory interpretation are questions of law, which are subject to de novo review by the appellate court. Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693, 695-96 (2012).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE EXPERT AFFIDAVIT FILED BY PLAINTIFF WAS SUFFICIENT UNDER THE PROVISIONS OF S.C. CODE ANN. §§ 15-79-125 AND 15-36-100.

Section 15-79-125(A) requires that a plaintiff contemporaneously file an affidavit of an expert witness with the Notice of Intent to File Suit. The affidavit is subject to the requirements established in § 15-36-100. "S.C. Code Ann. § 15-79-125(A)'s reference to the affidavit requirements established in S.C. Code Ann. § 15-36-100 constitutes an adoption of all provisions of § 15-36-100." Ranucci v. Crain, 409 S.C. 493, 504, 763 S.E.2d 189, 194 (2014). Plaintiff's original affidavit filed contemporaneously with the Notice of Intent does not reference any act or omission undertaken by Defendant Jeff Evans, DC. Rather, the entire affidavit refers to non-party Dr. John Evans.

Defendants acknowledge that the statute allows for a plaintiff to cure a defective affidavit within a proscribed time frame after the defendant alleges such defect in a motion to dismiss. "[T]he plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective " § 15-36-100(D).

Defendants notified Plaintiff initially of the defects in her expert's affidavit on December 16, 2013, and received no response or amended affidavit. Defendants contacted Plaintiff again on February 7, 2014, inquiring about the expert affidavit and received no response. Defendants filed their Motion to Dismiss on August 26, 2014, alleging defects in Plaintiff's expert affidavit and effectively notifying Plaintiff to cure said defects. Plaintiff did not file her amended expert affidavit until October 1, 2014 – missing the statutorily prescribed time frame of thirty (30) days by many months. Pursuant to § 15-36-100, this untimely amended affidavit does not cure the defective affidavit and is insufficient. As such, Plaintiff is not in compliance with the expert affidavit requirement under § 15-79-125 and, therefore, the Notice of Intent should be dismissed

II. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS IN THE FACE OF EVIDENCE THAT PLAINTIFF WILLFULLY FAILED TO TIMELY COMPLY WITH THE PRE-SUIT MEDIATION REQUIREMENTS OF S.C. CODE ANN. § 15-79-125.

Section 15-79-125 was enacted by the S.C. Legislature as part of the Medical Malpractice Reform Act of 2005. Section 15-79-125(A) requires that a plaintiff file a Notice of Intent to File Suit along with an affidavit of an expert witness prior to filing any civil medical malpractice action. Section 15-79-125(C) mandates that a mediation conference occur within ninety (90) and no later than one hundred twenty (120) days

from the date of filing, unless an extension for no more than sixty (60) days is granted by the Court. As further provided in section (C), the mediation process is to be governed by the South Carolina Alternative Dispute Resolution Rules, unless inconsistent with the statute. While the statute is silent as to the penalties imposed for non-compliance, § 15-79-125(D) grants explicit jurisdiction to the circuit court to maintain enforcement of these provisions.

Upon Plaintiff's filing of her Notice of Intent on August 9, 2013, the clock began running for the parties to hold timely mediation pursuant to the statute. However, no effort was made by Plaintiff to schedule this mediation, and despite defense counsel's repeated inquiries to Plaintiff regarding her expert witness affidavit and scheduling of mediation, Plaintiff failed to respond. Thus, no mediation was held by technical statutory deadline of January 1, 2014. Further, no extension was requested by Plaintiff nor granted by the court for an additional sixty (60) days within which the case could be mediated. It was not until Defendants filed a Motion to Dismiss for failure to comply with the statutory requirements eight (8) months after the deadline for mandatory mediation that Plaintiff finally responded. Plaintiff then tried to cure her defects by filing a Motion to Compel Mediation, but this was deemed moot by the both the parties and the Court.

There is no disagreement that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Ross v. Waccamaw, 404 S.C. 56, 62, 744 S.E.2d 547, 550 (2013) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."

Singletary v S Carolina Dept of Educ., 316 S.C. 153,161, 447 S.E.2d 231, 235 (Ct. App. 1994) (citations omitted) “It is clear the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims.” Ross at 63. Had it been the intention of the Legislature to allow for protracted settlement discussions between the parties in the pre-suit phase, it would not have specified time limes within the statute by which the parties are expected to abide. Defendants submit that to allow a party to ignore the statutory requirements and disregard Defense counsel’s prompts to cure significant defects, as well as participate in mediation undermines entirely the legislative intent of providing expeditious resolution to these matters.

Section 15-79-125(D) specifically denotes that the enforcement of these provisions is within the jurisdiction of the Circuit Court. While the courts decline to construe the time constraints in § 15-79-125 as a trap for plaintiffs with potentially meritorious claims, under certain circumstances dismissal is the appropriate response to the failure to comply with the 120-day statutory requirement. See generally Ross v. Waccamaw. Where consistent with the provisions of § 15-79-125, the Circuit Court Rules of Alternative Dispute Resolution control the mediation process. These rules specifically allow for sanctions under the South Carolina Rules of Civil Procedure Rule 37(b)(2)(C). “The courts have generally upheld a trial court’s decision to use dismissal as a sanction only when necessary to protect the rules of discovery or when there was evidence of bad faith, willful disobedience or a callous disregard for the rights of other litigants.” Rickerson v. Karl, 2015 S.C. App. LEXIS 54, *8.

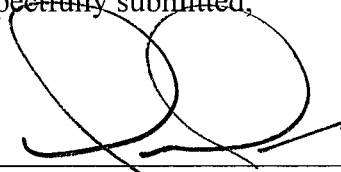
In the instant matter, Plaintiff cannot avoid the consequences of her failure to disregard both the applicable statutory provisions, and the rights of the defendants to have an expeditious mediation in an attempt to resolve the matter. Moreover, Plaintiff cannot use the excuse of waiver or estoppel, as were present in the facts in Ross. Failing to respond to Defendants' inquiries and requests for mediation over a period of eight (8) months is none other than unnecessary delay and disregard of the law. Simply put, waiting almost 410 days after filing the Notice of Intent and approximately 274 days after the deadline for mediation to occur, to even seek a mediation of the Notice of Intent is willful disobedience of the rules. Accordingly, dismissal is warranted and Plaintiff's Notice of Intent should be dismissed.

CONCLUSION

Plaintiff's failure to amend and cure her expert's affidavit in a timely manner, coupled with her directed failure to timely comply with S.C. Code Ann. § 15-79-125(C)'s provisions show a clear pattern of willful disobedience and a callous disregard for the rights of other litigants. The Trial Court erred in finding that Plaintiff's deficiencies are acceptable under the law and do not warrant dismissal of the action. Dismissal of Plaintiff's Notice of Intent with prejudice is the proper action by the Court. This Court should reverse the Trial Court's ruling and remand the case for reconsideration of Appellants' Motion to Dismiss in light of Plaintiff's incurable deficiencies and disregard of the provisions of § 15-79-125.

[signature to follow]

Respectfully submitted,

A handwritten signature in black ink, consisting of two large, overlapping loops followed by a horizontal line and a small upward tick at the end.

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April 17, 2015

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APPEAL FROM GEORGETOWN COUNTY
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The Honorable Larry B. Hyman, Jr.
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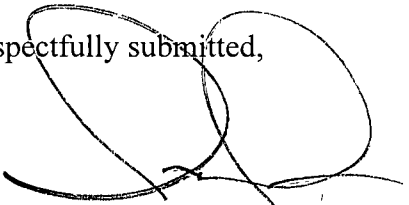
Waccamaw Chiropractic & Wellness
Center, LLC and Jeff Evans,

Appellants.

CERTIFICATION OF COUNSEL

Appellants certify, through undersigned counsel, that the Initial Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
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The Honorable Larry B. Hyman, Jr.
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Elizabeth Ribelin, Respondent,

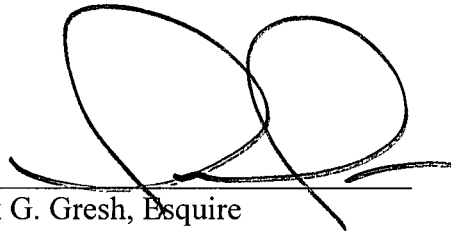
v.

Waccamaw Chiropractic & Wellness
Center, LLC and Jeff Evans, Appellants.

PROOF OF SERVICE

I certify that on this 17th day of April, 2015, a copy of the foregoing Initial Brief of Appellants was served on counsel of record by mailing a copy, properly addressed with sufficient postage affixed thereto as follows:

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SC Court of Appeals

April 17, 2015

VIA COURIER

The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
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Re: Elizabeth Ribelin v. Waccamaw Chiropractic & Wellness Center, LLC, and Jeff
Evans, DC
Case No : 2015-000674

Dear Ms Kitchings.

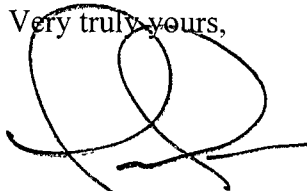
Enclosed please find the original and one copy of the Initial Brief of Appellants and Appellants' Designation of Matter to be Included in the Record on Appeal in the above-referenced matter.

Please acknowledge receipt of these documents by stamping the enclosed copy of this letter and returning it to me in the envelope provided

By copy of this letter, I am this day serving a copy of these enclosed documents on Robert W. Maring, Attorney for Respondent

Thank you for your time and attention to this matter. Should you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,



Jack G. Gresh

JGG/sea

Enclosures as stated.

cc: Robert W. Maring, Esq , counsel for Plaintiff/Respondent