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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Case No. 2016-000569

Greenville Pharmaceutical Research, Inc., Appellant,

v.

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

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SC Court of Appeals

APPELLANT'S PETITION FOR REHEARING

January 10, 2018

F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for Appellant

Appellant, Greenville Pharmaceutical Research, Inc., respectfully petitions this Court pursuant to Rule 221(a), SCACR, for rehearing of the Court's Unpublished Opinion No. 2017-UP-460 (the "Opinion") concerning the issue on appeal in this matter, specifically, whether the Circuit Court erred in dismissing Appellant's Complaint by sua sponte raising the issue of witness immunity, which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss, thus denying Appellant Due Process. Appellant seeks this rehearing on grounds that the Opinion appears to have overlooked or misapprehended specific allegations in Appellant's Complaint, which allege a cause of action for fraud.

Rule 221 Standard

Rule 221(a), SCACR, allows parties to petition for rehearing within fifteen days after the Court of Appeals files an opinion. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose for the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001), quoting Jean H. Toal, Shahin Vafai & Robert Muckenfriss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Instead, the purpose of a petition for rehearing "is to aid the Court in deciding correctly a case heard by it." *Arnold*, 168 S.C. at 172, 167 S.E. at 238. A proper petition does not simple contain "a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of." *Id.* Instead, a proper petition specifies points the Court supposedly has overlooked or misapprehended. *Id.*; see also *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

Appellant's Petition for Rehearing (the "Petition") is interposed for a proper purpose, *i.e.*, to aid the Court in deciding this case correctly, based on Appellant's Complaint. The Petition also is proper substantively, because it concerns the failure to state a cause of action issue properly preserved for this Court's decision, and points out allegations in the Complaint that are determinative of that issue, but that the Opinion appears to have overlooked or misapprehended. As shown below, the Petition identifies per Appellant's pleading the allegations of fraud. Significantly, in doing so, the Petition does not simply restate or "rehash" the due process argument Appellant has previously asserted on this statute of limitation issue.

Accordingly, and for the reason explained fully herein, Appellant respectfully request that this Court rehear the question of whether the Circuit Court erred in dismissing Appellant's Complaint by sua sponte raising the issue of witness immunity. Further, the Appellant requests clarification on these points:

Does the Court's Order hold that a testifying witness enjoys an absolute immunity extending to intentionally providing materially false statements?

Does the Court's Order hold that a falsely testifying witness does not force reliance or modify the elements of a cause of action for fraud upon the Appellant by his or her intentionally false statements given in an effort to circumvent Tort Reform within South Carolina?

Opinion's Findings and Holding as to Failure to State a Cause of Action

The Opinion find that the Circuit Court did not err in dismissing Appellant's complaint pursuant to Rule 12(b)(6), SCRPC, and did not "violate Greenville Pharmaceutical's due process rights."(Opinion 2.) The Opinion further stated that "the

circuit court could have dismissed Greenville Pharmaceutical's claim pursuant to 12(b)(6), SCRCF, on the ground Greenville Pharmaceutical failed to plead facts with particularity sufficient to constitute a cause of action for common-law fraud. *See* Rule 12(b)(6), SCRCF ...” (Opinion 3.)

Argument and Citation of Authority

Appellant respectfully submits that, contrary to the Opinion's findings, the Complaint does state a cause of action for fraud against Respondent Sokol and the circuit court did violate Appellant's due process rights in dismissing the Complaint.

As stated in Appellant's Final Reply Brief:

Appellant stands on the *Evans v. Rite Aid Corp.* argument that as a paid, skilled professional have a duty of care to conform to the generally recognized and accepted practices in their profession. Respondent Sokol did owe the Appellant duty of care. Compl. ¶¶ 10, 12-18, 20-27. (R. pp. 13-14) Respondent Sokol breached such duty. Compl. ¶¶ 16-20, 22, 24-27, 31-32, 35. (R. pp. 14-15) Further, contrary to Respondent Sokol's assertions, Appellant was forced to rely upon the fraud. In *Frist v. W.E. Gallant*, 240 F.Supp. 827 at 829 (D.S.C. 1965) the court, quoting *Morgan v. Graham*, 228 F.2d 625, 54 A.L.R.2d 1290 (1956):

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

Appellant would not have had to defend itself in the underlying lawsuit but for Respondent Sokol's false or reckless misrepresentations causing it to take a course of action it would not have had the statements not been made. Appellant was forced to defend itself and as a result, Appellant suffered damages. Compl. ¶¶ 37-38. (R. p. 16) As such, Appellant has a claim of fraud against Respondent Sokol and his Motion to Dismiss should be denied.

Frist stands for no protection for an intentionally fraudulent witness.

Additionally, *Frist* stands for a modification of the elements for a cause of action in fraud wherein the witness uses the legal process thereby forcing the aggrieved party to accept despite knowledge of the statements falsity, forcing reliance and depriving the aggrieved party's right to do otherwise. Appellant contends that the following allegations from the Complaint exceed the pleading requirements of *Frist*:

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

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

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

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

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

15. In South Carolina, the expert witness is required to specify at least one

negligent act or omission claimed to exist, by an Affidavit, before a Notice of Intent may be filed §15-36-100, South Carolina Code of Laws.

16. Sokol was recruited to provide a deviation of the standard of care affidavit pursuant to §15-79-125, South Carolina Code of Laws, regarding GPR for Bruce.

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

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

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

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

21. Sokol never requested any additional medical records.

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

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

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

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

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

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

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

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

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

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

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

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

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

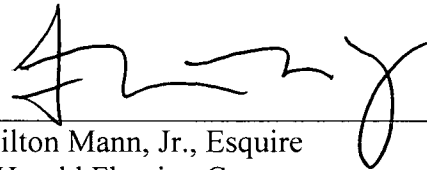
35. At all times material, Sokol was willing to state anything requested by Parham, regardless of its truth, veracity and medical accuracy.
36. Sokol provided no medical literature to support his opinion.
37. Plaintiff has suffered damages, loss and harm, including but not limited to their reputations, money, emotional tranquility, and privacy.
38. That said damages, loss and harm was the proximate and legal result of the aforementioned fraud.

Appellant contends that the Court erred in dismissing Appellant's Complaint by *sua sponte* raising the issue of immunity as to Respondent Sokol, an issue which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss and thus denying Appellant due process. A full reading of the February 12, 2015 hearing transcript clearly indicates the Court acted upon matters well beyond the four corners of the Complaint and in doing so, denied Appellant due process. In short, the Court applied an absolute immunity respecting witness testimony irrespective of the actual factual assertions of Appellant's Complaint. Thus, Appellant requests that the Court of Common Pleas' Order Dismissing its Complaint be reversed and this matter be remanded for a trial on the merits.

Conclusion

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. Mann, Jr.', written over a horizontal line.

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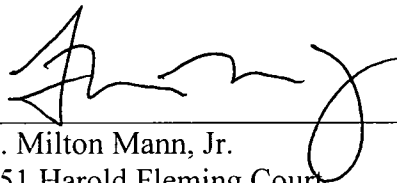
PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing upon The Honorable Jenny Abbott Kitchings, South Carolina Court of Appeals Clerk of Court, by hand-delivering the original and six (6) copies; counsel for Respondent Gerald H. Sokol, M.D. and, other counsel of record, Jeffrey M. Bogdan, Esquire, by email and by depositing copies in the United States Mail, postage pre-paid, on January 10, 2018, at the addresses listed below:

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