

STATE OF SOUTH CAROLINA) IN COURT OF COMMON PLEAS

COUNTY OF Dorchester) FIRST JUDICIAL CIRCUIT

Jamin Mazyck, #238056) C/A No. 2017-CP-18-1438

Plaintiff,)

VS.) Motion for Relief from Order of

) Dismissal

SOUTH CAROLINA DEPARTMENT OF)

CORRECTIONS(SCDC))

Defendants.)

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SC Court of Appeals

TO: Above-named Defendants:

PLEASE TAKE NOTICE that Plaintiff Jamin Mazyck will move The Honorable Edgar Warren Dickson, Circuit Court Judge, at such time and place as the court may direct, for an order vacating the Order of dismissal entered on July 18, 2018. This motion is made pursuant to Rule 60(b)(1), SCRCP, and is based upon the arguments set forth below.

I. Standard

Relief under rule allowing relief from a judgment due to mistake, inadvertence, surprise, or excusable neglect lies within the sound discretion of the trial judge. Tobias v Rice, 379 S.C. 357, 665 SE2d 216(s.c. app.2008).

II. Argument

This Court Should Vacate The Order of Dismissal Due to Excusable Neglect.

This court issued an order dismissing this action without prejudice on the grounds that Plaintiff failed to present an expert witness affidavit as part of his complaint pursuant to S.C. Code Ann. 15-36-100. "When expert testimony cannot be relied upon to established proximate cause, plaintiff in medical malpractice action must offer evidence that rises above mere speculation or conjecture." Carver v Med. Soc. of S.C., 334 S.E.2d 125 (Ct. App. 1985). (see Order generally). Within the Order, this court acknowledged that this action "Is a lawsuit brought in the state court pursuant to the South Carolina Tort Claims Act and that South Carolina law controls."

In 2014 the South Carolina Supreme Court, in Brouwer v. Sister of Charity Providence, 763 S.E.2d 200, made it clear:

You can be exempt from filing an expert witness affidavit because section 15-36-100(c)(2) does not require an affidavit where the alleged negligent act "lies within the ambit of common knowledge and experience." The South Carolina Supreme Court recently held that section 15-79-125(A) incorporates section 15-36-100 in its entirety, including the common-knowledge exception codified in 15-36-100(C)(2). Ranucci v. Crain, Op. No.27422, 763 S.E.2d 189, 2014 WL 3610956 (S.C.Supp.,Ct. filed July 23,2014)(Shearhouse Adv. Sh. No. 29 at 49).

The Plaintiff's suit was a tort claim brought under the S.C. Tort Claim Act alleging gross negligence and medical malpractice and thus, Plaintiff invoked 15-36-100(C)(2) exemption and, thus, should not have been required to file an expert witness affidavit with his complaint.

The Plaintiff is incarcerated and still presently on security lock down since his complaint was filed, due to several incidents within the department of corrections (escape from Lieber Correctional Institution and Lee Correctional Institution 7 inmates Killed) which continues (as he was during the May 30,2018 hearing and at the time this court issued its dismissal order) and therefore, Plaintiff's access to legal research materials is limited to that available within the law library located at the correctional institution his incident took place and the correctional institution to which he is assigned. Furthermore, Plaintiff ability to get medical documents to substantiates his allegations was due to the aforementioned security lock downs and defendants not adhering to the discover process properly submitted.

Prior to and at the time of the May 30, 2018 hearing on the Defendants Motion to Dismiss, Plaintiff's was "unavoidably hindered" (through no fault of his own) in his access to updated legal research material and thus, Plaintiff hereby contend that this constitutes "excusable neglect" for which he is entitled to relief from the Order which dismissed this suit pursuant to Rule 60(b)(1), SCRCF, which allow this court to relieve a party from a final judgment or order for excusable neglect.

To obtain relief from judgment on grounds of "excusable neglect" party must demonstrate that: (1) he has a meritorious defense; (2) he was not at fault; and (3) non-moving party will not be prejudiced by relief from judgment. Sterns Bank Nat. Ass'n. vs Glenwood Falls, LP,957 F.2d 126(4th cir. 1992).

"Excusable neglect" is defined as being:

A failure- which the law will excuse- to take some proper step at the proper time not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unavoidable hindrance or accident.

Id., Black's Law Dictionary, 8th Edition (2004).

As argued above, Plaintiff Mazyck's confinement to prison and thus his limited access to updated legal research material and Defendant's not adhering to SCRCF Depositions and Discovery but mainly Rule 33,34, and 36 that Plaintiff properly filed with this honorable court that was never ruled on during his May 30, 2018 hearing caused him to be unable to discover

and present to the court updated controlling legal authority which not only supported his position but was also directly adverse to the position taken by the opposing parties. **(FN 1)**. Plaintiff Mazyck submit that this was an “unavoidable hindrance” constituting “excusable neglect” within the definition found in Black’s Law Dictionary which warrants relief from the order of dismissal.

To the extent that the Supreme Court has held that section 15-79-125(A) incorporates section 15-36-100 in its entirety, including the common-knowledge exception codified in 15-36-100(c)(2), which does not require an affidavit where the alleged negligent act “lies within the ambit of common knowledge.

The judgment should be vacated because courts must weigh in the evidence of the common knowledge factor before dismissing Plaintiff complaint based on lack of expert affidavit. However, prior to and during the time period in question, the administrations, employees and correctional staff at Lieber Correctional Institution was well aware and knowledgeable of Plaintiff **prescribed** medication for his seizure disorder and lower lumbar spinal conditions as well as the potential danger, pain, and injury that would be bestowed upon Plaintiff without them providing him his **prescribed** medication.

“Prescribe” – is define as 1. To order; direct 2. To order as a medicine or treatment, said as physicians. (Webster’s New Dictionary and Thesaurus 2002). When the defendants consciously failed to provide the plaintiff with the prescribed medicine, the defendants failed to comply with the doctor’s orders, which is a breach of duty. Furthermore, the defendants knew that their conscious failure to provide Plaintiff his prescribe medicine was the sole remedy how plaintiff seizures are controlled(stopped). Without his seizure medicine, Plaintiff is subjected to potential risks of injury, anxiety, stress or depression worse, and lasting damage to the brain, or even death.

Plaintiff clearly established a cause of action for medical malpractice and within his amended complaint proved by a preponderance of the evidence, that Plaintiff and the defendants had the presence of a doctor-patient relationship between the parties when Plaintiff was being treated by the defendants for his seizure disorder. (see medical summary); and the defendants accepted the standards, practices, and procedures which were exercised by Plaintiff’s Neurologist Dr. James Salph, whose a competent physician at Palmetto Richland Medical Hospital (PRMH) and Nurse Practitioner Elizabeth Holcomb at Lieber Correctional Institution; The defendants clear negligence was cause by them deviating from generally accepted standards, practices, and procedures when they failed to provide Plaintiff his prescribed seizure medication for over eight (8) days which resulted in Plaintiff experiencing multiple seizures. Such deviation was the proximate cause of Plaintiff injuries and further exacerbated his lower lumbar spinal disorder. •

Defendant’s careless actions are quite obvious that Plaintiff needed not present an expert affidavit to established the standard of care when the defendant’s knowingly deviated

from the standard of care and knowing that plaintiff seizures is controlled(stopped) only by being provided his medicine and defendant's conscious failure in providing Plaintiff his prescribed medicine was a matter within the common knowledge or experience, so that no special learning was needed to evaluate medical defendant's conduct at pre-litigation stage, and thus Plaintiff was entitled to invoke statutory common knowledge exception to expert opinion requirement in his pre-litigation filing and did not need to file expert witness affidavit with his complaint. Code 1976, 15-36-100(c)(2), 15-79-125(A).

In addition, the Defendants not adhering to the SCRPC Discovery phase for Plaintiff to substantiate his allegations also hinder plaintiff ability to show the court that he did not need an expert witness affidavit and that defendant's owed him a standard and duty of care. On March 9, 2018, the defendant's served Plaintiff their First Interrogatories and Request for Production in this matter. On March 15, 2018, Plaintiff was able to receive the Defendants First Interrogatories and Production of Documents by Ridgeland Correctional Institution Mailroom personal. On April 11, 2018, Plaintiff adhered to SCRPC Discovery by responding to the defendant's discovery motions within its allotted time frame. However, on March 12, 2018, Plaintiff by way of certified mail filed his First request for Production of Documents, Admissions, and Interrogatories to the defendants and the defendant's failed to reply to any discovery requests served by Plaintiff. Plaintiff brought this to the court's attention and the circuit court failed to address Plaintiff's requested served motions during the May 30, 2018 hearing.

Furthermore, courts must require failing party to comply with discovery request before dismissing Plaintiff's complaint especially where the moving party can show common knowledge standard of care using the discoverable material. The defendants violated Plaintiff's constitutional right to be able to use the discovery material.

Good cause exists to set aside the court's order of dismissal especially when the court's reasons are as stated, "Specially, Plaintiff **speculates** that on or about the days of June 28, 2017, to July 6, 2017, SCDC employees failed their duty of care when his seizure medicine ran out. Further, **he relies on his own belief** that he **needs surgery to fix a spinal condition** which **he believe is due to frequent seizures.**) The record will clearly reflect each of Plaintiff's dispositions stated within his complaint and what Plaintiff stated at his May 30, 2018 hearing, that while he was admitted at Palmetto Richland Medical Hospital (PRMH) for his seizures and lower lumbar spine, that the doctor at Palmetto Richland Medical Hospital stated, "a muscle biopsy was considered but the inmate's lower extremity strength improved and this deferred for now." Further stating, "Physical therapy (PT) is recommended and if strength does not improve, would schedule biopsy to look for myopathies/genetic disorders (D/O). Plaintiff has submitted several request to medical requesting to have his surgery done because his back is weakening and he is in constant pain but defendant continues to ignore Plaintiff plea. Medical has seen Plaintiff on several occasions and continues to say that they're awaiting the approval from SCDC Head Doctor. It is clear to admit that the Defendant's neglect to abide by the SCRCivP. Rule 33, 34, and 36 was intentional to deceive the court in thinking that plaintiff was

speculating regarding his claims when they're in sole possession of all Plaintiff's medical requested documents that would show that the defendant is more concerned about monetary than Plaintiff's livelihood. Within plaintiff's requested medical documents it will also show that from June 28, 2017 to July 6, 2017, the defendants failed to provide to Plaintiff his prescribed medicine and this is an ongoing occurrence and not mere speculations. Plaintiff's exhibits will also clearly show this court that the defendants owe him a duty of care and that he doesn't need an expert witness affidavit when his claims lie within the ambit of common knowledge. Plaintiff exhibits will also support that on 3-26-13 he first endured severed back spinal pain until his seizures surface on 7-30-17 both simultaneously. (see Exhibits pages 27-14 all highlighted encounters).

Finally, it is undisputable that Mazyck has a meritorious claim because the allegations within his lawsuit are the type which, if proven to be true, would certainly establish gross negligence sufficient to establish liability upon the defendant's. see, Thompson vs. Hammon, 299 S.C 116, 382 S.E.2d 900(S.C. 1989)(" the complaint does not have to establish that he would prevail on the merits, but only that his defense in meritorious.")

Accordingly, this court should find excusable neglect and vacate the order which dismissed this action.

FN1

This court should ascertain whether opposing counsel was aware of in 2013 the South Carolina Supreme Court, held that you can be exempt from filing an expert witness affidavit because section 15-36-100(c)(2) does not require an affidavit where the alleged negligent act "lies within the ambit of common knowledge and experience and section 15-79-125(A) incorporates section 15-36-100 in its entirety, including the common-knowledge exception codified in 15-36-100(C)(2) because, if so, he may have violated his obligation to disclose controlling legal authority that's directly adverse to his client's position. Furthermore, that defendant intentionally disregarded in disclosing to Plaintiff's his requested Production of Documents within his Motion because Palmetto Richland Medical Hospital Records will show the standard of care and the required duty of care for my conditions that the defendants owed to me. See (*exhibit: page 14 encounter 254*).

(NOTICE: In light this Court's knowledge of the Supreme Court recently ruling for section 15-36-100(c)(2) in Brouwer vs. Sister of Charity Providence, Plaintiff Mazyck submit that this court should agree that "it is no longer equitable that the judgment should have prospective application" and thus, may vacate the dismissal order on that ground itself. See, Rule 60(b)(5), SCRPC.)

III. CONCLUSION

Based upon the foregoing reasons and legal authorities cited, Plaintiff Mazyck respectfully request that this Court relieve him of the order of dismissal.

By: Jamin Mazyck
Jamin Mazyck, #238056
Ridgeland Correctional Institution BA-2
P.O. BOX 2039
Ridgeland, SC 29936

Certificate of Service

I, Jamin Mazyck, hereby certify that I did serve a copy of the forgoing document upon all parties to this action by deposing the same in the U.S. mail, postage prepaid, addressed to the following:

1. Micheal Tanner, LLC
PO BOX 1061
Bamberg, SC 29003

Date: 7/20/18

s/ Jamin Mazyck
Jamin Mazyck, #238056

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