THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2015-CP-10-5000
Appellate Case No. 2016-000495

Jim Washington, ... Appellant.

v.

Trident Medical Center, LLC, ... Respondent.

Final Brief of Respondent

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Statement of the Case and Facts[1]

In this medical malpractice action, Appellant Jim Washington ("Washington") appeals the order granting the motion to dismiss of Respondent Trident Medical Center, LLC ("Trident") based on Washington's failure to comply with the pre-suit requirements mandated by Sections 15-79-125 and 15-36-100 of the South Carolina Code. {Order granting Motion to Dismiss, R. pp. 1-5}. Washington filed a complaint alleging medical malpractice against Trident pursuant to Sections 15-79-125 and 15-36-100. {Complaint dated September 11, 2015, R. pp. 9-14}. Trident moved to dismiss the complaint because Washington (1) failed to file the pre-suit Notice of Intent to File Suit ("Notice of Intent") required by Section 15-7-125(A) and (2) did not submit an expert witness affidavit to testify that Trident violated any applicable standard of care. {Motion to Dismiss, R. pp. 17-19}.

After a hearing, the circuit court granted the motion to dismiss and noted that a formal order would follow. {Form 4 Order, R. p. 6}. Washington filed a motion to reconsider the Form 4 order. Thereafter, the circuit court confirmed dismissal of the complaint because Washington failed to comply with the pre-suit requirements necessary to maintain a medical malpractice action. {Order granting Motion to Dismiss, R. pp. 1-5}. The circuit court dismissed the action because Washington did not file a Notice of Intent prior to filing the complaint and

[1] Trident combines the statement of the case and statement of the facts for ease of reference and to eliminate repetition in this appeal from the granting of a motion to dismiss the complaint.

because he did not submit the required expert affidavit. {Order granting Motion to Dismiss, R. pp. 1-5}. This appeal followed.[2]

Standard of Review

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "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." Cole Vision Corp. v. Hobbs, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011).

Argument

By initiating a medical malpractice action prior to filing a Notice of Intent to File Suit and an expert affidavit, Washington failed to comply with the mandatory pre-suit requirements imposed by Section 15-79-125(A). Thus, the circuit court properly granted Trident's motion to dismiss.

Section 15-79-125 of the South Carolina Code, titled in pertinent part as "Notice of Intent to File Suit as prerequisite to filing action . . ." controls the requirements necessary prior to the initiation of a medical malpractice action and provides:

> **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**, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action.

[2] Any facts or statements in this brief are taken from the allegations of the complaint for purposes of the appeal of the granting of Trident's motion to dismiss. As such, such usage should not be construed as an admission by Trident of the veracity of those allegations.

> The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.

S.C. Code Ann. § 15-79-125(A) (emphasis added). This plain and unambiguous language requires the filing of (1) a Notice of Intent to File Suit and (2) an affidavit of an expert witness and imposes a temporal limitation that requires the filing of those items "[p]rior to filing or initiating a civil action alleging injury or death as a result of medical malpractice." Id.; see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) (holding that the cardinal rule of statutory interpretation is to determine the intent of the legislature above all else); Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (holding that words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to expand the statute's operation).

As set forth in sections I and II, infra, Washington failed to comply with either of these mandatory pre-litigation obligations in this action. Rather, Washington filed and served a complaint and issued a summons to Trident. Thus, the circuit court properly dismissed the complaint. State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000) (recognizing that it is beyond a court's "power to effect a change in the statutes enacted by the Legislature"). This Court should affirm.

I. The circuit court correctly dismissed the complaint because Washington failed to file a pre-litigation Notice of Intent to File Suit prior to filing his complaint.

In his brief, Washington claims that by pleading Section 15-79-125(A) in his medical malpractice complaint he complied with the pre-suit requirements to maintain such an action. {App. Br. p. 16 ("[A]ppellant filed under S.C. Code Statutes 15-79-125(A) . . . citing these statutes for pleading notice of intent . . . ."). Such an argument lacks merit.

The Notice of Intent to File Suit must be filed prior to the filing of a medical malpractice complaint. S.C. Code Ann. § 15-79-125(A) (requiring that "[p]rior 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 . . . ."). Our Supreme Court has agreed that the plain language of Section 15-79-125(A) imposes mandatory pre-suit requirements that must be met prior to the initiation of a medical malpractice complaint. The court has recognized that:

> [S]ection 15-79-125 governs the **pre-litigation** requirements for medical malpractice cases. Specifically, section 15-79-125 requires a plaintiff, **prior to filing or initiating a medical malpractice claim**, to contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness.

Ranucci v. Crain, 409 S.C. 493, 502, 763 S.E.2d 189, 193-94 (2014) (emphasis added). "The filing and service of these two documents . . . are **prerequisites to** 'filing or initiating a civil action [alleging] medical malpractice.'" Ranucci, 409 S.C. at 510, 763 S.E.2d at 197 (Pleicones, C.J., concurring) (emphasis added, alteration in original).

Therefore, a plaintiff must file a Notice of Intent to File Suit prior to the initiation of a medical malpractice complaint as required by Section 15-79-125(A). Washington failed to adhere to this mandatory rule. The fact that Washington cited Section 15-79-125(A) in the

complaint does not absolve the failure to file the Notice of Intent **prior** to the filing of the complaint.[3] Thus, the circuit court correctly dismissed the complaint because Washington did not comply with the mandatory pre-suit Notice of Intent requirements. This Court should affirm.

II. The circuit court also correctly dismissed the complaint because Washington did not comply with the pre-litigation affidavit requirements.

Washington likewise failed to file an expert witness affidavit prior to filing the complaint. The statutory scheme created by the legislature requires the filing of an "affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100 . . ." prior to the filing of a medical malpractice complaint. 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, subject to the affidavit requirements established in Section 15-36-100"). That expert affidavit must "specify at least one action or omission claimed to exist and the factual basis for each claim." S.C. Code Ann. § 15-36-100(B).

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[3] Subsection C requires the parties, after filing and service of the Notice of Intent, to participate in pre-complaint mediation. S.C. Code. Ann. § 15-79-125(C). Only after the service of the Notice of Intent and an unsuccessful mediation may a plaintiff initiate a civil action by filing and service of a complaint for medical malpractice. S.C. Code Ann. § 15-79-125(E) ("If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure"). Subsection E would be rendered superfluous if a party could file the Notice of Intent at the same time as the complaint, as argued by Washington. Courts should seek a construction of a statute that gives meaning to every word of a statute rather than one that renders a portion meaningless. See, e.g., CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"); Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) (stating that courts should "avoid a construction that would read a provision out of a statute").

Washington did not file any expert affidavit specifying at least one negligent act or omission by Trident prior to filing his complaint. Thus, the circuit court correctly dismissed the complaint on that basis as well. See Ranucci, 409 S.C. at 502, 763 S.E.2d at 193-94 (holding that section 15-79-125 requires a plaintiff, **prior to filing or initiating a medical malpractice claim**, to contemporaneously file a Notice of Intent to File Suit and **an affidavit of an expert witness**") (emphasis added).

Moreover, Washington was not entitled to the Section 15-36-100(C)(1) exception from the pre-litigation affidavit requirement. A plaintiff can delay the filing of the affidavit if the Notice of Intent to File Suit would be filed "within ten days of the date" of the expiration of the statute of limitations. S.C. Code Ann. 15-36-100(C)(1). In such a case, a plaintiff must allege that "because of the time constraints" imposed by the statute of limitations "that an affidavit of an expert could not be prepared . . . ." Id. If both the temporal and pleading requirements are met, then the plaintiff "has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit." Id.

Washington did not meet the requirements for this exception to apply for four reasons. First, Washington failed to file any Notice of Intent to File Suit as required by Section 15-79-125(A). Second, Washington filed the complaint on September 11, 2015, alleging medical malpractice occurring between September 23-26, 2012. Thus, the filing occurred prior to the ten-day exception window in the statute. Third, Washington failed to plead "that an affidavit of an expert could not be prepared" because of the time constraints imposed by the statute of limitations as required by Section 15-36-100(C). Fourth, even if the exception applied,

Washington did not supplement his pleading with an expert affidavit within forty-five (45) days. As a result, the exception did not apply, and the circuit court correctly dismissed the complaint.

Washington further claimed that he was exempt from the expert affidavit requirement because his allegations fell within the "common knowledge" exception of Section 15-36-100(C)(2). {Trans. p. 4, R. p. 57}. This argument lacks merit. The complaint set forth allegations related to anticoagulation medication, amount and dosage of same, protocols related to the administration of such medication, blood clot prevention by use of specialized medicine, and protocols for treatment of patients presenting with possible stroke symptoms. {Complaint, R. pp. 11-13}. Each claim requires special knowledge because medical care and treatment is not within knowledge of ordinary persons. See Dawkins v. Union Hosp. Dist., 408 S.C. 71, 177, 758 S.E.2d 501, 504 (2014) (recognizing the accepted principle that "because medical knowledge is generally outside of a juror's common knowledge, the requisite expert testimony assists the jury in making a more accurate determination of fault regarding whether a physician's negligence in rendering medical care proximately caused the patient's injury"). Thus, the common knowledge exception does not apply.

Washington also alleges that he submitted expert affidavits from Dr. Greene and Dr. Ludington. {App. Br. p. 24}. Washington is incorrect for several reasons. First, Drs. Green and Ludington were the treating physicians when Washington presented to Trident; however, Drs. Green and Ludington were not experts retained by Washington to render expert opinions on the treatment and standard of care provided by Trident or the physicians. {Complaint Exhibits, R. pp. 70-96}. Second, the materials attached to the complaint constitute Drs. Green and Ludington's respective observations, treatment notes, diagnoses, medical records, and physician records of Washington's care at Trident. {Complaint Exhibits, R. pp. 70-96}. Those

documents do not set forth any expert opinion as to the standard of care or deviation therefrom by Drs. Green and Ludington. {Id., R. pp. 70-96}. Third, Drs. Green and Ludington's respective treatment records are not affidavits because the treatment records were not sworn to or affirmed before a notary or other officer allowed by law. See 1 S.C. Jur. Affidavits § 3 ("The only general requirements as to form are that the affidavit be reduced to writing and that it show, on its face, that it was sworn to, or affirmed before, an officer prescribed by law").[4]

III. This Court should also affirm because Washington failed to initiate the required pre-suit mediation.

Even if Washington's complaint could be construed as a Notice of Intent to File Suit and as containing the required expert affidavit, the complaint also warranted dismissal because Washington failed to conduct mandatory pre-suit mediation in this matter. Section 15-79-125 provides that:

> Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.

[4] In his brief, Washington appears to argue that his verification of his complaint acts to convert the medical records from Trident into expert affidavits. {App. Br. p. 2 ("The Expert Witness Affidavits met the requirements . . ." and citing Washington's "Verified Complaint Treat as Affidavit of An Expert – Dr. Ludington p. 1-5; Affidavit of Dr. M.K. Greene")}. The fact that Washington purported to verify his complaint does not alter this result. While a verified complaint can be construed as an affidavit of the person verifying the complaint, our law does not support a finding that a verification by one person can convert a statement from another person to an affidavit of that other person. Thus, the trial court properly rejected Washington's unsupported argument to the contrary. {Trans. p. 5, R. p. 58}. This Court should do likewise. See D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 548–49, 730 S.E.2d 340, 350–51 (Ct. App. 2012) (holding an appellant abandoned an issue by failing to cite any law or authority in support of the argument and making only conclusory arguments).

S.C. Code Ann. § 15-79-125(C). Washington did not participate in a mediation conference within the deadline imposed by the statute. Thus, this Court can affirm the dismissal of the complaint on that basis alone. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

Conclusion

Based on the foregoing, this Court should affirm the order granting Trident's motion to dismiss.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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