

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Fifth Judicial Circuit Court Judge

Appellate Case No. 2015-000061

Brenda G. Harmon,..... Appellant,

v.

Joel E. Johnson, D.M.D.,..... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in dismissing Appellant's summons and complaint based on Appellant's failure to file a Notice of Intent and expert affidavit as is required by S.C. Code Ann. 15-79-125(A) (Supp. 2010)?
2. Did the Circuit Court err in dismissing the Appellant's summons and complaint based on the Appellant's failure to engage in presuit mediation as is required by S.C. Code Ann. 15-79-125(C) (Supp. 2010)?
3. Did the Circuit Court err in denying Appellant's Motion for Default Judgment?

STATEMENT OF THE CASE

Appellant filed her Summons and Complaint alleging dental malpractice on April 17, 2014 and served Respondent on May 22, 2014 (Complaint, p. 1-3). Appellant did not file a Notice of Intent to File suit as is required by S.C. Code Ann. 15-79-125 (Supp. 2010). Appellant failed to include with the Summons and Complaint an affidavit by an expert witness detailing any breach of the standard of care by Respondent. Along with the summons and complaint, Appellant filed a signed affidavit detailing the date upon which the statute of limitations was to run and asserted that because of the imminent statute of limitations, she was entitled to a 45-day extension in which to file an expert affidavit. (Affidavit of Brenda Harmon, p.1).

Respondent filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP on May 30, 2014 that was denied with leave to re-file by Judge Alison Lee on August 11, 2014. (First Motion to Dismiss p.1-3, Judge Lee Order p.1). Respondent then filed an Answer and served discovery on August 12, 2014 in which Respondent denied every allegation in the Complaint with the exception of paragraphs 1, 2, and 3. (Answer p. 1-3). Respondent received an unstamped "Response to Representatives of Defendant's Denial" from Appellant dated August 21, 2014 in which Appellant acknowledged Respondent's denial of claims in Respondent's Answer and Appellant refused to respond to discovery. (Plaintiff's Response, p. 1-3).

Respondent filed a second Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP on September 23, 2014 due to Appellant's failure to provide an affidavit of an expert witness as is required by S.C. Code Ann. 15-79-125 and 15-36-100 (Supp. 2010). (Second Motion to Dismiss p.1-5). Appellant then sent an unstamped document entitled

“Willful Disrespect & Disregard for This Case and Time to Reply. Default” to Respondent’s counsel in which she again acknowledged her receipt of Respondent’s Discovery. (Plaintiff’s “Willful Disrespect & Disregard for This Case” document, p. 1). Despite Respondent’s filing and service of an Answer and discovery and Appellant’s acknowledgment of the receipt of these pleadings, Appellant filed a Motion for Default Judgment on November 10, 2014. (Plaintiff’s Motion for Default Judgment p. 1-3).

In a hearing on the Motion to Dismiss and Motion for Default Judgment Judge DeAndrea Benjamin found that Respondent had timely answered the Summons and Complaint and that Appellant failed to produce an expert witness affidavit supporting her Complaint. (Transcript p. 9-10, 14-15). Judge DeAndrea Benjamin then entered an Order of Dismissal on January 6, 2015, dismissing Appellant’s Complaint with prejudice. (Order of Dismissal, p.1). On the same day, Judge Benjamin entered an Order Denying Plaintiff’s Motion for Default Judgment because Respondent’s Answer was timely filed with the court and there was a Certificate of Service noting that the Answer was served on Respondent at her last known address. (Order Denying Motion for Default Judgment, p. 1). This appeal followed.

ARGUMENTS

I. BECAUSE APPELLANT FAILED TO FILE A NOTICE OF INTENT AND EXPERT AFFIDAVIT PURSUANT TO S.C. CODE ANN. 15-36-100 AND 15-79-125 (SUPP. 2010) WITHIN THE PRESCRIBED TIME PERIOD, THE ORDER DISMISSING APPELLANT'S CLAIM SHOULD BE AFFIRMED.

Section 15-79-125(A) of the South Carolina Code imposes pre-litigation filing requirements upon individuals intending to file suit for malpractice. One requirement is that the plaintiff must file a Notice of Intent accompanied by an affidavit of an expert witness. The affidavit is subject to the requirements established in S.C. Code Ann. 15-36-100 (Supp. 2010).

Section 15-36-100 of the South Carolina Code provides the requirements for filing a complaint in an action for damages based upon professional negligence. Professional negligence includes dental malpractice, the basis of Appellant's Complaint. Pursuant to S.C. Code Ann. 15-36-100 (Supp. 2010), "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."

The South Carolina Supreme Court recently clarified the expert affidavit requirements in Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189 (2014). The Supreme Court held that the intention of S.C. Code Ann. 15-36-100 (Supp. 2010) was to promote tort reform, make the adjudication of professional negligence cases more efficient, and discourage the filing of frivolous claims. To that end, a plaintiff must file an affidavit of

an expert witness along with a Notice of Intent to File suit. If the statute of limitations will expire within 10 days, the plaintiff has an additional 45 days after the filing of the summons and complaint to procure an affidavit. S.C. Code Ann. 15-36-100(C)(1) (Supp. 2010).

Appellant claims that Dr. Johnson acted negligently in the placement of a crown on her tooth on April 26, 2011. The statute of limitations on that claim should then run on April 27, 2014. Appellant filed her Summons and Complaint on April 17, 2014 without an expert affidavit, but she signed an affidavit on her own that indicated she knew she was filing within 10 days of the statute of limitations and had an extension of 45 days in which to file an expert affidavit. (Affidavit of Brenda Harmon, p. 1). Appellant had therefore until June 8, 2014 to file an expert affidavit. She failed to file an expert affidavit by June 8, 2014. As of the date of the hearing on this matter, Appellant did not possess an affidavit as is required by statute. Appellant obviously knew of the affidavit requirement because she acknowledged it in her original filing. Appellant has chosen to ignore the expert affidavit requirements despite being additionally informed of her deficient complaint through Respondent's two motions to dismiss.

II. BECAUSE APPELLANT FAILED TO PARTICIPATE IN A PRE-LITIGATION MEDIATION CONFERENCE AS REQUIRED UNDER S.C. CODE ANN. 15-79-125(C) (SUPP. 2010), THE ORDER DISMISSING THE APPELLANT'S CLAIM SHOULD BE AFFIRMED

In Ross v. Waccamaw Community Hosp., 404 S.C. 56, 744 S.E.2d 547 (2013), the Supreme Court concluded that the time period for pre-litigation mediation set forth in

S.C. Code Ann. 15-79-125 (Supp. 2010) was not intended to place limitations on the circuit court's subject matter jurisdiction. However, the court further held that the 120-day time period is not meaningless, and the failure to comply with the 120-day time period "could result in dismissal but as a function of the court's discretion based on the facts and circumstances..."*Id.* at 66.

Appellant filed her Complaint on April 17, 2014. Assuming the 120-day period was applicable to the date she filed her suit, pre-litigation mediation should have been scheduled by August 15, 2014. S.C Code Ann. 15-79-125(E)(1) (Supp. 2010) allows a plaintiff to file a summons and complaint only after the mediator determines "that the mediation is not viable, that an impasse exists, or that the mediation should end."

Through the time the case was dismissed with prejudice on January 6, 2015, Appellant made no effort to engage in pre-suit mediation and consequently no mediator has found that mediation was not viable, that an impasse exists, or that the mediation should end as required by S.C. Code Ann. 15-79-125(E)(1) (Supp. 2010).

III. BECAUSE RESPONDENT PROPERLY FILED AND SERVED AN ANSWER TO APPELLANT'S COMPLAINT, THE ORDER DENYING PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT SHOULD BE AFFIRMED.

Appellant served her Summons and Complaint on May 22, 2014. On May 30, 2014 Respondent filed a Motion to Dismiss under Rule 12(b)(6), SCRCPP for failure to comply with the Notice of Intent requirements set forth in S.C. Code Ann. 15-79-125 (Supp. 2010). Pursuant to Rule 12(a), SCRCPP the filing and service of a motion to dismiss alters the time requirements for the filing of an answer. Once a Rule 12 motion is

filed and served, the responsive pleading is due either 15 days after notice of the Court's denial of the motion or, in the case of a motion for a more definite statement, 15 days after the service of the more definite statement.

Respondent filed and served his motion under Rule 12(b)(6), SCRCP on May 30, 2014, less than eight days after service of the summons and complaint. The initial Motion to Dismiss was denied by Judge Alison Lee on August 11, 2014. The Respondent then filed and served an Answer on August 12, 2014, one day after the Motion to Dismiss was denied. In addition, a second Motion to Dismiss was filed on September 23, 2014.

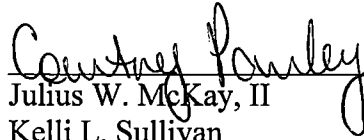
Appellant claims to have not received the Answer filed and served on August 12, 2014. There is, however, a Certificate of Service attached to the Answer, stamped by the clerk of court that evidences that the Answer was mailed to Appellant's last known address on August 12, 2014. (Certificate of Service, p. 1, Answer p.1-3). Service of the answer to the Appellant's last known address via U.S. Mail is proper pursuant to Rule 5(b)(1), SCRCP and the use of certified mail is not required. Wiggins v. Todd, 296 S.C. 432, 373 S.E.2d 704 (1988). Further, the two documents sent by Appellant to Respondent's counsel indicate that Appellant received both the Answer and discovery requests. (Plaintiff's Response, p.1-3, "Willful Disrespect & Disregard for This Case" document, p.1).

CONCLUSION

For the reasons stated, this Court should affirm the Order of Dismissal and Order Denying Plaintiff's Motion for Default Judgment of the Circuit Court.

SIGNATURE ON FOLLOWING PAGE

Respectfully Submitted,



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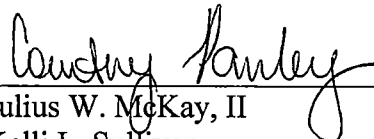
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Joel E. Johnson, D.M.D.,..... Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent upon Appellant, Brenda G. Harmon, by depositing a copy of it in the United States Mail, postage prepaid, on May 26, 2015, addressed to Brenda G. Harmon, 2110 Woodfield Drive, Columbia, SC 29223.



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