THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 21 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-2954

DARRELL EDWARDS,

Appellant,

v.

E. PAUL GIBSON, REISEN LAW FIRM, E. PAUL GIBSON PC and JOHN DOES 1-5,

Respondent.

INITIAL BRIEF OF APPELLANT

Chauntel Demetrius Bland, Esq.
Bar No. 70150
463 Regency Park Drive
Columbia, SC 29210
Tel. (803) 319-6262
Fax. (866) 322-6815
chauntel.bland@yahoo.com
Attorney for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. THE COURT ERRED IN NOT ALLOWING PLAINTIFF TO DISMISS HIS CASE AS A MATTER OF RIGHT UNDER RULE 41(a)(2) BECAUSE DEFENDANTS MADE NO SHOWING OF LEGAL PREJUDICE CAUSED BY THE DISMISSAL.

2. BECAUSE THE VERIFIED COMPLAINT, AFFIDAVITS OF PLAINTIFF'S EXPERT AND OTHER MATERIAL SUBMITTED BY PLAINTIFF ESTABLISH A GENUINE ISSUE OF MATERAL FACT, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

STATEMENT OF THE CASE

On May 9, 2014, Plaintiff Darrell Edwards filed a Verified Complaint in the Court of Common Pleas in the County of Charleston against Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson, PC, alleging professional negligence, misrepresentation and breach of contract in that Defendants failed to assert claims on behalf of Mr. Edwards under the Longshore and Harbor Workers Compensation Action ("LHWCA") and the South Carolina Workers Compensation Act ("SCWCA"), thereby prejudicing and damaging Mr. Edwards. The action was filed by Mr. Edwards' attorney, Eduardo Curry of Curry & Housey, PA of Charleston, South Carolina. In addition to being a verified complaint, the Complaint also incorporated the Affidavit of Joseph H. Reinhardt, Esq., Plaintiff's Trial Expert Witness, which in turn incorporated his expert report. Attorney Reinhardt opined that Defendants had committed professional negligence.

On or about July 22, 2014, after receiving a letter from Defendants' counsel threatening Rule 11 sanctions, Mr. Curry filed a Motion and Order to be Relieved as Counsel, citing a "conflict of interest." That same day, the Court entered an Order allowing Attorney Curry and his firm to withdraw as counsel and instructing Mr. Edwards to retain new counsel within 90 days. Since that date, Mr. Edwards diligently searched to retain new

counsel.

On December 5, 2014, Defendants filed a Motion for Summary Judgment, a Memorandum of Law in Support of the Motion of Summary Judgment. In support of their Motion for Summary Judgment, Defendants attached a number of affidavits, opining that Defendants did not commit professional malpractice.

On or about December 10, 2015, Mr. Edwards filed a letter with the Court, addressed to Judge Dennis. In the letter, Mr. Edwards, proceeding pro se despite efforts to hire substitute counsel, informed the Court, "I have been diligently searching for new counsel." He represented to the Court that he had to look for counsel outside the Charleston area, and in fact, was talking to counsel "in the West Coast." Later in the letter, Mr. Edwards requests that the action be stayed pending a determination of his LHWCA claim or, in the alternative, he be awarded another 60 days to respond. The Court did not respond to the letter.

On January 15, 2015, the parties appeared before Judge Dennis on the hearing on Defendants' Motion for Summary Judgment. Mr. Edwards, both verbally and through a letter dated the same date, moved to continue the case, or in the alternative, for leave to dismiss under Rule 41(a). The judge denied both motions. Mr. Edwards also sought to supplement the Affidavit of Attorney Reinhardt. The Court did not consider the supplemental affidavit or the additional evidence attached to the Letter to Judge Dennis, filed with the Court on or about January 15, 2015. At the conclusion of the hearing, Judge Dennis ordered Defendants' counsel to draft an Order allowing Summary Judgment.

On or about January 16, 2015, counsel for Defendants provided a copy of the proposed Order on Mr. Edwards. Mr. Edwards again wrote Judge Dennis, objecting to the

language of the proposed Order and asking for Judge Dennis to reconsider. Judge Dennis signed the Order as proposed by Defendants. The Court of Common Pleas is presently considering the letter as a Motion for Reconsideration to be calendared before Judge Dennis.

FACTS

On June 10, 2010, at approximately 13:10, Mr. Edwards, as owner and operator of a 2002 BMW motor vehicle was stopped inside the main gate of the Wando Welch Terminal of the South Carolina State Ports Authority in Mount Pleasant, South Carolina. On that same date and at that same time, Craig J. Connolly, operating a 1989 tractor trailer truck owned by Atlantic Trucking, Inc., ("Atlantic Trucking") was stopped immediately behind Mr. Edwards. Suddenly and without warning, the truck struck Mr. Edwards' car "with great force." At the moment of impact, Mr. Edwards was on his worksite, the Wando Welch Terminal. He was not outside the gates, as suggested by Defendants. As a result of the impact, Mr. Edwards is totally disabled.

As a direct and proximate result of actions by Atlantic Trucking, Mr. Edwards "suffered serious and permanent personal and bodily injuries." Defendants have alleged that such actions were, in fact, "willful, wanton, reckless, careless and grossly negligent." In support of this claim of gross negligence by Atlantic Trucking, Defendants authored a complaint, alleging Atlantic Trucking operated the tractor-trailer as a "dangerous instrumentality."

On behalf of Mr. Edwards and after complying with Rule 11 of the South Carolina Rules of Civil Procedure, Defendants filed a Complaint in United States South Carolina District Court, Charleston Division, on December 1, 2011. In addition to making the above

referenced allegations, Defendants orchestrated a scheme to falsely claim that Mr. Edwards was a resident of Texas in order to improperly obtain federal jurisdiction through diversity. Although Defendants exerted great effort to have Mr. Edwards claim he was a resident of Texas, Defendants failed to file concurrent claims under LHWCA and SCWCA, which would have provided Mr. Edwards temporary total disability payments during the pendency of his action and permanent total disability payments subsequent to the action.

Shortly after the running of the two year statute of limitations for LHWCA claims ran on June 10, 2012, Mr. Edwards terminated Defendants from representation on June 14, 2012. In a letter to U.S. District Court Judge Patrick Duffy, Mr. Edwards wrote, "I have learned from the U.S. Department of Labor, Office of Workers Compensation, that my case should have been filed under the Longshore Act and the South Carolina Workers Compensation." Mr. Edwards alerted the Court that he was under financial distress because he was not receiving any temporary total compensation he could have received under the LHWCA and SCWCA because Defendants failed to file under those acts. Mr. Edwards states, "I have had to draw from my retirement and I have nearly lost my home." By filing under the act, Mr. Edwards would have had income during the pendency of his lawsuit. Without the income, he came under financial distress and settled for less than he could have received under the LHWCA and SCWCA. It bears noting that the LHWCA and SCWCA would have restricted Defendants' portion of proceeds and attorney fees, thereby providing a pecuniary interest in filing solely a third-party action.

ARGUMENTS

1. THE COURT ERRED IN NOT ALLOWING PLAINTIFF TO DISMISS HIS CASE AS A MATTER OF RIGHT UNDER RULE 41(a)(2) BECAUSE DEFENDANTS MADE NO SHOWING OF LEGAL PREJUDICE CAUSED BY THE DISMISSAL.

Appellant Edwards contends the trial court erred in failing to dismiss his case without prejudice. At the hearing, Mr. Edwards, then proceeding pro se, attempted to dismiss his case without prejudice by presenting a written letter to Judge Dennis. Although Mr. Edwards moved for a voluntary dismissal, both orally and in writing, the judge denied the Motion to Dismiss without Prejudice. Defendants presented no evidence showing legal prejudice, and apparently the Court denied the motion without such a showing.

"Ordinarily, a plaintiff is entitled to a voluntary dismissal without prejudice as a matter of right, unless there is a showing of legal prejudice to the defendant." *Knight v. Waggoner*, 359 S.C. 492, 495, 597 S.E.2d 894 (2004) (citing *Moore v. Berkeley County*, 290 S.C. 43, 44, 348 S.E.2d 174, 175 (1986); *Gulledge v. Young*, 242 S.C. 287, 291, 130 S.E.2d 695, 697 (1963)). If no legal prejudice is shown, the trial judge has no discretion with respect to granting a dismissal without prejudice; but if prejudice to the other party is shown, the matter becomes one of discretion for the trial judge. *Id.* (citing *Moore*, 290 S.C. at 44, 348 S.E.2d at 175 (1986); *Ralston Purina Co. v. O'Dell*, 248 S.C. 37, 41-42, 148 S.E.2d 736, 737 (1966)).

In *Prime Medical Corp. v. First Medical Corp.*, 291 S.C. 296, 353 S.E.2d 294 (1986), the Court set forth the reasoning why the then "new Rule 41(a)(2)" should continue to be read in light of *Gulledge* and *Moore*:

> Both the Supreme Court, applying Rule 41(a)(2) of the new rules, and this court, applying Circuit Court Rule 45(2), have recently reasserted the rule set forth in *Gulledge* that "a plaintiff is entitled to a voluntary nonsuit without prejudice as

> a matter of right, unless there is a showing of legal prejudice to the Defendant." *Moore v. Berkeley County*, 290 S.C. 43, 44, 348 S.E.2d 174, 175 (1986), quoting *Marlow v. Marlow*, 284 S.C. 155, 325 S.E.2d 703 (Ct.App.1984). The showing of legal prejudice must be made by the defendant. See *Walker v. Jones*, 269 S.C. 19, 21, 235 S.E.2d 810, 810 (1977) ("The party opposing the motion for [a] voluntary nonsuit without prejudice must show prejudice (i.e., 'legal' prejudice) to successfully defeat the motion.")

Id. at 296-97, 353 S.E.2d at 294.

In *Prime Medical*, the non-moving party made no showing that it would suffer any legal prejudice in the event of a dismissal without prejudice. In reversing and remanding the case, the Court held "a plaintiff is entitled to a voluntary nonsuit without prejudice as a matter of right, unless there is a showing of legal prejudice to the Defendant." In the present case, Defendants made no showing of legal prejudice; consequently, the Court is without discretion and must allow the dismissal without prejudice as a matter of right. Instead, the Court proceeded with the hearing on the Motion for Summary Judgment and dismissed Plaintiff's case with prejudice.

Appellant respectfully requests that the Court reverse the dismissal with prejudice and remand the case so that it may be dismissed without prejudice.

2. BECAUSE THE VERIFIED COMPLAINT, AFFIDAVITS OF PLAINTIFF'S EXPERT AND OTHER MATERIAL SUBMITTED BY PLAINTIFF ESTABLISH A GENUINE ISSUE OF MATERAL FACT, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP; see also *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C.

242, 247, 626 S.E.2d 1, 3 (2006) ("In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party."). In cases decided by summary judgment, the court must view all inferences arising from the facts in light most favorable to the nonmoving party. *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party." *Cantrell v. Green*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct.App.1990).

In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Rydde v. Morris,* 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession," *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000), and "[t]he standard to be applied in determining legal malpractice issues is statewide," *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 437-38, 472 S.E.2d 612, 614 (1996). Finally, generally, a plaintiff in a legal malpractice action must establish this standard of care by expert testimony. *Id.* at 435, 472 S.E.2d at 613.

In the present case, the parties do not dispute the existence of an attorney-client relationship. Moreover, the Verified Complaint alleges that Mr. Edwards "was unable to collection South Carolina Worker's Compensation Benefits and ... Longshore and Harbor

Workers Compensation Act Benefits". These verified pleadings are regarding damages are uncontested and must be considered in contravention to the movant's affidavits. *Dawkins v. Fields*, 345 S.C. 23, 29, 545 S.E.2d 515 (S.C. App. 2001) (For the purposes of summary judgment, a verified complaint is the equivalent of an affidavit, provided that the verified complaint meets the requirements of Rule 56(e).).

A fair reading of the Order Granting Summary Judgment discloses that the Court solely focused on the affidavits presented by the Defendants and did not consider the Verified Complaint, Affidavit of Joseph H. Reinhardt, Esq., Plaintiff's Trial Expert Witness, Reinhardt's supplemental Affidavit or the other material submitted by Mr. Edwards. The Order is devoid of any mention of the Reinhardt Affidavit. Reinhardt's Affidavit and Supplemental Affidavit, along with the materials attached to the January 15, 2015 letter, establish a genuine issue of material fact as to claims asserted by Mr. Edwards.

The record reflects that Joseph H. Reinhardt, J.D., opined the following:

1. Atty. Gibson breached his duty of care [to proceed with reasonable diligence as the average qualified practioner would so do] to Mr. Edwards when Atty. Gibson failed to timely file on Mr. Edward's behalf under the South Carolina Workers' Compensation Act.

2. Atty. Gibson's breach of his duty of care was the proximate cause of the damages suffered by Mr. Edwards when he received no compensation under the South Carolina Workers' Compensation Act.

3. Atty. Gibson breached his duty of care [to proceed with reasonable diligence as the average qualified practioner would do] to Mr. Edwards when Atty. Gibson failed to timely file a claim on Mr. Edward's behalf under the U.S. Longshore and Harbor Workers Compensation Act.

4. Atty. Gibson's breach of his duty of care was the proximate cause of the damages suffered by Mr. Edwards when he received no compensation under the U.S. Longshore and Harbor Workers Compensation Act.

The seven-page, single spaced expert opinion then sets forth in great detail the grounds for

each opinion. Contrary to the "facts" asserted by Defendants and accepted by the Court, Mr. Edwards was on the worksite when he was injured. Moreover, passing security is within the course and scope of his employment. Attorney Reinhardt report, which is incorporated within his Affidavit, addresses each of the elements of the underlying professional negligence claim and creates, for each element, a genuine issue of material fact to be determined by a jury. In conclusion, Attorney Reinhardt states, "There is absolutely nothing in the record that I have reviewed that gives even a hint that Mr. Edward's South Carolina Workers' Compensation claim would not have been successful if it had been timely filed." Attorney Reinhardt makes a similar statement regarding the LHWCA claim.

In Attorney Reinhardt's 1st Supplemental Trial Expert Witness Report, dated January 13, 2015 (filed with Mr. Edward's letter dated January 15, 2015), Attorney Reinhardt argues that the affidavits submitted in support of Defendant's Motion for Summary Judgment are conclusory. "Each of the proffered affidavits of Atotrneys Fitzhugh III, Raley, Luzuriaga, Bluestein, Jacobson, Crossland, Warder and Harrell states the conclusion that Mr. Edwards did not meet the situs requirement to bring for the omitted claims. Each affidavit is devoid of any reasoning or rationale underlying the conclusion. As such they should be disregarded by the Court." Attorney Reinhardt then provides a legal argument to further establish that the situs test is satisfied.

In *Bowen v. Lee Process Systems Co*, 342 S.C. 232, 536 S.E.2d 86 (S.C. App. 2000), this Court held that it must conduct a thorough review of the record to determine if the Order of the lower court is supported by the record:

> On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record.

> It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal.

Id. at 235.

Appellant submits that the record is replete with facts and expert opinions that create genuine issues of material fact, warranting a trial on the merits. In sum, Appellant submits that trial court erred in granting summary judgment in this case.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

This the _____ day of May, 2015.

By: _____

Chauntel Demetrius Bland, Esq.
Bar No. 70150
463 Regency Park Drive
Columbia, SC 29210
Tel. (803) 319-6262
Fax. (866) 322-6815
chauntel.bland@yahoo.com
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this 21th day of May 2015, postage prepaid to

Carl E. Pierce, II
Pierce, Herns, Sloan & Wilson
The Blake House
321 East Bay Street
Charleston, SC 29401
P.O. Box 22437
Charleston, SC 29413
Tel. (843) 722-7733
Fax. (843) 722-7732
Attorney for Defendants/Respondants
E. Paul Gibson, Reisen Law Firm, E. Paul Gibson PC

RECEIVED
MAY 21 2015
SC Court of Appeals

By: Chantel Demetrius Bland

Chauntel Demetrius Bland, Esq.
Bar No. 70150
463 Regency Park Drive
Columbia, SC 29210
Tel. (803) 319-6262
Fax. (866) 322-6815
chauntel.bland@yahoo.com
Attorney for Plaintiff/Appellant