

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Evelyn Grier, as the appointed
Personal Representative of the
Estate of Willie James Fee,
deceased, Appellant,

v.

AMISUB of South Carolina,
Inc., d/b/a Piedmont Medical
Center, Respondent.

Appeal from York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 27118
Heard March 6, 2012 – Filed May 2, 2012

REVERSED AND REMANDED

John Gressette Felder, Jr, McGowan Hood & Felder,
LLC, of Columbia, William Angus McKinnon,
McGowan Hood & Felder, LLC, of Rock Hill, for
Appellant.

William U. Gunn and Joshua T. Thompson, of
Holcombe Bomar, P.A., of Spartanburg, for
Respondent.

JUSTICE HEARN: Willie James Fee died while in the care of AMISUB of South Carolina, Inc., d/b/a Piedmont Medical Center (Piedmont). Evelyn Grier, as the personal representative of his estate, subsequently brought this medical malpractice claim against Piedmont. The circuit court dismissed Grier's claim on the ground that the expert witness affidavit she was required to submit pursuant to Sections 15-36-100 and 15-79-125 of the South Carolina Code (Supp. 2011) did not contain a competent opinion on proximate cause. Grier appeals, arguing the court erred in finding these statutes require the affidavit contain such an opinion. We agree and therefore reverse and remand for further proceedings.

FACTUAL/PROCEDURAL BACKGROUND

Fee was admitted to Piedmont in January 2008 for treatment of a host of ailments, the list of which is not pertinent to this appeal. He remained at Piedmont until September 2008, at which point he was discharged to another facility for further care. However, he was readmitted to Piedmont twelve days later, and he remained there until his death in February 2009.

Prior to bringing wrongful death and survival proceedings against Piedmont stemming from medical malpractice allegedly committed while it was treating Fee, Grier filed a notice of intent to file suit as required by section 15-79-125(A). Her claims contend Piedmont's failure to monitor and treat Fee for bedsores and sepsis contributed to his death. In conjunction with this notice, Grier also filed an affidavit from Sharon Barber, a nurse with experience treating bedsores and their complications. In it, Nurse Barber opined, based on her review of Fee's medical records, that Piedmont breached its duty of care towards Fee in multiple respects and these breaches were a contributing cause of Fee's death.

Piedmont subsequently filed a motion to dismiss on the ground that Nurse Barber was not qualified to render an opinion as to cause of death,

which meant Grier's affidavit did not contain a competent causation opinion. The circuit court agreed that Nurse Barber was not qualified to opine as to cause of death. Additionally, the court held

that it is implicit in the Tort Reform Act, and in particular the Notice of Intent, Short and Plain Statement of Facts, and the affidavit requirements at issue in this motion, that a showing of proximate cause must be made by submission of a proper affidavit addressing proximate cause, and made by a person qualified to do so. Plaintiff in this instance has failed to submit such an affidavit, and for that reason Defendant's Motion must be granted

While the court gave Grier thirty days to submit a qualifying affidavit, Grier failed to do so. The court accordingly dismissed Grier's claim. This appeal followed.

LAW/ANALYSIS

On appeal, Grier concedes Nurse Barber is not qualified to render an opinion as to Fee's cause of death. Thus, the only argument Grier presents is that the circuit court erred in holding the pre-suit affidavit a plaintiff statutorily is required to file before bringing a medical malpractice claim must contain an expert opinion on proximate cause. We agree.

The issue before us is purely one of statutory interpretation. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). It is well-established that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quotation omitted). Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* It is only when applying the words literally leads to a result so patently absurd

that the General Assembly could not have intended it that we look beyond the statute's plain language. *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

In ascertaining the meaning of language used in a statute, we presume the General Assembly is "aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *see also Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("[W]hen Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).

Finally, statutes in derogation of the common law are to be strictly construed. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Under this rule, a statute restricting the common law will "not be extended beyond the clear intent of the legislature." *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Statutes subject to this rule include those which "limit a claimant's right to bring suit." 82 C.J.S. *Statutes* § 535.

With these principles in mind, we turn to the statutes at issue in this case. Section 15-79-125(A) provides, "Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100." The statute then gives specific guidance as to the requirements for the notice document:

The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the

plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure.

Id. However, it provides no specifics for the expert affidavit. For that, the statute directs the reader to section 15-36-100. This section in turn states the plaintiff has to submit "an affidavit of an expert witness which 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." *Id.* § 15-36-100(B).

We begin by examining the statute concerning the affidavit itself, section 15-36-100(B). No party disputes that this statute is unambiguous, and thus we must apply its plain language. In our opinion, the language that the affidavit must "specify at least one negligent act or omission" encompasses only the breach element of a common law negligence claim and not causation. Thus, the statute limits its requirement for the affidavit to only breach.

First, the term "negligent act or omission" consistently has been used to refer *only* to breach and never to causation. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) ("A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." (emphasis added)); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) ("To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) *a breach of that duty by negligent act or omission*; and (3) damage proximately caused by the breach." (emphasis added)); *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000) ("To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; and (3) damage proximately resulting from the breach of duty." (emphasis added)); *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998) ("To establish a cause of

action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) *breach of that duty by a negligent act or omission*; and (3) damage proximately resulting from the breach of duty." (emphasis added)). Furthermore, proximate cause requires proof beyond just the act or omission in question and concerns whether it is the "but for" cause of the plaintiff's injuries and whether the harm was foreseeable. *Bishop*, 331 S.C. at 88-89, 502 S.E.2d at 83.

The General Assembly therefore used a term of art which has a well-defined common law meaning as just breach, and we can find nothing indicating the General Assembly intended to vary from it. Accordingly, the plain and unambiguous language of the statute forecloses any argument that the affidavit contain a proximate cause opinion.

Moreover, section 15-36-100 restricts a plaintiff's common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed, and section 15-36-100 cannot extend any further than what the General Assembly clearly intended. Once again, this statute plainly and unambiguously uses a term of art which at common law refers only to the breach element of a negligence claim. The plain language of a statute being the best evidence of the General Assembly's intent, there is no clear indication it sought to go any further. Thus, we are in no position to go further ourselves.

We therefore hold under these well-established principles that section 15-36-100(B) requires that the expert render an opinion only as to a breach of the standard of care. In its brief, Piedmont appears to concede as much by pointing out that it "has never made the argument that the 'plain language' of Section 15-36-100(B) requires an expert affidavit to opine on proximate cause. Instead, [Piedmont] focus upon Section 15-79-125(A) which requires a plaintiff alleging medical malpractice show a claim upon which a plaintiff is entitled to relief."¹ Under this guise, Piedmont advances two arguments

¹ At oral argument, Piedmont changed its tune and relied instead on section 15-36-100(B). In particular, Piedmont argued for the first time that the language requiring the affidavit set forth "the factual basis for each claim" imposes a requirement for a causation opinion. The essence of the argument

regarding this statute: (1) the plain language of section 15-79-125(A) requires the affidavit contain an opinion as to proximate cause because it requires that a plaintiff show he is entitled to relief, and in the alternative, (2) section 15-79-125(A) implicitly imposes this requirement. We disagree with both.

Like section 15-36-100(B), section 15-79-125(A) is unambiguous and in derogation of the common law. Read plainly and strictly, section 15-79-125(A) simply requires the contemporaneous filing of both the notice and the affidavit. While this statute supplies several requirements for the notice, it does not speak at all to what is required for the affidavit beyond stating that it is "subject to the affidavit requirements established in Section 15-36-100." S.C. Code Ann. § 15-79-125(A). While Piedmont argues that the affidavit must contain the same information as the notice—i.e., a demonstration that the plaintiff is entitled to relief, which would include causation—its construction is refuted by the plain language of section 15-79-125(A). By its very terms, this statute imposes no content requirements for the expert affidavit and specifically delegates that task to section 15-36-100.

We also reject Piedmont's "implicit legislative intent" argument. For this, Piedmont turns to the policies behind tort reform legislation such as section 15-79-125. It correctly notes that one of the major goals behind these requirements is curtail frivolous litigation by ensuring plaintiffs only present colorable claims. Moreover, section 15-79-125(C) requires that parties to a medical malpractice claim engage in mandatory pre-suit mediation. It is only if this mediation fails that a civil action officially is initiated in the circuit court. S.C. Code Ann. § 15-79-125(E). Thus, Piedmont argues having a fuller picture of a plaintiff's claim prior to mediation, including the basis for proximate cause, enables a more productive mediation process which can avoid the need for a protracted battle in court.

is that if the plaintiff must show a factual basis for the "claim," that necessarily includes the element of causation. Not only was this the first time it made this argument, the argument is unavailing. The "factual basis" language clearly refers back to the "negligent act or omission" requirement, and therefore it only requires the affiant supply a factual basis for his opinion regarding breach.

We do not doubt that requiring the affidavit to contain an opinion regarding causation furthers these important goals. Nevertheless, the statute is unambiguous and we are confined to what the statute says, not what it ought to say, for we have no right to modify a statute's application "under the guise of judicial interpretation." *See Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 182, 161 S.E.2d 175, 178 (1968). In other words, when a statute is clear on its face, it is "improvident to judicially engraft extra requirements to legislation" just because doing so may further the intent behind the statute. *See Berkebile v. Outen*, 311 S.C. 50, 55-56, 426 S.E.2d 760, 763 (1993). We must also be mindful that section 15-79-125(A) is to be strictly construed, and imposing requirements which are not clearly intended to be in it violates this rule. We do not believe it is clear the General Assembly intended to include this requirement, and there are many reasons why it could have chosen not to do so. Moreover, Piedmont has not shown how an application of the plain language would lead to a result so patently absurd it could not have been intended by the General Assembly. We therefore are in no position to look beyond the plain language of the statute and read into it a requirement that the expert also opine as to causation at this stage in the proceedings.

Accordingly, we hold nothing in section 15-79-125(A) requires that an expert affidavit in a medical malpractice action submitted pursuant to section 15-36-100(B) contain an opinion regarding causation.

CONCLUSION

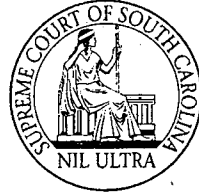
In conclusion, we reverse the circuit court and hold the expert affidavit required by sections 15-36-100 and 15-79-125 does not need to contain an opinion as to proximate cause.² We therefore remand this matter for further

² Piedmont made a general request for us to affirm under Rule 220(c), SCACR, but did not identify any specific grounds appearing in the record on which we could do so. It has therefore abandoned any additional sustaining grounds. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief."); *see also*

proceedings. Our holding today in no way limits a plaintiff's burden to come forward with expert testimony to support the merits of his claims, if necessary, later in the process. Instead, we merely hold that sections 15-36-100 and 15-79-125 do not require an expert opinion as to causation to be contained within the pre-filing affidavit.

**TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ.,
concur.**

State v. Jones, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (finding a conclusory argument abandoned).



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 27, 2012

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William Angus McKinnon, Esquire
McGowan Hood & Felder
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Rock Hill, SC 29732

William U. Gunn, Esquire
Joshua T. Thompson, Esquire
Holcombe Bomar, P.A.
P. O. Drawer 1897
Spartanburg, SC 29304

Re: Grier, Evelyn v. Amisub of SC, Inc.

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant 10 minutes

Respondent 10 minutes

Appellant in Reply 5 minutes.

This case is scheduled for hearing on Tuesday, March 6, 2012 at 9:30 a.m.

Very truly yours,

Daniel E. Shearouse, Clerk

By Debbie M. Hopkins
Administrative Assistant

DES/dmh



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Joshua T. Thompson
Kyle T. Clelland
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Special Counsel
Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

January 26, 2012

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

RECEIVED

JAN 27 2012

S.C. SUPREME COURT

RE: Evelyn Grier, as the appointed Personal Representative of the Estate
of Willie James Fee, deceased, vs. Amisub of South Carolina, Inc., d/b/a
Piedmont Medical Center
C. A. Number: 2010-CP-46-2909

Dear Mr. Shearouse:

We are in receipt of your letter dated January 24, 2012 advising us the above matter
is on the roster of the Court and will probably be heard during the March, 2012 term.

I have looked at the dates you provided, and have no conflicts presently with any
of those dates.

With best regards,

Yours very truly,

William U. Gunn

WUG:dl

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC, GA, NC)

S. Randall Hood

John G. Felder, Jr.

W. Jones Andrews, Jr.

Jordan C. Calloway

Susan F. Campbell

Ashley Creech

Christy M. DeLuca

Lara Pettiss Harrill



Patrick M. Killen

T. Travis Medlock

William A. McKinnon (SC, DC)

Daniel "Ernie" Peagler

Robert V. Phillips

Seth Rose

James Stephen Welch* (SC, OK)

Jay F. Wright

Joseph G. Wright, III*

Of Counsel*

Writer's Email: abrock@mcgowanhood.com

January 26, 2012

VIA U.S. MAIL & FACSIMILE: (803) 734-1499 (2 pages)

The South Carolina Supreme Court

The Honorable Daniel E. Shearhouse

Post Office Box 11330

Columbia, South Carolina 29211

RE: Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased, v. AMISUB of South Carolina d/b/a Piedmont Medical Center

Dear Mr. Shearhouse:

We are in receipt of your correspondence dated January 24, 2012 in the above referenced matter. A copy of this letter is enclosed for your convenience. Attorneys John G. Felder, Jr. and William A. McKinnon are available all dates proposed in the letter.

Please let us know if you need anything further in this regard.

With kind regards, I am

Sincerely,

Ann B. Brock

Paralegal to John G. Felder, Jr.

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JAN 27 2012

S.C. SUPREME COURT

/ab

Enclosure

Cc: William A. McKinnon (via facsimile only: 803-327-5656)

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The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: John Gressette Felder, Jr, Esquire
From: Daniel E. Shearouse
Date: January 24, 2012
RE: March Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the March 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of March 6, 7, 8, 20 and 21. Please notify this office in writing prior to January 31, 2012 as to any scheduling conflicts for the March term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Grier, Evelyn v. Amisub of SC, Inc.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
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Grier, Evelyn v. Amisub of SC, Inc.



The South Carolina Supreme Court

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CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
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Grier, Evelyn v. Amisub of SC, Inc.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
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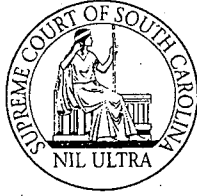
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Grier, Evelyn v. Amisub of SC, Inc.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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January 11, 2012

John Gressette Felder, Jr, Esquire
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William U. Gunn, Esquire
Joshua T. Thompson, Esquire
Holcombe Bomar, P.A.
P. O. Drawer 1897
Spartanburg, SC 29304

Re: Grier, Evelyn v. Amisub of SC, Inc.

Dear Counsel:

When the roster for the February 2012 term of Court was prepared, the above referenced case was not scheduled. Our records indicate that you are counsel of record in this case.

This case will be placed on the March 2012 Preliminary List of Cases. Court will meet the days of March 6, 7, 8, 20 and 21.

Grier, Evelyn v. Amisub of SC, Inc.

Page Two

January 11, 2012

Very truly yours,

Daniel E. Sharouse
b5

CLERK

DES/dmh

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC, GA, NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Jordan C. Calloway
Susan F. Campbell
Lara Pettiss Harrill
T. Travis Medlock



William A. McKinnon (SC, DC)
Daniel "Ernie" Peagler
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James Stephen Welch* (SC, OK)
Jay F. Wright
Joseph G. Wright, III*
Of Counsel*

Writer's Email: bmiskelly@mcgowanhood.com

December 20, 2011

The South Carolina Supreme Court
Daniel E. Shearouse
Clerk of Court
PO Box 11330
Columbia, SC 29211

RE: Grier, Evelyn v. Amisub of SC. Inc.

Dear Mr. Shearouse:

I am writing in response to your December 12, 2011, letter regarding oral arguments in the above referenced case. Mr. Felder and I have conflicts on February 8, 22 & 23 and are free on February 7 & 9.

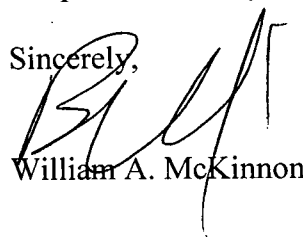
February 8, 2012 – We have a mediation scheduled in a long running medical malpractice action.

February 22, 2012 – We have a video deposition for trial use scheduled in Texas.

February 23, 2012 – We have a deposition scheduled with a Doctor. in a medical malpractice case. .

Thank you very much for taking the time to write us in regards to scheduling. We are of course available on any day the court wishes, but would prefer February 7th or 9th.

Sincerely,



William A. McKinnon

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DEC 28 2011

WAM/bdm

S.C. SUPREME COURT

pm 12-20-11

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McGowan, Hood & Felder, LLC

Chad A. McGowan (SC, GA, NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
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Susan F. Campbell
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The South Carolina Supreme Court
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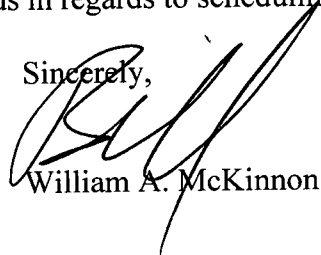
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Sincerely,



William A. McKinnon

WAM/bdm

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DEC 20 2011

S.C. SUPREME COURT

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Robert M. Barrett
Ginger D. Goforth
W. McElhaney White
A. Todd Darwin
J. Hayes Walsh
Nathaniel P. Mark
Joshua T. Thompson
Kyle T. Clelland

Stacey Campbell Davis
Special Counsel

Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

December 19, 2011

RECEIVED

DEC 20 2011

S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

RE: Evelyn Grier, as the appointed Personal Representative of the Estate
of Willie James Fee, deceased, vs. Amisub of South Carolina, Inc., d/b/a
Piedmont Medical Center
C. A. Number: 2010-CP-46-2909

Dear Mr. Shearouse:

We have the Court's preliminary list of February cases upon which the above-referenced matter appears for oral argument.

We have some depositions scheduled February 7 and February 9 involving multiple parties, therefore our preference, if suitable with the Court and opposing counsel, would be February 22 or 23, 2012.

If this request cannot be accommodated, we will be happy to appear on any of the dates in February outlined in your memorandum.

December 19, 2011

Page 2

With best regards,

Yours very truly,



William U. Gunn

WUG:dl

cc: William McKinnon, Esquire
Joshua Thompson, Esquire



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: William U. Gunn, Esquire
Jushua T. Thompson, Esquire
From: Daniel E. Shearouse
Date: December 12, 2011
RE: February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22 and 23. Please notify this office in writing prior to December 20, 2011 as to any scheduling conflicts for the February term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Grier, Evelyn v. Amisub of SC, Inc.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

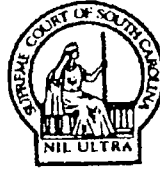
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: William Angus McKinnon, Esquire
From: Daniel E. Shearouse
Date: December 12, 2011
RE: February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

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Grier, Evelyn v. Amisub of SC, Inc.



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: John Gressette Felder, Jr, Esquire
From: Daniel E. Shearouse
Date: December 12, 2011
RE: February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22 and 23. Please notify this office in writing prior to December 20, 2011 as to any scheduling conflicts for the February term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Grier, Evelyn v. Amisub of SC, Inc.

The Supreme Court of South Carolina

Evelyn Grier, as the appointed
Personal Representative of the
Estate of Willie James Fee,
deceased,

Appellant,

v.

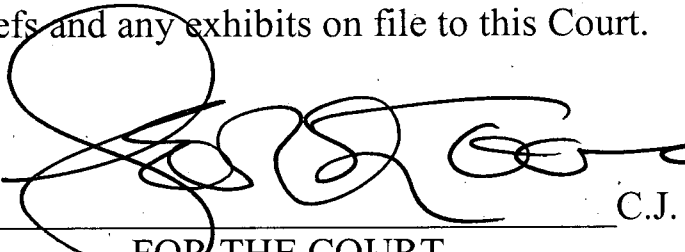
Amisub of South Carolina, Inc.,
d/b/a Piedmont Medical Center, Respondent.

The Honorable S. Jackson Kimball, III
York County
Trial Court Case No. 2010-CP-46-02909

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

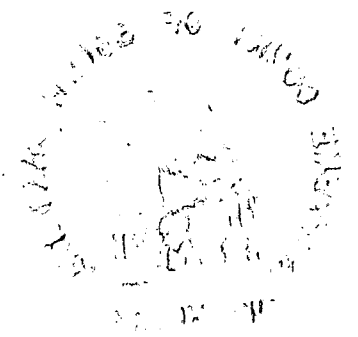
IT IS SO ORDERED.


C.J.
FOR THE COURT

Columbia, South Carolina

November 14, 2011

cc: John G. Felder, Jr, Esquire
William Angus McKinnon, Esquire
William U. Gunn, Esquire
Joshua T. Thompson, Esquire
The Honorable Tanya Gee



McGowan, Hood & Felder, LLC

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S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Jordan C. Calloway
Susan F. Campbell
Lara Pettiss Harrill
T. Travis Medlock



William A. McKinnon (SC, DC)
Daniel "Ernie" Peagler
Robert V. Phillips
Seth Rose
James Stephen Welch* (SC, OK)
Jay F. Wright
Joseph G. Wright, III*
Of Counsel*

Writer's Email: bmiskelly@mcgowanhood.com
August 18, 2011

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AUG 19 2011

SC Court of Appeals

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

Re: Filings in Grier v. AMISUB, Court of Appeals Case No. 2011190090

Dear Ms. Gee,

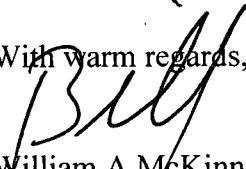
Enclosed for filing are:

- 1) Sixteen (16) Bound copies of the Final Brief of Appellant;
- 2) One (1) unbound original copy of the Final Brief of Appellant; and
- 3) Sixteen (16) Bound copies of the Final Reply Brief of Appellant;
- 4) One (1) unbound original copy of the Final Reply Brief of Appellant;
- 5) Certificate of Counsel; and
- 6) Proof of Service of the above on Opposing Counsel (respondent);

I have provided 16 bound copies (15 for the court and 1 extra) of the Final Briefs. Please return the one extra copy of each after it has been clocked to me in the enclosed self-addressed envelope with postage prepaid.

By copy of this letter, I am serving the same on opposing counsel. Thank you very much for your assistance with this matter.

With warm regards,


William A McKinnon

Cc: William U. Gunn, Esq.



Holcombe Bomar, P.A.

100 Dunbar Street, Suite 200
Spartanburg, SC 29306
P.O. Box 1897
Spartanburg, SC 29304

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Writer's Direct Dial: (864) 594-5307

William U. Gunn
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Perry D. Boulter
William B. Darwin, Jr.
Robert M. Barrett
Ginger D. Goforth
W. McElhane White
A. Todd Darwin
J. Hayes Walsh
Nathaniel P. Mark
Joshua T. Thompson
Stacey Campbell Davis
Special Counsel
Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

August 23, 2011

VIA U.S. Mail

The Honorable Tanya Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased v. AMISUB of South Carolian d/b/a Piedmont Medical Center
C/A No. 2010-CP-46-02909
Our File No. 10791

Dear Ms. Gee:

Enclosed for filing, please find the following:

- (1) An unbound original and 16 bound copies of Respondent's Final Brief in the referenced action as is required by SCACR Rule 211;
- (2) An unbound original and 16 copies of the Certificate of Counsel bound as the final page to the Respondent's Final Brief; and
- (3) An original and one copy of the Certificate of Service on opposing counsel.

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AUG 24 2011
SC Court of Appeals

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2000-2001

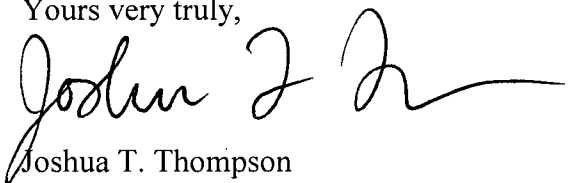
Please clock and return the one extra copy of the Final Brief and the copy of the Certificate of Service. I have enclosed a self-addressed, stamped envelope for your convenience.

By copy of this letter, we are serving counsel for Appellant with a copy of the above listed filings.

Thank you very much for your assistance.

With kindest regards, I am

Yours very truly,

A handwritten signature in black ink, appearing to read "Joshua T. Thompson", with a long horizontal flourish extending to the right.

Enclosures

C: William A. McKinnon (w/ enclosures)

John G. Felder, Jr. (w/ enclosures)

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC, GA, NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Jordan C. Calloway
Susan F. Campbell
Lara Pettiss Harrill
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William A. McKinnon (SC, DC)
Daniel "Ernie" Peagler
Robert V. Phillips
Seth Rose
James Stephen Welch* (SC, OK)
Jay F. Wright
Joseph G. Wright, III*
Of Counsel

Writer's Email: bmiskelly@mcgowanhood.com
August 17, 2011

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AUG 19 2011
SC Court of Appeals

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

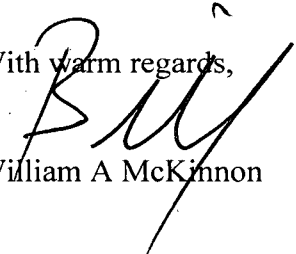
Re: Filings in Grier v. AMISUB, Court of Appeals Case No. 2011190090

Dear Ms. Gee,

After speaking with Lori in your office on August 17, 2011, she informed us that we needed to send an original signed Certificate of Counsel. It is enclosed.

By copy of this letter, I am serving the same on opposing counsel. Thank you very much for your assistance with this matter.

With warm regards,


William A McKinnon

Cc: William U. Gunn, Esq.
Holcombe Bomar, PA
100 Dunbar Street
Suite 200
Spartanburg, SC 29304



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
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August 16, 2011

John Gressette Felder, Jr, Esquire
McGowan Hood & Felder, LLC
1517 Hampton St.
Columbia, SC 29201

William Angus McKinnon, Esquire
McGowan Hood & Felder
1539 Health Care Dr.
Rock Hill, SC 29732

Re: Grier, Evelyn v. Amisub of SC, Inc.
2011190090

Dear Counsel:

We have received the Record on Appeal in the above case. However, the Certificate of Counsel appears to be a copy.

Within ten days of the date of this letter, please provide an original Certificate of Counsel.

Very truly yours,


CLERK

TAG/laf

cc: William U. Gunn, Esquire
Jushua T. Thompson, Esquire

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC, GA, NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Jordan C. Calloway
Susan F. Campbell
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T. Travis Medlock



William A. McKinnon (SC, DC)
Daniel "Ernie" Peagler
Robert V. Phillips
Seth Rose
James Stephen Welch* (SC, OK)
Jay F. Wright
Joseph G. Wright, III*
Of Counsel*

Writer's Email: bmiskelly@mcgowanhood.com
August 5, 2011

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
1205 Pendleton Street
Columbia, SC 29201

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AUG 08 2011

SC Court of Appeals

Re: Filings in Grier v. AMISUB, Court of Appeals Case No. 2011190090

Dear Ms. Gee,

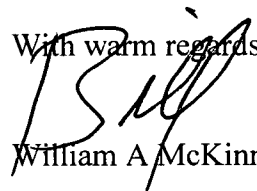
Enclosed for filing are:

- 1) Sixteen (16) Bound copies of the Record on Appeal;
- 2) One (1) unbound original copy of the Record on Appeal; and
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I have provided 16 bound copies (15 for the court and 1 extra) of the record on appeal. Please return the one extra copy after it has been clocked to me in the enclosed self-addressed envelope with postage prepaid.

By copy of this letter, I am serving the same on opposing counsel. Thank you very much for your assistance with this matter.

With warm regards,


William A. McKinnon

Cc: William U. Gunn, Esq.
Holcombe Bomar, PA
100 Dunbar Street
Suite 200
Spartanburg, SC 29304

1539 Health Care Drive, Rock Hill, SC 29732 · Tel: 803-327-7800 · Fax: 803-328-5656
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The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
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July 12, 2011

John Gressette Felder, Jr, Esquire
McGowan Hood & Felder, LLC
1517 Hampton St.
Columbia, SC 29201

William Angus McKinnon, Esquire
McGowan Hood & Felder
1539 Health Care Dr.
Rock Hill, SC 29732

William U. Gunn, Esquire
Jushua T. Thompson, Esquire
Holcombe Bomar, P.A.
P. O. Drawer 1897
Spartanburg, SC 29304

Re: Grier, Evelyn v. Amisub of SC, Inc.
2011190090

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUL 11 2011

SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Appellant** upon AMISUB of South Carolina, Inc. d/b/a Piedmont Medical by depositing a copy of it in the United States Mail, first-class postage prepaid, on July 8, 2011, addressed to its attorney of record, William U. Gunn, HOLCOMBE BOMAR, PA, 100 Dunbar St., Ste 200, Spartanburg, SC 29304.

July 8, 2011

[signature page follows]



William A. McKinnon
MCGOWAN HOOD & FELDER, LLC
1539 Health Care Dr.
Rock Hill, SC 29732
Telephone: (803) 327-7800
Facsimile: (803) 328-5656
Email: bmckinnon@mcgowanhood.com

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Attorneys for Appellant

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC, GA, NC)
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Jordan C. Calloway
Susan F. Campbell
Lara Pettiss Harrill
T. Travis Medlock



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Jay F. Wright
Joseph G. Wright, III*
Of Counsel*

Writer's Email: bmiskelly@mcgowanhood.com

July 8, 2011

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JUL 11 2011

SC Court of Appeals

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Filings in Grier v. AMISUB, Court of Appeals Case No. 2011190090

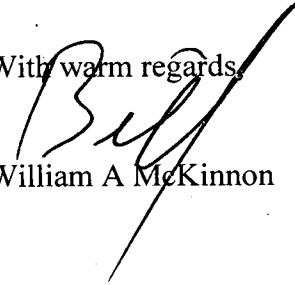
Dear Ms. Gee,

Enclosed for filing are the Initial Reply Brief of Appellant and Proof of Service of the Initial Reply Brief of Appellant

I have provided the original and one copy of each. Please return the clocked copies to me in the enclosed self-addressed envelope with postage prepaid.

By copy of this letter, I am serving the same on opposing counsel. Thank you very much for your assistance with this matter.

With warm regards,


William A McKinnon

Cc: William U. Gunn, Esq.
Holcombe Bomar, PA
100 Dunbar Street
Suite 200
Spartanburg, SC 29304

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

INITIAL REPLY BRIEF OF APPELLANT

William A. McKinnon
MCGOWAN HOOD & FELDER, LLC
1539 Health Care Dr.
Rock Hill, SC 29732
Telephone: (803) 327-7800
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John G. Felder, Jr.

RECEIVED

JUL 11 2011

SC Court of Appeals

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1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
Email: jfelder@mcgowanhood.com

Attorneys for Appellant

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ARGUMENT

1. S.C. CODE ANN. § 15-79-125(A)'S REQUIREMENT OF A "SHORT AND PLAIN STATEMENT OF THE FACTS SHOWING THAT THE PARTY FILING THE NOTICE IS ENTITLED TO RELIEF" HAS NOTHING TO DO WITH THE EXPERT AFFIDAVIT REQUIREMENT AND NO BEARING ON THIS APPEAL

In its Brief, Respondent claims: "Respondent focuses upon Section 15-79-125(A) which requires that plaintiff alleging medical negligence show a claim upon which plaintiff is entitled to relief. Appellant has failed . . . to explain how her NOI and accompanying expert affidavit satisfied this requirement." Brief of Respondent at 8. Respondent's entire first issue, as illustrated by this representative quote, is an improper attempt to conflate and combine *two separate statutory requirements* -- the Notice of Intent and the expert affidavit -- into one single requirement. In other words, Respondent wants to claim the expert affidavit must address the "short and plain statement of the facts showing that the party filing the notice is entitled to relief," a provision which plainly does not apply to the expert affidavit according to the statute. There is no authority of any sort supporting Respondent's position, and in fact S.C. Code Ann. § 15-79-125(A) says nothing at all about the expert affidavit, except that it must comply with S.C. Code Ann. § 15-36-100.

The statutory scheme of S.C. Code Ann. § 15-79-125(A) is quite clear:

Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is

entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure.

S.C. Code Ann. § 15-79-125(A) (emphasis added). There are *two separate* requirements: the **first** is S.C. Code Ann. § 15-79-125(A)'s requirement of a "Notice of Intent to File Suit." The **second** is S.C. Code Ann. § 15-79-125(A)'s requirement of an "affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100." The Notice is entirely separate from the affidavit, and it is only the Notice that must contain "short and plain statement of the facts showing that the party filing the notice is entitled to relief." As S.C. Code Ann. § 15-79-125(A) provides: "The notice . . . must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief." The affidavit has nothing to do with the "short and plain statement of the facts."

This is a careful, considered and logical system set up by the statute. The Plaintiff's Notice of Intent must allege "a short and plain statement of the facts showing that the party filing the notice is entitled to relief." The only element that must be included or addressed in the affidavit is at least one "negligent act or omission." S.C. Code Ann. § 15-36-100. As Appellant set forth exhaustively in its Opening Brief, the "negligent act or omission" required in the affidavit is a term of art specifically referring to the "breach" element and not including proximate cause. See, e.g., Fowler v. Hunter, 388 S.C. 355, 361, 697 S.E.2d 531, 534 (2010) ("To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) **breach of that duty by a negligent act or omission**; and (3) damages proximately resulting from the breach of duty") (emphasis added). Nurse Barber's affidavit provided four distinct "negligent acts or omissions," following the

exact language of S.C. Code Ann. § 15-36-100, and plainly satisfying the statute. Barber Affidavit, Exhibit B to Notice of Intent. The plain language of the statute ends the inquiry. “If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Catawba Indian Tribe of S. Carolina v. State, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007) (internal quotation omitted).

This “short and plain statement” provision regarding the Notice of Intent had absolutely nothing to do with the ruling below. Judge Kimball held:

I find and conclude that it is implicit in the Tort Reform Act, and in particular the Notice of Intent, Short and Plain Statement of Facts, and the affidavit requirement at issue in this motion, that a showing of proximate cause must be made by submission of a proper affidavit addressing proximate cause, and made by a person qualified to do so. Plaintiff in this instance has failed to submit such an affidavit, and for that reason Defendant’s motion must be granted

January 4, 2011 Order of Judge Kimball at 3 (emphasis added). It is quite plain that the basis for Judge Kimball’s ruling is that he believed the affidavit required an expert opinion on proximate cause, not that there was some unspecified other issue with the “short and plain statement of the facts showing that the party filing the notice is entitled to relief” required as part of the Notice of Intent. S.C. Code Ann. § 15-79-125(A) had nothing to do with Judge Kimball’s ruling, as what is required in the affidavit is set forth in S.C. Code Ann. § 15-36-100, not S.C. Code Ann. § 15-79-125(A).

Section 15-79-125(A)’s requirement that the Notice of Intent contain a “short and plain statement of the facts showing that the party filing the notice is entitled to relief” was not the basis of the ruling below and has nothing to do with the affidavit requirement, and frankly has no bearing on this appeal. Nevertheless, for completeness’

sake, Appellant will briefly demonstrate this requirement was easily satisfied by Plaintiff/Appellant. The Notice of Intent to File Suit, filed on July 12, 2010, contains as Exhibit A a draft complaint as its "short and plain statement of the facts showing that the party filing the notice is entitled to relief." Exhibit A to Notice of Intent. This draft complaint has a specific, separate title page stating "EXHIBIT A Plaintiff's short and plain statement of the facts showing that the party is entitled to relief." That Exhibit is a five-page, fourteen-paragraph draft complaint which sets forth eight (8) specific acts of negligence at paragraph 10 and then specifically alleges proximate cause at paragraph 11:

As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by agents and/or employees of Defendant, the Plaintiff's decedent suffered from severe debilitating injuries that resulted in his death, as a result of which the decedent's statutory beneficiaries have lost the aid, comfort, support, society and companionship of the decedent, and have suffered severe and extreme emotional distress, anxiety, grief and sorrow, the likes of which no person should endure. . . .

Notice of Intent, Exhibit A, p. 4. Paragraph 13 again alleges proximate cause:

As a direct and proximate result of the negligence, carelessness, gross negligence and recklessness and departures from professional standards of care by Defendant, as herein-set forth above, Willie James Fee endured continuous and excruciating conscious pain and suffering and mental distress in the time leading up to his death on February 25, 2009.

Notice of Intent, Exhibit A, p. 4. "There are eight specific allegations of negligence that the draft complaint specifically alleges proximately caused injuries. This language more than satisfies the proximate cause element of the "short and plain statement of the facts showing that the party filing the notice is entitled to relief," and in fact it is difficult to imagine what more plaintiff could add at the notice of intent stage, without the opportunity for discovery.

No amount of obfuscation or confusion sown by Respondent can alter the statutory scheme: a plaintiff must submit a Notice of Intent, which must include allegations of a “short and plain statement of the facts showing that the party filing the notice is entitled to relief,” and which is entirely separate from the expert affidavit requirement. In addition to the Notice of Intent, plaintiffs must submit an expert affidavit which must only address one “negligent act or omission,” and which has nothing to do with the “short and plain statement” required as part of the Notice of Intent. The two requirements are not related and there is no authority of any kind to apply the “short and plain statement” requirement to the expert affidavit, when the language of the statute limits it to the Notice of Intent. All that is required for the expert affidavit is one “negligent act or omission,” and Appellant provided four. The judgment below should be reversed.

2. THERE IS NO AUTHORITY ANYWHERE TO SUPPORT AN
 “IMPLICIT” REQUIREMENT OF AN EXPERT AFFIDAVIT
 ADDRESSING PROXIMATE CAUSE.

The remainder of Respondent’s brief makes the argument that “legislative intent makes it implicit that proximate cause be established for an . . . accompanying expert affidavit to be sufficient.” Brief of Respondent at 9. Other than some generic cases about statutory interpretation, Respondent provides not one whit of authority supporting its “legislative intent” argument, and does not even provide any citations to suggest to the reader what the legislative intent might have been for S.C. Code Ann. § 15-79-125(A) or § 15-36-100.

Courts of this state determine legislative intent, at first recourse, from the language actually enacted by the legislature. “With any question regarding statutory

construction and application, the court must always look to legislative intent as determined from the plain language of the statute.” Peake v. S. Carolina Dept. of Motor Vehicles, 375 S.C. 589, 597-98, 654 S.E.2d 284, 289 (S.C. Ct. App. 2007). The language here could not be more plain: the expert affidavit must contain only a “negligent act or omission,” which means the “breach.” “In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) **the defendant breached the duty by a negligent act or omission**, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages.” Moore v. Weinberg, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009) (emphasis added). There is no evidence, in Respondent’s Brief or anywhere else, that the legislature intended anything other than what it enacted in plain English.

3. THERE IS NO OTHER BASIS TO AFFIRM THE COURT BELOW

Respondent’s final issue, at p. 12 of its Brief, is a “request[] that this Court affirm . . . upon any ground appearing the [sic] record.” It is, of course, a correct statement of the law that this Court may affirm upon any basis appearing in the record. See, e.g., Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154, 156 (S.C. Ct. App. 1987). However, Respondent identifies no such ground in its Brief, and Respondent’s “issue” appears to be a bald invitation to this Court to scour the record on its own to find one, without any support. None will be found. There was no trial in this case, no discovery, not even a filed complaint. The only pleading was a Notice of Intent, which the Court below dismissed because the accompanying affidavit did not adequately cover proximate cause, a requirement that appears nowhere in S.C. Code Ann. § 15-79-

125(A) or § 15-36-100. The ruling of the Court below is incorrect as a matter of law, and should be reversed.

CONCLUSION

For the stated reasons, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

July 8, 2011



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2010-CP-46-02909

RECEIVED

JUL 01 2011

SC Court of Appeals

Evelyn Grier, as the appointed Personal
Representative of the Estate of Willie
James Fee, deceased Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a
Piedmont Medical Center.....Respondent.

**RESPONDENT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the following be included in the Record on Appeal:

1. Each and every document, filing, hearing transcript, and exhibit designated within the Appellant's Designation of Matter to Be Included In the Record of Appeal;
2. Respondent's Notice of Motion to Dismiss for Insufficiency of Affidavit (10/27/10);
3. Appellant's Memorandum in Opposition to Motion to Dismiss (12/15/10); and
4. Respondent's Memorandum in Support of Defendant's Motion to Dismiss for Insufficiency of Affidavit (12/15/10).

Counsel certifies that this designation contains no matter which is irrelevant to this appeal.

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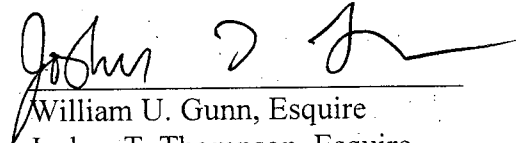
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60-31850

Respectfully submitted,

HOLCOMBE BOMAR, PA

By:



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June 29, 2011

Spartanburg, SC

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal
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AMISUB of South Carolina, Inc. d/b/a
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PROOF OF SERVICE

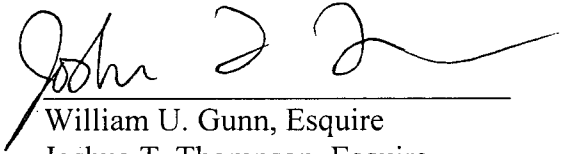
I certify that I have served the RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL on Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, by depositing a copy of it in the United States Mail, postage prepaid, on June 29, 2011, addressed to her attorneys of record, William A. McKinnon, at his office at 1539 Health Care Drive, Rock Hill, South Carolina 29732, and John G. Felder, Jr., at his office at 1517 Hampton Street, Columbia, South Carolina 29201.

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JUL 01 2011

SC Court of Appeals

A handwritten signature in black ink, appearing to read "John D. D.", is positioned above a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal
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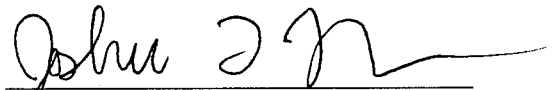
v.

AMISUB of South Carolina, Inc. d/b/a
Piedmont Medical Center.....Respondent.

PROOF OF SERVICE

I certify that I have served the INITIAL BRIEF OF RESPONDENT on Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, by depositing a copy of it in the United States Mail, postage prepaid, on June 29, 2011, addressed to her attorneys of record, William A. McKinnon, at his office at 1539 Health Care Drive, Rock Hill, South Carolina 29732, and John G. Felder, Jr., at his office at 1517 Hampton Street, Columbia, South Carolina 29201.

[Signature Block on Next Page]

A handwritten signature in black ink, appearing to read "Gunn" followed by a stylized flourish.

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June 27, 2011

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JUL 01 2011

SC Court of Appeals

RE: Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased v. AMISUB of South Carolina, Inc. d/b/a Piedmont Medical Center
Case No. 2010-CP-46-02909
HB File No. 10791

Dear Ms. Gee:

Enclosed for filing in the above-referenced matter are one (1) original and one (1) copy of the following:

- (1) Initial Brief of Respondent;
- (2) Proof of Service of the Initial Brief of Respondent on Appellant;
- (3) Respondent's Designation of Matter to be Included in the Record on Appeal;
and
- (4) Proof of Service of the Designation of Matter to be Included in the Record on Appeal on Appellant.

I would appreciate it if you file the originals and return the clocked copies of each filing to me in the enclosed self-addressed, stamped envelope.

Q32

[illegible]

the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 200 million to 400 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

Also, by copy of this letter, I am serving a copy of the above-listed filings on counsel of record for Appellant.

Thank you very much for your assistance.

With kindest regards, I am

Yours very truly,

A handwritten signature in black ink, appearing to read "Joshua T. Thompson", with a stylized flourish at the end.

Joshua T. Thompson (S.C. Bar #79137)

Enclosures

cc: William A. McKinnon (w/ enclosures)
John G. Felder, Jr. (w/ enclosures)

2009-10-01
 2009-10-01

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal
Representative of the Estate of Willie
James Fee, deceased Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a
Piedmont Medical Center.....Respondent.

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STATEMENT OF THE ISSUES ON APPEAL

- I. WHETHER THE PLAIN LANGUAGE OF S.C. CODE ANN. § 15-79-125(A) REQUIRES THAT A NOTICE OF INTENT TO FILE SUIT AND ACCOMPANYING EXPERT AFFIDAVIT DEMONSTRATE A CLAIM UPON WHICH APPELLANT IS ENTITLED TO RELIEF BY ESTABLISHING PROXIMATE CAUSE THROUGH EXPERT MEDICAL TESTIMONY.
- II. WHETHER THE LEGISLATIVE INTENT BEHIND ENACTMENT OF S.C. CODE ANN. § 15-79-125(A) REQUIRES THAT THE NOTICE OF INTENT TO FILE SUIT DEMONSTRATE A CLAIM UPON WHICH THE APPELLANT IS ENTITLED TO RELIEF BY ESTABLISHING PROXIMATE CAUSE THROUGH EXPERT MEDICAL TESTIMONY.
- III. WHETHER, PURSUANT TO THE SOUTH CAROLINA APPELLATE COURT RULES, THE COURT OF APPEALS MAY AFFIRM THE CIRCUIT COURT'S JANUARY 4, 2011 AND MARCH 10, 2011 RULINGS AND ORDERS BASED UPON ANY GROUND APPEARING IN THE RECORD.

STATEMENT OF THE CASE

Willie James Fee (the “decedent”) received treatment and care at Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center (“Respondent” or “Amisub”) from January of 2008 through early September of 2008 and from late September of 2008 through February of 2009. Mr. Fee died on February 24, 2009. On July 12, 2010, Appellant Evelyn Grier, Personal Representative of the Estate of Willie James Fee (“Appellant”), filed her Notice of Intent to File Suit (“NOI”) against Amisub for claims of wrongful death and survivorship stemming from alleged acts of medical malpractice. (Notice of Intent to File Suit, Grier v. Amisub (July 8, 2010) (C/A No. 2010-CP-46-2909) (hereinafter “NOI”).) The NOI purports to comply with S.C. Code Ann. § 15-79-125 (2005).

Attached to the NOI as Exhibit “A” is a draft complaint which, according to Appellant, contains a short and plain statement of the facts showing that Appellant was entitled to relief. Exhibit “A” contains bare allegations that the decedent’s death and Appellant’s survivorship claims

were the direct and proximate result of the alleged negligent actions or inactions of Amisub relating to Amisub's "failure to properly supervise or monitor [the decedent's] medical condition in that he suffered multiple pressure ulcers...which all contributed to his death." (NOI, Exhibit "A", ¶ 7.) Attached to the NOI as Exhibit "B" is an Affidavit from Nurse Sharon Barber. Nurse Barber sets out four potential negligent actions or inactions of Amisub relating to the care and treatment of Mr. Fee, and makes the statement "that the actions or inactions of the agents, employees and/or nurses from PMC contributed to the injuries, damages and death of Willie Fee." (NOI, Exhibit B: Expert Affidavit, ¶ 5, 6.)

On October 27, 2010 in response to Appellant's NOI, Respondent filed a Notice of Motion to Dismiss for Insufficiency of Affidavit on the grounds that the NOI and supporting "expert" affidavit "do not comport or comply with §§ 15-79-125 and 15-36-100 of the Code of Laws of South Carolina." (Notice of Motion to Dismiss (Oct. 17, 2010), ¶ 1.) On December 15, 2010, Appellant filed a "Memorandum in Opposition to Motion to Dismiss," stating that the plain language of Section 15-36-100 did not require an expert affidavit to address proximate cause. (Memorandum in Opposition (Dec. 15, 2010).) On December 16, 2010, Respondent filed a "Memorandum in Support of Defendant's Motion to Dismiss for Insufficiency of Affidavit," arguing that the language of S.C. Code Ann. § 15-79-125(A) and the intent behind that the Notice of Intent process required proximate cause to be established. (Memorandum in Support (Dec. 16, 2010).)

On December 16, 2011, a hearing on the Motion was held before The Honorable S. Jackson Kimball, Special Circuit Court Judge. The Circuit Court considered both parties memoranda of law and arguments at the hearing. (The Honorable S. Jackson Kimball, Order, January 4, 2011 (hereinafter "January 4th Order"), ¶ 1.) The Circuit Court then issued an Order on January 4, 2011

finding in favor of Respondent on the grounds that Appellant's NOI and accompanying expert affidavit were defective because they failed to demonstrate a claim upon which Appellant was entitled to relief and that it is implicit within the NOI, Short and Plain Statement of Facts, and affidavit requirements that Appellant must show proximate cause by submission of a proper affidavit of a person qualified to opine on proximate cause. (January 4th Order, ¶¶ 6, 11.)

The Circuit Court elected not to dismiss Appellant's action without first giving Appellant an opportunity to cure the defect, allowing Appellant thirty (30) days from the filing date of the Order to submit a proper affidavit establishing proximate cause. (January 4th Order, ¶ 12.) The Circuit Court made clear that if Appellant failed to comply with the Order, the action would be dismissed. (January 4th Order, ¶ 12.) Due to Appellant's failure to comply with the Circuit Court's Order, Judge Kimball issued a finalized Order dismissing Appellant's NOI on March 10, 2011.

Plaintiff placed in the mail for service its notice of appeal on April 7, 2011, and the same was received by Respondent in the proceeding days. On May 27, 2011, Respondent was served with the Initial Brief of Appellant.

STATEMENT OF THE FACTS

Upon his admission to Piedmont Medical Center on January 22-23, 2008, the decedent was suffering from a multitude of complex and severe medical issues. (January 4th Order, ¶ 7.) His past medical history included diabetes mellitus, type 2 for which he did not use insulin and cardiomegaly/cardiomyopathy. (January 4th Order, ¶ 7.) Mr. Fee's admitting diagnoses included a diabetic hyperosmolar nonketotic coma; a seizure, possibly secondary to alcohol withdrawal or cocaine abuse; acute renal failure; metabolic acidosis, possibly multifactorial due to acute renal failure and

lactic acidosis; hypotension; and hypoalbuminemia plus proteinuria, nephrotic syndrome. (January 4th Order, ¶ 7.) Further, Mr. Fee's social history revealed habitual cigarette use, regular alcohol consumption, and abuse of illicit drugs. (Memorandum in Support, ¶ 8.)

After months of treatment, Mr. Fee was discharged to the care of Magnolia Manor on September 15, 2008, only to be readmitted to PMC on September 27, 2008 where he remained until his death on February 24, 2009 (January 4th Order, ¶ 8). Mr. Fee's diagnoses during this second stay at Piedmont Medical Center included fever secondary to aspiration pneumonia and urinary tract infection; aspiration pneumonia and urinary tract infection; diffuse and focal cerebral dysfunction; large left middle cerebral artery hemorrhagic stroke; encephalopathy; actual renal failure with a possibility of chronic kidney disease; seizure disorder; insulin dependant diabetes; multiple respiratory tract infections; a sacral decubitus ulcer; history of upper extremity deep venous thrombosis; and history of alcohol and cocaine abuse (January 4th Order, ¶ 8). At all times, Mr. Fee's prognosis was poor, and he presented a poor quality of life (January 4th Order, ¶ 8).

STANDARD OF REVIEW

Statutory interpretation is a question of law. Dreher v. Dreher, 370 S.C. 75, 79 634 S.E.2d 646, 648 (2006), citing Charleston County Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Questions of law may be decided without a particular deference to the lower court. Id., citing Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). Such questions may be decided based on the appellate court's "assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right." Sloan v. S.C. Bd. Of Physical Therapy Examiners, 370

S.C. 452, 467, 636 S.E.2d 598, 605-606 (2006), citing Croft v. Old Republic Ins. Co., 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927).

ARGUMENTS

I. PURSUANT TO THE PLAIN LANGUAGE OF S.C. CODE ANN. § 15-79-125(A), APPELLANT MUST SHOW A CLAIM UPON WHICH SHE IS ENTITLED TO RELIEF, INCLUDING PROXIMATE CAUSE ESTABLISHED BY COMPETENT EXPERT MEDICAL TESTIMONY.

The “prime object” of statutory construction “is to ascertain and give effect to the legislative intent.” Media Gen’l Comm., Inc. v. SC Dep’t of Rev., 388 S.C. 138, 148, 694 S.E.2d 525, 530, quoting Etiwan Fertilizer Co. V. S.C. Tax Comm’n, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950). The best evidence of legislative intent is the language of the statute itself. Id. Therefore, “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Id., quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Before filing a claim alleging medical negligence, “the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100.” S.C. Code Ann. § 15-79-125(A). The NOI “must contain a short and plain statement of the facts **showing that the party filing the notice is entitled to relief.**” Id. (emphasis added). The accompanying expert witness affidavit “must specify at least one negligent act or omission claimed to exist and the factual basis for each claim.” S.C. Code Ann. § 15-36-100(B). Where a defendant “alleges, with specificity, by motion to dismiss...that the affidavit is defective, the plaintiff’s complaint is subject to dismissal for failure to state a claim.”

S.C. Code Ann. § 15-36-100(E).

Within its Order, the Circuit Court found:

[Appellant's] Notice of Intent to File Suit and accompanying expert affidavit are defective. They fail to show facts demonstrating that Plaintiff has a claim upon which she is entitled to relief. Specifically, the affidavit of Nurse Sharon Barber fails to articulate relevant facts showing her qualification to opine on the issue of proximate cause. Thus, Plaintiff's allegations as to the proximate cause of injury and death to Willie Fee are insufficient.

(January 4th Order, ¶ 6.) The Circuit Court's reasoning cannot be denied as the plain language of that Section § 15-79-125(A) is painstakingly clear: the NOI must show that the party filing the notice is entitled to relief.

To be entitled to relief upon a claim of medical malpractice, a plaintiff must show that the defendant deviated from "generally recognized practices and procedures" and that said deviation "was the proximate cause of the plaintiff's alleged injuries and damages." David v. McLeod Regional Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 3-4 (2006); see also Hanselmann v. McCardle, 275 S.C. 46, 49, 267 S.E.2d 531, 533 (1980) ("A plaintiff must plead and prove not only that he has been injured and the defendant's fault, but also the causal connection between the two."). Where causation of an injury is not within the common knowledge or experience of laymen, "proof of proximate cause must be established by expert testimony." Welch v. Whitaker, 282 S.C. 251, 317 S.E.2d 758 (Ct.App. 1984), citing Hanselmann.

For a medical professional to be qualified to give an expert opinion concerning causation of an injury, said professional must be qualified to render medical diagnoses. See Nelson v. Taylor, 347 S.C. 210, 553 S.E.2d 488 (Ct.App. 2001) (holding that a physical therapist was not qualified to render expert medical testimony concerning causation of plaintiff's alleged injuries because physical

therapists are not qualified to render medical diagnoses); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct.App. 2003) (holding that where a nurse practitioner was qualified to render medical diagnoses under proper written protocol from a physician, said nurse practitioner was qualified to render expert medical testimony concerning causation).

In accord with South Carolina case law, proximate cause must be established to maintain an action for medical malpractice. Appellant has not argued—in memoranda, at the hearing, in brief, or otherwise—that her allegations fall within the common knowledge exception to the requirement for expert medical testimony. Because the complex medical issues presented in this matter, and recognized by the Trial Court, are outside of the common knowledge and experience of a layperson, expert medical testimony is required to show that alleged negligent actions or inactions relating to pressure ulcers proximately caused the decedent’s death.

Appellant’s draft complaint attached to the NOI contains bare allegations of proximate cause not supported by the facts alleged. As to Nurse Barber’s expert affidavit, neither Plaintiff nor Nurse Barber have established that she is qualified to testify concerning medical causation of the injuries claimed by Plaintiff because Nurse Barber’s affidavit does not establish any qualifications she legally holds which entitle her to diagnose the decedent’s many existing health conditions and conclude that alleged acts of negligence related to pressure ulcers were the proximate cause of Mr. Fee’s death. Appellant readily concedes this point. (See Initial Brief of Appellant, Grier (May 24, 2011), p. 4, fn. 1 (“Plaintiff/Appellant does not contest that if there is an ‘implied’ requirement for a proximate causation opinion - which appellant strongly denies - that such an opinion must be provided by a physician and not a nurse.”).)

Simply put, by focusing upon the “plain language” of S.C. Code Ann. § 15-36-100(B),

Appellant overlooks the plain language of the Notice of Intent statute, S.C. Code Ann. § 15-79-125(A). Respondent has never made the argument that the “plain language” of Section 15-36-100(B) requires an expert affidavit to opine on proximate cause. Instead, Respondent focuses upon Section 15-79-125(A) which requires that a plaintiff alleging medical negligence show a claim upon which plaintiff is entitled to relief. Appellant has failed to address this requirement and to explain how her NOI and accompanying expert affidavit satisfied this requirement. Further, Appellant proposes no alternative way to satisfy this requirement besides that recognized by South Carolina law: competent medical expert testimony establishing proximate cause. Because Appellant failed to adhere to the plain language requirements of S.C. Code Ann. § 15-79-125(A), declined to cure this defect in the thirty day period provided by the Trial Court’s January 4th Order, and has provided no justification for this deficiency, the Circuit Court properly dismissed the Appellant’s NOI.

Appellate’s argues that the Trial’s Court’s holding creates “the bizarre situation where the requirements for a notice of intent exceed the requirements for a jury verdict at trial.” (Initial Brief of Appellant, p. 7). This argument is gravely mis-founded. Appellant overlooks the “common knowledge” exception found at S.C. Code Ann. § 15-36-100(C)(2): the contemporaneous filing of a expert affidavit “is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience.” This exception applies the same standard to NOI proceedings as is required for a jury verdict. See Pederson v. Gould, 288 S.C. 141, 142, 341 S.E.2d 633 (1986) (stating that expert testimony is required in a medical malpractice action except in situations whether the common knowledge and experience of laymen allows them to recognize negligence and the presence of the required casual link between the medical provider’s act and the patient’s injury). The Circuit Court found that expert testimony was required to establish

proximate cause in this matter. The January 4th Order does not address matters where the common knowledge exception *is* applicable, and it certainly has no effect on the validity and applicability of S.C. Code Ann. § 15-36-100(C)(2).

II. IT IS IMPLICIT IN THE LEGISLATIVE INTENT BEHIND ENACTMENT OF S.C. CODE ANN. § 15-79-125 THAT APPELLANT DEMONSTRATE A CLAIM UPON WHICH SHE IS ENTITLED TO RELIEF, REQUIRING COMPETENT EXPERT TESTIMONY REGARDING PROXIMATE CAUSE.

As argued above, the plain language of S.C. Code Ann. § 15-79-125(A) requires that a plaintiff who files a Notice of Intent to File Suit must show a claim upon which he or she is entitled to relief. Expert testimony of a medical provider competent to establish proximate cause is required to make such a showing where the common knowledge exception does not apply. Assuming, *arguendo*, that S.C. Code Ann. § 15-79-125(A) does not establish this requirement by its plain language, legislative intent makes it implicit that proximate cause be established for an NOI and accompanying expert affidavit to be sufficient.

“The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” Peake v. S.C. Dept. Of Motor Vehicles, 375 S.C. 589, 597, 654 S.E.2d 284, 289 (Ct.App. 2007), *citing* Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct.App. 2005). A statute’s language “is considered the best evidence of the legislative intent or will.” Id., 375 S.C. at 598, 654 S.E.2d at 289, *citing* Jones, 364 S.C. at 231, 612 S.E.2d at 724. When the Court looks beyond the language of a statute to ascertain meaning, “The court’s primary function in interpreting a statute is to determine the intent of the General Assembly.” Id., *citing* Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct.App. 2002).

In so interpreting statutes based upon legislative intent, “Statutes, as a whole, must receive

practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.” Id. 375 S.C. at 599, 654 S.E.2d at 289, quoting Collins Music Co., Inc. v. IGT, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct.App. 2005). As such, particular clauses of a statute should not be read in isolation but “in conjunction with the purpose of the entire statute and the policy of the law.” Id., citing Hinton v. S.C. Dep’t of Prob., Parole, and Pardon Servs., 357 S.C. 327, 333, 592 S.E.2d 335, 328 (Ct.App. 2004). “Courts will reject statutory interpretations that lead to results so plainly absurd they could not have been intended by the legislature or that defeat the plain legislative intention.” Id., 375 S.C. at 599, 654 S.E.2d at 289, citing Jones, 364 S.C. at 232, 612 S.E.2d at 724.

Within its January 4th Order, the Circuit Court found,

Here, there is a lack of showing that Ms. Barber is qualified to opine on the question of proximate cause in this instance, as there is no showing of qualification in accordance with *Crawford, supra*. I find and conclude that it is implicit in the Tort Reform Act, and in particular the Notice of Intent, Short and Plain Statement of Facts, and the affidavit requirements at issue in this motion, that a showing of proximate cause must be made by submission of a proper affidavit addressing proximate cause, and made by a person qualified to do so.

(January 4th Order, ¶ 11.)

The current versions of S.C. Code Ann. § § 15-75-125 and 15-36-100 were enacted as part of the South Carolina Tort Reform Act of 2005 (the “Act”). Interpreting these statutes requires that they be considered in light of the overall policy of law behind the Act. The contents of the Act evidence an implicit intent by the Legislature to refine the requirements necessary to maintain claims for medical malpractice, to discourage wasteful litigation, and to spur pre-suit mediation. The Act places damages caps on recoveries in medical malpractice actions (S.C. Code Ann. § 15-32-200, et seq.), provides offer of judgment procedures whereby a party who imprudently refuses to accept an offer of judgment may be made to pay certain attorney’s fees and costs of the offering party (S.C.

Code Ann. § 15-35-400), and revamps the privilege granted to the medical peer review process (S.C. Code Ann. § 40-71-10, et seq.).

The requirements of filing an NOI and accompanying expert affidavit fit within the overall intent of Act. By requiring that a plaintiff file a NOI and accompanying expert affidavit stating the facts and showing a claim upon which the plaintiff is entitled to relief, the Act requires that a Plaintiff demonstrate a colorable claim of medical malpractice prior to filing suit. This requirement discourages the filing of wasteful litigation. Even more importantly, the Act requires that a plaintiff demonstrate a colorable claim to make effective the required pre-suit mediation. The Act clearly aims to cut down on unnecessary litigation, and settling claims prior to suit being filed is one method of accomplishing this goal. Only by presenting colorable claims to defendant health care providers can those providers attempt to determine exposure and meaningfully participate in the pre-suit mediation.

As discussed in above, to demonstrate a colorable claim of medical malpractice requiring expert testimony, Appellant is required to demonstrate that the alleged negligent act proximately caused the complained of injury. See, supra Part I, at ¶ 4. Also as discussed above, to establish proximate cause in medical malpractice actions which involve matters outside of the common knowledge of a layperson, expert medical testimony is required. See id. Without such a showing of proximate cause, Appellant does not present a colorable claim, Respondent will not have the knowledge necessary to truly evaluate exposure and meaningfully mediate the matter pre-suit, and Appellant will be allowed to file a complaint without having to demonstrate the merit behind that complaint. Such an absurd reading of S.C. Code Ann. § § 15-79-125 and 15-36-100 would fly in the face of the intent of the General Assembly in enacting S.C. Code Ann. § 15-79-125 as part of the

Act.

As stated above, Appellate contends that a reading of the NOI and expert affidavit requirements will create a “bizarre situation” where expert testimony as to proximate cause is required when the negligence alleged is within the common knowledge of laypersons. The “common knowledge” exception, found at S.C. Code Ann. § 15-36-100(C)(2), is more than adequate to safeguard against such result.

III. THE COURT OF APPEALS MAY AFFIRM THE CIRCUIT COURT BASED UPON ANY OTHER GROUNDS APPEARING IN THE RECORD.

Pursuant to Rules 208(b)(2) and 220(c), South Carolina Appellate Court Rules, Respondent requests that this Court affirm the Circuit Court’s Orders of January 4, 2011 and March 10, 2011 dismissing Appellant’s NOI and accompanying expert affidavit based upon any ground appearing the record.

CONCLUSION

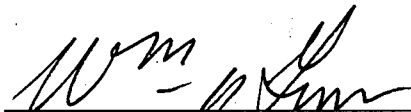
Whether it be viewed as a requirement imposed by the plain language of S.C. Code Ann. § 15-75-125(A) or whether it be read as an implicit requirement of the overall NOI and accompanying expert affidavit requirements based upon the intent behind the Tort Reform Act of 2005, a plaintiff filing an NOI and accompanying expert must show a claim upon which he or she is entitled to relief. Because Appellant failed to file expert medical testimony establishing proximate cause, Appellant failed to establish a claim upon which she was entitled to relief, and her Notice of Intent to File Suit and accompanying expert affidavit are defective.

For these reasons and those set forth above, Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center respectfully submits that the Court must uphold the Trial Court’s orders

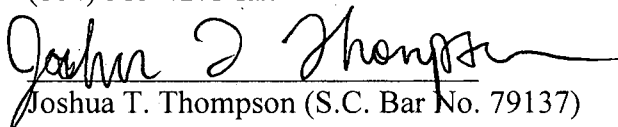
dismissing Plaintiff's Notice of Intent to File Suit and accompanying expert affidavit.

Respectfully submitted,

By:



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Attorneys for Defendant Amisub of South
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Spartanburg, SC

June 28, 2011



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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June 21, 2011

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William U. Gunn, Esquire
Jushua T. Thompson, Esquire
Holcombe Bomar, P.A.
P. O. Drawer 1897
Spartanburg, SC 29304

Re: Grier, Evelyn v. Amisub of SC, Inc.
2011190090

Dear Counsel:

The following Order has been endorsed on your Joint/Consent Motion for Extension of Briefing Schedule in the above entitled case on appeal.

"Granted.

John Cannon Few C.J.
For the Court

By s/ V. Claire Allen
Deputy Clerk

June 21, 2011."

Please be advised the Respondent's Initial Brief and Designation of Matter must be served and filed no later than July 1, 2011 and the Appellant's Initial Reply Brief must be served and filed no later than July 21, 2011.

Very truly yours,

V. Claire Allen, Deputy
CLERK

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

RECEIVED
JUN 20 2011
SC Court of Appeals

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

JOINT/CONSENT MOTION FOR EXTENSION OF BRIEFING SCHEDULE

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Attorneys for Respondent

The undersigned, Counsel for Appellant, served his initial brief on May 24, 2011, making Respondent's brief due on or before June 23, 2011. The undersigned is about to depart for a church mission trip to Belize, and will be out of the office from June 17-27, 2011.

Therefore, Counsel for Appellant, **jointly and with the consent of counsel for respondent**, respectfully moves this Court for an order **setting the deadline for the Initial Brief of Respondent as July 1, 2011 and setting the deadline for the Initial Reply Brief of Appellant as July 21, 2011.**

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SC Court of Appeals

June 15, 2011

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: V. Claire Allen
(Clerk) (Deputy Clerk)

FILED
6/21/11

Respectfully submitted,



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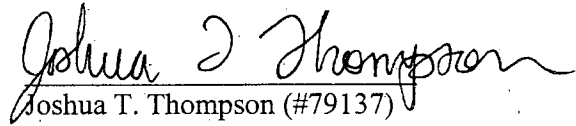
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1987-1988

Attorneys for Appellant

Handwritten signature of Joshua T. Thompson in cursive script.

Joshua T. Thompson (#79137)

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Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

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JUN 20 2011

SC Court of Appeals

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

PROOF OF SERVICE

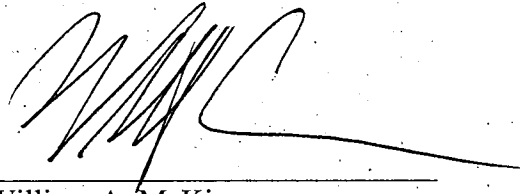
I certify that I have served the **JOINT/CONSENT MOTION FOR
EXTENSION OF BRIEFING SCHEDULE** upon AMISUB of South Carolina, Inc.
d/b/a Piedmont Medical by depositing a copy of it in the United States Mail, first-class
postage prepaid, on June 15, 2011, addressed to its attorney of record, William U. Gunn,
HOLCOMBE BOMAR, PA, 100 Dunbar St., Ste 200, Spartanburg, SC 29304.

16 WAM
June 15, 2011

[signature page follows]

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Jay F. Wright
Joseph G. Wright, III*
Of Counsel*

Writer's Email: bmiskelly@mcgowanhood.com

June 16, 2011

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JUN 20 2011

SC Court of Appeals

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Filings in Grier v. AMISUB, Court of Appeals Case No. 2011190090

Dear Ms. Gee,

Enclosed please find for filing the original and seven (7) copies of JOINT/CONSENT MOTION FOR EXTENSION OF BRIEFING SCHEDULE in the above referenced matter. Please file the original and return the clocked copies to me in the self-addressed envelope provided. I have also enclosed check #24486 in the amount of \$25.00 to cover the filing fee. Thank you in advance for your help in this matter and please contact me if you should have any questions.

By copy of this letter, I am serving the same on opposing counsel.

Sincerely,

Becky D. Miskelly
Becky D Miskelly

Cc: William U. Gunn, Esq.
Holcombe Bomar, PA
100 Dunbar Street
Suite 200
Spartanburg, SC 29304

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposed the following be included in the Record on Appeal:

1. Notice of Intent with all attachments
2. January 4, 2011 Order of Judge Kimball
3. March 10, 2011 Order of Judge Kimball
4. Transcript of Oral Argument at Hearing

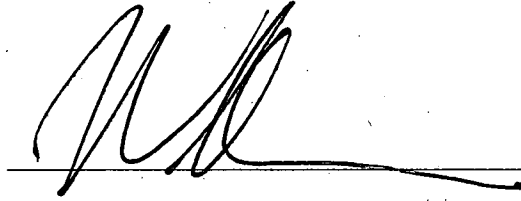
I certify that this designation contains no matter which is irrelevant to this appeal.

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SC Court of Appeals

14-00000

14-00000

May 24, 2011



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Attorneys for Appellant

10/10/10

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02909

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

AMENDED PROOF OF SERVICE

I certify that I have served the **Initial Brief of Appellant** and the **Designation of Matter to be Included in the Record on Appeal** upon AMISUB of South Carolina, Inc. d/b/a Piedmont Medical by depositing a copy of it in the United States Mail, first-class postage prepaid, on May 24, 2011, addressed to its attorney of record, William U. Gunn, HOLCOMBE BOMAR, PA, 100 Dunbar St., Ste 200, Spartanburg, SC 29304.

May 24, 2011

[signature page follows]

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DISTRICT ATTORNEY



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May 24, 2011

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: Filings in Grier v. AMISUB, Court of Appeals Case No. 2011190090

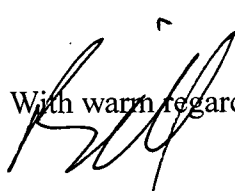
Dear Ms. Gee,

Enclosed for filing is an Amended Proof of Service in the above referenced matter. I apologize, but the proof of service I mailed earlier today had a typographical error as to the date of service. The amended proof of service, enclosed, correctly states that the Initial Brief of Appellant and the Designation Of Matter To Be Included In The Record On Appeal were served via US mail today, May 24, 2011.

I have provided the original and one copy of each. Please return the clocked copies to me in the enclosed self-addressed envelope with postage prepaid.

By copy of this letter, I am serving the same on opposing counsel. Thank you very much for your assistance with this matter.

With warm regards,


William A. McKinnon

Cc: William U. Gunn, Esq.

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Of Counsel*

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May 24, 2011

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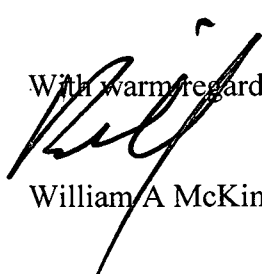
Enclosed for filing are:

- 1) Initial Brief of Appellant;
- 2) Designation Of Matter To Be Included In The Record On Appeal; and
- 3) Proof of Service of the Notice of Appeal on Opposing Counsel (respondent);

I have provided the original and one copy of each. Please return the clocked copies to me in the enclosed self-addressed envelope with postage prepaid.

By copy of this letter, I am serving the same on opposing counsel. Thank you very much for your assistance with this matter.

With warm regards,


William A McKinnon

Cc: William U. Gunn, Esq.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

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Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

INITIAL BRIEF OF APPELLANT

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John G. Felder, Jr.

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SC Court of Appeals

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100-100000-12

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN HOLDING IT IS "IMPLICIT" IN S.C. CODE ANN. § 15-36-100 THAT A MEDICAL MALPRACTICE EXPERT AFFIDAVIT INCLUDE PROXIMATE CAUSE WHEN THE STATUTE HAS NO SUCH REQUIREMENT?

STATEMENT OF THE CASE

Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased, filed a Notice of Intent to File Suit on July 12, 2010 pursuant to S.C. Code Ann. § 15-79-125 alleging that decedent Willie Fee died as a result of pressure ulcers proximately caused by Defendant AMISUB, doing business as Piedmont Medical Center. The Notice of Intent was supported by the Affidavit of Sharon Barber, RN.

On October 27, 2010 Defendant AMISUB filed a motion to dismiss the Notice of Intent on the ground the affidavit of Nurse Barber was insufficient under S.C. Code Ann. §§ 15-79-125 and 15-36-100. By order of the court on January 4, 2011, and finalized in an order filed March 10, 2011, Defendant AMISUB's motion was granted and the Notice of Intent Dismissed. Plaintiff/Appellant served notice of this appeal on Defendant/Respondent AMISUB on April 7, 2011.

ARGUMENT

1. S.C. CODE ANN. § 15-36-100, BY ITS PLAIN LANGUAGE, ONLY REQUIRES AN EXPERT AFFIDAVIT “SPECIFY AT LEAST ONE NEGLIGENT ACT OR OMISSION” AND THE TRIAL COURT ERRED IN HOLDING IT IS “IMPLICIT” THAT SUCH AFFIDAVITS ALSO INCLUDE AN OPINION ON PROXIMATE CAUSE

Appellant/ Plaintiff Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased, filed a instant Notice of Intent to File Suit on July 12, 2010 pursuant to S.C. Code Ann. § 15-79-125 (which requires Notices of Intent in medical malpractice cases). Notice of Intent, *passim*. In the “short and plain statement of the facts” required by S.C. Code Ann. § 15-79-125, Appellant alleged that, among other things, decedent Willie Fee died as a result of pressure ulcers (i.e., bedsores) proximately caused by Defendant AMISUB. Short and Plain Statement of the Facts, Exhibit A to Notice of Intent. As is also required by S.C. Code Ann. § 15-79-125, the Notice of Intent was accompanied by an “affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100” – in this case, the Affidavit of Sharon Barber, RN. Barber Affidavit, Exhibit B to Notice of Intent.

The affidavit provision, S.C. Code Ann. § 15-36-100, provides: “the plaintiff must file as part of the complaint an affidavit of an expert witness **which 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” (emphasis added).

Nurse Barber’s affidavit states, in relevant part:

[I]t is my opinion to a reasonable degree of nursing certainty that the agents, employees and/or nurses from AMBISUB of South Carolina d/b/a Piedmont Medical Center (hereinafter “PMC”), committed negligent acts or omissions in their care and treatment of Willie Fee. Without intending to limit the scope of my opinions, some of the specific breaches of the

standard of care I have identified as being perpetrated by agents, employees and/or nurses from PMC, are as follows:

- * Failure to ensure safe and proper care to Willie Fee;
- * Failing to follow physician orders in a timely fashion;
- * Failing to institute measures to avoid skin breakdown in the face of his high risk for skin breakdown;
- * Failing to ensure physical therapy was involved in Mr. Fee's care to avoid/minimize contractures; and . . .

Barber Affidavit, Exhibit B to Notice of Intent. The affidavit provides four separate and distinct "negligent acts or omissions," echoing the *exact language* of S.C. Code Ann. § 15-36-100 and plainly satisfying the statute. Nevertheless, the trial court dismissed the notice of intent because the attached affidavit did not also provide an expert opinion on proximate cause¹ – a requirement which appears nowhere in the statute, but which the trial court erroneously found was "implicit." The Court held: "I find and conclude that it is implicit . . . that a showing of proximate cause must be made by submission of a proper affidavit addressing proximate cause" January 4 Order of Judge Kimball at 3.² This Order, and the March 10, 2011 Order finalizing it, were error and are the cause of this appeal.

This appeal presents the purely legal question of whether the expert affidavit must only comply with the requirements listed in S.C. Code Ann. § 15-36-100, or whether as the trial court held, there is also an "implicit" requirement that the affidavit include expert

¹ Nurse Barber's affidavit does state: "Further, it is my opinion to a reasonable degree of nursing certainty that the actions or inactions of the agents, employees and/or nurses from PMC contributed to the injuries, damages, and death of Willie Fee." Affidavit of Nurse Barber at p. 2. However, the trial court held proximate causation testimony is not only required, but must come from a physician, not a nurse. Plaintiff/Appellant does not contest that if there is an "implied" requirement for a proximate causation opinion – which appellant strongly denies – that such an opinion must be provided by a physician and not a nurse.

² This Order was finalized, and the Notice of Intent Dismissed, by the March 10, 2011 Order.

opinion on proximate cause. That is a legal question, and the standard of review is *de novo*. “The issue of statutory interpretation is a question of law for the court, and this Court may decide questions of law without deference to the trial court.” Sloan v. Greenville Hosp. Sys., 388 S.C. 152, 157, 694 S.E.2d 532, 534-35 (2010) (internal quotation omitted).

It is well-settled in South Carolina jurisprudence that the plain language of legislative enactments controls their interpretation. “With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.” Peake v. S. Carolina Dept. of Motor Vehicles, 375 S.C. 589, 597-98, 654 S.E.2d 284, 289 (S.C. Ct. App. 2007). Even more explicitly, a court has “no right” to impose another meaning if the language of a statute is clear. “If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Catawba Indian Tribe of S. Carolina v. State, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007) (internal quotation omitted).

S.C. Code Ann. § 15-36-100 requires the expert affidavit set forth at least one “negligent act or omission.” The meaning of “negligent act or omission” could not be more “plain” -- it is a term of art in South Carolina. “Negligent act or omission” merely means the “breach” – one of the four elements of a negligence cause of action – and **is not a synonym for all four elements of a negligence cause of action**. Our Supreme Court has made this plain over and over, as recently as last year: “To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) **breach of that duty by a negligent act or**

omission; and (3) damages proximately resulting from the breach of duty” (emphasis added). Fowler v. Hunter, 388 S.C. 355, 361, 697 S.E.2d 531, 534 (2010). As Fowler demonstrates, “negligent act or omission” is one element (i.e., the breach of the standard of care) and proximate cause is a separate element.

This holding has been repeated innumerable times in the state and federal courts of South Carolina. *See, e.g., Moore v. Weinberg*, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009) (“In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) **the defendant breached the duty by a negligent act or omission**, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages”) (emphasis added); Vinson v. Hartley, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (S.C. Ct. App. 1996) (“To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) **a breach of that duty by a negligent act or omission**; and (3) damage proximately caused by a breach of duty” (emphasis added)); Crolley v. Hutchins, 300 S.C. 355, 356, 387 S.E.2d 716, 717 (S.C. Ct. App. 1989) (“In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach”). “To establish negligence, a party must prove the following three elements: 1) a duty of care owed by the defendant to the plaintiff; 2) **breach of that duty by a negligent act or omission**; and 3) damages proximately resulting from the breach of duty.” Kauffman v. Park Place Hospitality Group, CIV.A. 2:09-1399-MBS, 2011 WL 1335832 (D.S.C. Apr. 7, 2011) (emphasis added).

There is no reported case law in South Carolina – none at all -- interpreting S.C. Code Ann. § 15-36-100 as requiring the affidavit to include an opinion on proximate cause.

Even the venerable Black's Law Dictionary agrees. "Negligence" as a general term means the breach or deviation from the standard of care and **does not include causation**. "Negligence is the failure to use such care as a reasonably prudent and careful person" BLACK'S LAW DICTIONARY, 6th Ed. (West). Defendant AMISUB is wrongfully conflating "negligence" with the elements of a negligence cause of action, or "actionable negligence." *See, e.g.,* BLACK'S LAW DICTIONARY, 6th Ed. (West) ("actionable negligence" is defined as a breach "resulting in damage or injury"). There is **no language** in S.C. Code Ann. § 15-36-100 requiring an affidavit including all four elements of actionable negligence.

Not only did the trial court err according to the plain language of the statute, but the trial court's holding creates the bizarre situation where the requirements for a notice of intent exceed the requirements for a jury verdict at trial. Every medical malpractice case *does not* need expert testimony as to causation. "Expert testimony [in a medical malpractice case] is not required, however, to prove proximate cause if the common knowledge or experience of laypersons is extensive enough to determine the presence of the required causal link between the medical treatment and the patient's injury."

Bramlette v. Charter-Med.-Columbia, 302 S.C. 68, 72-73, 393 S.E.2d 914, 916 (1990).

The trial court's unsupported and unwarranted expansion of S.C. Code Ann. § 15-36-100 means even in a case where expert causation testimony is unneeded to support a **jury verdict** (such as a surgeon who amputates the wrong limb) the affidavit must nonetheless

have an expert opinion on causation, an illogical holding which only increases the cost of litigation.

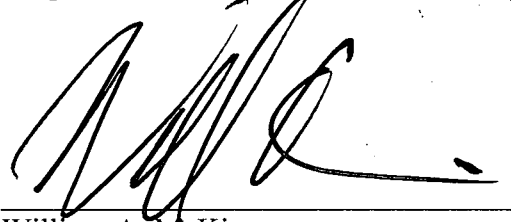
The only requirement in the plain language of S.C. Code Ann. § 15-36-100 is that the expert affidavit provide at least one “negligent act or omission.” An “implied” requirement that the affidavit also address proximate cause violates the canon that the plain language controls, flies in the face of the definition of basic legal terms, and creates the illogical situation where the affidavit would, in some cases, demand expert testimony not even necessary for trial. It is for these reasons that courts have “no right” to alter the meaning or terms of statutes. Catawba Indian Tribe, 372 S.C. at 525, 642 S.E.2d at 754. The trial court committed error when it found an “implicit” requirement and its judgment should be reversed.

CONCLUSION

For the stated reasons, this Court should reverse the judgment of the circuit court.

May 24, 2011

Respectfully submitted,



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The South Carolina Court of Appeals

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May 25, 2011

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Re: Grier, Evelyn v. Amisub of SC, Inc.
2011190090

Dear Counsel:

Our records indicate that the transcript in the above matter should have been ordered by April 18, 2011. As of today's date we have not received notification of the request or the Appellant's Initial Brief and Designation of Matter.

You must file a Motion to Order the Transcript Out of Time within ten (10) days of this letter, or your appeal may be dismissed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: William U. Gunn, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN /
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April 18, 2011

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Re: Grier, Evelyn v. Amisub of SC, Inc.
2011190090

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,



Tanya A. Gee
CLERK

TAG/laf

cc: William U. Gunn, Esquire



The South Carolina Court of Appeals

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April 18, 2011

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Re: Grier, Evelyn v. Amisub of SC, Inc.
2011190090

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: William U. Gunn, Esquire

The Supreme Court of South Carolina

RE: Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006); Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991). Therefore, with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts.

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court:²

1. Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
2. Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
3. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
4. Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e., In the Interest of John S., a Juvenile.)

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

August 13, 2007

¹ See, e.g., Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR; Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502, SCACR; Rule 402(n), SCACR; and Rule 403(l), SCACR.

² This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

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April 11, 2011

Ms. Shirley Broom
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RE: Evelyn Grier as Personal Representative of the Estate of Willie Fee v. AMISUB of South Carolina, Inc, York Co. Case No. 2010-CP-46-02909

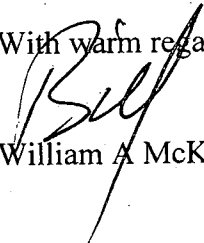
Dear Ms. Broom,

On December 16, 2010, this matter was heard at a motion hearing before the Honorable S. Jackson Kimball, III, Special Circuit Judge for York County. My records indicate you were the court reporter for this hearing.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record.

I agree to pay the per-page charge for this transcript as provided by Rule 607, SCACR.

With warm regards


William A. McKinnon

Cc: William U. Gunn, Esq.
SC Court Administration
Clerk, SC Court of Appeals

PM 4-4-11
POS 4-7-11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02909

RECEIVED

APR 13 2011

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....

SC Court of Appeals
Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....

Respondent.

NOTICE OF APPEAL

Evelyn Grier, as the appointed Personal Representative of the Estate of Willie James Fee, deceased, appeals the order and judgment appeals the order of the Honorable S. Jackson Kimball dated January 4, 2011, which granted her a right to file an amended affidavit before dismissing this suit. This appeal is taken from Judge Kimball's order dated February 9, 2011 and filed March 10, 2011, which made this previous order final and dismissed the suit. Appellant received written notice of the entry of this order on March 15, 2011.

April 7, 2011

[signature page follows]

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APR 13 1971

SC Court of Appeals



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Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

RECEIVED

APR 13 2011

Case No. 2010-CP-46-02909

SC Court of Appeals

Evelyn Grier, as the appointed Personal Representative of the
Estate of Willie James Fee, deceased.....Appellant,

v.

AMISUB of South Carolina, Inc. d/b/a Piedmont Medical
Center.....Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal upon AMISUB of South Carolina, Inc. d/b/a Piedmont Medical by depositing a copy of it in the United States Mail, first-class postage prepaid, on April 7, 2011, addressed to its attorney of record, William U. Gunn, HOLCOMBE BOMAR, PA, 100 Dunbar St., Ste 200, Spartanburg, SC 29304

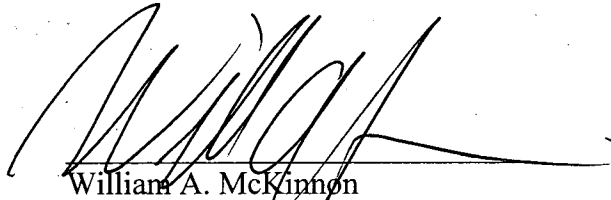
April 7, 2011

[signature page follows]

20 CONT. OF 4008317

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SECRET



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Writer's Email: bmiskelly@mcgowanhood.com

April 11, 2011

RECEIVED

APR 13 2011

SC Court of Appeals

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Filing of Notice of Appeal in Grier v. AMISUB, York Co. Case No. 2010-CP-46-02909

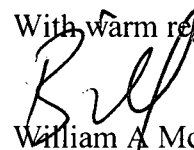
Dear Ms. Gee,

Enclosed for filing are documents for a new appeal, an appeal from the York County Court of Common Pleas, Case No. 2010-CP-46-02909. The following documents are enclosed for filing pursuant to Rule 203, S.C.A.C.R.:

- 1) Notice of Appeal in this action;
- 2) Proof of Service of the Notice of Appeal on Opposing Counsel (respondent);
- 3) Copies of the January 4, 2011 and March 10, 2011 orders which are being appealed;
- 4) A copy of a letter to Shirley Broom, the Court Reporter, ordering the transcript; and
- 5) A firm check for the filing fee

I have provided the original and one copy. Please return the clocked to me in the enclosed self-addressed envelope with postage prepaid. Thank you very much for your assistance with this matter.

With warm regard,


William A. McKinnon

1539 Health Care Drive, Rock Hill, SC 29732 · Tel: 803-327-7800 · Fax: 803-328-5656
Rock Hill · Columbia · Anderson · Charlotte, NC
www.mcgowanhood.com

SECRET

Page 10 of 10

Cc: William U. Gunn, Esq.
Holcombe Bomar, PA
100 Dunbar Street
Suite 200
Spartanburg, SC 29304



McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732

Hon. Tanya Gee
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED - RECEIVED
2011 MAR 10 PM 1:30
IN THE COURT OF COMMON PLEAS

DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Evelyn Grier, as the appointed
Personal Representative of the
Estate of Willie James Fee,
deceased,

Plaintiff,

vs.

Amisub of South Carolina, Inc.,
d/b/a Piedmont Medical Center,

Defendant.

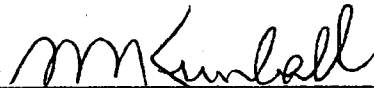
ORDER OF DISMISSAL

Case No.: 2010-CP-46-2909

An Order of this Court was filed on January 4, 2011, allowing Plaintiff thirty days within which to file an appropriate affidavit establishing proximate cause in accordance with the terms of the Order. Plaintiff has failed to do so.

Accordingly, IT IS ORDERED that the above-entitled action be, and the same is hereby dismissed, with prejudice.

AND IT IS SO ORDERED.



S. Jackson Kimball
Special Circuit Judge
York County

York, SC

February 9, 2011

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2010CP4602909

Evelyn Grier vs. AMISUB of South Carolina Inc

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 22nd day of December, 2010.

Court Reporter:

s/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 4th day of January, 2011, and a copy mailed first class this 4th day of January, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

John Gressette Felder Jr. McGowan Hood
Felder & Johnson 1405 Calhoun Street
Columbia, SC 29201

William U Gunn Holcombe Bomar Gunn &
Bradford, PA P.O. Box 1897 Spartanburg, SC
29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

1/6/11 re-sent to John Felder
1517 Hampton Street
Columbia, SC 29201

CPFORM4M

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Evelyn Grier, as the appointed Personal
Representative of the Estate of Willie James
Fee, deceased,

Plaintiff,

vs.

Amisub of South Carolina, Inc., d/b/a
Piedmont Medical Center,

Defendant.

ORDER

Case No. 2010-CP-46-2909

FILED-RECEIVED
2011 JAN -4 AM 8:36
DAVID HAMILTON
C.C.P. & CS
YORK COUNTY, SC

This matter came before me on December 16, 2010, upon Motion to Dismiss of Defendant. Representing the parties were: William McKinnon for Plaintiff; and, William U. Gunn for Defendant. The parties submitted arguments and memoranda of law for the court's consideration.

STATEMENT OF CASE

This is a medical negligence suit in which Plaintiff filed her Notice of Intent pursuant to S.C. Code Ann. § 15-79-125 (1976, as amended) against Defendant for claims of wrongful death and survival stemming from alleged acts of medical malpractice. The notice purports to comply with § 15-79-125. Attached to the notice is a draft Complaint which, according to the Plaintiff, contains a short and plain statement of the facts showing that Plaintiff is entitled to relief. The draft Complaint contains allegations that the Decedent's death and Plaintiff's claims were the direct and proximate result of the alleged negligent actions or inactions of Defendant.

Also attached to the Notice of Intent is an affidavit from Nurse Sharon Barber. Ms. Barber sets out four potential negligent actions or inactions on the part of Defendant relating to care or treatment of the Decedent and makes the statement "[t]hat the actions or inactions of the agents, employees, and/or nurses from PMC contributed to the injuries, damages, and death of Willie Fee."

DISCUSSION

Prior to filing a medical malpractice claim, a plaintiff must file a Notice of Intent to File Suit accompanied by the affidavit of an expert witness under S.C. Code Ann. § 15-79-125(a). The accompanying expert witness affidavit which is filed "must specify at least one negligent act or omission claimed to exist and the factual basis for each claim." S.C. Code Ann. § 15-36-100(e).

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The current versions of §§ 15-75-125 and 15-36-100 were enacted as part of the South Carolina Tort Reform Act of 2005 (the "Act"). The contents of this Act evidence an implicit intent by the legislature of this State to make more stringent the requirements necessary to maintain claims for medical malpractice and to discourage frivolous litigation. The Act implements statutes which place damages caps on recoveries in medical malpractice actions under § 15-32-200 *et seq.*, and provides Offer of Judgment procedures whereby a party who imprudently refuses to accept an Offer of Judgment may be made to pay attorneys' fees and costs of the offering party. That requirement is found in S.C. Code Ann. § 15-35-400. Additionally, certain changes were made to the privilege granted to the medical peer review process under § 40-71-10 *et seq.* The requirements of filing a Notice of Intent to File Suit and supporting expert affidavit fit within the Act's implicit purposes because these requirements assure that a plaintiff has shown a colorable claim of medical malpractice before suit may be maintained.

Against this background, and in view of existing precedent concerning qualification to render an expert medical opinion, I find and conclude that Plaintiff's Notice of Intent to File Suit and accompanying expert affidavit are defective. They fail to show facts demonstrating that Plaintiff has a claim upon which she is entitled to recover. Specifically, the affidavit of Nurse Sharon Barber fails to articulate relevant facts showing her qualification to opine on the issue of proximate cause. Thus, Plaintiff's allegations as to the proximate cause of injury and death to Willie Fee are insufficient.

The record shows that Mr. Fee was admitted to Piedmont Medical Center ("PMC") in January, 2008, with complex and severe medical issues. His medical history included diabetes mellitus, type II, for which he did not use insulin and cardiomegaly/cardiomyopathy. He had suffered a diabetic hyperosmolar nonketotic coma, a seizure, acute renal failure, metabolic acidosis, possibly multifactorial due to acute renal failure, lactic acidosis, hypotension, hypoalbuminemia plus proteinuria, and nephrotic syndrome.

Mr. Fee remained at Piedmont Medical Center almost eight months, being discharged to Magnolia Manor on September 15, 2008, only to be readmitted to PMC on September 27, 2008, where he remained until his death on February 24, 2009. During this second stay at PMC, his diagnosis included fever secondary to aspiration pneumonia and urinary tract infection, aspiration pneumonia and urinary tract infection, diffuse and focal cerebral dysfunction, large left middle cerebral artery hemorrhagic stroke, encephalopathy, acute renal failure with a possibility of chronic kidney disease, seizure disorder, insulin dependant diabetes, multiple respiratory tract infections, a sacral decubitus ulcer, history of upper extremity deep venous thrombosis, and a history of alcohol

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and cocaine abuse. At all times, his prognosis was poor, and he presented a poor quality of life.

I have examined the affidavit of Nurse Barber, and find and conclude that it fails to establish that she is qualified to testify concerning medical causation of the injuries claimed by Plaintiff. For a medical professional to be qualified to give an expert opinion concerning causation of an injury, the professional must be qualified to render a medical diagnosis. *See Nelson v. Taylor*, 347 S.C. 210, 553 S.E.2d 488 (Ct.App. 2001).

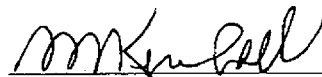
In *Nelson*, the Court held that a physical therapist was not qualified to render expert medical testimony concerning causation of Plaintiff's alleged injuries because physical therapists are not qualified to render medical diagnoses. However, in *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct.App. 2003), the Court held that where a nurse practitioner is qualified to render medical diagnoses under proper written protocol from a physician, the nurse practitioner may give expert medical testimony concerning causation.

Here, there is a lack of showing that Ms. Barber is qualified to opine on the question of proximate cause in this instance, as there is no showing of qualification in accordance with *Crawford, supra*. I find and conclude that it is implicit in the Tort Reform Act, and in particular the Notice of Intent, Short and Plain Statement of Facts, and the affidavit requirements at issue in this motion, that a showing of proximate cause must be made by submission of a proper affidavit addressing proximate cause, and made by a person qualified to do so. Plaintiff in this instance has failed to submit such an affidavit, and for that reason Defendant's Motion must be granted, unless Plaintiff files and serves a proper affidavit within thirty days of the date of filing of this Order.

Therefore, it is ordered that Plaintiff has thirty days from the date of the filing of this Order within which to submit a proper affidavit by a person qualified to do so, establishing proximate cause in accordance with the discussion herein. Should Plaintiff fail to do so within that thirty-day period, the within action shall be dismissed.

AND IT IS SO ORDERED.

December 22, 2010


S. Jackson Kimball
Special Circuit Judge
York County

#3

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP4602909

Evelyn Grier vs. AMISUB of South Carolina Inc

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APR 13 2011

CHECK ONE:

SC Court of Appeals

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Order of Dismissal

Dated at York, South Carolina, this 9th Day of February, 2011.

Court Reporter:

S/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 10th Day of March, 2011, and a copy mailed first class this 10th Day of March, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

John Gressette Felder Jr. McGowan Hood
Felder & Johnson 1517 Hampton Street
Columbia, SC 29201

William U Gunn Holcombe Bomar Gunn &
Bradford, PA P.O. Box 1897 Spartanburg, SC
29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRCP APP-24/FORM 4

David Hamilton - Clerk of Court

RECEIVED

May 2 1964

at Court to Appeal