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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable Marvin H. Dukes, III, Circuit Court Judge
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-000242

Trial Court Case No. 2015-CP-07-01251

RECEIVED

FEB 24 2017

SC Court of Appeals

Robert E. Feldman and Louis J. Feldman Respondents

v.

Gary P. Coggin Respondent.

**RESPONDENT'S RETURN TO APPELLANTS' MOTION TO REMAND TO THE
COURT OF COMMON PLEAS**

M. Dawes Cooke, Jr.
Jeffrey M. Bogdan
Barnwell Whaley Patterson & Helms, LLC
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700
Attorneys for Respondents

Dated: February 20, 2017
Charleston, South Carolina

Other Counsel of Record
Thomas A. Pendarvis
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Attorneys for Appellants

NOW COMES Respondent, Gary P. Coggin, and files the following return to Appellants' Motion to Remand to the Court of Appeals. This appeal was taken from the lower court's grant of Respondent's Motion for Summary Judgment and Appellants' instant Motion was filed contemporaneously with their Notice of Appeal.

Appellants seek to have this case remanded with a directive to the lower court to rule on Appellants' Motion for Leave to File an Amended Complaint. Respondent respectfully asks that the Court deny Appellants' Motion.

Respondent filed his Motion for Summary Judgment, which serves as the foundation of this appeal, on May 16, 2016 and his Memorandum in Support of the same on June 22, 2016. See printout of case docket, attached hereto as Exhibit A. Appellants filed their Memorandum in Opposition on June 27, 2016. Id. A hearing was held on Respondent's Motion for Summary Judgment on June 29, 2016. The parties filed and served post-hearing supplemental briefs, with the final brief being filed on August 1, 2016.

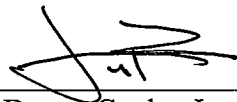
Meanwhile, On July 19, 2016, following the hearing on the Motion for Summary Judgment, Appellants filed a Motion for Leave to File an Amended Complaint. Respondent filed a Memorandum in Opposition to that motion, a copy of which is attached hereto as Exhibit B. On September 8, 2016, prior to the lower court ruling on Respondent's Motion for Summary Judgment, Appellants' Motion for Leave to File Amended Complaint came before the lower court for a hearing. The lower court declined to rule on Plaintiff's Motion for Leave at the hearing because of the outstanding Motion for Summary Judgment.

The following day, September 9, 2016, the lower court granted Respondent's Motion for Summary Judgment, which disposed of this case in its entirety. The lower court subsequently denied Appellant's Motion to Alter or Amend that ruling. See Exhibit A.

As soon as the lower Court granted Respondent's Motion for Summary Judgment, which disposed of this case in its entirety, all other motions then pending or under the lower court's advisement were rendered moot. The online docket for this case confirms that this case is disposed in its entirety, and that the Appellants' Motion for Leave to File Amended Complaint is completed, not "outstanding" as Appellants now claim. See Exhibit A. Once summary judgment was granted, the lower court was not required to rule on any pending motions (with the exception of Appellants' later-filed Motion to Alter or Amend the summary judgment order).

Appellants now claim that Rule 58 of the South Carolina Rules of Civil Procedure requires the lower court to "enter a written order when a Motion has been filed." Actually, Rule 58 only requires a court to prepare an order "upon a decision by the court" See Rule 58(a)(2), SCRPC. The lower court never decided Appellants' Motion for Leave to File Amended Complaint, and never had to since it was rendered moot by its granting of Respondent's Motion for Summary Judgment. Therefore, a written order deciding Appellants' Motion for Leave to File Amended Complaint was not required and, as such, there is no reason for this Court to remand this case to the lower court.

Respondent respectfully asks this Court to deny Appellants' Motion to Remand this case to the lower court to rule on their already disposed of Motion for Leave to File an Amended Complaint.

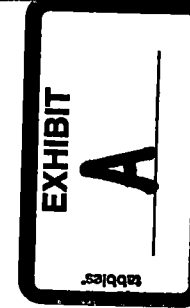


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Dated: February 20, 2017
Charleston, South Carolina



Beaufort County
Fourteenth Judicial Circuit
Public Index



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Switch View

Robert E Feldman , plaintiff, et al VS Gary P Coggin

| | | | | | |
|----------------------|-------------------|-------------------|------------------------------|--------------------|---------------------|
| Case Number: | 2015CP0701251 | Court Agency: | Beaufort County Common Pleas | Filed Date: | 05/19/2015 |
| Case Type: | Common Pleas | Case Sub Type: | Legal Malpract 210 | File Type: | Jury |
| Status: | Disposed | Assigned Judge: | | | |
| Disposition: | Ended by Non Jury | Disposition Date: | 09/09/2016 | Disposition Judge: | Dukes, Marvin H III |
| Original Source Doc: | | Original Case #: | | | |
| Judgment Number: | | Court Roster: | | | |

Case Parties Judgments Tax Map Information Associated Cases Actions Financials

| Name | Description | Type | Motion Roster | Begin Date | Completion Date | Documents |
|-------------------------|--|--------|---------------|------------------|------------------|-----------|
| Feldman, Robert E | Order Denying Motion to Alter or Amend Judgment | Order | | 01/27/2017-14:40 | | |
| Coggin, Gary P | Supplemental Memo in Opposition to Motion to Alter or Amend | Filing | | 01/10/2017-16:05 | | |
| Feldman, Robert E | Notice/Notice of Appearance | Filing | | 01/06/2017-12:51 | 09/09/2016-12:51 | |
| Coggin, Gary P | Memo in Opposition/Motion to Alter or Amend Judgment, Cert | Filing | | 10/03/2016-13:57 | 09/09/2016-13:57 | |
| Feldman, Robert E | Motion to Alter or Amend Judgment, Cert of Serv | Motion | | 09/19/2016-13:59 | 12/12/2016-13:59 | |
| Coggin, Gary P | Order Granting Def Motion for SJ | Order | | 09/09/2016-08:50 | 09/09/2016-08:50 | |
| Coggin, Gary P | Memo Opposition/Motion Leave File Amended Verified Complaint | Filing | | 09/07/2016-09:56 | 09/09/2016-09:56 | |
| Feldman, Robert E | Notice of Hearing Plts Motion for Leave to File Amd Verified | Filing | | 08/04/2016-16:31 | 09/09/2016-16:31 | |
| Pendarvis, Thomas A. | 9/8/2016_MOTION_Roster/Notice of Motions Roster Publication | Action | | 08/03/2016-12:00 | 09/09/2016-12:00 | |
| Bogdan, Jeffrey Michael | 9/8/2016_MOTION_Roster/Notice of Motions Roster Publication | Action | | 08/03/2016-12:00 | 09/09/2016-12:00 | |
| Feldman, Robert E | Sur-Reply to (Coggin) Reply to Supp Memo of Opp/Motion Summa | Filing | | 08/01/2016-08:31 | 09/09/2016-08:31 | |
| Coggin, Gary P | Reply to Supplemental Memo in Opp/Motion Summary Judgment, | Filing | | 07/28/2016-16:26 | 09/09/2016-16:26 | |
| Feldman, Robert E | Amended Certificate of Service (Motion to Amend) 7-15-16 | Filing | | 07/20/2016-11:22 | 09/09/2016-11:22 | |

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|-------------------------|--|--------|--|------------------|------------------|--|
| Feldman, Robert E | Motion for Leave to File Amended Verified Complaint, Cert of | Motion | | 07/19/2016-16:54 | 09/08/2016-16:54 | |
| Feldman, Robert E | Supplemental Memo in Opposition to Defs Motion for SJ | Filing | | 07/11/2016-15:52 | 09/09/2016-15:52 | |
| Feldman, Robert E | Affidavit of Thomas A Pendarvis, Cert of Serv | Filing | | 06/28/2016-13:59 | 09/09/2016-13:59 | |
| Feldman, Robert E | Memo in Opposition/Motion Summary Judgment, Cert of | Filing | | 06/27/2016-10:18 | 09/09/2016-10:18 | |
| Coggin, Gary P | Memo in Support of Motion for Summary Judgment | Filing | | 06/22/2016-15:16 | 09/09/2016-15:16 | |
| Feldman, Robert E | Scheduling Order, tdn 1-1-17 | Filing | | 06/17/2016-11:21 | 06/17/2016-11:21 | |
| Bogdan, Jeffrey Michael | 6/16/2016_MOTION_Roster/Notice of Motions Roster Publication | Action | | 05/25/2016-12:09 | 09/09/2016-12:09 | |
| Pendarvis, Thomas A. | 6/16/2016_MOTION_Roster/Notice of Motions Roster Publication | Action | | 05/25/2016-12:09 | 09/09/2016-12:09 | |
| Feldman, Robert E | Offer Of Judgment, Cert of Serv | Filing | | 05/20/2016-15:38 | 09/09/2016-15:38 | |
| Coggin, Gary P | Motion for Summary Judgment, Cert of Serv | Motion | | 05/16/2016-09:55 | 09/09/2016-09:55 | |
| Feldman, Robert E | Oform4/Transfer to Jury Trial/tdn 1-2017 | Order | | 04/22/2016-08:22 | 04/22/2016-08:22 | |
| Feldman, Robert E | ADR/Notice of ADR | Action | | 04/04/2016-12:18 | 03/07/2016-12:18 | |
| Feldman, Robert E | Response to Request for Scheduling Order, Cert of Serv | Filing | | 03/25/2016-14:39 | 09/09/2016-14:39 | |
| Coggin, Gary P | Response to Request for Scheduling Order, Cert of Serv | Filing | | 03/18/2016-09:20 | 09/09/2016-09:20 | |
| Coggin, Gary P | Request for Scheduling Order | Filing | | 03/09/2016-12:36 | 09/09/2016-12:36 | |
| Coltrane, Curtis Lee | ADR/Mediation Results - Impasse | Action | | 03/07/2016-08:23 | 09/09/2016-08:23 | |
| Coltrane, Curtis Lee | ADR/Mediation Results Report/Filing | Filing | | 03/07/2016-08:23 | 09/09/2016-08:23 | |
| Feldman, Robert E | Request to Transfer to the Jury Trial Roster | Motion | | 02/29/2016-12:29 | 03/31/2016-12:29 | |
| Feldman, Robert E | Email from David H keller | Filing | | 01/15/2016-15:16 | 09/09/2016-15:16 | |
| Feldman, Robert E | Notice of ADR to attorneys | Filing | | 01/08/2016-14:40 | 09/09/2016-14:40 | |
| Feldman, Robert E | ADR/Alternative Dispute Resolution (Workflow) | Action | | 12/15/2015-11:11 | 03/29/2016-11:11 | |
| Feldman, Robert E | Offer Of Judgment \$445,000.00, Cert of Serv | Filing | | 11/30/2015-09:10 | 09/09/2016-09:10 | |
| Coggin, Gary P | Answer to Complaint; Certificate of Service 8/17/15 | Filing | | 08/20/2015-10:49 | 09/09/2016-10:49 | |
| Feldman, Robert E | Aff Svc Summons Verified Complaint on Gary P Coggin 6-17-15 | Filing | | 06/26/2015-10:29 | 09/09/2016-10:29 | |
| Feldman, Robert E | Verification of the Complaint | Filing | | 05/22/2015-11:14 | 09/09/2016-11:14 | |

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|-------------------|----------------------|--------|--|------------------|------------------|--|
| Feldman, Robert E | Summons & Complaint | Filing | | 05/19/2015-11:00 | 09/09/2016-11:00 | |
| Feldman, Robert E | GARY P COGGIN-SUMCMP | Filing | | | 09/09/2016-00:00 | |
| Feldman, Robert E | GARY P COGGIN-VERIFD | Filing | | | 09/09/2016-00:00 | |

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT
) C/A No.: 2015-CP-07-01251

ROBERT E. FELDMAN and LOIS J.
FELDMAN,

2016 SEP -7 AM 11:02
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Plaintiffs,

vs.

GARY P. COGGIN,

Defendant.

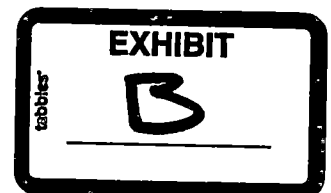
**DEFENDANT'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO FILE AMENDED
VERIFIED COMPLAINT**

TO: THOMAS A. PENDARVIS, ATTORNEY FOR PLAINTIFF

For the reasons that follow, the Defendant, Gary P. Coggin (hereinafter "Attorney Coggin") respectfully requests that the Court deny the Plaintiff's Motion for Leave to File Amended Verified Complaint.

BRIEF SUMMARY OF ARGUMENT

In this legal malpractice case, Plaintiffs' current Verified Complaint alleges only one theory of liability against Attorney Coggin: failure to properly serve a complaint in an underlying case. The expert affidavit that was filed as part of their current Verified Complaint specifies this one negligent act or omission, but no others. Attorney Coggin has moved for Summary Judgment, arguing that even if he failed to properly serve the complaint in the underlying case, such failure cannot support this legal malpractice action because as a matter of law the defendant failed to timely assert that as a defense. Instead of addressing this argument, Plaintiff responded to the Motion for Summary Judgment by arguing that Attorney Coggin is liable to the Plaintiffs under a new and distinct theory: that he failed to prepare the underlying case for settlement and trial. Attorney Coggin's Motion for Summary Judgment was fully briefed and argued to Judge Dukes and is currently awaiting decision.



Plaintiffs now seek to amend their Verified Complaint to include the new theory of liability: that Attorney Coggin was negligent in failing to prepare the underlying case. However, Plaintiffs propose to use the exact same expert affidavit that they filed as part of their original Verified Complaint, which opines only that Attorney Coggin breached the standard of care by failing to properly serve the complaint. The expert affidavit does not specify any other alleged negligent acts or omissions and does not opine that Attorney Coggin breached the standard of care by failing to prepare the underlying case. The expert affidavit therefore does not support the new theory of liability.

If the Court allows Plaintiffs' proposed Amended Verified Complaint and Judge Dukes grants Attorney Coggin's Motion for Summary Judgment, Plaintiffs' Amended Verified Complaint will not be supported by any expert affidavit, and thus would violate S.C. Code § 15-36-100(B). Alternatively, if Judge Dukes denies Attorney Coggin's Motion for Summary Judgment, Attorney Coggin will consent to the filing of the proposed Amended Verified Complaint. Accordingly, Attorney Coggin requests that the Court deny the Plaintiffs' Motion for Leave to Amend pending Judge Dukes' ruling on the Motion for Summary Judgment.

FACTS

Attorney Coggin represented the Plaintiffs in an effort to recover for personal injuries that Plaintiff Robert Feldman sustained when he was involved in an automobile accident allegedly caused by Sarah Dickenson on October 9, 2010. Compl. ¶¶8-9. After successfully recovering \$85,000 for Mr. Feldman from Ms. Dickenson's automobile liability insurance carrier without litigation, Attorney Coggin filed suit on behalf of both Plaintiffs against Ms. Dickenson in an attempt to recover UIM benefits from Plaintiffs' own automobile liability insurance carrier, Liberty Mutual Insurance Company. Compl. ¶¶15-16. That case, styled Robert & Lois Feldman

v. Sarah Dickenson, 2012-CP-070-3800 (hereinafter the "UIM Action") was filed on or around October 29, 2012. Compl. ¶16.

After Attorney Coggin served the summons and complaint in the UIM Action on Liberty Mutual, as is required by S.C. Code Ann. §38-77-160, Liberty Mutual retained attorney Julian Allen "to represent Dickenson" in the UIM Action.¹ Compl. ¶¶17, 28. Liberty Mutual filed an Answer to the UIM Action on January 7, 2013. The Answer included only four (4) affirmative defenses, the last of which read as follows:

FOR A FIFTH DEFENSE
(Improper Service)

10. FURTHER ANSWERING, this party alleges that Plaintiff has failed to effectuate proper service under Rule 12(b)(4) and Rule 12(b)(5).

Liberty Mutual's Answer did not allege that the at-fault driver, Dickenson, was not served, nor did it raise the statute of limitations as an affirmative defense. Liberty Mutual did not file any motions prior to the Answer, nor did it amend its Answer within 30 days of serving it as allowed by Rule 15(a), SCRC. CP.

For almost two years, Liberty Mutual defended the UIM Action by participating in written discovery, filing motions, taking both of the Plaintiffs' depositions, and participating in mediation on or around May 7, 2014. Liberty Mutual offered, and Attorney Coggin recommended Plaintiffs accept, \$25,000 at mediation, but the Plaintiffs refused. Attorney Coggin's recommendation to accept this amount was based partially on the fact that he recently discovered evidence that Plaintiff Robert Feldman had been playing golf regularly after the October 9, 2010 accident, something which both Plaintiffs had represented to Attorney Coggin that Robert Feldman could not do because of the injuries he sustained in the accident. To

¹ Despite the fact that Plaintiffs claim that Attorney Allen represented Dickenson in the UIM Action, South Carolina law is clear that Attorney Allen actually represented Liberty Mutual and did not represent Dickenson. Crawford v. Henderson, 356 S.C. 389, 398, 589 S.E.2d 204, 209 (Ct. App. 2003) ("[T]he attorney for the UIM carrier represents the carrier and not the named defendant.").

Attorney Coggin, this newly discovered evidence completely undermined Plaintiffs' claim for damages in the UIM Action.

After Plaintiffs' refusal to accept Liberty Mutual's \$25,000 settlement offer at mediation, Attorney Coggin began focusing on getting the UIM Action ready for trial. In order to present the Plaintiffs' case at trial, Attorney Coggin would have to incur some rather large expenses, including those associated with taking video-taped *de bene esse* depositions of Plaintiff Robert Feldman's treating physicians. However, Plaintiffs refused to provide Attorney Coggin the funds to cover these expenses, despite having agreed to do so in the Contingency Fee Agreement that Mr. Feldman signed. After over nine months of attempting to get Plaintiffs to commit to paying these expenses, on September 16, 2014 Attorney Coggin filed a Motion to Withdraw as Counsel and to Stay the Proceedings. The following day Attorney Coggin was contacted by Attorney Robert Metro with notice that his firm, Bauer & Metro, P.C, was taking over representation of the Plaintiffs in the UIM Action. On September 23, 2014, Attorney Coggin provided Bauer & Metro his entire file in the UIM Action. The Consent Order to substitute counsel was filed on November 20, 2014.

Between January 7, 2013 when Liberty Mutual filed his Answer, and September 16, 2014, when Attorney Coggin filed his Motion to Withdraw, Liberty Mutual did not raise or argue that anyone was not served or was improperly served with process or that the statute of limitations had expired. Notably, the three-year statute of limitations for the UIM Action expired on October 9, 2013. Liberty Mutual continued actively defending the UIM Action after the expiration of the statute of limitation, including participation at mediation.

On October 14, 2014, after Bauer & Metro took over representation of the Plaintiffs, but before the Consent Order to substitute counsel was filed, Liberty Mutual filed a Motion to Dismiss, claiming for the first time that *Dickenson* was not served with the Summons and

Complaint in the UIM Action within the statute of limitations, which expired on October 9, 2013. Notably, the Motion to Dismiss was filed almost two years after the UIM Action was filed.

While this Motion to Dismiss was pending, Plaintiffs, then represented by Bauer & Metro, decided to accept Liberty Mutual's \$25,000 settlement offer that was made at mediation while they were under Attorney Coggin's representation. Importantly, Plaintiffs did not allow the Motion to Dismiss to be adjudicated, as they claim they now were "certain" that it would have been granted (Compl. ¶38). A Stipulation of Dismissal with Prejudice of the UIM Action was filed on March 4, 2015.

PROCEDURAL HISTORY

This legal malpractice action was filed just over two months later, on May 19, 2015. In the Verified Complaint, Plaintiffs allege that Attorney Coggin breached the standard of care only by failing to serve Dickenson with the Summons and Complaint in the UIM Action (Compl. ¶39), which forced them to accept Liberty Mutual's \$25,000 settlement offer instead of the \$500,000 maximum UIM benefits that Plaintiffs claim they "more likely than not" would have recovered from Liberty Mutual in the UIM Action (Compl. ¶¶38, 40). The Verified Complaint includes no other theory of liability. Similarly, the expert affidavit that Plaintiffs were required to file with their Verified Complaint specifies only one alleged negligent act or omission: Attorney Coggin's alleged failure to serve Dickenson with the Summons and Complaint in the UIM Action. Notably, Plaintiffs' expert affidavit is issued by Sam Bauer, one of the attorneys with Bauer & Metro who replaced Attorney Coggin as the Plaintiffs' counsel of record in the UIM Action and voluntarily consummated the \$25,000 settlement of the UIM Action.

After participating in discovery, Attorney Coggin filed a Motion for Summary Judgment on May 16, 2016. Attorney Coggin argued that even if Plaintiffs could establish that Attorney

Coggin failed to serve Dickenson, that theory of liability could not support this legal malpractice action because the defendant in that case failed to timely assert lack of service upon the at-fault driver and could therefore not defend the action on that basis.² Plaintiffs filed a Memorandum in Opposition, but instead of addressing Attorney Coggin's argument they stated that Attorney Coggin could be found liable to the Plaintiffs under a new theory of liability: that Attorney Coggin failed to adequately prepare the UIM Action for settlement or trial. Attorney Coggin's Motion for Summary Judgment was argued before Judge Dukes on June 29, 2016. Again, Plaintiffs failed to present any response to Attorney Coggin's argument that his alleged failure to serve Dickenson could not support this legal malpractice action, and instead again argued that Attorney Coggin could be held liable on the separate, distinct, and unpled theory that Attorney Coggin failed to adequately prepare the UIM Action. Judge Dukes took the matter under advisement, and allowed Plaintiffs to submit a supplemental memorandum. In their Supplemental Memorandum in Opposition, Plaintiffs continued to argue only that Attorney Coggin could be found liable for failing to prepare the UIM Action, and still failed to address the argument that the only pled theory of liability was meritless. After Attorney Coggin filed a Reply, Plaintiffs filed a Sur-Reply, still arguing only that Attorney Coggin could be found liable under this new failure-to-prepare theory of liability. The last brief was submitted to Judge Dukes on July 28, and the Motion is currently under his advisement.

After the June 29 hearing in front of Judge Dukes, but before the supplemental briefing was closed, Plaintiffs requested that Attorney Coggin consent to the filing of an Amended Verified Complaint, which proposed to add the new failure to prepare theory of liability.

² Attorney Coggin incorporates herein the arguments presented in his Memorandum in Support of Motion for Summary Judgment, at the hearing on the Motion for Summary Judgment, and in his Reply to Plaintiff's Supplemental Memorandum in Opposition to Motion for Summary Judgment. In short, Attorney Coggin argued at summary judgment that his alleged failure to serve Dickenson in the UIM Action had absolutely no effect on the UIM Action and did not proximately cause Plaintiffs any damages because Liberty waived its right to challenge service on Dickenson by not specifically raising that issue in its answer and by actively litigating the UIM Action as if service was appropriate, only to later move to dismiss after the statute of limitations had expired. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

Attorney Coggin responded by inquiring as to whether Plaintiffs intended to use the same affidavit of Sam Bauer to support the proposed Amended Verified Complaint, or if they had a different expert affidavit. Plaintiffs responded that they intend to use Mr. Bauer's original affidavit. Attorney Coggin replied by pointing out that Mr. Bauer's affidavit alleges only that Attorney Coggin breached the standard of care by failing to serve Dickenson, and does not alleged that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. Attorney Coggin reminded Plaintiffs that they still had not advanced any argument that would allow Judge Dukes to let the failure-to-serve theory survive summary judgment. Attorney Coggin declined to consent to the proposed Amended Verified Complaint until Plaintiffs present a qualifying expert affidavit stating that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. See email chain attached hereto as Exhibit A. Plaintiffs have not submitted an additional or revised expert affidavit, and instead filed the present Motion for Leave to Amend.

ARGUMENT

“[I]n an action for damages alleging professional negligence against [an attorney] . . . 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.”

The expert affidavit that Plaintiffs intend to file as part of their proposed Amended Verified Complaint alleges only one negligent act or omission: Attorney Coggin's alleged failure to serve the at-fault driver, Dickenson, with the summons and complaint. This alleged negligent act or omission cannot, as a matter of law, support a legal malpractice action because the defendant insurer did not timely assert it as a defense. Plaintiffs appear to agree with this position, as they have not submitted any argument against it despite filing three briefs and

appearing at a hearing on Defendant Coggins' Motion for Summary Judgment.

What is conspicuously missing from Mr. Bauer's affidavit is an opinion that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. Since Mr. Bauer actually represented the Plaintiffs in the UIM Action after Attorney Coggin withdrew, he has unique personal knowledge of Attorney Coggin's preparation of that case. He was also in the best position to ensure that the case was properly prepared to maximize settlement or trial potential. Nevertheless, despite the fact that Plaintiffs have been aware since July 11 of Attorney Coggin's desire to see an expert affidavit identifying his alleged failure to prepare as a basis for liability, Plaintiffs have not produced a revised affidavit from Mr. Bauer opining that Attorney Coggin failed to prepare the UIM Action or that any such failure was a breach of the standard of care.

Further, on August 1, 2016, Plaintiffs identified another expert witness, attorney Ronnie Richter. However, Plaintiffs have failed to produce any affidavit from Mr. Richter opining that Attorney Coggin's alleged failure to prepare the UIM Action constitutes a negligent act or omission.

Having declined to present any argument that Attorney Coggin's alleged failure to serve Dickenson can support a legal malpractice claim, Plaintiffs now have changed their case to argue that Attorney Coggin was negligent for failing to prepare the UIM Action for settlement or trial. However, Plaintiffs are trying to shoehorn this theory into an already flawed pleading without a valid expert affidavit. Since the only negligent act or omission contained in Plaintiffs' expert affidavit cannot support Plaintiffs' case, as a matter of law, the Court should deny Plaintiffs' Motion for Leave to Amend. If Judge Dukes grants Attorney Coggin's Motion for Summary Judgment, Plaintiffs' expert affidavit will not allege any viable acts of negligence against

Attorney Coggin.³ If Judge Dukes denies the Motion for Summary Judgment, Attorney Coggin will consent to Plaintiffs filing the proposed Amended Verified Complaint, as the expert affidavit will then state one viable negligent act or omission. Either way, this Court's denial of Plaintiffs' Motion for Leave to Amend will not materially prejudice the Plaintiffs in any way.

CONCLUSION

Attorney Coggin readily concedes that § 15-36-100(B) only requires an expert affidavit to specify one negligent act or omission. However, the stated negligent act or omission must be one that can support liability. The only alleged negligent act contained in the expert affidavit Plaintiffs have presented does not meet this standard. Plaintiffs do not have an expert affidavit to support the new theory of liability that they intend to include in their Amended Verified Complaint. As such, Plaintiffs' Motion for Leave to File the Amended Verified Complaint should be denied, as it is not supported by a qualifying expert affidavit.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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Charleston, SC 29401
843-577-7700 (phone)
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jbogdan@barnwell-whaley.com
Attorneys for Defendant

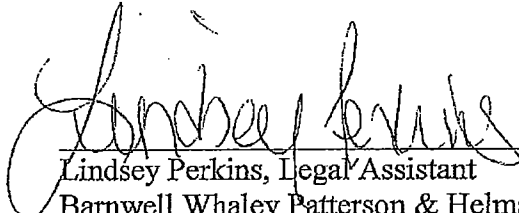
September 6, 2016
Charleston, South Carolina

³ In addition to the failure-to-prepare theory being unsupported by expert affidavit, it is contradicted by the evidence exchanged in discovery. The failure-to-prepare theory is based on Attorney Coggin's failure to retain expert witnesses on Mr. Feldman's behalf in the UIM Action. However, Mr. Feldman refused to agree to pay for the expenses of even the most essential expert witness – his treating physician – to testify at deposition or trial. See collection of letters from Attorney Coggin requesting that Mr. Feldman agree to pay expert expenses, attached hereto as Exhibit B. It is disingenuous for Mr. Feldman to now claim that Attorney Coggin was negligent for failing to retain expert witnesses on his behalf when Mr. Feldman would not agree to pay for the most essential expert witness services in the UIM Action. Accordingly, the failure-to-prepare theory is meritless.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED VERIFIED COMPLAINT** has been forwarded to counsel of record via USPS and/or e-mail this 6th day of September, 2016 as follows:

Thomas A. Pendarvis, Esquire
Pendarvis Law Offices, P.C.
500 Carteret St., Ste. A
Beaufort, South Carolina 29902


Lindsey Perkins, Legal Assistant
Barnwell Whaley Patterson & Helms, LLC

2016 SEP -7 AM 11: 02
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Jeff Bogdan

From: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>
Sent: Monday, July 11, 2016 4:33 PM
To: Jeff Bogdan
Cc: M. Dawes Cooke; Lindsey Perkins; Sara Wood; Chris Lempesis
Subject: RE: Feldman v. Coggin;

Jeff,

First, thanks for your response message earlier today. Next, as you consider any response to the requests posed by Chris, please understand that to keep things moving we intend to file the Motion to Amend by Friday, if a resolution is not reached by then.

Thanks.

Regards,

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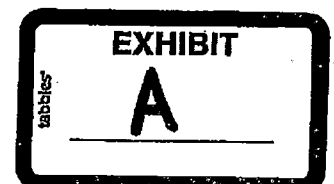
Practice concentrated in lawyer professional responsibility matters (plaintiff lawyer-malpractice claims, law-firm dissolutions, lawyer moves between firms, and consultation on lawyer professional ethics matters).

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From: Chris Lempesis
Sent: Monday, July 11, 2016 3:42 PM
To: Jeff Bogdan <jbogdan@barnwell-whaley.com>
Cc: M. Dawes Cooke <mdc@barnwell-whaley.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>; Sara Wood <SWood@pendarvislaw.com>; Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>
Subject: RE: Feldman v. Coggin;

Jeff,

Thank you for your email. I believe that the Plaintiffs have articulated a sufficient response to the Motion for Summary Judgment, both in an initial memo, at the hearing, and subsequent to the hearing by way of supplemental memo. At this point, I think that it may be up to Judge Dukes to opine as to whether summary judgment on the particular point referenced in the motion is appropriate so I will leave that to Judge Dukes to decide.



As to the sufficiency of the Affidavit, I believe that the issue that you have raised is addressed in Section 15-36-100(B), which requires 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. Mr. Bauer's Affidavit meets this requirement, given the context in which it was filed.

As far as I am aware, a Defendant's position as to the merit of the claims is not a predicate for amending a complaint generally speaking, unless there is a related argument as to bad faith and/or prejudice in the timing of the amendment. In this scenario, there is no discernable requirement contained in the relevant statute for the affidavit you have requested in order to amend the complaint, nor is there, generally, a requirement aside from not prejudicing the defendant or otherwise not acting in bad faith. If your client believes that there is prejudice or a showing of bad faith attendant to the proposed amendment of the complaint, please let me know that so that we can attempt to address that issue. Otherwise, I cannot see an actual basis, aside from a difference of opinion as to the merit of your client's defense as recited in the Motion for Summary Judgment, that would preclude your consenting to amending the complaint, and if a difference of opinion is the only reason, that in and of itself does not meet the standard as far as I am aware so as to provide a legitimate basis for your client to withhold consent to the filing of the proposed Amended Complaint.

I would appreciate it if you could provide additional information that supports your position as to the requirement for the additional affidavit as I would prefer to discuss this issue over email as opposed to unnecessarily subjecting your client to the additional cost of an additional motion hearing -- regardless of which analysis is correct regarding the need for an additional affidavit.

Thanks,

Chris

Christopher W. Lempesis, Jr.
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
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From: Jeff Bogdan [mailto:jbogdan@barnwell-whaley.com]
Sent: Monday, July 11, 2016 12:00 PM
To: Thomas A. Pendarvis <tpendarvis@pendarvislaw.com>; Melanie Weitzel <melanie@pendarvislaw.com>
Cc: M. Dawes Cooke <mdc@barnwell-whaley.com>; Chris Lempesis <chris@pendarvislaw.com>; Lindsey Perkins <lperkins@barnwell-whaley.com>
Subject: RE: Feldman v. Coggin;

Thomas,

I have received your Motion for Leave to File an Amended Complaint and the proposed Amended Complaint. I see that your proposed Amended Complaint adds new theories of legal malpractice: that my client breached the standard of care by (1) failing to retain expert witnesses on Mr. Feldman's behalf to develop his claim for future medical needs and expenses, and thus failing to prepare the case for settlement and trial and (2) failing to develop Mr. Feldman's claim for lost wages, and thus failing to prepare the case for settlement and trial. Your proposed Amended Complaint retains

your previous theory that my client breached the standard of care by failing to serve Ms. Dickenson with the Summons and Complaint in the UIM case.

You have also expressed your intention to use the affidavit of Sam Bauer, dated May 7, 2015, which was attached to your initial Complaint, to satisfy the expert affidavit filing requirement for your proposed Amended Complaint. Mr. Bauer's affidavit swears to only one alleged breach of the standard of care by my client: the alleged failure to serve Ms. Dickenson. Mr. Bauer's affidavit does not raise the issues of the alleged failure to retain expert witnesses, alleged failure to develop a lost wages claim, or alleged general failure to prepare Mr. Feldman's case for settlement or trial.

As you know, the issue of whether Mr. Coggin's alleged failure to serve Ms. Dickenson with the summons and complaint in the underlying UIM case is currently under Judge Dukes's advisement by way of my Motion for Summary Judgment. We argued that any alleged failure to serve Ms. Dickenson cannot support a claim of legal malpractice under these circumstances. To date, you have not advanced any opposing arguments to this position, and instead took the position in your briefs and at the hearing that these separate theories of legal malpractice (failure to retain experts and failure to develop lost wages) should allow your case to remain.

Since it is our position that that the theory of malpractice espoused in Mr. Bauer's affidavit is not viable, we cannot consider consenting to your filing of this proposed Amended Complaint until we see a qualifying affidavit alleging that my client breached the standard of care by either failing to retain expert witnesses, failing to develop a lost wages claim, or generally failing to prepare Mr. Feldman's case for settlement or trial.

If you have such an affidavit, please share it with me and I will reconsider my position.

Thanks,
Jeff

Jeffrey M. Bogdan
BWPB
843-577-7700

From: Thomas A. Pendarvis [<mailto:tpendarvis@pendarvislaw.com>]
Sent: Friday, July 08, 2016 1:50 PM
To: Jeff Bogdan; Melanie Weitzel
Cc: M. Dawes Cooke; Chris Lempesis; Lindsey Perkins
Subject: RE: Feldman v. Coggin;

Yes, we intend to use the same expert affidavit to support the Amended Verified Complaint.

Regards,

Thomas A. Pendarvis
Pendarvis Law Offices, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Thomas@PendarvisLaw.com
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2017-000242

Trial Court Case No. 2015-CP-07-01251

RECEIVED

FEB 24 2017

SC Court of Appeals

Robert E. Feldman and Louis J. Feldman Appellants,

v.

Gary P. Coggin Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellants' Motion to Remand to the Court of Common Pleas on Appellants Robert E. Feldman and Louis J. Feldman by depositing a copy of it in the United States Mail, postage prepaid, on February 20, 2017, addressed to its counsel of record Christopher W. Lempesis, Jr., Esquire at address 710 Boundary Street, Unit A1, Beaufort, SC 29902-4188.



Lindsey Perkins
Legal Assistant



Jeffrey M. Bogdan, Esquire
jbogdan@barnwell-whaley.com

February 20, 2017

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

Re: Robert E. Feldman, et al v. Gary P. Coggin
C/A No. 2015-CP-07-01251
BWPH# 5059.001

FEB 24 2017

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Respondent's Return to Appellants' Motion to Remand to the Court of Common Pleas. Upon filing the original, please return one (1) clocked copy to me in the envelope enclosed for your convenience. Please do not hesitate to contact me with any questions or concerns.

With kind regards,

Yours truly,

Jeffrey M. Bogdan

JMB/lap

Enclosures

cc: Thomas A. Pendarvis (w/enclosure)
Christopher W. Lempesis, Jr., Esquire (w/enclosure)

www.barnwell-whaley.com

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FEB 24 2017
SC Court of Appeals

5059.001
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211