

IN THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

FROM THE SOUTH CAROLINA COURT OF COMMON PLEAS

Honorable Michael G. Nettles, Judge

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NOV 28 2016

Case No.: 2016-000784

SC Court of Appeals

Francis Brown as Personal Representative of the Estate of Alice Queen Ester Wallace

..... APPELLANT

v.

Carolina Hospital System and Regency Hospital/Hospice of Florence RESPONDENT

FINAL BRIEF OF APPELLANT

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November 28, 2016

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OTHER REFERENCES

None.

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial judge erred in granting the Respondent's motion to dismiss the Appellant's case on the Rule 12(B)(6) ground.
- II. Whether the trial judge erred in granting the Respondent's motion to dismiss the Appellant's case on the Rule 12(B)(5) ground.

STATEMENT OF THE CASE

1. Date of Commencement of the action or matter was June 15, 2015 when the Appellant, Francis Brown, as Personal Representative of the Estate of Alice Queen Ester Wallace, filed a Civil Action Cover Sheet, Affidavit of Plaintiff as to § 15-36-100 C(1) Expert Affidavit, Summons (Wrongful Death/ Medical Malpractice Action), Complaint (Wrongful Death/ Medical Malpractice Action), Verification (Wrongful Death/ Medical Malpractice Action), and Standard Interrogatories (Wrongful Death/ Medical Malpractice Action); and Civil Action Cover Sheet, Affidavit of Plaintiff as to § 15-36-100 C(1) Expert Affidavit, Summons (Wrongful Death/ Survival Action), Complaint (Wrongful Death/ Survival Action), Verification (Wrongful Death/ Survival Action), and Standard Interrogatories (Wrongful Death/ Survival Action); in the Lee County Court of Common Pleas seeking damages from the Respondents, for the wrongful death and injuries she sustained by her mother at the hand of the Respondents;

When the complaints were delivered to the Clerk of Court for filing on June 15, 2015 the Clerk called the Plaintiff's attorney to indicate that the NOIs were not included with the complaints so the NOIs were placed in the mail on June 15, 2015 and marked as filed by the Clerk of Court on June 18, 2015 when the clerk actually received them and not when they were delivered to the post office. ROA pg 37.

2. Nature of the action or matter is for damages for the wrongful death of the Appellant's mother and injuries her mother sustained while in the Respondent's care;

3. Nature of the defense or response is that the Respondent alleges that the Appellant failed provide an expert affidavit and failed to comply with the requirements of the South Carolina Medical Malpractice Act;

4. Action of the circuit court judge was to grant the Respondent's Motion to dismiss both of the Appellant's Complaints and both of the Appellant's Notices of Intent (NOI) to file lawsuit;

5. Date of the motion hearing was December 18, 2015,

6. The mode of resolution of the issue was oral arguments before the Court and written memoranda submitted by the attorneys;

7. The amount involved on appeal was a jury question;

8. The date and nature of the order, judgment or decision appealed from is a written order from the circuit court judge that was filed on March 23, 2016 in which the hearing judge granted the Respondent's motion for Summary Judgment. This appeal was thereafter filed on April 15, 2016.

9. The date of the service of the Notice of Appeal was April 15, 2015;

FACTUAL BACKGROUND

Plaintiff, Francis Brown as Personal Representative of the Estate of Alice Queen Ester Wallace . . . , asserts claims for the alleged wrongful death of her mother, Alice Queen Ester Wallace, in a Medical malpractice and a survival action. ROA pgs 17 and 28.

On June 15, 2015, the Plaintiff, Frances Brown as Personal Representative of the Estate of Alice Queen Ester Wallace, filed a wrongful death Complaint and a survival Complaint alleging medical malpractice against the Defendant. In the Complaints, the Plaintiff alleged the decedent was admitted to Carolinas Hospital System where “deficient nursing care.....resulted in the decedent, Alice Queen Ester Wallace, getting bed sores which contributed to the decline in her health and contributed to her death.” Compl. 4,6; ROA 22 – 23 and 33 - 34. In the Complaints, the Plaintiff did not plead the common knowledge exception to the expert affidavit requirement but raised that issue at the motion hearing and in a Memorandum of law requested of the parties by the trial for the first time. ROA pg 92, lns 17 – 23.

The Plaintiff believes the common knowledge exception is part of the statute and need not be plead.

Contemporaneously with the Complaints, the Plaintiff filed an affidavit signed by Frances Brown stating that the statute of limitations would expire on June 16, 2015, and “because of the time constraints the affidavit of expert cannot be prepared in time to avoid the expiration of the statute of limitations.” Brown Aff. 3, 4 (June 15, 2015), ROA pg 60. In the 45 days allowed by the statute the Plaintiff sought and found an expert witness with at an initial cost of about \$5,400.00. To retain the witness and submit the affidavit after the 45 days without knowing whether the Court would grant the additional time to file the affidavits under its good cause discretion would be to throw away the

\$5,400.00 should the Court decide not to grant the good cause exception. **Indeed, that would have been the case here were the trial court dismissed the case.**

The Plaintiff did put forth its good cause reasons at the motion hearing which included the closing of the charter school in Lake City of the Plaintiff's sister, Dr. Deloris Brown and the diagnosis of cancer of Dr. Brown's husband. ROA pg 96, lns 4 - 18.

On June 18, 2015, the clerk of court filed the Plaintiff's, wrongful death Notice of Intent to File Suit and a survival Notice of Intent to File Suit against the Defendants which was mailed to the clerk on June 15, 2015. According to the two Notices of Intent, the decedent was admitted to Carolinas Hospital System where "deficient nursing care left her with gross bed sores." NOI 2. The decedent was then transferred to another facility "where she was not given possible lifesaving resuscitation as was her living will and she was given the wrong medication or the correct medication in the wrong form which was the proximate cause of her death." NOI 2, ROA pg 44.

The Plaintiff did not contemporaneously file an affidavit of an expert witness with the Notices of Intent to File Suit as required by S. C. Code Ann. 15-79-125 (A). Additionally, the Plaintiff did not allege that an affidavit of an expert witness could not be prepared because of time constraints as required by S. C. Code Ann. 15-36-100 (C) but the affidavits as to the expert were filed with the complaints filed on the same day, and the Plaintiff did not plead the common knowledge exception to the expert affidavit requirement since it is statutory. To require duplicate affidavits in the same case involving the same parties would serve no purpose under the statute and the common law exception is part of the statute.

On July 30, 2015 the Plaintiff's attorney mailed a Motion to Extend Time to File Affidavit of Expert Witness for the wrongful death Complaint and for the survival Complaint but the motion was not filed until On August 17, 2015 due to filing fee issues.

ROA pg 60. The Plaintiff did not file a similar motion for either of the Notices of Intent to file suit because to do so would be duplicative of the motions already filed with the complaints.

On September 29, 2015 and September 30, 2015, the Motions to Extend Time to File Affidavit of Expert Witness for the Complaints were heard by the court but the Plaintiff and his attorney did not appear as the Defendants had not been served and no attorney for the Defendant could have appeared. No motions for a continuance were filed as the Plaintiff planned to re-file the motions once attorneys for the Defendants had been identified. On September 29, 2015 and October 2, 2015, the court signed Orders dismissing the motions for failure to prosecute.

On October 6, 2015, the two Notices of Intent to File Suit and the two Summonses and Complaints were delivered to Debbie Brace, a human resource specialist at Carolinas Hospital System, who indicated that she was authorized to accept service of process for the hospital and instructed the process servers where to bring the suit documents. The Plaintiff's attorney previously called the S. C. Secretary of State and was told there was no registered agent for Carolina Hospital System or Regency Hospital/Hospice of Florence. The Plaintiff's attorney first heard of the name of the hospitals' parent company at the summary judgment motion hearing on December 18, 2015. ROA pg 101, lns 9 - 17.

On November 5, 2015, Defendant Carolinas Hospital System served and filed its Motion to Dismiss the two Notices of Intent and two Complaint pursuant to South Carolina Rules of Civil Procedure 12 (b) (6) and 12 (b) (5) by mail.

ARGUMENTS

RULE 12 (B) (6) GROUNDS

I. The Plaintiff did substantially comply with the requirements of S.C. Code Ann 15-79-

125 (A) to initiate an action for medical malpractice.

A. Standard of Review:

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). That standard requires the Court to construe the complaint in the light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (internal quotations omitted). The Court may sustain the dismissal when “the facts alleged in the complaint do not support relief under any theory of law.” *Fleteau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

Prior to filing a medical malpractice claim, S.C. Code Ann. 15-79-125 (A) requires a plaintiff to “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.” Section 15-36-100 (C) (1) states the contemporaneous filing requirement does not apply if the statute of limitations will expire or there is a good faith basis to believe it will expire “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.” If the plaintiff alleges that an affidavit of an expert could not be prepared, then Section 15-36-100 (C) (1) allows the plaintiff “forty- five days after the filing of the complaint to supplement the pleadings with the affidavit.” In *Ranucci v. Crain*, the Supreme Court held that the affidavit requirements of Section 15-36-100 apply to a notice of intent to file suit in a medical malpractice action, including the forty- five day provision that extended the time for filing a pre-litigation affidavit. 409 S.C. 493, 763 S.E.2d 189 (2014). If the Plaintiff does not file an expert affidavit within the 45 days but files a motion to extend

time , then Section 15-36-100 (C) (1) states the court “after hearing and for good cause, may extend the time as the court determines justice requires.”

However, if an affidavit is not filed within forty- five days or as extended by the court and the defendant raises failure to file and affidavit by motion to dismiss, then Section 15-36-100 (F) states “the complaint is not subject to renewal after the expiration of the applicable period of limitation unless the court determines that the plaintiff had the requisite affidavit within the time required.....and the failure to file the affidavit is the result of a mistake.” Since Ranucci held that “section 15-79-125 (A) incorporates section 15-36-100 in its entirety,” Defendant Carolinas Hospital System appropriately raised the failure to file an affidavit by motions to dismiss as to the wrongful death Notice of Intent to File Suit and the survival Notice of Intent to File Suit. 409 S.C. at 497, 763 S.E.2d at 191.

B. Discussion of the Issue:

At the hearing on the Defendant’s Motions to Dismiss hearing on December 18, 2015 the Court allowed the parties to supplement their arguments with memoranda before he made his decision. ROA pg 101, pg 102 lns1 - 8. Those memoranda are a part of the record in this case and are incorporated in this brief. ROA 105 - 127.

At the hearing the Defendant indicated that no affidavit on an expert witness was ever filed in the case. ROA pg 89, lns 23 – 24. That is true, however, the Plaintiff’s attorney did file a motion to extend the time to file the affidavit which the Plaintiff allowed to be dismissed with intent to re-file when the Defendants were served and the attorney for the Defendants was identified. The Plaintiffs attorney had ethical concerns about addressin the Court without the other side present. However, the first appearance of the Defendants was their motions to dismiss which was granted by the trial court for which this appeal ensued. ROA pg 65.

At the hearing on these Motions to Dismiss, the Plaintiff argued that the common knowledge exception applied to the expert affidavit requirement as to the Notices of Intent to File Suit. Section 15-36-100 (C) (2) states that an expert affidavit is not required “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 and conduct of the defendant.” However, Plaintiff did not plead the common knowledge exception in either of the Notices of Intent since the exception is engrained in the law itself. In this case the Plaintiff pleaded negligent care of the decedent that caused bed sores which everyone knows can lead to death. Similarly, lay people like nurses can testify as to whether or not extraordinary life saving measures were taken not.

In Brouwer v. Sisters of Charity Providence Hospitals, the Supreme Court found that “the negligent exposure of a patient to latex with a known allergy can result in an allergic reaction in that patient” met the common knowledge exception. 409 S.C. 514, 522, 763 S.E.2d 200, 204 (2014). Similarly, The Plaintiff believes that everyone has knowledge of the effects of bed sores on hospital patients and can see for themselves the extent of the bed sores. Likewise, the Plaintiff alleges that no extraordinary measures were taken to save the decedent as her living will required. These are matters which require no expert testimony but can be testified to by lay people and patient care personnel

The Plaintiff disputes the Defendant’s assertion that the recognition of excessive bed sores or the failure to grant extraordinary care are not within the common knowledge and experience of lay witnesses.

In Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss, which was an extension of the hearing, the Plaintiff argued that the affidavit of Frances Brown and the Motions to Extend Time to File Affidavit of Expert Witness that

were filed in 2015-CP-21-1699 and 2015-CP-21-1701 should be applied to 2015-NI-21-7 and 2015-NI-21-8 because all four cases were mailed on the same day and involve the same parties and matter. The Plaintiff stands by this argument since Ranucci held that “section 15-79-125(A) incorporates section 15-36-100 in its entirety. Also, as to the two Notices of Intent to File Suit at issue, the Plaintiff agrees with the Court finding that the Plaintiff did not contemporaneously file an affidavit of an expert witness along with the Notices of Intent to File Suit but asserts as indicated above the Section 15-36-100 (C) (1) affidavits to extend time were filed in the cases as outlined in the facts above. Justice demands that the Plaintiff be allowed to file the affidavits of the expert as good cause for not filing has been shown.

The trial court erred in granting the motion in light of the catch 22 situation the law places the Plaintiff in when the Plaintiff seeks to present its affidavit after the 45 days but before the Court finds that there is just cause for the delay as is present in this case.

The common knowledge of exception would apply to bedsores even if it doesn't apply to cause of death, and the Plaintiff invoked the common knowledge exception when filing the Notices of Intent to File Suit. Alternatively, The Court should allow the Plaintiff to present the expert affidavits.

Since the statute of limitations ran out on June 16, 2015 so to not allow the affidavits to be filed is a denial of justice since the case cannot be re-filed.

II. The Plaintiff agrees that the Complaints were prematurely filed but that is not a ground for dismissal of the NOIs.

A. Standard of Review:

In Ranucci, the Supreme Court stated in reference to medical malpractice actions that Sections 15-79-125 and 15-36-100 “establish a unique two – step procedure that filters frivolous claims but permits the filing of potentially meritorious claims.” 409 S.C.

at 506, 763 S.E.2d at 196. In these cases, the Plaintiff failed to follow the statutory requirements of Section 15-79-125 (A), which state a Plaintiff must file a Notice of Intent to File Suit and an affidavit of expert witness “prior to the filing or initiating a civil action alleging injury or death as a result of medical malpractice.”

B. Discussion of the issue:

The respondent alleges that, the Plaintiff should have filed the two Notices of Intent to File Suit, along with an expert affidavit, before filing the two Complaints alleging medical malpractice. Instead, the Plaintiff mailed the two Notices of Intent to File Suit without an expert affidavit and the two Complaints on the June 15, 2015.

The Plaintiff agrees that the complaints were filed prematurely in this case and respectfully withdraws them. However, the Plaintiff asserts that when both the complaint and the NOIs are filed together or the Complaint are erroneously filed prior to the NOIs being filed the error alone is not fatal to the case. In Brouwer v. Sisters of Charity Providence Hospital the Court allowed the premature complaint to be withdrawn without prejudice.

RULE 12 (B) (5) GROUNDS

The two Notices of Intent and two Complaints should not be dismissed pursuant to Rule 12 (b) (5), SCRPC.

A. Standard of Review:

South Carolina Rule of Civil Procedure 4 (d) (3) states that service is accomplished on a corporation “by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process”

B. Discussion of the issue:

At the motion hearing on December 18, 2015 the attorney for the Plaintiff learned for the first time that of the entity called QHG of South Carolina which is allegedly the

parent company of the Defendant Carolinas Hospital System. ROA pg 101, lns 1- 11.

Prior to that time the Plaintiff's attorney sought to find the agent for service of process on the Defendant by calling the South Carolina Secretary of State's office. That office indicated that Carolinas Hospital System was not registered with them and they did not know it by any other name.

I thereafter called the Human resources department of Carolinas Hospital System and was told that they could accept service so service was made on that department as outlined in my memorandum in this case. The attorneys for the Defendants thereafter entered the case and filed their motions to dismiss.

The service was made in good faith as directed by the human resources employee who believed that she was authorized to accept the service of process, who accepted the documents and who delivered the documents to the attorneys for the Defendant.

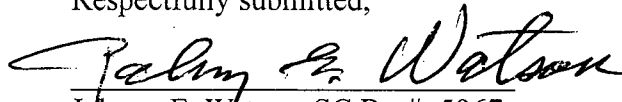
Therefore the NOIs should not be dismissed on that ground.

CONCLUSION

The Court failed to grant the Plaintiff a meaningful hearing into the good cause reasons for failing to file the affidavit of the expert witness. The case should therefore be remanded to the trial court to look into such reasons.

For the reasons stated above, the Defendant respectfully requests that this Court deny the Defendant's motion for summary judgment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Johnny E. Watson", is written over a horizontal line.

Johnny E. Watson, SC Bar#: 5967

Attorney for the Plaintiff

November 28, 2016
Columbia, South Carolina