

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Phillip Durrett,

Plaintiff,

vs.

Palmetto Health Alliance d/b/a Palmetto
Richland Memorial and W. Ross, M.D.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2013-CP-40-01259

**ORDER ON MOTION TO
RECONSIDER BY DEFENDANT
PALMETTO HEALTH ALLIANCE
d/b/a PALMETTO RICHLAND
MEMORIAL**

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SC Court of Appeals

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PALMETTO HEALTH ALLIANCE
C.C.P. 2013-CP-40-01259

This matter is before the Court on the motion by Defendant Palmetto Health Alliance d/b/a Palmetto Richland Memorial ("Palmetto Richland") for reconsideration of the Court's Order denying summary judgment. After careful consideration the Court grants Palmetto Richland's motion for the reasons stated in greater detail, below, and directs that summary judgment be entered on each and every allegation asserted in Plaintiff's Complaint on file in this action.

BACKGROUND

Plaintiff Phillip Durrett ("Durrett") sustained physical injury in a multi-vehicle collision that occurred August 7, 2006. Specifically, Durrett, who was cited for driving too fast for conditions, failed to observe the flashing lights of an ambulance parked in the eastbound median of Interstate 20 to assist another motorist, struck the ambulance in the rear, and became entrapped in his own vehicle for approximately 15-20 minutes. (August 7, 2006 South Carolina Traffic Collision Report Form (Ex. 1 to Def.'s Mot. for Summ. J.)) Durrett sustained "incapacitating injuries", was extricated from his vehicle, and transported from the scene by paramedics with Richland County EMS. (*Id.*; DHEC Patient Care Form (Ex. 2 to Def.'s Mot. for

Summ. J.) According to the DHEC Patient Care Form, Durrett was agitated but remained stable during transport to Palmetto Richland. (Ex. 2 to Def.'s Mot. for Summ. J.) No medication, other than saline, was administered.

According to Palmetto Richland Emergency Department documentation, Durrett was "awake, alert, and oriented . . . upon arrival" in the ER, displayed a "very aggressive, violent nature", and "was on a back board and C-collar, complaining of left leg pain." (August 9, 2006 record (PRMH 0497-98) (Ex. 3 to Def.'s Mot. for Summ. J.)) He denied tobacco, alcohol, or illicit drug use,¹ and his chart indicates he is allergic to Morphine. (*Id.*) During examination, Durrett "was verbal, cussing, noncompliant, and very uncooperative." (*Id.*) For his protection, and to facilitate his medical examination, Durrett was sedated, intubated, examined, and prepped for further radiologic studies to confirm initial impressions of left leg fracture and abdominal injuries. (*Id.*) During his course of treatment in the Emergency Department, Durrett was started on propofol, became hypotensive, and underwent two precordial thumps² prior to returning to sinus tachycardia. (August 10, 2006 Consult (PRMH 0501) (Ex. 4 to Def.'s Mot. for Summ. J.)) Durrett remained at Palmetto Richland until discharged on August 23, 2006. (August 21, 2006 Progress Note and Discharge Summary (PRMH 00513-515) (Ex. 5 to Def.'s Mot. for Summ. J.))

In his Notice of Intent filed August 5, 2009, Durrett alleged Defendant Palmetto Richland and others were negligent in disregarding his instructions and administering "certain (but unspecified) anesthetic and sedative drugs" to him in the emergency room, which caused him to go into cardiac arrest. (Notice of Intent, ¶¶ 7-12) These allegations are repeated essentially

¹ Durrett's urine drug screen was positive for amphetamines. (August 11, 2006 Consult Note (PRMH 0502) (Ex. 6 to Def.'s Mot. for Summ. J.))

² "Hypotensive" refers to abnormally low blood pressure. "In a precordial thump, a provider strikes with a single blow of the fist to the middle of a persons [sic] sternum. The intent is to interrupt a potentially life-threatening rhythm." http://en.wikipedia.org/wiki/Precordial_thump (last accessed July 16, 2014).

verbatim in Durrett's Complaint filed February 28, 2013. (Plaintiff's Compl., ¶¶ 6-8) Defendants filed their Answer on or about June 24, 2013, in which they asserted a general denial and numerous substantive defenses, including expiration of the statute of limitations, comparative fault, and Durrett's failure to file the required expert affidavit. (Defs.' Answer, ¶¶ 1, 6, 14, and 15)

LEGAL STANDARD

1. Rule 59(e)

The South Carolina Supreme Court has held that "it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also a vehicle to seek 'reconsideration' of issues and arguments. . . . Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. DOT*, 361 S.C. 9, 22, 602 S.E.2d 772, 778-779 (2004).

2. Summary Judgment

South Carolina jurisprudence makes clear that in medical malpractice actions such as this, summary judgment "is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 626 S.E.2d 1 (2006) (citing SCRCP 56(c)). In order to establish a genuine issue of material fact, Plaintiff must adduce evidence demonstrating "(1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants' field of medicine under the same or similar circumstances, and (2) that the defendants departed from the recognized and generally accepted standards." *Id.*, 367 at 248-247, 626 S.E.2d at 4 (citing *Pederson v. Gould*, 288 S.C. 141, 143-144, 341 S.E.2d 633, 634 (1986) (additional citation omitted)). Further, Plaintiff must establish that the breach of the applicable

standard of care proximately caused his injuries and damages. *Id.* (citing *Green v. Lilliewood*, 272 S.C. 186, 193, 249 S.E.2d 910, 913 (1978)).

Plaintiff also must “provide expert testimony to establish both the required standard of care and that defendants’ failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants.” *Id.*, 367 S.C. at 248, 626 S.E.2d at 4 (citing *Pederson*, 288 S.C. at 143, 341 S.E.2d at 634). In recognition of these requirements, the South Carolina General Assembly has seen fit to impose the requirement that plaintiffs in medical malpractice actions must, prior to the filing of a summons and complaint, file a “Notice of Intent to File Suit and an affidavit of an expert witness, subject to the requirements established in Section 15-36-100. . . .” S.C. Code Ann. § 15-79-125(A); *see also* S.C. Code Ann. § 15-36-100.

ARGUMENT

I. PLAINTIFF’S NOTICE OF INTENT TO FILE SUIT AND COMPLAINT ARE SUBJECT TO SUMMARY DISMISSAL GIVEN HIS FAILURE TO FILE THE TIMELY AFFIDAVIT OF AN EXPERT WITNESS AS REQUIRED BY APPLICABLE STATUTORY PROVISIONS.

The legal issues in this case are simple. Durrett’s case is subject to dismissal because he did not file the affidavit of an expert witness in support of his Notice of Intent to File Suit or his Complaint, which is a prerequisite to the filing or initiating of a civil action alleging injury as a result of medical malpractice. *See* 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. . . .”). Instead, he relied upon the affidavit of his attorney, which expressly relied upon inapplicable provisions of S.C. Code Ann. 15-36-100(C)(2) in an attempt to excuse his failure to comply with the affidavit requirement. As such, Durrett’s Notice of Intent to File Suit was procedurally

defective, and his claims are barred by the statute of limitations. Even assuming, without conceding, that Durrett's claims are procedurally viable, he has adduced no competent evidence establishing a genuine issue for trial. As such, summary judgment is appropriate.

A. Procedural Background

Durrett filed his Notice of Intent to File Suit pursuant to S.C. Code Ann. § 15-79-125 on or after August 5, 2009. In that Notice of Intent, Durrett alleged he sustained injuries and damages during his course of medical treatment at Palmetto Richland following his August 9, 2006 automobile accident. Of particular relevance here, Durrett alleges the administration of certain medications by Palmetto Richland personnel caused him to go into cardiac arrest, thereby causing him to sustain injuries and damages.

Durrett's Notice of Intent did not include the affidavit of an expert witness as required pursuant to S.C. Code Ann. § 15-79-125(A). Instead, Durrett submitted the Affidavit of his attorney, Melvin Bannister ("Bannister"), and contended he was not required to submit an affidavit in light of the provisions of S.C. Code Ann. § 15-36-100(C)(2) (excusing the filing of an affidavit with the complaint "to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant."). In his Affidavit, Bannister acknowledged Durrett's notice was filed within ten days of expiration of the statute of limitations and pledged to "file an expert's affidavit to supplement the filing of a Complaint in this matter within forty five (45) days of the filing of such a pleading and a determination by the Court of Common Pleas that such an affidavit is required." (Bannister Aff. (Ex. 7 to Def.'s Mot. for Summ. J.), p. 2, ¶ 3) Durrett never filed the affidavit required by §15-79-125(A) (Notice of Intent

to File Suit) or the affidavit contemplated by § 15-36-100 (complaint alleging professional negligence).

Defendants filed a motion to dismiss Durrett's Notice of Intent pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100, as well as Rules 12(b)(1) and 12(b)(6), SCRCPP, on or after September 22, 2009. Defendants' motion was based upon: (a) Durrett's failure to follow the statutory conditions precedent to the filing of a medical malpractice action as set forth in § 15-79-125; and (b) Durrett's failure to provide an expert affidavit within 45 days of the filing of a complaint as provided for in § 15-36-100(C). Defendants supported their motion with the Affidavit of William Ross, M.D., who opined to a reasonable degree of medical certainty, and without contradiction, that Defendants did not deviate from the applicable standard of care and that administration of the types of drugs at issue in Durrett's Complaint "is not within the common knowledge of the ordinary lay person and expert testimony is required." (Aff. of W. Ross, M.D., (Ex. 8 to Def.'s Mot. for Summ. J.), ¶¶ 3-4)

The Court of Common Pleas for Richland County filed its order dismissing Durrett's Notice of Intent to File Suit on May 25, 2011. In its order, the court concluded this case involves complex interactions with drugs allegedly resulting in cardiac arrest and other medical complications. (May 25, 2011 Order (Ex. 9 to Def.'s Mot. for Summ. J.), pp. 3-4) Further, the court concluded Durrett ran afoul of S.C. Code Ann. §§ 15-36-100(C)(1) and 15-79-125(A) because he did not file a timely expert affidavit in support of medical malpractice allegations. (*Id.*, pp. 4-5) Durrett moved for reconsideration, and, via Form 4 Order filed April 3, 2012, the court ruled the "[m]otion to reconsider granted. Formal order to follow." (April 3, 2012 Form 4 Order (Ex. 10 to Def.'s Mot. for Summ. J.)) In an order filed nearly 18 months later – on January 8, 2014 – the court noted that "after consideration," the earlier order should be vacated

but provided no additional discussion or analysis of the substantive issues presented³. (January 8, 2014 Order (Ex. 11 to Def.'s Mot. for Summ. J.), p. 2) Further, the court determined, pursuant to § 15-36-100(C)(2), that no affidavit was required because Durrett's claims fell within the ambit of common knowledge and ordered the parties to engage in mediation. (*Id.*, pp. 1-2)

Durrett filed his Summons and Complaint on or after February 28, 2013, in which he largely re-asserted the allegations set forth in the Notice of Intent. Defendants answered with a general denial and asserted numerous substantive defenses, including expiration of the statute of limitations, comparative fault, and Durrett's failure to file the required expert affidavit. Thereafter, on July 17, 2014, Palmetto Richland moved for summary judgment on the bases that (1) Durrett failed to support his medical malpractice allegations with the required expert affidavit; and (2) Durrett failed to adduce any evidence to support his claims and that those claims relied entirely upon insufficient conjecture and speculation. Palmetto Richland's motion was heard July 22, 2014, and denied via written order entered December 3, 2014. Palmetto Richland moved to reconsider, and that motion was heard January 25, 2016.

B. Legal Analysis

Section 15-79-125(A) addresses the notice of intent as a prerequisite to filing an action for medical malpractice and requires the plaintiff to file, contemporaneously with his notice of intent, "an affidavit of an expert witness, subject to the affidavit requirements⁴ established in Section 15-36-100" Turning to Section 15-36-100, that provision sets forth certain

³ The January 8, 2014 Order only addressed Durrett's Notice of Intent and did not pass upon the sufficiency (or insufficiency) of the matters asserted in his Complaint. Given the absence of meaningful discussion or analysis underlying the January 8, 2014 Order, the undersigned does not consider itself bound thereby. Even setting aside the expert affidavit issue, Durrett's Complaint fails for the additional reasons set forth herein.

⁴ These requirements are set forth in § 15-36-100(A)(1)-(3) and address issues such as, but not necessarily limited to, licensure and other relevant credentials and experience.

requirements for complaints alleging professional negligence and the requirement that such complaints be supported by the contemporaneously filed affidavit of an expert witness. Specifically, Section 15-36-100(B) makes clear that “in an action for damages alleging professional negligence against . . . any licensed health care facility . . . 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.” Subsection (C)(1) affords plaintiffs an additional 45 days to file the required affidavit where “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.” Subsection (C)(2) excuses the contemporaneous affidavit requirement where the alleged negligent act or omission involves subject matter that lies within the ambit of common knowledge and experience. Finally, Subsection (D) makes clear that “[t]his section does not extend an applicable period of limitation” absent an exception that does not apply in this case.

Durrett failed to file an affidavit of any expert as required pursuant to the statutory provisions addressed in the preceding paragraph. As such, his Notice of Intent to File Suit and Complaint are subject to summary dismissal, and the statute of limitations bars him from seeking recovery against Palmetto Richland. To the extent Durrett relies upon *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) or *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012), to compel a different result, his reliance is misplaced. *Ranucci* addressed the interplay between §§ 15-79-125 and 15-36-100 at the *pre-suit* phase and affirmed the legislative intent that those provisions be read in harmony. *Grier* addressed (and rejected) the contention

that the plaintiff's *pre-suit* expert affidavit is required to contain an opinion as to proximate cause. Unlike Durrett, the plaintiffs in both of those cases ultimately proffered the affidavit of an expert witness to bolster their medical malpractice claims.

Inasmuch as Durrett failed to comply with the clear requirements of S.C. Code § 15-79-125(A) by filing the required affidavit contemporaneously with his Notice of Intent or at any point thereafter, Durrett's filings are procedurally defective and must be dismissed. The Bannister Affidavit does nothing to change this result. If anything, the Bannister Affidavit is an implicit recognition on Durrett's part that he would be required at some point to support his claims with competent expert testimony. The procedural defects in Durrett's Notice of Intent to File Suit and his Complaint warrant dismissal with prejudice, and his claims are now barred by the statute of limitations.

II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE ADDITIONAL BASIS THAT PLAINTIFF HAS FAILED TO ADDUCE ANY COMPETENT EVIDENCE DEMONSTRATING A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL.

In addition to Durrett's failure to file the affidavit of an expert witness, Palmetto Richland is entitled to summary judgment given Durrett's failure to adduce any competent evidence, expert or otherwise, demonstrating an issue of fact for trial. Specifically, Durrett has not come forward with any evidence to support the allegations in his Complaint that agents of Palmetto Richland disregarded his instructions, administered "anesthetic and sedative drugs" to which he claims to be allergic, and that the administration of these unspecified "anesthetic and sedative drugs" caused him to sustain injuries and damages. (Plaintiff's Compl., ¶¶ 6, 8, 12-15) To the contrary, the only medical evidence of causation in this case demonstrates that Durrett's alleged injuries and damages stem from the interaction of medically necessary medications with the illegal methamphetamine that was present in Durrett's body at the time of his underlying

automobile accident. Furthermore, this case clearly falls outside of the common knowledge exception found in § 15-36-100(C)(2) given the complicated nature of drug interaction, both with other drugs and with the human body. As such, Palmetto Richland is entitled to summary adjudication in its favor on all claims asserted against it in this action.

Pursuant to South Carolina law, “medical malpractice actions require a greater showing than generic allegations and conjecture.” *David v. McLeod Regional Medical Center*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). Indeed, as the South Carolina Supreme Court has observed, “if the patient receives allegedly negligent professional medical care, then expert testimony as to the standard of that type of care is necessary, and the action sounds in medical malpractice.” *Dawkins v. Union Hospital District*, 408 S.C. 171, 758 S.E.2d 501 (2014), *reh’g denied* (June 11, 2014) (internal citations omitted). In the uncontroverted opinion of one of Durrett’s treating physicians, “[t]he subject matter of this lawsuit involves the use and administration of various anesthetic and/or sedative medications as well as contraindications for various anesthetic and/or sedative medications [, and] that the utilization of these medications is not within the common knowledge of the ordinary lay person and expert testimony is required.” (Ross Aff., (Ex. 8 to Def.’s Mot. for Summ. J.) at ¶ 4) Here, Durrett relies solely upon “generic allegations and conjecture” in support of his claims and has not produced evidence or testimony from any expert who will testify to a reasonable degree of medical certainty on his behalf.

According to Durrett’s own testimony, he was anesthetized and therefore unable to provide any medical history to hospital personnel shortly after his admission at Palmetto Richland. (March 12, 2014 deposition of Phillip Scott Durrett (Ex. 12 to Def.’s Mot. for Summ. J.), p. 44, lines 14-20; p. 45, lines 19-20) He further testified that from the time he presented in the emergency room, it “[m]ight have been a minute” that he remained conscious and that he

does not remember anything else until waking up days later. (*Id.*, p. 47, lines 5-21) Along these lines, Durrett could not identify by name any medical provider associated with Palmetto Richland, including the physician he named as a defendant in this lawsuit and later dismissed with prejudice. (*Id.*, p. 50, lines 8-23; p. 54, lines 19-24) Similarly, he did not have any knowledge of what medications he actually received while a patient at Palmetto Richland or what made him vomit following his sedation in the emergency room. (*Id.*, p. 50, lines 6-24) At the same time, he testified he did not tell EMS or Palmetto Richland about any allergies to anesthetic or sedative medications. (*Id.*, p. 65, lines 18-25)

Durrett simply had no memory of what treatment he received or anything specific he discussed with his doctors regarding his treatment. (Durrett Dep., p. 53, lines 4-15) Durrett also candidly admitted he did not recall giving any medical history to anyone at the hospital, including his alleged allergy to anesthetic and/or sedative medications. (*Id.*, p. 60, lines 9-15) Further, when questioned about which medications he received, Durrett himself acknowledged the medically complex nature of drug interaction when he testified “I have no idea. My getting sick from that stuff like that is kind of hard to research.” (*Id.*, p. 65, lines 12-15) Nevertheless, Durrett has failed to identify any expert who will opine that his injuries and damages stem from Palmetto Richland’s administration of medications to which he now claims to be allergic, relying instead upon inadmissible hearsay statements attributed to a prior treating physician.

The only medical expert who has offered a causation opinion in this case is Palmetto Richland’s retained expert witness, Dr. Robert Clodfelter (“Dr. Clodfelter”). Dr. Clodfelter is board certified in emergency medicine and serves as the Medical Director of the Emergency Department of the Hilton Head Hospital. (June 11, 2014 deposition of Robert Clodfelter, M.D., (Ex. 13 to Def.’s Mot. for Summ. J.), p. 5, lines 5-12) In his review of the relevant medical

records, Dr. Clodfelter noted Durrett arrived at Palmetto Richland in an uncooperative and combative state and, therefore, was given a paralytic agent and a sedative in order to facilitate a “very rapid trauma assessment.” (*Id.*, p. 6, lines 12-23)

Dr. Clodfelter also noted that medical records indicate Durrett admitted ingesting methamphetamine the day before the accident, that Durrett’s urine drug screen yielded a positive result for that substance, and that Durrett is allergic to morphine and codeine⁵. (*Id.*, p. 19, lines 1-8) Further, the methamphetamines were still present in Durrett’s system because that drug metabolizes quickly and would not have been detectible in a urine screen twenty-four hours after it had been ingested. (*Id.*, p. 23, line 16 – p. 24, line 1) In Dr. Clodfelter’s opinion, the methamphetamine in Durrett’s system could interact adversely with everything and anything given to the patient, resulting in symptoms including altered mental status, cardiac dysrhythmia, and tachycardia. (*Id.*, p. 22, line 25 – p. 23, line 9)

Turning to the paralytic agents hospital staff actually administered (Norcuron and Anectine), Dr. Clodfelter testified these medications are not indicated to have caused Durrett’s cardiac issues. (Clodfelter Dep., Ex. 13, p. 26, line 24 – p. 27, line 4) Instead, Dr. Clodfelter agreed with Durrett’s treating cardiologist that Durrett’s cardiac issues likely resulted from a combination of the methamphetamines in his system, the administration of propofol, and a sharp drop in blood pressure. (*Id.*, p. 27, lines 5-10; August 11, 2006 consult record) Specifically, Dr. Clodfelter opined that Durrett’s “cardiac problems were related to dysrhythmia, which means an abnormal cardiac rhythm due to hypotension and the effects of amphetamines.” (*Id.*, p. 27, line 25 – p. 28, line 2)

⁵ Neither morphine nor codeine was administered during Durrett’s course of treatment at Palmetto Richland.

The dearth of evidence substantiating Durrett's allegations of medical malpractice plainly demonstrates the absence of any genuine material issue of fact for trial. Moreover, Durrett is nothing like the plaintiff in *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 522, 763 S.E.2d 200, 203-204 (2014) (plaintiff with a known latex allergy noted on pre-procedure paperwork successfully invoked common knowledge exception at the pre-suit phase). In comparison to plaintiffs in *Brouwer* and related cases, complex issues relating to drug interactions and Durrett's concession that he never conveyed *any* medical history, including known allergies, to hospital staff, prevent him from invoking the common knowledge exception. Given Durrett's reliance on supposition and conjecture, and his failure to come forward with competent expert testimony in support of his claims, Palmetto Richland is entitled to an order granting it summary judgment on each and every allegation asserted against it in this lawsuit.

CONCLUSION

For all of the reasons stated herein, the undersigned has reconsidered the briefing and argument presented by the parties and finds that no genuine issue of act exists with regard to Plaintiff Phillip Durrett's medical malpractice allegations. Therefore, Defendant Palmetto Richland's motion to reconsider is granted, and Palmetto Richland is entitled to summary judgment on each and every allegation directed against it in Plaintiff's Complaint.

AND IT IS SO ORDERED.



The Honorable Robert E. Hood
Circuit Judge

1/26, 2016
Columbia, South Carolina