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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

Sarah Dawkins, Appellant,

v.

Union Hospital District
(aka) Wallace Thomson Hospital, Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. PLAINTIFF'S ARGUMENTS ARE PRESERVED FOR THIS COURT'S REVIEW

The Hospital contends that Plaintiff's argument that her Complaint did not allege "medical malpractice" as found in Section 15-79-110(6) of the South Carolina Code "was not raised to and/or ruled upon by the Lower Court" and is therefore not preserved for review. (Respondent's Brief, pp. 5-6). This argument should not be persuasive.

The entire basis for the motion to dismiss was that the claim is, in essence, a "medical malpractice" claim for purposes of the Notice of Intent (NOI) statute. The counter to that argument was that the allegations of the complaint do not meet the definition of "medical malpractice" such that the NOI statute applies. To resolve this contention, one must look at the statute itself, which contains a definition of that term. Plaintiff then provided the Court with the appropriate rules of statutory construction, as set forth in *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (App. Br. p. 9). The trial court focused on the definition of "medical malpractice" found in Section 15-36-100(6), describing the term as "broadly defined" and holding the facts of this case fell within the NOI statute. (Amended Order, pp. 2-3; Order on Reconsideration, p. 2, correcting scrivener's error). That is, the meaning of the term "medical malpractice" for purposes of the NOI statute is at the heart of the dispute in this case. In ruling upon the arguments presented on appeal (which are the same arguments made below), this Court must engage in statutory construction because the statute is ambiguous. The Court should reject Hospital's argument that this issue is not preserved.

The Hospital also argues Plaintiff's assertion that the "common knowledge"

exception to the affidavit requirement is conclusory and is thus abandoned. (Respondent's Brief, p. 12). The Court should reject this assertion.

The statute at issue does not define "the ambit of common knowledge and experience." Plaintiff's entire argument in this case is that the circumstances of her injury amount to a common tort claim such that the NOI statute does not apply, and that the Hospital's liability does not require expert evidence. Thus, she should be able to proceed even though she did not provide an expert affidavit through a NOI. This argument is in accord with long-standing precedent of this Court. *See, e.g., Thomas v. Dootson*, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (noting expert not required for claim arising from a surgical drill that burns skin on contact because claim would fall well within the common knowledge or experience of laymen); *Hickman v. Sexton Dental Clinic, P.A.*, 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (where the evidence permits the jury to recognize or infer a breach of duty without the aid of expert testimony, such testimony is not required in order for the case to go to the jury); *Carver v. Medical Soc. of S.C.*, 286 S.C. 347, 334 S.E.2d 125 (Ct. App. 1985) (proof of proximate cause must also be established by expert testimony where either the origin of the injury is obscure and not readily apparent to a layperson or where there are several equally probable causes of the condition); *Botelho v. Bycura*, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984) (in a medical malpractice action plaintiff must establish by expert testimony both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge or experience, so that no special learning is needed to evaluate the defendant's conduct; the reason for requiring expert testimony is that matters

of proper diagnosis and treatment ordinarily involve technical knowledge beyond the ken of laymen). Thus, the arguments Plaintiff presented in her Brief of Appellant support both contentions, that is, that the NOI procedure does not apply because this case does not involve “medical malpractice” and further that the liability in this case is within the ambit of the common knowledge and experience of lay persons.

The Court should reject the Hospital’s argument that this issue is abandoned.

II. *RANUCCI V. CRAIN* DOES NOT CONTROL THIS CASE

Hospital points to this Court’s decision in *Ranucci v. Crain*, 397 S.C. 168, 723 S.C. 242 (Ct. App. 2012), *cert. pending*, as correctly determining that the NOI statute and the general professional negligence statute “operate independently of one another” so that the “common knowledge exception of Section 15-36-100 is inapplicable to Plaintiff’s action and does not save the same from dismissal.” (Resp. Br. pp. 12-13). *Ranucci* was decided the week after the arguments in this case and neither party argued the substance of *Ranucci*’s holding; the Hospital did not raise this argument in its opposition to Plaintiff’s motion for reconsideration, and the trial court did not address this analysis in either its order dismissing the case or its order denying reconsideration. The Court should not be persuaded by this argument.

First, the trial court did not address *Ranucci* or its application to this matter. Accordingly, this Court should decline to reach this argument.

Second, *Ranucci* was wrongly decided, and the case is currently pending before the Supreme Court. If the Court decides to address the argument, the Court should either

wait for the Supreme Court to rule, or should overrule *Ranucci*.

Third, if *Ranucci* was correct that Sections 15-79-125 and 15-36-100 operate independently of each other, then there is no basis for dismissing a case under Section 15-79-125; instead, the only remedy is to ask the trial court to “enforce the provisions” of the statute, which means instruct the Plaintiff to file a Notice of Intent to Sue. If Hospital is in Section 15-36-100 for a penny (i.e., attacking the pleading through Rule 12), then it must be in for a pound (i.e., accepting that all provisions of § 15-36-100 apply).

If the Court decides to address this contention, the Court must once again revisit *Ranucci*, a decision which is based upon an incorrect reading of Sections 15-79-125 and 15-36-100. Under the plain language of both statutes, the sections should be read *in pari materia* and should not be divorced from each other as was done in *Ranucci*.

The Hospital’s argument tests the interplay between the two “presuit notice” statutes – one which deals with a pre-filing procedure for medical malpractice suits, and a separate statute which deals with all “professional negligence” lawsuits. The statute governing professional negligence lawsuits requires that an expert witness’ affidavit be filed along with a plaintiff’s complaint, *see* S.C. Code Ann. § 15-36-100(B) (Supp. 2012), and the statute contains a “safe harbor” provision that allows a plaintiff to file a complaint without the accompanying affidavit *if* the plaintiff alleges that an affidavit of an expert could not be prepared *and* there is a good faith basis to believe that the statute of limitations on a claim stated in the complaint will expire within ten days. *See* § 15-36-100(C)(1). The statute also defines “expert witness,” a phrase that is used but not separately defined in the NOI statute. *See* § 15-35-100(A).

A. THE COURT SHOULD OVERRULE *RANUCCI*

If the Court is inclined to rely upon *Ranucci*, then the Court should hear this case *en banc*¹ and overrule *Ranucci* for several reasons. First, the plain language of the professional negligence statute indicates that the legislature intended its provisions to apply to medical malpractice lawsuits because that statute specifically references suits against “medical doctors.” See § 15-36-100 (G)(7). That interpretation also most-closely honors the Legislature’s likely intent behind the professional negligence statute and the medical malpractice statute. That intent was to involve a proposed expert in the earliest stages of these disputes, to create a pre-lawsuit period in medical malpractice actions allowing discovery and an avenue for parties to resolve their disputes outside of formal litigation, and to outline who is an “expert” and when an expert is required. These statutes were passed together, reference one another, should be construed together, and should be

¹ This Court stated recently that one panel lacks authority to overturn prior published precedent from another panel of the Court absent *en banc* review. See *Mr. T v. Ms. T*, 378 S.C. 127, 131 n. 3, 662 S.E.2d 413, 415 n. 3 (Ct. App. 2008) (“this court, sitting as a three judge panel, lacks the authority to rule against prior published precedent without *en banc* review”); *State v. Hoyle*, 397 S.C. 622, 629, 725 S.E.2d 720, 724 (Ct. App. 2012) (“one panel of this court cannot overturn prior published precedent of another panel of this court absent *en banc* review”). This Court’s authority derives from statute, and the Court sits in panels of three unless it sits “as a whole.” S.C. Code Ann. § 14-8-80(a) (Supp. 2012). Authority to sit *en banc* is governed by Section 14-8-90 of the South Carolina Code, and the statute does not mention overruling precedent. S.C. Code Ann. § 14-8-90 (Supp. 2012). The Court’s jurisdiction (*i.e.*, its authority) is governed by Section 14-8-200, but that provision contains no requirement that the Court sit *en banc* to overrule one of its decisions. S.C. Code Ann. § 14-8-200 (Supp. 2012). Although Rule 219 (a)(1), SCACR, provides that a hearing *en banc* ordinarily will not be ordered except “when consideration by the full court is necessary to secure or maintain uniformity of its decisions,” this Rule does not mandate a hearing *en banc* before the Court overrules its own precedent. In any event, Appellant intends to suggest the matter be heard *en banc* as provided by Rule 219(b), SCACR, in accordance with the practice adopted by this Court in *Mr. T v. Ms. T* and *State v. Hoyle*.

construed in a manner that avoids an absurd result.

Second, *if* the *Ranucci* decision is correct that the two provisions operate independently of each other, then there was *no* basis for the Hospital to seek dismissal of this action for lack of an NOI. In fact, there is no provision in the NOI statute that permits dismissal for noncompliance. Recognizing this problem, the Hospital seeks for this Court to adopt a “law of the case” ruling that blends the two procedures while the Hospital asks the Court to apply *Ranucci*. (Resp. Br. p. 12, footnote 2). The Court should not adopt this pretzel logic, that is, that *Ranucci* is correct so that none of the provisions of § 15-36-100 apply to medical negligence cases while at the same time saying the provisions of § 15-36-100 permitting a motion to dismiss for noncompliance does, in fact, apply.

Finally, if *Ranucci* is correct, and in the absence of any provision expressly permitting dismissal, the circuit court should have given Plaintiff the opportunity to correct the perceived defect rather than dismiss pursuant to Rule 12. The Supreme Court of South Carolina’s decision in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) suggests that a plaintiff should generally be given an opportunity to cure defects in his pleadings if the statute of limitations has expired.

As noted, *Ranucci* depends on the premise that the professional negligence statute (§ 15-36-100) and the medical malpractice statute (§ 15-79-125) operate independently of each other and apply in two different contexts and at two different times. This argument is contrary to the plain language of the professional negligence statute, overlooks the more likely legislative intent behind the professional negligence statute and the medical malpractice statute, and leads to an absurd result.

**1. BY ITS TERMS, THE PROFESSIONAL NEGLIGENCE STATUTE
APPLIES TO MEDICAL MALPRACTICE ACTIONS**

Among other functions, the professional negligence statute defines “expert witness” as the term is used in the statute, *see* § 15-36-100(A); sets forth the requirement that an affidavit of an expert accompany the filing of a complaint which states a claim for professional negligence, *see* § 15-36-100(B); establishes the “safe harbor” provision for filing an affidavit late, *see* § 15-36-100(C); and provides no affidavit is required if “the subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant. *See* § 15-36-100(C)(2) The statute additionally provides for *possible* dismissal in the event of a failure to file an expert’s affidavit, *see* § 15-36-100(C) (“the complaint is *subject to* dismissal for failure to state a claim” (emphasis added)), and instructs that so long as an affidavit is filed within the “safe harbor” period, there is no basis for a statute of limitations defense. *See* § 15-36-100(D). The professional negligence statute instructs that it applies to “actions for damages alleging professional negligence,” *see* § 15-36-100(B), and says that the statute applies to a number of professions, including “medical doctors.” *See* § 15-36-100(G)(7).

There is more to the statutory framework. The provision of the professional negligence statute requiring that a plaintiff file an expert’s affidavit as part of his complaint directs a plaintiff with a potential claim for medical malpractice to file his affidavit according to the instructions contained in the medical malpractice statute. *See* § 15-36-100(B) (referencing § 15-79-125(A)). The medical malpractice statute contains the

instructions that a lawsuit for medical malpractice is to be preceded by the plaintiff filing a NOI and that the expert's affidavit is to accompany that notice. *See* § 15-36-100(B) (referencing § 15-79-125(A)). The filing of the plaintiff's notice initiates a pre-litigation period of discovery and a mandatory attempt at resolving the potential medical malpractice dispute outside of formal litigation. *See* § 15-79-125(B) & (C).

This is the distinction between these types of suits. The first step in a lawsuit against *most* professionals in *most* kinds of cases is to file an expert's affidavit along with a complaint. The first step in *most* lawsuits against a medical doctor is to file an affidavit with a NOI. But if expert testimony is not required (for example, the removal of the wrong limb), then filing the NOI without an expert affidavit is permissible in some medical negligence claims.

The professional negligence statute's inclusion of "medical doctor" indicates that the statute applies – in its entirety – to medical malpractice suits. *See* § 15-36-100(G)(7). The professional negligence statute establishes the general construct for *all* professional negligence lawsuits, and the medical malpractice statute supplements and completes this construct by adding the features of the NOI, a pre-lawsuit period of discovery, and a forum for alternative dispute resolution to medical malpractice cases. If this were not the case, the professional negligence statute's listing of "medical doctors" would be completely meaningless. The courts do not read statutory language in a manner that renders it without meaning or containing idle verbiage or superfluous language. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). *See also Cain v. Nationwide Property and Cas. Ins. Co.*, 378 S.C. 25, 661 S.E.2d 349 (2008) (in

construing a statute, appellate court must presume that the Legislature did not intend to perform a futile thing). This has been the rule in South Carolina for nearly 200 years. *State v. Helfrid*, 11 S.C.L. (2 Nott & McC.) 233 (S.C. Const. Ct. App. 1820) (“it is a fair conclusion that the Legislature did not intend it to be understood as mere idle verbiage”).

The reference to “medical doctors” in the professional negligence statute, however, is not meaningless. Instead, the professional negligence statute performs the heavy-lifting of both statutes in a number of ways: Defining “expert witness,” *see* § 15-36-100(A); providing the “safe harbor” provision when the statute of limitations will soon expire, *see* § 15-36-100(C); allowing a defendant to request dismissal if an expert’s affidavit is not filed (or not timely filed), *see* § 15-36-100(C)(1); describing how to deal with affidavits that are allegedly defective, *see* § 15-36-100 (E); and instructing that a dismissed lawsuit may not be initiated after the expiration of the statute of limitations “unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit [was] the result of a mistake.” *See* § 15-36-100(F). The medical malpractice statute provides *none* of the context and procedure for this process. By divorcing these statutes from one another, the *Ranucci* decision not only read the specific reference to “medical doctors” out of the professional negligence statute, it also cut the “safe harbor” provision, the provision dealing with deficient affidavits, and the provision detailing a defendant’s ability to seek dismissal of a lawsuit completely off from use in medical malpractice suits.

The *Ranucci* Court’s analysis finds no refuge in the maxim that a specific statute will prevail over a more general statute, *see, e.g., Wilder v. S.C. State Hwy. Dep’t*, 228

S.C. 448, 454-55, 90 S.E.2d 635, 638 (1955), because *both* of these statutes deal *specifically* with medical malpractice lawsuits. These statutes should not be read in discord; they should be read in harmony. *See, e.g., Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) (noting “[i]t is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.”). These principles also have a long lineage in the law of this State. As the Constitutional Court of Appeals noted in 1799:

* * * That it is a rule of construction, applicable as well to statutes as to deeds, *ut res magis valeat quam pereat*. Such interpretation ought to be made of them as to preserve every part of them in force, and give effect to their several provisions, rather than such a construction as must necessarily destroy or make void any part, for the purpose of forcing into agreement and consistency the other parts. And that statutes made *in pari materia*, ought to be liberally and beneficially expounded, to advance the objects in view, and give consistent effect to every part of them, so as to reconcile every seeming contradiction, if possible, and give force to the whole; and not so as to do away, as null and void, every repugnant particle in one statute, for the purpose of giving effect to an arbitrary construction of another, which construction must necessarily set one at variance with the other.

Carpenter v. Kennedy, 2 S.C.L. (1 Brev.) 25 (S.C. Const. Ct. App. 1799). *See* Black’s Law Dictionary 1687 (9th ed. 2009) (“*ut res magis valeat quam pereat*” means “to give effect to the matter rather than having it fail”).

Accordingly, the Court should read all of the provisions of the professional negligence statute as applying to medical malpractice cases, including the “common knowledge” exception to the affidavit requirement.

**2. READING THE STATUTES AS OPERATING INDEPENDENTLY IS
CONTRARY TO THEIR SHARED LIKELY INTENT AND LEADS TO
AN ABSURD RESULT**

The professional negligence statute and the medical malpractice statute were enacted as part of the same legislation, *see* Act No. 32, 2005 S.C. Acts 133, and these statutes create special rules for the initiation of professional negligence lawsuits generally and for medical malpractice lawsuits specifically. This legislation, through these two statutes, requires the filing of expert affidavits at the outset of most adversarial proceedings involving a claim for professional negligence (including actions against “medical doctors”) unless the matter is within common knowledge, provides a procedure for challenging deficient affidavits in all professional negligence actions, and provides an avenue for possible dismissal in the event of non-compliance with the statutory scheme. In the case of a potential lawsuit for medical malpractice, the legislation provides *additionally* for a pre-litigation period of discovery and a mandatory mediation.

These provisions suggest that the shared intent of these statutes was to involve a proposed expert in the earliest stages of these disputes and to create a pre-lawsuit period in medical malpractice actions allowing discovery and establishing a forum for resolving disputes outside of formal litigation. Reading these statutes to operate in tandem most closely honors that legislative intent.

All rules of statutory construction “are subservient to the one that the legislative intent must prevail,” *Baggerly v. CSX Transportation, Inc.*, 370 S.C. 362, 373, 625 S.E.2d 97, 103 (2006), and the Court will reject an interpretation of a statute that would “lead to a result so plainly absurd that it could not possibly have been intended by the

Legislature.” *Id.* at 373, 625 S.E.2d at 103. If the constant in the equation is that a plaintiff with a lawsuit is facing a set of facts within the ken of common knowledge, it would be absurd to except the affidavit requirement for a plaintiff in a garden variety lawsuit for professional negligence but to deny a medical malpractice plaintiff the same thing. It would also be absurd to overlook the professional negligence statute’s specific reference to “medical doctors.” *See* § 15-36-100(G)(7). With respect to allowing a plaintiff to proceed without an expert in a “common knowledge” case, there is no reason the Legislature would arbitrarily distinguish a professional negligence suit directed at a medical doctor from all other professional negligence suits.

3. IT IS NOT LIKELY THAT THE LEGISLATURE INTENDED THE PROVISIONS OF SECTION 15-36-100 TO APPLY TO EVERY KIND OF PROFESSIONAL NEGLIGENCE SUIT EXCEPT MEDICAL MALPRACTICE

The holding of *Ranucci* depends upon the view that the Legislature *must* have intended the affidavit requirement of the medical malpractice statute to be mandatory. It is not likely that this was the Legislature’s intention. It is reasonably clear that in adding the NOI requirement to the Medical Malpractice Act, the Legislature intended for experts to be involved in the earliest stages of most true medical malpractice lawsuits. For the run-of-the-mill professional negligence action, those suits begin with a complaint.

This legislation created the new process of a *Notice of Intent to File Suit* (NOI) that would apply in medical malpractice cases. The easy conclusion is that in adding an expert affidavit requirement to the first stage of the medical malpractice statute, the Legislature sought to clarify that the affidavit requirement of the professional negligence

statute would be modified to come not with the plaintiff's complaint, but with the filing of his or her NOI in most medical negligence cases. That the Legislature *must* have intended this filing requirement to be *mandatory* in all medical malpractice cases is a conclusion that, at least from the plaintiff's perspective, does not necessarily follow. If a plaintiff with a potential lawsuit has a fact situation that "lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant," it is arbitrary and illogical for the Legislature to have intended that the plaintiff must still secure an expert's affidavit if the suit is against a medical doctor but need not get an affidavit if the suit is against any other kind of professional listed in the statute. This would be an absurd result.

Ranucci parses these statutes too finely and makes the assumption that what could simply have been loose drafting represents a deliberate expression of Legislative purpose. When the professional negligence statute is read on its own, the statute sets forth the numerous requirements for an expert's affidavit; requires filing an affidavit as a part of most complaints; provides for dismissal (but only in the event that a required affidavit is not filed "within the period specified in *this subsection*"), § 15-36-100(C)(1) (emphasis added); provides for possible dismissal in the event that an affidavit is defective (but only dismissal of "the plaintiff's *complaint*"), § 15-36-100(E) (emphasis added); and limits remedial relief that can be afforded by the trial court (but only "[i]f a plaintiff fails to file an affidavit as required by *this section*"). § 15-36-100(F) (emphasis added).

When the medical malpractice statute is read on its own, it incorporates only "the affidavit requirements established in [the professional negligence statute]," § 15-79-

125(A); requires the filing of an expert's affidavit along with the plaintiff's NOI; and sets forth *no* remedy for the plaintiff's failure to do so other than that "[t]he circuit court has jurisdiction to enforce the provisions of this section." *See* § 15-79-125(D).

On the other hand, when the medical malpractice statute and the professional negligence statute are construed together and in harmony, these statutes create an orderly procedural construct wherein expert affidavits are present in the earliest stages of the disputes, where a defendant can challenge an allegedly defective affidavit, where a defendant can move to dismiss adversarial proceedings in the event that a plaintiff does not comply with the expert affidavit requirement, where the burden and expense of an expert affidavit is not required if the actions are within the ambit of common knowledge, and where a plaintiff in a potential medical malpractice lawsuit engages in a pre-litigation process of sharing information and attempting to resolve the dispute informally. It is absurd to read these statutes in a way that overlooks the professional negligence statute's express reference to lawsuits against "medical doctors," does not require an affidavit in some cases in every class of professional negligence lawsuit save a suit against a medical doctor, and provides a specific mechanism for enforcing these requirements in every class of professional negligence lawsuit except for a lawsuit against a medical doctor.

If the Court is persuaded to rely upon *Ranucci*, the Court should revisit its holding that the two statutes operate independently of each other. The Court should overrule *Ranucci*, and hold that the plain language of the professional negligence statute indicates that all of the sections affecting the affidavit procedure, including its "common knowledge" provision, apply to medical malpractice lawsuits.

III. THIS ISSUE DOES NOT INVOLVE THE CIRCUIT COURT'S SUBJECT MATTER JURISDICTION

The Hospital invites this Court to affirm the trial court's dismissal of this action under the purported "additional sustaining ground" that the failure to abide by the NOI statute deprives the circuit court of "subject matter jurisdiction." (Respondent's Brief, pp. 15-17). The Court should reject this argument.

First, the issue in this case does not involve the circuit court's "subject matter jurisdiction." There is nothing about the NOI statute that grants or deprives the circuit court of the authority to hear the underlying tort case. A court's subject matter jurisdiction is determined by whether it has the authority to hear the *type* of case in question. *E.g.*, *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012); *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994). *See also Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (observing subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong" and holding the circuit court erred in ruling it lacked subject matter jurisdiction where the alleged error concerned the failure to properly serve a notice of appeal on the South Carolina Workers' Compensation Commission (quoting *Dove v. Gold Kist, Inc.*)).

Circuit courts have jurisdiction over general tort cases. *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (2009); *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). *See also McCullar v. Estate of Campbell*, 381 S.C. 205, 672 S.E.2d 784 (2009) (on its face complaint alleged a tort; it was therefore not subject to dismissal

for lack of subject matter jurisdiction). The complaint in this case alleged ordinary negligence in the custody and care of Plaintiff resulting in her injury – therefore, this is a general tort case. See Plaintiff’s argument (R. p. 12, l. 10 - p. 13, l. 5). There is nothing in NOI statute that affects the circuit court’s power to adjudicate that type of case.

Respondent’s argument below and in its brief on appeal is wrong as a matter of law, and this Court should reject it.

Even if the Hospital were correct (and it is not), this issue would not be an “additional sustaining ground” but would be an issue both the trial court and this Court would have to address *sua sponte*. *Tourism Expenditure Review Committee v. City of Myrtle Beach*, Op. No. 27249 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 21 at 44) (even where parties do not raise such a challenge, issue of subject matter jurisdiction is properly raised for the first time on appeal by the appellate court). In fact, there would be no necessity for a motion to dismiss under Rule 12(b), SCRCF, or any other device, since even the circuit court would have to raise and address the issue *sua sponte*. *Hammaraskold v. Bull*, 43 S.C. L. (9 Rich.) 474 (1856) (trial court must address substantial defects which make the proceedings null and void), *overruled on other grounds Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994). However, the professional negligence statutory scheme requires the trial court to address this issue upon a defendant’s motion to dismiss.

Hospital is correct that Section 15-79-125(D) provides the “circuit court has jurisdiction to enforce the provisions of the Section.” S.C. Code Ann. § 15-79-125(D) (Supp. 2012). There is nothing in Section 15-79-125, however, that describes the

consequence of a Plaintiff's failure to file a NOI in a medical negligence case. Instead, those "provisions" the circuit court may enforce are the ability to do discovery and take depositions as set forth in Sections 15-79-125(B) and (C).

Hospital contends that the language of Section (D) demonstrates the circuit court must lack jurisdiction otherwise, that is, it would read the word "only" somewhere into the statute. That is not the job of the courts. Had the legislature desired to add the limiting language Hospital reads into the statute, the legislature could easily have done so; it did not. *See, e.g., Taylor v. South Carolina Dept. of Motor Vehicles*, 382 S.C. 567, 570, 677 S.E.2d 588, 590 (2009) (if Legislature had intended certain result in a statute it would have said so); *Giannini v. SC Department of Transportation*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008) (same); *accord State v. Curtis*, 356 S.C. 622, 591 S.E.2d 600 (2004) (legislature, had it chosen to do so, could easily have specified certain result in statute).

Additionally, Section 15-36-100, which is the sister section to Section 15-79-125, contains a provision that requires a defendant to raise the lack of an affidavit by Rule 12 motion, and provides the action is "subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100 (C)(1) (Supp. 2012). Even so, this section describes the procedure as permitting, but not requiring, dismissal for noncompliance. If this procedure involved subject matter jurisdiction, then there would be no discretion and *sua sponte* dismissal would be required. That is not the law.

The Court should decline Hospital's invitation to hold the failure to file a NOI deprives the circuit court of subject matter jurisdiction.

IV. PLAINTIFF'S COMPLAINT SUFFICIENTLY ASSERTS A CLAIM FOR NEGLIGENCE

The Hospital contends this Court should affirm the trial court's dismissal of the complaint on the additional sustaining ground that Plaintiff's Amended Complaint fails to adequately plead a premises liability claim. The Court should not be persuaded by this argument.

It is true that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Furthermore, "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* at 420, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). However, it is within an appellate court's discretion as to whether to address an additional sustaining ground. *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). *See also Gecy v. Bagwell*, 372 S.C. 237, 243-44, 642 S.E.2d 569, 572 (2007) (declining to address an additional sustaining ground); *State v. Humphries*, 354 S.C. 87, 91 n. 2, 579 S.E.2d 613, 615 n. 2 (2003) (declining to affirm judgment for a ground appearing in the record and noting it was within appellate court's discretion whether to address additional sustaining ground).

The lone basis for the Hospital's motion to dismiss was Plaintiff's failure to comply with the NOI statute. (Memorandum in Support of Motion to Dismiss,

1/12/2012). The sole ground under which the trial court dismissed this matter was its ruling that Plaintiff's claims outlined in the Amended Complaint fell within the statutory definition of "medical malpractice" so that the NOI and Expert Affidavit statutory requirements were triggered as a matter of law. In opposing Plaintiff's Motion for Reconsideration, the Hospital's only reasons for requesting the trial court deny the motion centered around the failure to present a NOI prior to filing suit. (Memorandum in Opposition of 3/14/12). In fact, in denying the motion for reconsideration, the circuit court stated:

As a preliminary matter, the court does not see this as a pleading issue, as Plaintiff seems to place some focus in her Motion to Reconsider. This is a fundamental issue; that is, compliance with a statute with specific requirements and specific remedies.

(Order of March 20, 2012, p. 3). Thus, whether the complaint sufficiently pled a claim in general negligence (or even premises liability) was not an issue for the trial court to decide.

As the Supreme Court stated in *I'On*:

In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, *an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court*. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, *but the appellate court is likely to ignore it*.

I'On, *supra* at 421, 526 S.E.2d at 724 (emphasis added). Accordingly, the Court should

declined to decide this matter on this alternative ground.

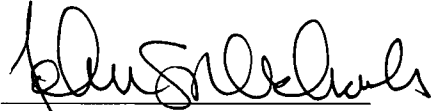
Even so, as pointed out in Plaintiff's Brief of Appellant, she adequately pled negligence under the law of South Carolina. (App. Br., pp. 3-4, setting forth allegations; pp. 13-14, setting forth theory). See *Standard Federal Sav. and Loan Ass'n v. Mungo*, 306 S.C. 22, 410 S.E.2d 18 (Ct. App. 1991) (noting Rule 1, SCRCPP, directs that the Rules be construed to secure the just, speedy, and inexpensive determination of every action, and that Rule 8(f), SCRCPP, requires all pleadings be so construed as to do substantial justice for all parties). Furthermore, it is the policy of the law of South Carolina to favor the trial of cases on the merits. *Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc.*, 275 S.C. 556, 274 S.E.2d 287 (1981). See also *Caldwell v. Wiquist*, ___ S.C. ___, 741 S.E.2d 583 (Ct. App. 2013) (it is the policy of our state to resolve cases on the merits); *Micronics, Inc. v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (South Carolina's policy favors the disposition of issues on their merits rather than on technicalities).

This Court should therefore refuse Hospital's request that it affirm on the alternative basis that the Amended Complaint in this case does not sufficiently allege tort liability on the Hospital's part.

CONCLUSION

For the reasons stated this Court should reverse the trial court's dismissal of this matter and should remand for further proceedings consistent with this Court's ruling.

Respectfully submitted,



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June 6, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

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JUN 06 2013

SC Court of Appeals

Sarah Dawkins, Appellant,

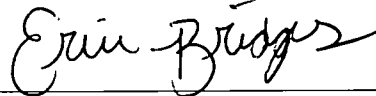
v.

Union Hospital District
(aka) Wallace Thomson Hospital, Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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June 6, 2013
Columbia, South Carolina