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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

May 15 2020

SC Court of Appeals

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2019-CP-40-2750

PATRICIA BRENNAN CLARK,)
)
Plaintiff,)
)
v.)
)
RAYMOND E. MCKAY, JR., ESQ., CPA)
and MCKAY & AMOS, LLC,)
)
Defendants.)

**ORDER
DENYING PLAINTIFF'S
MOTION TO RECONSIDER,
ALTER, AND AMEND THE
MARCH 5, 2020 ORDER DISMISSING
PLAINTIFF'S ORIGINAL AND
AMENDED COMPLAINTS**

This Court issued its Order Granting Defendants' Motions to Dismiss Complaint and Amended Complaint (the "Order") on March 5, 2020. Plaintiff filed a Motion to Reconsider, Alter and Amend (the "Motion to Reconsider") on March 16, 2020. After due consideration, the Court denies Plaintiff's Motion to Reconsider.

Plaintiff's Complaint and Amended Complaint speak for themselves and this Court, upon Motions to Dismiss filed by Defendants, correctly confined itself to the four corners of the pleadings. In neither the Complaint nor the Amended Complaint did Plaintiff allege the language required by statute, S.C. Code Ann. § 15-36-100, and Plaintiff did not attach an expert affidavit to either pleading. Plaintiff's assertion that it is sufficient to simply cite to the "safe-harbor" provision of the statute in her pleadings, without any contemporaneous allegation as to any good faith basis to invoke the provision, is contrary to the statutory language and is without legal support. Additionally, Plaintiff's filing of an expert affidavit after she filed her Amended

Complaint, but within 45 days, does not cure the threshold deficiencies in failing to follow the statutory mandates in both the Complaint and Amended Complaint.¹

Plaintiff's Motion to Reconsider also includes a number of misstatements of fact. In its Order, this Court did not impose pleading requirements not present in the statute. Specifically, this Court did not state that the statute requires that Plaintiff, herself, file an affidavit nor did the Court "require" that Plaintiff file an affidavit or that Plaintiff "elaborate": this Court ruled only that the statutory mandates must be followed, that is, Plaintiff must allege in her pleadings the language that the statute requires. Plaintiff in this case failed to do so in her Complaint and again in her Amended Complaint. Furthermore, this Court was not required to convert Defendants' Motion to Dismiss to one for summary judgment simply because, just before hearing on the motion, Plaintiff filed an affidavit as to her alleged good faith basis for not attaching an expert affidavit to her Complaint or to her Amended Complaint. This Court did not consider, nor was it required to consider, an affidavit that was not relevant to the issues presented in the Motion to Dismiss: that is, that on the face of both the Complaint and the Amended Complaint, Plaintiff had failed to satisfy the statutory requirements. In addition, Plaintiff cannot correctly assert that this Court deprived her of the opportunity to amend her pleading: this Plaintiff had the opportunity to amend her pleading; she filed not only a Complaint but also an Amended Complaint wherein, both times, she failed to satisfy the mandates of the statute.

Plaintiff's reliance throughout its motion on *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 763 S.E.2d 426 (2014), is misplaced for a number of reasons. First, *Wilkinson* was a medical malpractice action, which this is not, and was thus covered by separate statutory requirements. Second, the plaintiff in *Wilkinson* filed an expert affidavit in relation to the pre-

¹ This Court's ruling is especially applicable in this case where Plaintiff was on notice of the deficiencies in her Complaint through her receipt of Defendants' first Motion to Dismiss alerting Plaintiff to the deficiencies. Despite this notice, Plaintiff thereafter filed an Amended Complaint which exhibited the same deficiencies.

litigation Notice of Intent (“NOI”), under the separate statutory requirements applicable to medical malpractice actions, prior to filing the complaint in state court. *Id.* at 171, 763 S.E.2d at 431. Thus, the court held that because Defendants were in possession of the plaintiff’s expert affidavit **prior to the filing of the complaint** in the civil litigation matter, “a medical malpractice claimant [is exempt] from filing a second expert affidavit as one has already been filed with the NOI pursuant to section 15-79-125.” *Id.* at 173, 763 S.E.2d at 432. In no way can this Court reasonably interpret the holding in *Wilkinson* to apply to a non-medical malpractice case in which Defendants were not in possession of any expert affidavit at the time of the filing of the Complaint or the Amended Complaint, and where the invocation of the “safe-harbor” provision did not comport with the statutory requirements.

For these reasons and as further stated in this Court’s Order Granting Defendants’ Motions to Dismiss Complaint and Amended Complaint dated March 5, 2020, the Court denies Plaintiff’s Motion to Reconsider, Alter and Amend.

AND IT IS SO ORDERED.

Honorable L. Casey Manning
Circuit Judge

_____, 2020



Richland Common Pleas

Case Caption: Patricia Brennan Clark vs Raymond E Mckay Jr , defendant, et al
Case Number: 2019CP4002750
Type: Order/Other

So Ordered

s/L. Casey Manning, 2061