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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

J. Cordell Maddox, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2016-000569

Greenville Pharmaceutical Research, Inc., Appellant,

v.

Parham & Smith, LLC and
Gerald H. Sokol, M.D., Defendants,

Of whom Gerald H. Sokol, M.D. is the Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This lawsuit arises from a previous lawsuit filed by John L. Bruce and Marilyn Bruce (hereinafter "Bruce") against Alliance Biomedical Research, LLC (hereinafter "Alliance"), Greenville Pharmaceutical Research, Inc. (hereinafter "Appellant"), Dr. Nayan Desai and North Hills Medical Center, alleging a claim for medical malpractice arising from the care of Mr. Bruce during the course of a study he participated in for treatment of his COPD. Following is the background of that litigation.

In January 2010, during the course of the study in question, an x-ray was taken of Mr. Bruce's chest and reviewed by Dr. Desai, who noted a 1.8 cm mass in the right upper lobe. A CT scan was recommended. Mr. Bruce denied that anyone ever told him about the findings on the x-ray or of the need for further tests. During a follow-up visit in August 2010, another x-ray was taken which showed that the mass had increased to 3.05 cm, and at that time Mr. Bruce was told of the need for a CT scan. The CT scan confirmed the mass had enlarged and also that lymph nodes in the lung had enlarged as well. Thereafter, a fine needle aspiration of the mass was performed, which determined that it was large cell lung cancer. By the time of that diagnosis, the mass was non-operable. Mr. Bruce then underwent 35 treatments of radiation and 9 treatments of chemotherapy, but ultimately died of lung cancer.

The Bruces were represented in the underlying lawsuit by Michael Parham, (hereinafter "Parham"), now deceased. In or about late March 2011, Parham, through Ellen Rieback of Rieback Medical-Legal Consultants, Inc., sought an opinion from Dr. Sokol on several issues. (Appellant Complaint, ¶ 19) (R. pp. 11-25). In that letter Parham requested that Dr. Sokol provide opinions regarding the following issues:

1. Did Dr. Desai deviate from ordinary and customary standards of care in failing to inform the patient and/or the referring physician of the existence of the lesion in January 2010?

2. Did Dr. Desai deviate from ordinary and customary standard of care in failing to advise the patient and/or the referring physician of the need for follow-up with CT scan following the study of January, 2010?

3. Had diagnosis of this lesion been made in January 2010, was the lesion, in your opinion, to a reasonable degree of medical certainty, most probably an operable lesion?

4. Due to the pathology of the lesion and its small size without metastasis in January 2010, had surgery taken place would Mr. Bruce, most probably, live his full and complete life expectancy?

5. Had Mr. Bruce undergone surgical intervention in January 2010 with reference to this lesion, would he most probably have avoided the necessitation of having to undergo both radiation and chemotherapy?

On or about May 26, 2011, Dr. Sokol signed and submitted an affidavit in the underlying lawsuit. (Appellant Complaint, Ex. A) (R. pp. 20-22). In his affidavit, Dr. Sokol stated that he had reviewed the records provided to him from Appellant, Upstate Lung and Critical Care Specialists, PC and Greenville Radiology regarding Mr. Bruce. Based upon that, as well as his background, education, training and experience, Dr. Sokol stated that in his opinion there had been "at least one negligent deviation from the standard of care on behalf of Nayan Desai, M.D., North Hills Medical Center, and Greenville Pharmaceutical Research in the care given to Mr. Bruce." After a brief review of the history of Mr. Bruce's treatment, Dr. Sokol also stated that Mr. Bruce's prognosis "at stage 3(B) squamous cell carcinoma [was] grim to incurable." He also stated that to a reasonable degree of medical certainty, had Mr. Bruce's January 2010 x-ray been

reported to his treating physicians and a CT scan performed at that time, the scan would have revealed that the mass was "stage one squamous cell carcinoma and that his tumor was operable." Finally, Dr. Sokol offered his opinion that had the mass been correctly diagnosed in January 2010, Mr. Bruce would have had "a prognosis of greater than 50 percent for survival." He also reserved the right to modify, change or supplement his opinions in the future.

Eventually the Bruce lawsuit was settled. Appellant, through its insurer, MAG Mutual Insurance Company, paid Mr. and Mrs. Bruce $325,000.00 to settle their claims. (Sokol's Memorandum in Support of Motion to Dismiss, Ex. B) (R. pp. 41-48).

In June 2014, Alliance filed a similar lawsuit to this one against Dr. Sokol and Michael Parham (personally) in the Pickens County Court of Common Pleas. In that lawsuit Alliance asserted a claim against Dr. Sokol for negligence *per se* for violation of *S.C. Code Ann.* §15-79-125 (2005). It also asserted a claim for common law fraud, just as Appellant has done here. Dr. Sokol filed a motion to dismiss that case as well, and following a hearing before Judge Steven John on October 2, 2014, the case was dismissed. (Sokol's Memorandum in Support of Motion to Dismiss, Ex.C) (R. pp. 29-58).

As noted above, in this lawsuit Appellant has asserted a claim against Dr. Sokol for common-law fraud based upon the affidavit submitted in the underlying case pursuant to §15-79-125 (2005). In response, Dr. Sokol filed a motion to dismiss pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*. That motion was granted by the trial court. Appellant filed a motion for reconsideration, which was also denied by the trial court. Appellant now appeals that ruling.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT BASED UPON APPELLANT'S FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED, AND DID NOT BASE ITS DECISION UPON THE THEORY OF EXPERT WITNESS IMMUNITY.

On October 20, 2014, Appellant filed a summons and complaint in the Greenville County Court of Common Pleas against Dr. Gerald H. Sokol and Parham and Smith, LLC. In its complaint, Appellant claimed that Michael Parham, now deceased, obtained an affidavit from Dr. Sokol pursuant to *S.C. Code Ann.* §15-79-125 (2005), which requires a plaintiff to provide an affidavit from a medical expert prior to filing a medical malpractice lawsuit. In the complaint, Appellant asserted only a cause of action for fraud against Dr. Sokol, claiming Dr. Sokol fraudulently executed the affidavit and thereafter provided it to Ellen Rieback, a nurse consulted by Mr. Parham to assist in obtaining the required affidavit, who thereafter provided the affidavit to Mr. Parham. After obtaining the affidavit Mr. Parham filed the medical malpractice lawsuit on behalf of the Bruces against Appellant, Dr. Nayan Desai and North Hills Medical Center.

On December 23, 2014, Dr. Sokol filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*. Thereafter, Dr. Sokol submitted a memorandum of law to the court in support of his motion to dismiss. Exhibits to the memorandum included an order dismissing the previous lawsuit filed by Alliance against Dr. Sokol in Pickens County. (Sokol's Memorandum in Support of Motion to Dismiss, Ex.C) (R. pp. 29-58). In that lawsuit Alliance asserted causes of action against Dr. Sokol for negligence *per se* for violation of *S.C. Code Ann.* §15-79-125 (2005), and also for common-law fraud, based upon the exact same affidavit that

Appellant takes issue with in this case. Dr. Sokol's motion to dismiss that case was granted both because his affidavit did not so much as mention Alliance and because the statutes relating to the expert affidavit in a medical malpractice case do not afford a private right of action by a party against the expert of the opposing party.

To establish a common-law cause of action for fraud, a plaintiff must plead and prove the following essential elements:

(1) the defendant made a false representation to the plaintiff;

(2) the defendant had a pecuniary interest in making the statement;

(3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff;

(4) the defendant breached that duty by failing to exercise due care;

(5) the plaintiff justifiably relied on the representation; and

(6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

AMA Management, Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). Failure to allege all of the essential elements of common-law fraud is fatal to a claim for fraud. *Ardis v. Cox*, 314 S.C.512, 431 S.E.2d 267 (Ct. App. 1993).

In this appeal, Appellant claims that the trial court, *sua sponte*, granted Dr. Sokol's motion to dismiss upon a theory of witness immunity not argued by Dr. Sokol as a basis for his motion. That is not correct. While the trial court did express some concern about the potential impact of such a lawsuit on the willingness of medical experts to offer affidavits if they could be subject to civil liability to the adverse party, there was never any statement made by Judge Maddox that that was the basis for granting the motion to dismiss. Instead, the vast bulk of the hearing transcript deals with Dr. Sokol's argument

that Appellant failed to properly plead the elements of a common-law cause of action for fraud. In addition, Judge Maddox stated on at least two separate occasions that he was granting Dr. Sokol's motion.[1] (Tr. p. 14, lns. 6-7; p. 15, lns. 10-11) (R. pp. 433, lns. 6-7; p. 434, lns. 10-11). Accordingly, and contrary to the claims of Appellant, the trial court based its ruling on the grounds stated in Dr. Sokol's argument, not upon a *sua sponte* theory of witness immunity.

Here, Appellant's complaint completely fails to meet the requirements necessary to establish a cause of action against Dr. Sokol for fraud because Appellant has neither alleged the elements of fraud as they relate to Dr. Sokol, nor has it alleged particular facts to support the elements of fraud. It is axiomatic that to assert a claim for fraud the alleged intentionally false representation must be made by the defendant ***to the plaintiff***. In addition, ***the plaintiff*** must have relied upon the truth of the representation(s) and taken some action based upon the false representation(s) to its detriment/injury.

An examination of the allegations of the complaint reveals that Appellant merely mechanically asserted the elements of fraud to try to create a cause of action where none exists. For example, it alleged that Dr. Sokol "made false and material misrepresentations" without alleging to whom, or whom he expected to act upon the alleged false representations. (Complaint, ¶ 26) (R. p. 14). It did not allege that Dr. Sokol ever made any representation to it at all, false or otherwise, nor did it allege that it relied upon any such false representation to its detriment. Thereafter, attempting to track case law, Appellant merely alleges that the "hearer" was ignorant of the falsity of the

[1] On one occasion, the court stated that it was granting Dr. Sokol's motion for summary judgment, but it is agreed by the parties that Dr. Sokol's motion was a motion to dismiss, not a motion for summary judgment.

statement(s), that the "hearer" rightfully relied upon the truthfulness of the statement, and that the "hearer' was injured, without bothering to allege who the "hearer" is. (Complaint, ¶ 26) (R. p. 14). The "hearer" is left unidentified because, quite clearly, the "hearer" is not Appellant. In the absence of a representation made to Appellant, the elements of fraud cannot be established.

While Appellant alleges in paragraph 32 of the complaint that Dr. Sokol sold his signature fraudulently to Parham, and in paragraph 34 that Dr. Sokol intended to appease his handler, Ellen Rieback, by providing the affidavit, Appellant fails to mention itself as the "hearer" or even a recipient of any of the information from Dr. Sokol. All of that might be well and good if Parham or Rieback were suing Dr. Sokol, but they are not. Appellant is the party that brought this lawsuit, and Appellant has utterly failed to allege any element of fraud that might apply to it.

In addition, Appellant has completely failed to allege any facts with particularity to support any of the nine elements of fraud. It merely alleges, in conclusory terms, that Dr. Sokol made false and material misrepresentations, that he fraudulently claimed that he based his opinion as to liability upon his review of medical records, that he fraudulently sold his signature to Parham and that he was merely attempting to appease Ms. Rieback. However, Appellant failed to allege any facts to establish to the trial court how the statements were false or fraudulent, that it relied upon the statements or that it was damaged by any such reliance. Instead, the complaint clearly establishes that Dr. Sokol never made any representations at all to Appellant, and that Appellant disputed those alleged false representations throughout the underlying litigation. It never could have, nor would have relied upon the alleged false representations to its detriment for any

reason whatsoever, and there are not and could not be any facts to support any argument to the contrary. If Appellant had done so, it would have admitted liability in the underlying case, which clearly it did not do.

II. THERE IS NO PRIVATE CAUSE OF ACTION AVAILABLE TO APPELLANT BASED UPON ALLEGED FRAUD IN THE PREPARATION OF THE EXPERT WITNESS AFFIDAVIT REQUIRED BY *S.C. CODE ANN.* §15-79-125 (2005).

Although not argued during the hearing of the motion to dismiss, Dr. Sokol asserts as an additional sustaining ground that *S.C. Code Ann.* §15-79-125 does not provide a private cause of action in favor of Appellant against him for the alleged fraudulent affidavit. The prevailing party may argue an additional sustaining ground on appeal, even if it was not argued in the trial court, as long as the "basis for respondent's additional sustaining grounds...appear[s] in the record on appeal". *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

As noted above, included as an exhibit to Dr. Sokol's memorandum in support of his motion to dismiss is a copy of the order granting his motion to dismiss in the Pickens County case filed by Alliance. (Sokol's Memorandum in Support of Motion to Dismiss, Ex.C) (R. pp. 49-57). In that order, Judge John noted that under South Carolina law there is no private cause of action in favor of one party in a medical malpractice case against the expert retained by the opposing party. As such, Dr. Sokol asserts as an additional sustaining ground on appeal that Appellant has no private cause of action against him based upon its claim that he fraudulently prepared or signed the affidavit in the underlying case.

In South Carolina, prior to the filing of a civil action alleging injury as a result of medical malpractice, a plaintiff must first file a notice of intent to file suit as well as an

affidavit from an expert witness. *S.C. Code Ann.* §15-79-125 (2005). According to that statute, the affidavit must comply with the requirements of *S.C. Code Ann.* §15-36-100 (2005). Section 15-79-125 thereby incorporates all of the provisions of §15-36-100. *Ranucci v. Crain,* 409 S.C. 493, 503-04, 763 S.E.2d 189, 193-94 (2014). According to §15-36 100, the affidavit must specify at least one negligent act or omission claimed to exist, as well as the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. Enforcement of the provisions of §15-79-125 is left to the circuit court. *S.C. Code* Ann. §15-79-125(D) (2005). In addition "[i]f a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim..." *S.C. Code Ann.* §15-39-100(E) (2005). "If a plaintiff fails to file an affidavit... and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the applicable period of limitation..." *S.C. Code Ann.* §15-36-100(F) (2005). If it is determined that an expert in a medical malpractice action "has offered testimony or evidence in bad faith or without a reasonable basis in fact or otherwise acted unethically in conjunction with testifying as an expert in deposition or at trial," the judge must report the expert to the state entity that licenses and regulates the profession of the expert. *S.C. Code Ann.* §15-79-130 (2005).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the

legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.*

Appellant's cause of action for fraud is based upon Dr. Sokol's alleged dishonest and fraudulent affidavit. As an initial matter, there is nothing on the face of the affidavit to indicate that it is either dishonest or fraudulent, or even that it is incorrect. On its face, the affidavit complied with the statutory requirements. However, even if it did not, there is nothing within either of the applicable statute(s) that creates a private cause of action in favor of Appellant against Dr. Sokol. In fact, §15-79-125 specifically states that its enforcement will be left to the circuit court. Section 15-36-100 establishes the remedy available to any plaintiff for deficiencies in the required affidavit in a medical malpractice action. Specifically, no lawsuit can be filed without an affidavit. Alternatively, any such lawsuit should be dismissed if the affidavit is defective. Finally, and as noted by Judge Maddox during the hearing, where a judge finds an expert in a medical malpractice action to have offered testimony or evidence in bad faith or without a reasonable basis in fact, §15-39-130 requires the judge to report the expert to the state agency that licenses the expert. (Tr. p. 15, lns. 2-4) (R. p. 434, lns. 2-4).

There is nothing within any of the applicable statutes to indicate that the South Carolina Legislature intended to create a private cause of action in favor of Appellant against Dr. Sokol. In fact, the statutes clearly set forth the remedies available for either deficiencies in the affidavit or for evidence offered in bad faith by the expert, including dismissal of the complaint and/or reporting of the expert to the appropriate licensing agency. Had the legislature intended to create a private cause of action, it could have specifically done so – it did not. Instead, it created other remedies. Appellant cannot

pursue a private cause of action for alleged violations of the statutory scheme.

CONCLUSION

For the foregoing reasons, Respondent requests that the Court deny the appeal and dismiss with prejudice. Appellant failed to allege the elements of a common-law cause of action for fraud against Dr. Sokol and failed to allege any facts with particularity to support any of the elements of fraud. In addition, *S.C. Code Ann.* §15-79-125 (2005) does not provide a private cause of action to Appellant for the alleged fraud of Dr. Sokol in providing the affidavit in the underlying medical malpractice lawsuit.

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RULE 211, SCACR CERTIFICATION
FINAL BRIEF OF RESPONDENTS

I, T. David Rheney, Esquire, hereby certify that the *Final Brief of Respondent* complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

T. David Rheney, Esquire

Greenville, South Carolina

October 21, 2016