

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-00558
Appellate Case No. 2012-213464

Vicki L. Wilkinson,

Appellant,

v.

East Cooper Community Hospital, Inc.
d/b/a East Cooper Regional Medical Center,
Carolina Aesthetic Plastic Surgery Institute, P.A.,
and Thomas X. Hahm, M.D.,

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SC Court of Appeals

Respondents.

INITIAL BRIEF OF RESPONDENTS
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AND THOMAS X. HAHM, M.D.

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STATEMENT OF THE ISSUES ON APPEAL

Respondents Thomas X. Hahm, M.D. and Carolina Aesthetic Plastic Surgery Institute, PA and would restate the issues on appeal as:

- I. Did the Trial Court properly dismiss the Plaintiff's medical malpractice claims against the Defendant Physician and his practice as barred by the statute of limitation because the statute was not tolled when the Plaintiff filed her notice of intent to file suit without an expert affidavit as required by §15-79-125?

Or, as otherwise stated

Did § 15-36-100 give the Plaintiff a 45-day grace period after filing her notice of intent to file suit in which to file the expert affidavit required by §15-79-125?

- II. Did the Trial Court properly dismiss the Plaintiff's medical malpractice claims against the Defendant Physician and his practice for failure to state a claim because the Plaintiff filed her complaint without an expert affidavit as required by §15-36-100?

Or, as otherwise stated

Did the untimely filing of an affidavit during the pre-suit mediation process excuse the Plaintiff from the mandatory provision of §15-36-100, which requires that an affidavit be filed with the complaint to commence a civil action?

- III. Should the Trial Court have allowed the Plaintiff time to file an expert's affidavit before her complaint was dismissed where the statute of limitations had already expired and she never made any motion to supplement her Complaint?

STATEMENT OF THE CASE¹

This is a medical malpractice action arising out of the care and treatment of Vicki Wilkinson (“the Patient”) during her hospitalization at East Cooper Community Hospital in September 2008. During that time, Dr. Thomas Hahm, a board-certified plastic surgeon, performed breast reconstruction surgery on the Patient on September 4, 2008.

The Plaintiff filed a Notice of Intent to File Suit on September 1, 2011 and alleged, *inter alia*, that Dr. Hahm was negligent for failing to properly diagnose and treat the Plaintiff. The Plaintiff alleges that her complications began the same day as the surgery – September 4, 2008.² [ROA ___; Ex. A to Memorandum in Support of Motion to Dismiss - Plaintiff’s Notice of Intent to File Suit, ¶¶ 18-19.] Dr. Hahm’s practice, Carolina Aesthetic Plastic Surgery, was also named as a defendant,³ in addition to East Cooper Community Hospital. The matter was docketed by the County Clerk as Case Number 2011CP1006306.

Plaintiff did not file an expert affidavit with her Notice of Intent; rather, she stated: “No expert affidavit is attached as the statute of limitations is construed to expire shortly. The Plaintiff will file an expert affidavit at a later date.” The Plaintiff later filed an Expert Affidavit on October 5, 2011 in Case Number 2011CP1006306. [ROA ___; Ex. B to Memorandum in Support of Motion to Dismiss -- Expert Affidavit of John Newkirk, MD.] The Plaintiff sent the Affidavit to counsel for the Defendant Physician

¹ The issues on appeal involve only procedural facts and thus, the underlying facts of the medical treatment are not relevant and no separate Statement of the Facts is necessary.

² See also ROA ___; Complaint ¶¶18-19.

³ The Defendant Physician and the Defendant PA will be referred to collectively as “the Defendant Physician.”

on October 13, 2011. [ROA ____; Ex. C to Memorandum in Support of Motion to Dismiss -- Correspondence from the Plaintiff's attorneys to these Defendants' attorneys.]

The parties subsequently participated in pre-suit mediation as required by S.C. Code § 15-79-125(C), but were unable to resolve the case. The Plaintiff then filed her Summons and Complaint on January 25, 2012, which was docketed by the County Clerk with a new case number – 2012CP1000558. [ROA ____; Complaint.] The Plaintiff did not attach an expert affidavit to her complaint.

The Defendant Physician filed an answer denying the Plaintiff's allegations and asserting affirmative defenses and also contemporaneously filed a Motion to Dismiss on the basis the Plaintiff's claims were barred by the statute of limitations. [ROA ____, ____; Answer, Motion, filed February 27, 2012.] The Defendant East Cooper Community Hospital filed an answer and motion to dismiss. [ROA ____, ____; Answer, Motion, filed March 15, 2012.]

The motions came to be heard by the Honorable R. Markley Dennis, on May 12, 2012, who thereafter issued his order granting the Defendants' Motion to Dismiss "on each of the grounds that:

(1) the Plaintiff failed to file an expert affidavit contemporaneously with her Notice of Intent to File Suit as mandated by South Carolina Code Section 15-79-125 and thus the statute of limitations was not tolled; and

(2) the Plaintiff failed to file an expert affidavit contemporaneously with her Complaint or within forty-five days thereafter in accordance with South Carolina Code Section 15-36-100 within the statute of limitations applicable to her claim. [ROA ____; 10/2/12 Order, pp. 1-2.]

The Plaintiff filed a motion for reconsideration on October 10, 2012, and Judge Dennis denied the motion by order filed on October 16, 2012. [ROA ___, ___; Order on Motion for Reconsideration.] Plaintiff filed a notice of appeal from these Orders.

SUMMARY OF ARGUMENT

S.C. Code Ann. § 15-3-545 provides the general three-year statute of limitations in actions for medical malpractice, and requires an action “must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.”

It is shown on the face of the summons and complaint that this civil action is barred by this statute of limitations because it was filed on January 25, 2012, more than three years after the Patient’s surgery on September 4, 2008.⁴ Plaintiff argues that the statute of limitations was tolled when she filed her Notice of Intent to File Suit under the provisions of §15-79-125 and §15-36-100, on September 1, 2011. While the Plaintiff did file a Notice of Intent to File Suit within the statutory period, she did not file the required expert affidavit until more than a month later. Nevertheless, the Plaintiff argues that it still was timely because she filed an Affidavit within what she refers to as the 45-day “safe harbor” provision of §15-36-100(C)(1) which provides an exception to the contemporaneous filing requirement of §15-36-100(B).

The Trial Court correctly found, that the statute was not tolled because the exception allowed by §15-36-100(C) does not apply to the requirement of §15-79-125 that an expert affidavit be filed with the Notice of Intent to File Suit. Moreover, the

⁴ The Plaintiff does not contest that her statute of limitations began to run on September 4, 2011. [See ROA ___; 10/2/12 Order p. 6.]

Plaintiff would not have been entitled to that 45-day grace period, because she did not allege in her Notice of Intent to File Suit, as required by §15-36-100(C)(1), that an affidavit of an expert could not be prepared within the limitation period.

The Trial Court properly dismissed the civil action for the additional reason that the Plaintiff did not file her expert affidavit with her complaint as required by §15-36-100, and, there is no basis in the law or this record to allow the Plaintiff to supplement her complaint with an expert affidavit where the statute of limitations has already expired.

Applicable Statutory Provisions

Section 5, 2005 S.C. Acts 32, as codified at S.C. Code Ann. § 15-79-125:

(A) 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. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.

(B) After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.

(C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days

is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to mediation pursuant to this section.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure. The action must be filed:

(1) within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end; or

(2) prior to expiration of the statute of limitations, whichever is later.

(F) Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution after the civil action is initiated. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

Section 3, 2005 S.C. Acts 32, as codified at S.C. Code Ann. § 15-36-100:

(A) As used in this section, “expert witness” means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who: [requirements as to experts] ...

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), 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.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint

is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

- (1) architects;
- (2) attorneys at law;
- (3) certified public accountants;
- (4) chiropractors;
- (5) dentists;
- (6) land surveyors;
- (7) medical doctors;
- (8) marriage and family therapists;
- (9) nurses;
- (10) occupational therapists;
- (11) optometrists;
- (12) osteopathic physicians;
- (13) pharmacists;
- (14) physical therapists;
- (15) physicians' assistants;
- (16) professional counselors;
- (17) professional engineers;
- (18) podiatrists;
- (19) psychologists;
- (20) radiological technicians;
- (21) respiratory therapists; and
- (22) veterinarians.

Statutory Interpretation

Specifically, in considering §15-79-125, the Supreme Court recently stated:

“ ‘Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.’ ” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). “It is well-established that ‘the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.’ ” *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *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.” *Id.* at 536, 725 S.E.2d at 695–96 (citing *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)).

Further, “statutes in derogation of the common law are to be strictly construed.” *Id.* at 536, 725 S.E.2d at 696 (citing *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.’ ” *Id.* (quoting *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.’ ” *Id.* (quoting 82 C.J.S. *Statutes* § 535).

Ross v. Waccamaw Cmty. Hosp., ___ S.C. ___, ___ S.E.2d ___, # 2010-155046, 2013 WL 3200593 (S.C., filed June 26, 2013).

ARGUMENT

I. THE STATUTE OF LIMITATIONS WAS NOT TOLLED WHEN THE PLAINTIFF FILED HER NOTICE OF INTENT TO FILE SUIT WITHOUT AN EXPERT AFFIDAVIT BECAUSE SECTION 15-36-100 DID NOT ALLOW THE PLAINTIFF A 45-DAY GRACE PERIOD AFTER FILING HER NOTICE IN WHICH TO FILE THE AFFIDAVIT REQUIRED BY §15-79-125.

The issues in this case involve interpretation and application of two sections of Act No. 32, passed by the General Assembly in 2005, which are codified at §15-79-125 and §15-36-100. Section 15-79-125 is part of a new chapter governing medical malpractice actions that imposes pre-suit filing requirements, including a requirement that a plaintiff shall contemporaneously file a notice of intent to file suit and an expert affidavit prior to filing any civil action.⁵ Section 15-36-100 is as an amendment to the South Carolina Frivolous Civil Proceedings Sanctions Act which added provisions

⁵An expert affidavit is not required if the alleged negligence involves a subject matter that “lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.” The Plaintiff does not contend that this exception applies here.

requiring that an expert affidavit be filed contemporaneously with any complaint alleging professional negligence, however, subsection (C)(1) provides for an exception in certain circumstances that allows a plaintiff a 45-day grace period to supplement her complaint. These statutory provisions have been the subject of four reported appellate decisions in medical malpractice cases⁶: *Ross v. Waccamaw Cmty. Hosp.*, supra; *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012); *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012).⁷

The Court of Appeals' decision in *Ranucci* specifically dealt with the affidavit provisions of §15-79-125 and §15-36-100. The trial court dismissed the plaintiff's notice of intent to file suit because she had not filed her expert affidavit contemporaneously with her notice. The plaintiff argued that since § 15-79-125 provided that the affidavit was "subject to the affidavit requirements established in Section 15-36-100," then § 15-36-100(C)(1) permitted her to file the affidavit within the 45-day grace

⁶ The Court of Appeals issued another published opinion in *H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, ___ S.C. ___, ___ S.E.2d ___, #5139, 2013 WL 2422867 (Ct. App., filed June 5, 2013), affirming the dismissal of a legal malpractice action because the plaintiff did not file an expert affidavit as required in § 15-36-100. The issue was whether an affidavit was necessary because the plaintiff claimed that his action against the attorney defendant was not a legal malpractice claim.

⁷ Strikingly, each of these cases came on appeal from orders dismissing the notice of intent to file suit. In the trial court, the Plaintiff argued that the Defendants waived any defect in the timing of her filing of the expert affidavit by not raising it during the pre-suit process. The Trial Court held that: "The Defendants did not waive their right to challenge the Plaintiff's defective Notice of Intent to File Suit because the plain language of the statute requires pre-suit mediation and provides no opportunity for Defendants to opt out of pre-suit mediation and contest a defect." [ROA ___; 10/2/12 Order p. 6.] The Trial Court further held that: "Neither the statute nor *Ranucci* **require** that a defendant contest pre-suit defects prior to the suit being filed. Therefore, in light of the plain language of the statute, it was proper for the Defendants to raise both the Plaintiff's pre and post-suit defects after the filing of Plaintiff's Complaint." [ROA ___; 10/2/12 Order p. 6 fn. 3.] The Plaintiff has not challenged this holding on appeal.

period. However, the Court of Appeals rejected the plaintiff's argument and affirmed the dismissal, holding that: "The affidavit requirements invoked by section 15-79-125 govern only authorship and content. They do not permit a potential plaintiff to file her expert witness's affidavit after she files her Notice of Intent to File Suit." 723 S.E.2d at 247.

The Plaintiff argues that "review of this case should begin with a revisit to *Ranucci v. Crain*," asserting that *Ranucci* was wrongly decided and urging the Court to overrule its prior holding. [Appellant's Brief p. 7.] However, the Defendant Physician maintains that this case should begin and end with the statutory provisions of §15-79-125 and §15-36-100. The Trial Court properly applied the clear, express language of the statutes in accordance with the existing precedent of the Court of Appeals' decision in *Ranucci*,⁸ and in addition, the Trial Court's decision also is fully consistent with the Supreme Court's decisions in *Grier* and *Ross*.

A. Section 15-36-100(C)(1) only allows a 45-day grace period to supplement a complaint in a civil action.

Plaintiff argues that the 45-day grace period of §15-36-100(C) applies because the plain language of §15-36-100(G)(7) specifically references lawsuits against medical doctors. She also argues that if the statutes operate independently of each other, as construed in *Ranucci*, then the specific reference in (G)(7) to "medical doctors" is meaningless, and it leads to the absurd result that none of the provisions of § 15-36-100 apply in medical malpractice suits. The logic of Plaintiff's argument fails because §15-

⁸ As of the filing of the Respondent's initial brief, a petition for a writ of certiorari was pending in the *Ranucci* case.

36-100 clearly does apply to medical malpractice *civil actions*; however, it has only limited application to the pre-suit filing and mediation requirements of §15-79-125.

First, while §15-36-100(B) mandates that a plaintiff must file an expert affidavit as part of the complaint, that section begins with the preface “except as provided in §15-79-125:

(B) *Except as provided in Section 15-79-125*, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), 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.)

By its express terms, §15-36-100 acknowledges the separate pre-suit provisions of §15-79-125.

Second, the plain language of §15-36-100(C)(1) provides that the 45-day grace period is allowed “after the filing of the *complaint*.”

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. **In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. (Emphasis added.)**

There is no language in either statute allowing the Plaintiff 45-days after filing the notice of intent to file suit to supplement her notice with the affidavit required by §15-79-125.

In *Grier*, the Supreme Court was presented with an issue regarding the requisite contents of an expert affidavit on appeal from a trial court order dismissing a notice of intent to file suit because the expert affidavit did not contain an opinion on proximate

cause. The Court held that §15-79-125 and §15-36-100 do not require a causation opinion in the pre-suit expert affidavit. The Court noted that §15-75-125 provides no specifics for the expert affidavit, but rather, directs the reader to §15-36-100 as to the contents of the affidavit:

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.” ... By its very terms, this statute imposes no content requirements for the expert affidavit and specifically delegates that task to section 15-36-100.

Applying that same analysis to the issue before the Court, §15-79-125(A) plainly and strictly requires that the affidavit be filed contemporaneously with the notice of intent to file suit, and while the content requirements of §15-36-100 are incorporated by cross reference, the statute does not incorporate the 45-day grace period exception to the contemporaneous filing requirement.

In *Ross*, the Supreme Court was presented with the question of whether the failure to complete the mediation conference in a timely manner, as required by §15-79-125, divests the trial court of subject matter jurisdiction and requires dismissal of a notice of intent to file suit. The Court held that “the failure to complete the mediation conference in a timely manner does not divest the trial court of subject matter jurisdiction and dismissal is not mandated.” ___ S.E.2d at ___. While the issues are different, the Supreme Court’s reminder that §15-79-125 is to be strictly construed supports the conclusion that while the requisite contents of the expert affidavit are governed by §15-36-100(C)(1), the contemporaneous filing requirement is not subject to the 45-day grace period exception under §15-36-100(C)(1).

B. Section 15-36-100(C)(1) only allows a 45-day grace period to supplement a complaint in a civil action where the plaintiff alleges that an affidavit of an expert could not be prepared.

Even if the 45-day grace period of §15-36-100(C)(1) applied to the pre-suit process, it would not save the Plaintiff's claim because the Plaintiff did not make the allegations necessary to invoke the protection of the grace period. Subsection (C)(1) provides that the contemporaneous filing requirement does not apply if the period of limitations will expire within 10 days AND "because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared." The Plaintiff's notice of intent to file suit only stated that: "No expert affidavit is attached as the statute of limitations is construed to expire shortly. The Plaintiff will file an expert affidavit at a later date." [ROA ____.]

The required allegation is not mere verbiage to be ignored or implied. See *Keefe v. Northside Hosp., Inc.*, 219 Ga. App. 875, 876, 467 S.E.2d 9, 10 (1996):

[I]n order to invoke the protections of subsection (b) the plaintiff must allege in the complaint that because of the time constraints, the expert affidavit could not be prepared. ... This is not mere verbiage but rather representation of a fact, a fact which is a necessary ingredient for the applicability of the grace period. ... We are constrained by its important role, as well as by rules of statutory construction, to hold that the allegation may not be merely implied, as was arguably done in this case. Instead, it must be stated. (Citations omitted.)⁹

See also *Anderson v. Navarro*, 227 Ga. App. 184, 185, 489 S.E.2d 40, 41 (1997)

(to invoke the 45-day grace period, the plaintiff must allege in the complaint that because of the time constraints, the expert affidavit could not be prepared).

⁹The pertinent code section was subsequently amended in particulars that do not affect the holding of these cases. Ga. Code Ann. § 9-11-9.1 Affidavit of expert to be filed with complaint in action for damages alleging professional malpractice.

Accordingly, in the absence of the required allegation, the grace period would not have applied

II. THE PLAINTIFF’S COMPLAINT FAILED TO STATE A CLAIM BECAUSE SHE DID NOT FILE AN EXPERT AFFIDAVIT IN COMPLIANCE WITH §15-36-100.

A. The untimely filing of an affidavit during the pre-suit mediation process did not excuse the Plaintiff from the mandatory provision of §15-36-100, which requires that an affidavit be filed with the complaint to commence a civil action.

Section 15-36-100(B) required that the Plaintiff file an expert affidavit with her complaint: “[T]he 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.” The Plaintiff did not file an expert affidavit with her complaint nor did she file an expert affidavit within the 45-day grace period. Rather, the Plaintiff argued that she “had already filed an affidavit of an expert witness that met these requirements, the Defendants were in possession of this affidavit for approximately four and a half months have raised no claims that it was defective.” [ROA ___; Memorandum of Law in Opposition to Defendants’ Motion to Dismiss, p. 4.]

Nothing in the statute nor the appellate decisions supports the Plaintiff’s argument that a plaintiff does not have to file an expert affidavit with a medical malpractice complaint when an affidavit has already been filed with a notice of intent to file suit in the pre-suit process. These are two separate processes, as the Court of Appeals recognized in *Ranucci*:

Each statute governs a distinct time period during the litigation process, and those time periods are consecutive. Section 15-79-125 controls the portion of the process that commences with the filing of a Notice of Intent to File Suit and ends with prelitigation mediation. If the parties are unable

to resolve their dispute through mediation, section 15-36-100 guides them through the preparation of initial pleadings and provides mechanisms for challenging and curing defects in the required affidavit.

723 S.E.2d at 246.

As standard procedure, when the notice of intent to file suit was filed, the Clerk of Court created a file and assigned a case number; the affidavit was filed under that case number. When the complaint was filed, a separate file was created by the Clerk of Court and assigned a different number. As the Trial Court explained, the expert affidavit is part of the complaint. Without the required affidavit, the complaint was properly dismissed for failure to state a claim.

B. The Plaintiff was not entitled to the 45-day grace period to supplement her complaint in the civil action because she did not allege that an affidavit of an expert could not be prepared as required by §15-36-100(C)(1).

In opposing the motions to dismiss, the Plaintiff declared that: “Clearly, the Plaintiff had the requisite affidavit within the time required and if the court deems it should be physically attached to the complaint the Plaintiff will certainly adhere to this request.” [ROA___; Memorandum of Law in Opposition, p. 5.] At the hearing, the Plaintiff’s attorney proffered the excuse that he handled the case the way he had been taught when he worked at the Hood Law Firm, who represent the Defendant Physician, and that the Hood Law Firm had settled cases with him in the past when he had supplemented with an affidavit. [ROA ___; Tr. 6, ll. 6-17.] When the Trial Judge soundly rejected his excuses, the Plaintiff’s attorney simply insisted that they had complied with the statute: “[W]e’ve gone through and done all the procedural steps that we knew how to do. We’ve met the burden of the statute.” [ROA___; Tr. 9, ll.5-8.]

In holding that the complaint failed to state a claim without an expert affidavit, the Trial Court correctly noted that the 45-day grace period § 15-36-100(C)(1) would not apply because the Plaintiff did not give the requisite explanation for why she did not file the expert affidavit with her complaint or within the 45-day grace period:

It should be noted that the exception to the requirement that the expert affidavit be filed contemporaneously with the complaint does not apply in this case. An exception permits that the expert affidavit be filed within forty-five days of the complaint being filed where the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim states in the complaint within ten days of filing and, due to time constraints, the plaintiff alleges that an expert affidavit could not be prepared. S.C. Code Ann. § 15-36-100(C)(1). Here the Plaintiff did not provide any explanation whatsoever as to why the expert affidavit was not filed. Nor did the Plaintiff file the expert affidavit within forty-five days from the date of the filing of the Complaint. Accordingly, the Plaintiff is in no way excepted from the requirements of section 15-36-100.

[ROA ___; 10/2/12 Order, p. 8.] ¹⁰

As noted above, the required allegation cannot be ignored or implied. See *Keefe v. Northside Hosp., Inc.*, supra. Accordingly, the Trial Court's dismissal of the complaint can be affirmed on the additional ground that the Plaintiff did not comply with §15-36-100(C) to supplement her complaint in this action.

¹⁰ It does not appear that the Plaintiff has challenged this ruling in her Appellant's Brief. Rule 208(b)(1)(B), SCACR; *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." (citation omitted)). Thus, the Court can affirm under the two issue rule. *Id.* ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.")

III. THE PLAINTIFF WAS NOT ENTITLED TO ANY MORE TIME TO FILE AN EXPERT'S AFFIDAVIT WHERE THE STATUTE OF LIMITATIONS HAD ALREADY EXPIRED AND SHE NEVER MADE ANY MOTION TO SUPPLEMENT HER COMPLAINT

A. The Trial Court did not dismiss the notice of intent to file suit.

Somewhat inexplicably, the Plaintiff makes an argument that “the medical malpractice statute does not require that a court dismiss a notice of intent to file suit if it was filed without an expert’s affidavit,” and, that Rule 12(b) (6) was not a proper vehicle for attacking her notice of intent. [Appellant’s Brief pp. 18, 19.]

First, the Defendant Physician never moved to dismiss her notice of intent, and the Trial Court did not dismiss her notice. Rather, the Defendant Physician moved to dismiss the Plaintiff’s civil action as barred by the statute of limitations as was shown on the face of the complaint. The Plaintiff argued that the statute was tolled by the filing of the notice of intent, but the Trial Court correctly concluded that the statute was not tolled because she did not file her expert affidavit contemporaneously with the notice.

Second, as to the appropriate use of Rule 12(b)(6), § 15-36-100(C)(1) expressly provides that the defendant may file a motion to dismiss when the plaintiff fails to file the requisite affidavit with the complaint. And, more generally, Rule 12(b)(6) is a proper basis to dismiss a civil action as barred by the statute of limitations. See *Spell v. S. Carolina Dep't of Highways & Pub. Transp.*, 292 S.C. 228, 230, 355 S.E.2d 860, 861 (1987) (affirming grant of Rule 12(b)(6) motion to dismiss on statute of limitations grounds); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 615, 698 S.E.2d 879, 881 (Ct. App. 2010) (affirming grant of Rule 12(b)(6) motion to dismiss on statute of limitations grounds).

B. The Plaintiff did not ask for the opportunity to cure the defect in her complaint.

As discussed above, the Plaintiff never made any motion to amend her complaint or request additional time to supplement with her expert affidavit. Rather, she steadfastly maintained that the affidavit filed in the pre-suit proceeding was sufficient to meet the statutory requirement of §15-36-100, while grudgingly offering to physically attach it if ordered to do so by the court. [ROA___; Memorandum of Law in Opposition, p. 5.] Now on appeal, she argues that she should be given the opportunity to cure any defects in her expert affidavit, even though the statute of limitations has expired, relying upon §15-36-100(C)(1) and the Supreme Court's decision in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006).

Subsection (C)(1) provides that when an affidavit is not timely filed with or after the complaint, "the complaint is subject to dismissal for failure to state a claim." The Plaintiff argues that the term "subject" suggests that dismissal is not mandatory and that the court has the discretion to permit the plaintiff to cure the defect. [Appellant's Brief p. 20.] However, the Plaintiff never made this argument to the Trial Court. *Talley v. S. Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) ("It is an axiomatic rule of law that issues may not be raised for the first time on appeal.").

In relying upon *Spence* for her argument that she should be given an opportunity to amend her complaint, Plaintiff contends that the Supreme Court held that an appellate court has discretion to allow a plaintiff an opportunity to amend a complaint after the statute of limitations has expired. However, a close reading of that opinion does not support the Plaintiff's argument.

In *Spence*, a titleholder in certain land brought an action against others in the chain of title for reformation of deeds. The trial court dismissed a claim against one of the owners, with prejudice, on the ground that the “Complaint gives rise to no reasonable interpretation other than that the Cromers [Owner 4] were bona fide purchasers for value.” 628 S.E.2d at 874. The plaintiff made a Rule 59(e), asking the trial court to grant her at least fifteen days to file and serve an amended complaint instead of dismissing the complaint with prejudice, which was denied. On appeal, the Supreme Court affirmed because the plaintiff had not presented any additional factual allegations or a different theory of recovery which might have given rise to a cause of action upon which relief may be granted.

Plaintiff attempts to seek a rescue from her predicament based on the Court’s discussion of dismissal with or without prejudice, wherein the Court stated that in most cases a plaintiff should be given an opportunity to file and serve an amended complaint when a complaint is dismissed for failure to state a claim. However, as the Court also stated that: “Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint.” *Id.* at 881. The Court’s decision in *Spence* does not support the Plaintiff’s request, made for the first time on appeal, to be allowed to supplement her complaint which was filed after the statute of limitations had expired.

The Plaintiff contends that the Defendants arguments are “purely technical” and of the “gotcha” variety that “turns [the legislative scheme] into a complicated dance where any technical misstep results in the death of a plaintiff’s claim.” [Appellant’s

Brief, p. 22.] However, the process is not complicated. Section 15-79-125 clearly requires that a plaintiff file an expert affidavit contemporaneously with her notice of intent to file suit, and Section 15-36-100 also clearly requires that a plaintiff file an expert affidavit with her complaint – subject to a 45-day grace period only if certain allegations are made.

Further, these statutorily imposed steps for filing an expert affidavit are not mere technicalities. See *Martin v. Rapid Plumbing*, 369 S.C. 278, 289, 631 S.E.2d 547, 553 (Ct. App. 2006) (failure to follow statutory procedures regarding required paperwork “are not mere technicalities, but are substantial deviations from the statutory procedure”). “Statutes of limitations are not simply technicalities.” *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). When a statute of limitations is tolled or extended based on a statutory provision, compliance is a matter of substance. See *Rink v. Richland Mem'l Hosp.*, 310 S.C. 193, 197, 422 S.E.2d 747, 749 (1992) (failure to comply with statutory requirement that notice be verified will invalidate the notice, even where no prejudice, because verification is a matter of substance and not form).

In Florida, where state law requires a pre-suit process in medical malpractice actions¹¹, the appellate court has stated:

The medical negligence statutory “provisions were not intended to ... deny parties access to the court on the basis of technicalities.” On the other hand, the “presuit notice and screening requirements ... represent more than mere technicalities. The legislature has established a comprehensive procedure designed to facilitate the amicable resolution of medical malpractice claims.” Another important purpose is to dispose of claims devoid of merit without the necessity of a full adversarial proceeding.

Archer v. Maddux, 645 So. 2d 544, 546 (Fla. Dist. Ct. App. 1994) (citations omitted).

¹¹ Fla. Stat. Ann. § 766.202, 766.203 .

In that case, the Florida court also discussed that state's precedent that the failure to mail the corroborating medical expert opinion with the notice of intent is not fatal if the opinion is provided before the statute of limitation has run, but clearly stated that: "The 'failure to provide a corroborating medical expert opinion with the notice of intent to initiate a medical malpractice action ... is fatal if the limitations period has run.'" *Id.* at 547 (citations omitted).

Here, the Plaintiff did not file an expert affidavit contemporaneously with her notice of intent to file suit, and the statute of limitations had already expired by the time she belatedly filed her affidavit on October 5, 2011. Moreover, she failed to file an expert affidavit with her complaint when she commenced the civil action. And, finally, nothing in this record supports the accusation that the Defendant Physician's assertion of her legitimate, substantive legal defenses is an inappropriate or unprofessional "gotcha" as implied by the Plaintiff.

CONCLUSION

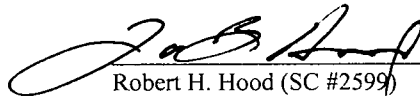
Based on the foregoing, the Trial Court properly dismissed the medical malpractice civil action against the Defendant Physician Thomas X. Hahm, M.D and his practice, Carolina Aesthetic Plastic Surgery Institute, PA as barred by the statute of limitations because the Plaintiff failed to file an expert affidavit contemporaneously with her notice of intent to file suit as required by §15-79-125 to toll the statute.

The dismissal can also be affirmed on the additional ground that the Plaintiff did not timely file an expert affidavit with her Complaint as required by § 15-36-100(B) or within the 45-day grace period under the requisite provisions of §15-36-100(C)(1).

Accordingly, these Respondents respectfully request that the Court affirm the dismissal entered below.

Respectfully submitted,

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July 22, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-00558
Appellate Case No. 2012-213464

Vicki L. Wilkinson,

Appellant,

v.

East Cooper Community Hospital, Inc.
d/b/a East Cooper Regional Medical Center,
Carolina Aesthetic Plastic Surgery Institute, P.A.,
and Thomas X. Hahm, M.D.,

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that the Initial Brief and Additional Designations on behalf of Respondents Carolina Aesthetic Plastic Surgery Institute, P.A. and Thomas X. Hahm, M.D. were served on the following counsel at the addresses listed:

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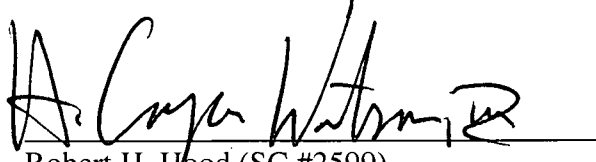
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A handwritten signature in black ink, appearing to read "R. Hood", written over a horizontal line.

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