



The South Carolina Court of Appeals

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August 02, 2019

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: Robert E. Feldman v. Gary P. Coggin
Lower Court Case No. 2015CP0701251
Appellate Case No. 2017-000242

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Thomas A. Pendarvis, Esquire
Christopher W. Lempesis, Jr., Esquire
M. Dawes Cooke, Jr., Esquire
Jeffrey Michael Bogdan, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Robert E. Feldman and Lois J. Feldman, Appellants,

v.

Gary P. Coggin, Respondent.

Appellate Case No. 2017-000242

Appeal From Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Unpublished Opinion No. 2019-UP-261
Submitted June 4, 2019 – Filed July 17, 2019

AFFIRMED

Thomas A. Pendarvis and Christopher W. Lempeis, Jr.,
both of Pendarvis Law Offices, P.C., of Beaufort, for
Appellants.

M. Dawes Cooke, Jr. and Jeffrey Michael Bogdan, both of
Barnwell Whaley Patterson & Helms, LLC, of Charleston,
for Respondent.

Doe, 367 S.C. at 446, 626 S.E.2d at 32 (emphasis added) (quoting David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass. L. Rev. 74, 79 (1993)).

In *Hall v. Fedor*, this court held that the plaintiff "could satisfy the 'most probably' requirement and defeat [the defendant's] summary judgment motion by establishing he 'most probably' would have received a larger settlement than [the settlement obtained by the defendant] or that he 'most probably' would have prevailed on the underlying claim at trial." 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (emphasis added). However, the court held that the plaintiff failed to meet this standard: "[C]onsidering the absence of any admissible evidence presented by [the plaintiff], and in light of the evidence presented by [the defendant], [the plaintiff] failed to show he 'most probably' would have received a settlement amount greater than [the amount obtained by the defendant]." *Id.* at 177, 561 S.E.2d at 658.

Here, the Feldmans likewise failed to present any evidence showing that they most probably would have obtained more than \$25,000 to settle their UIM claims. First, the Feldmans presented no evidence that Coggin failed to serve Dickenson with the complaint before the statute of limitations expired or that his failure to file the affidavit of service diminished the settlement value of the case. Neither Liberty Mutual's answer nor its motion to dismiss the case included specific facts indicating how service of process was deficient, and the record does not indicate that Liberty Mutual submitted any supporting affidavits or other evidence or even amended its answer to assert the statute of limitations before the case was settled; therefore, Liberty Mutual waived this defense. *See Unisun Ins. v. Hawkins*, 342 S.C. 537, 542–43, 537 S.E.2d 559, 562 (Ct. App. 2000) (holding that the defendant waived the defense of insufficiency of service of process by failing to specify any defects in the service of process and thereby also waived his statute of limitations defense).

Notwithstanding the lack of merit to Liberty Mutual's motion to dismiss, the attorney who took over representation of the Feldmans after Coggin filed his motion to be relieved, Samuel Bauer, accepted Liberty Mutual's \$25,000 settlement offer. The record indicates Bauer's recommendation to accept this offer was based on the mistaken assumption that Liberty Mutual's motion to dismiss had merit. In the expert affidavit attached to the Feldmans' malpractice complaint, Bauer stated that Coggin's failure to timely serve Dickenson precluded the Feldmans' recovery of a judgment against Dickenson.

point to Coggin's settlement demand letters,¹ these letters do not serve as evidence of the actual amounts of medicals and lost wages. Likewise, the Feldmans presented no evidence refuting Coggin's testimony that Bob was unwilling to pay the substantial expenses necessary to prepare his case for trial.

Based on the foregoing, the circuit court properly granted summary judgment to Coggin. See *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner."); *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 208, 758 S.E.2d 187, 190–91 (Ct. App. 2014) ("Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004))); *Eadie v. Krause*, 381 S.C. 55, 64 n.5, 671 S.E.2d 389, 393 n.5 (Ct. App. 2008) ("[T]o survive a motion for summary judgment, the plaintiff must offer some evidence that a genuine issue of material fact exists as to *each* element of the claim unless that element is either uncontested or agreed to by stipulation; otherwise, the plaintiff cannot meet his burden of proof and the claim may be determined as a matter of law by the trial judge." (emphasis added)); see also *Robinson*, 416 S.C. at 525, 787 S.E.2d at 489 ("[A] claimant is required to demonstrate that 'he or she "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."'" (quoting *Doe*, 367 S.C. at 442, 626 S.E.2d at 30)); *Hall*, 349 S.C. at 177, 561 S.E.2d at 658 (affirming summary judgment against a malpractice plaintiff after noting he presented no admissible evidence and concluding that in light of the defendant's evidence, the plaintiff "failed to show he 'most probably' would have received a settlement amount greater than [the amount obtained by the defendant]").

II. Rule 56(f) Affidavit/Discovery

The Feldmans also argue that summary judgment was inappropriate given counsel's submission of a Rule 56(f) affidavit explaining that discovery was incomplete. We disagree.

¹ The record includes a letter from Coggin to Liberty Mutual's counsel that is not a demand letter but merely a cover letter referencing enclosed copies of Bob's medical bills. Upon reviewing this letter to refresh his recollection, Coggin testified that Bob's post-accident medical bills amounted to \$47,450.

request, Coggin filed a request for a scheduling order. In this document, Coggin stated that the parties' previous mediation had been unsuccessful but "despite the fact that the mediation was still not declared to be at an impasse and before a single deposition had been taken or even noticed, [the Feldmans] requested that this case be transferred to the jury trial [roster]."

On March 31, 2016, Judge Mullen conducted a hearing on the requests. Judge Mullen ruled that the case would not be called for trial before January 1, 2017, and the parties agreed on additional deadlines prior to the trial date as set forth in Judge Mullen's scheduling order. The order required, *inter alia*, the Feldmans to identify each person they expected to call as an expert *at trial* by August 1, 2016; and discovery to be completed no later than December 1, 2016.

It was not until after May 16, 2016, when Coggin filed his summary judgment motion alerting the Feldmans to this court's precedent in *Unisun*, that the Feldmans' counsel filed a Rule 56(f) affidavit seeking a continuance until discovery could be completed. The affidavit also stated that the Feldmans had "commenced the process of information exchange with . . . potential expert witnesses and anticipate shortly having justification to identify [these individuals] as expert witnesses for trial," including a "life care plan" expert, a vocational expert, an expert "competent to provide an additional opinion as to the various acts and omissions of [Coggin that] constitute legal malpractice," and a present value expert. Counsel asserted, "Depending on the outcome of pending discovery, the [Feldmans] may seek to amend their Verified Complaint to include additional specific allegations of legal malpractice, based on [Coggin's] failures to secure a life care plan expert, a vocational expert and an expert to reduce the damages to present value, which . . . resulted in [the Feldmans] losing valuable rights, including diminution in the settlement value of the case."

However, the affidavit does not explain why the expert affidavit attached to the Feldmans' complaint does not address Coggin's alleged failure to prepare the UIM case in a particular fashion before mediation or why they did not have such an affidavit by the time Coggin filed his summary judgment motion. *See* § 15-36-100(B) (requiring the plaintiff in a professional negligence action to "file as part of the complaint an affidavit of an expert witness [that] 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 absence of a failure-to-prepare claim in the Feldmans' complaint, the absence of support for such a claim in the attached expert affidavit, and the Feldmans' motion to transfer the case to the jury trial roster belie their argument that they simply did not have

plaintiff must offer some evidence that a genuine issue of material fact exists as to *each* element of the claim unless that element is either uncontested or agreed to by stipulation; otherwise, the plaintiff cannot meet his burden of proof and the claim may be determined as a matter of law by the trial judge." (emphasis added)); *McNair*, 330 S.C. at 342, 499 S.E.2d at 494 ("A plaintiff in a legal malpractice action must generally establish the standard of care by expert testimony.").

IV. Order Format

The Feldmans contend that Rule 52(a), SCRCP, required the circuit court to include findings of fact and conclusions of law in its order granting summary judgment and its order denying their motion to alter or amend. We disagree. Rule 52(a) states, in pertinent part,

In all actions *tried upon the facts* without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. . . . *Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).*³

(emphases added). Therefore, we reject the Feldmans' argument that the circuit court's orders were deficient.

CONCLUSION

Based on the foregoing, we affirm the circuit court's order granting summary judgment to Coggin.

³ Rule 41(b), SCRCP, addresses involuntary dismissal of a complaint and requires findings of fact and conclusions of law when the circuit court resolves the factual issues and renders judgment on the merits. In contrast, the circuit court's ruling on a summary judgment motion under Rule 56, SCRCP, does not involve resolving factual issues but merely determines whether any genuine factual issues exist. *See S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.").