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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000569

Greenville Pharmaceutical Research, Inc., Appellant,

v.

Parham & Smith and Gerald H. Sokol, M.D., Defendants,
Of whom, Gerald H. Sokol, M.D. is the Respondent.

REPLY BRIEF OF APPELLANT

August 4, 2016

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STATEMENT OF ISSUES ON APPEAL

1. The Trial Court's Order did not state the specific reason why it granted the Rule 12(b)(6) Motion to Dismiss but a reading of the February 12, 2015 Hearing transcript clearly shows the Court's focus was on the sua sponte issue of witness immunity, which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss, thus denying Appellant Due Process.
2. The Court of Common Pleas erred in granting Respondent Sokol's 12(b)(6) Motion to Dismiss as Appellant stated a Cause of Action upon which relief could be granted for Fraud which is not premised upon a cause of action brought pursuant to §§ 15-79-125 and 15-36-100, South Carolina Code of Laws.

STATEMENT OF FACTS

Appellants allege the following additional relevant facts from its initial Complaint before the Lower Court, which are quoted herein and enumerated as in the original Complaint:

10. Sokol is a licensed physician and a member of the American Medical Association, who is engaging in the service of providing paid-for testimony and affidavits in many states, including the State of South Carolina, and has testified in several hundred medical negligence cases.

11. There is a high probability that Sokol will continue selling his testimony and affidavits in South Carolina in the future.

12. South Carolina Code of Laws §15-79-125 is meant to protect the public and to discourage or eliminate the filing of the lawsuits without credible expert support in the form of a pre-suit affidavit, or a certificate of merit from a physician.

13. If physicians deliver dishonest or fraudulent medical testimony and affidavits, they discredit physicians as a group, unjustly cause meritless litigation and endanger the public's trust in physicians, as well as the legal system.

14. South Carolina requires an individual bringing a medical malpractice claim to file an expert affidavit in a proceeding called the Pre-Suit Notice of Intent, §15-79-125 South Carolina Code of Laws.

15. In South Carolina, the expert witness is required to specify at least one negligent act or omission claimed to exist, by an Affidavit, before a Notice of Intent may be filed §15-36-100, South Carolina Code of Laws.

16. Sokol was recruited to provide a deviation of the standard of care affidavit

pursuant to §15-79-125, South Carolina Code of Laws, regarding GPR for Bruce.

17. Sokol knew very well about this South Carolina requirement respecting affidavit by virtue of his years at selling his testimony and affidavits.

18. Parham prepared and presented the affidavit attached as Exhibit A to Sokol, who signed it without modification or sufficient information to form good faith opinions.

19. During his recruitment, Sokol received a letter from Parham by way of his handler, Ellen Rieback, RN, in which he advised Sokol that a pre-suit affidavit was required for Parham to bring suit.

20. Parham's letter stated that the medical records provided were incomplete.

21. Sokol never requested any additional medical records.

22. The standard of the profession for providing expert testimony in medical negligence liability cases requires that they be willing to evaluate cases objectively and derive an independent opinion, not simply sell their credentials.

23. The South Carolina requirement of a sworn statement is meant to prevent frivolous claims before they make it into the court system.

24. In his affidavit, Sokol fraudulently claimed that he had based his opinion as to liability upon his review of medical records.

25. Sokol received limited medical records and no records indicating medical care allegedly given by GPR.

26. Sokol thereby made false and material misrepresentations, which he knew to be false or had a reckless disregard for its truth or falsity, which he intended said representations to be acted upon, by the hearer's ignorance of its falsity, hearer's reliance

on its truth, hearer's right to reply, and consequence and proximate injury by signing Parham's Affidavit.

27. During Sokol's deposition, he was clearly unfamiliar with the facts of the case, and spoke only in generalities.

28. Sokol candidly admitted he only testifies for Plaintiffs' counsel.

29. Sokol refused to answer questions about his prior work as a paid-for witness during his deposition.

30. Ultimately, Sokol left his deposition before its conclusion, thereby necessitating it being reconvened at a later time.

31. Upon reconvening Sokol's deposition, he admitted he had insufficient evidence and would not opine as to any standard of care that may have applied to Greenville Pharmaceutical Research.

32. Sokol's actions clearly established he sold his signature fraudulently to Parham.

33. Sokol intentionally marketed and sold his medical license by executing a fraudulent Affidavit merely for the purpose of circumventing the pre-suit requirements of §15-79-125 South Carolina Code of Laws.

34. Sokol clearly intended to appease his handler, Ellen Rieback, RN, as it was in his best economic interest to continue a positive and prosperous business relationship in order to obtain future Plaintiff's cases.

35. At all times material, Sokol was willing to state anything requested by Parham, regardless of its truth, veracity and medical accuracy.

36. Sokol provided no medical literature to support his opinion.

37. Plaintiff has suffered damages, loss and harm, including but not limited to their reputations, money, emotional tranquility, and privacy.

38. That said damages, loss and harm was the proximate and legal result of the aforementioned fraud.

ARGUMENTS IN REPLY

In response to the points within Respondent Sokol's Initial Brief the Appellant offers the following points of clarification and rebuttal.

1. The Trial Court's Order did not state the specific reason why it granted the Rule 12(b)(6) Motion to Dismiss but a reading of the February 12, 2015 Hearing transcript clearly shows the Court's focus was on the *sua sponte* issue of witness immunity, which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss, thus denying Appellant Due Process.

Respondent raises a point within his Initial Brief under his Statement of the Case that warrants clarification. Respondent references another lawsuit involving Respondent and a different Plaintiff, Alliance Biomedical Research, LLC ("ABR"). Appellant and ABR were co-defendants in the underlying Bruce litigation. Also, Appellant and ABR are two independent legal entities. Thus, Appellant had no standing to appeal the Pickens County Lower Court's Order and ABR chose not to appeal. A review of the Order's caption clearly indicates Appellant was **not** a party to that proceeding. However, nothing in the trial record indicates that the lower court considered this relevant in reaching its decision. Which, of course, was appropriate given the Appellant not being a party. (Respondent's Br. p. 4.)

The Honorable J. Cordell Maddox granted Respondent's 12(b)(6) Motion to Dismiss by way of a Form 4 Order, dated February 19, 2015. Nowhere on said Form 4 Order did the Court state the reason for dismissing Appellant's case. However, a reading of the February 12, 2015 Hearing Transcript clearly shows the Court's only focus was the *sua sponte* issue of witness immunity.

"The ruling on a 12(b)(6), SCRCP, motion to dismiss must be based solely on the allegations set forth in the complaint. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)." *TCI Media, Inc. v. NuVox Communications, Inc.*, 010709 SCCA, 2009-UP-004 "The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the Plaintiff to relief on any theory of the case. *Ashley River Prop. I, L.L.C. v. Ashley River Prop. II, L.L.C.*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007)." *TCI Media, Inc. v. NuVox Communications, Inc.*, 010709 SCCA, 2009-UP-004. "Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120 (1978). Further, a judgment on the pleadings is considered to be a drastic procedure by our courts. *U.S. Casualty Company v. Hiers,* 233 S.C. 333, 104 S.E.2d 561 (1958)." *Russell v. City of Columbia,* 305 S.C. 86, 406 S.E.2d 338 (S.C. 1991).

Judge Maddox's inquiry during the February 12, 2015 hearing, candidly displayed his personal feelings that Respondent should not be subject to litigation, regardless of Respondent's actions towards Appellant.

> I'd like to tell you that I don't think much of this. I know you're a good lawyer but what I'm concerned about is it's very difficult, as you know, to get a doctor – let's assume – for any reason to file one of these Affidavits because they're immediately ostracized.
>
> The statute requires you to get one and thank God I got out of that practice before the statute came into place because I have my own opinion of it but all he did was give his opinion that the threshold for filing the lawsuit was there and if the opinion was wrong, then it was wrong.

(Maddox February 12, 2015, Hearing Tr. p. 10, ln. 20 through p. 11, ln. 6) Further, the Court inquired, "Let me get this straight, this doctor is asked by a lawyer to issue an opinion in an affidavit that comports with the statute that's part of the tort reform requiring a presuit affidavit

and the defendant's allegation is that his opinion was erroneous and that he would have said anything if Mike Parham asked him to say it?" (Maddox February 12, 2015, Hearing Tr. p. 9, ln. 7 through p. 10, ln. 3; p. 11, Lns. 20 through 25; p. 12, lns. 3 through 7 and 16 through 22; p. 13, lns. 1 through 3 and 19 through 22; p. 14, lns. 3 through 8) The basis for the Order granting the Motion was a potential "killing effect" (sic) on getting doctors to signs Pre-Suit Affidavits in the future. (Maddox February 12, 2012, Hearing Tr. p. 11, lns. 14 and 15) Judge Maddox further states:

> ... I don't think there's a cause of action here. I think if I don't dismiss this, then ever (sic) doctor in the world that signs – and it could happen to the defense just the same way – could be subject to – they are already under a tremendous amount of pressure not to get involved in these, but the remedy here is to go to the medical board and say, this guy is not really doing what he's supposed to be doing, he's a trained hire (sic) gun.
>
> Look, I knew hired guns. They were the worse (sic) things in the world because you could get them to say anything and as the late great Carrie Doyle, rest his soul, used to tell you don't every (sic) hire those people. If he's that, then I think all you need to go to the medical board. I'm not sure there's anything you can do in this case against Dr. Sokol.

(Maddox February 12, 2015, Hearing Tr., p. 14, ln. 15 through p. 15, ln. 6) Attorney for Appellant immediately questioned, "Judge, I don't know what grounds other than what you just said I'm not pleading the cause of action." (Maddox February 12, 2015, Hearing Tr. P. 15, Lines 7-9) Judge Maddox replied, "I think under the theory of summary judgment – I think just looking at the case and the facts and what I have in front of me, there's not enough there to deny summary judgment." (Maddox February 12, 2015, Hearing Tr., p. 15, lns. 10 through 13) By granting Respondent's Motion to Dismiss, or Summary Judgment, under this theory, the Court is saying Respondent Sokol is immune from being held accountable for his fraudulent actions. Clearly, this theory is outside the arguments presented to the Lower Court, in that immunity was never

presented by the Appellant or Respondent. Immunity was not addressed in Respondent's Motion to Dismiss, nor in Respondent's Memorandum in Support of his Motion to Dismiss. The theory of Respondent's alleged immunity was brought up for the first time by the Court, *sua sponte*, during the February 12, 2015 hearing. The Court in *Heins v.Heins*, 344 S.C. 146, 543 S.E.2d 224 (S.C. App., 2001) stated, "It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. *Loftis v. Loftis*, 286 S.C. 12, 331 S.E.2d 372 (Ct. App. 1985)." Pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120 (1978). However, they cannot "be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider." *Bass v. Bass*, 272 S.C. 177, 249 S.E.2d 905 (1978). Appellants were never placed on notice of a potential immunity affirmative defense for Respondent Sokol until the Court, *sua sponte*, raised the issue during the February 19, 2015 hearing. As such, Appellant was denied due process. "Due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." *South Carolina Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* "Litigants should be placed on notice of the issues that the court is to consider in order to comply with due process. *Murdock v. Murdock*, 338 S.C. 322, 333, 526 S.E.2d 241, 248 (Ct.App.1999)." *South Carolina Dep't of Social Services v. Meek*, et al., 352 S.C. 523, 575 S.E.2d 846.

A judgment on the pleadings is considered to be a drastic procedure by our courts. *U.S. Casualty Company v. Hiers,* 233 S.C. 333, 104 S.E.2d 561 (1958)." *Russell v. City of Columbia,*

305 S.C. 86, 406 S.E.2d 338 (S.C. 1991). In the instant case, the Court, *sua sponte*, raised the immunity affirmative defense as to Respondent Sokol and granted his Motion dismissing the case, all in the same hearing. As such Appellant was denied due process by not having an "opportunity to be heard at a meaningful time and in a meaningful manner." "As to the master raising *sua sponte* affirmative defenses on behalf of the Respondents: *Heins v. Heins*, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001)('It is well settled that ordinarily a party may not receive relief not contemplated in his or her pleadings.'); Collins Entertainment, Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005)('[T]he failure to plead an affirmative defense is deemed a waiver of the right to assert it.')." *Mortgage Electronic Registration Systems, Inc. v. Parrott et al.*, Opinion No. 2006-UP-00402 (S.C. App. 12/11/2006)(S.C. App., 2006). Respondent should not be granted relief he did not contemplate and denying Appellant due process. Immunity is "an affirmative defense which must be specifically pled. Rule 8(c), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. *Adams v. B&D, Inc.,* 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)." *Collins Entertainment, Inc. v. White,* 611 S.E.2d 262, 363 S.C. 546 (SC, 2005). Appellant contends that the Court erred in dismissing Appellant's Complaint by *sua sponte* raising the issue of immunity as to Respondent Sokol, an issue which had not been raised in Respondent's Oral Argument, Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss and thereby denying Appellant due process. Thus, Appellant requests that the Court of Common Pleas' Order Dismissing its Complaint be reversed and this matter be remanded for discovery and a trial on the merits.

2. **The Court of Common Pleas erred in granting Respondent Sokol's 12(b)(6) Motion to Dismiss as Appellant stated a Cause of Action upon which relief could be granted for Fraud, which is not premised upon a cause of action brought pursuant to §§ 15-79-125 and 15-36-100, South Carolina Code of Laws.**

Arguing in the alternative to address Respondent Sokol's assertions that the Lower Court based its decision on a deficiency within the Complaint or that Appellant's claim was brought pursuant to South Carolina Code of Laws §§15-79-125 and 15-36-100. "In deciding a motion to dismiss pursuant to 12(b)(6), SCRP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.' *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*" *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007).

"Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court. *See O'Laughlin v. Windham*, 330 S.C. 379, 382, 498 S.E.2d 689, 691 (Ct.App.1998)." *Williams v. Condon*, 553 S.E.2d 496, 347 S.C. 277 (S.C. App., 2001).

Respondent Sokol argues that Appellant is unable to meet the required elements of common-law fraud as laid out in its Complaint. Appellant argues it has met the require elements for a claim of fraud against Respondent Sokol.

The elements of fraud are:

1. a representation;
2. its falsity;
3. its materiality;
4. knowledge of its falsity or a reckless disregard of its truth or falsity;
5. intent that the representation be acted upon;
6. hearer's ignorance of its falsity; hearer's reliance on its truth
7. hearer's right to rely;
8. and, hearer's consequent and proximate injury.

Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985).

It is important to note, nowhere does Appellant's Complaint allege that Respondent Sokol provided an opinion. It alleges that Respondent Sokol made a false representation to the Appellant by his affidavit that was used as the inception of the underlying case. In paragraphs 16-22, 24-27, 31-32, and 35 of Appellant's Complaint, it makes allegations against Respondent Sokol of knowingly executing a false affidavit, or he had a reckless disregard for its truth or falsity which resulted in Appellant being hauled into court. Appellant heard representations when it was named in and served with the required Notice of Intent to File Suit on or about July 13, 2011 and Respondent Sokol's Affidavit was attached. Compl. ¶ 7. Respondent Sokol's affidavit was material in that it was required by §§15-79-125 and 15-36-100, South Carolina Code of Laws, prior to bringing a medical malpractice claim. Compl. ¶¶ 14, 15, 16. Respondent Sokol intended for the representations in his Affidavit to be acted upon since, he knew without it, the underlying lawsuit could not have commenced. If there was no lawsuit, Respondent Sokol would not have received compensation as being an expert witness. Clearly, he had a pecuniary interest in ensuring the lawsuit move forward. Compl. ¶¶ 10-11, 17, 19, 28-29, 32-35.

Additionally, nowhere in Appellant's Complaint does it state that its claim is being brought pursuant to §§15-79-125 and 15-36-100, South Carolina Code of Laws. The statutes

reference, by Appellant, is merely to establish: (1) Respondent Sokol knew his fraudulent Affidavit would be published to the Appellant; (2) his fraudulent Affidavit would be the keystone of a medical malpractice case against the Appellant; (3) that Appellant would be forced to rely upon it; (4) that he had a duty of care to the Appellant; and, (5) his fraudulent Affidavit foreseeably would damage the Appellant.

Appellant stands on the *Evans v. Rite Aid Corp.* argument that as a paid, skilled professional have a duty of care to conform to the generally recognized and accepted practices in their profession. Respondent Sokol did owe the Appellant duty of care. Compl. ¶¶ 10, 12-18, 20-27. Respondent Sokol breached such duty. Compl. ¶¶ 16-20, 22, 24-27, 31-32, 35. Further, contrary to Respondent Sokol's assertions, Appellant was forced to rely upon the fraud. In *Frist v. W.E. Gallant,* 240 F.Supp. 827 at 829 (D.S.C. 1965) the court, quoting *Morgan v. Graham,* 228 F.2d 625, 54 A.L.R.2d 1290 (1956):

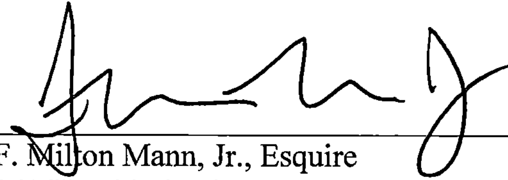
> 'It is, of course, true as stated by appellant that there must be reliance upon a fraudulent misrepresentation in order to sustain an action for fraud. That is just another way of saying that the aggrieved party took a course of action because of that false representation. It is true that Graham testified he did not believe Morgan's statement that no policy was issued. He was nonetheless **forced** to act to his detriment and do what he would not have done had the statement not been made. In other words, he was **forced** to rely on the misrepresentations. He was **forced** to act on the misrepresentations to the same extent that he would have acted had he believed them to be true.' (Emphasis added).

Appellant would not have had to defend itself in the underlying lawsuit but for Respondent Sokol's false or reckless misrepresentations causing it to take a course of action it would not have had the statements not been made. Appellant was forced to defend itself and as a result, Appellant suffered damages. Compl. ¶¶ 37-38. As such, Appellant has a claim of fraud against Respondent Sokol and his Motion to Dismiss should be denied.

CONCLUSION

For the reasons stated above, Appellant requests that the Court of Common Pleas Order granting Respondent's Motion to Dismiss Appellant's Complaint be reversed and this matter remanded for discovery and a trial on the merits.

Respectfully submitted,



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of whom Gerald H. Sokol, M.D. is Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief upon Respondent Gerald H. Sokol, M.D. by email and by depositing copies in the United States Mail, postage pre-paid; South Carolina Court of Appeals Clerk of Court, The Honorable Jenny Abbott Kitchings by hand-delivery; and, other counsel of record, Jeffrey M. Bogdan, Esquire, by email and by depositing copies in the United States Mail, postage pre-paid, on August 4, 2016, at the addresses listed below:

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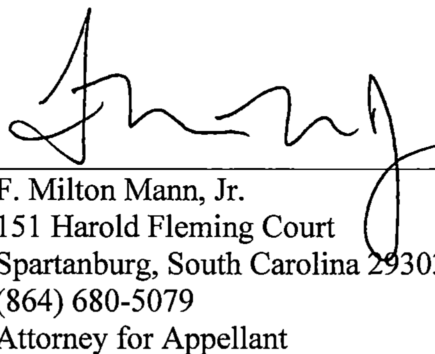

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BY HAND DELIVERY

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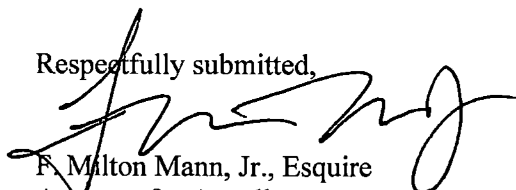
v. Parham & Smith, LLC and Gerald H. Sokol, M.D., Defendants,
of whom, Gerald H. Sokol, M.D. is Respondent
Appellate Case No. 2016-000569

Dear Ms. Kitchings:

Enclosed please find one (1) each original and copy of Appellant's Reply Brief and Proof of Service in the above-referenced case. Please file the original with the case file and return the copy to Appellant.

Thank you in advance for your assistance in this matter. If you should have any questions, please call me at 864/680-5079.

Respectfully submitted,



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