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

Case No. 2012-CP-10-558

Vicki L. Wilkinson, ... Appellant,

v.

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

INITIAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENTS 1

I. SOUTH CAROLINA'S NOTICE OF INTENT PROCEDURE IS MEANINGFULLY DIFFERENT FROM THE PROCEDURES OF OTHER STATES 1

II. THE ARGUMENT THAT THIS COURT SHOULD OVERRULE ITS DECISION IN *RANUCCI* IS PRESERVED FOR THIS COURT'S REVIEW 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA

City of Florence v. Berry, 62 S.C. 469, 40 S.E. 871 (1902) 15

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) 5

Ranucci v. Crain. 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012) 1, 15, 16, 17

Southern Ry. Co. v. South Carolina State Highway Dept.,
237 S.C. 75, 115 S.E.2d 685 (1960) 16

Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000) 16

OTHER STATES

Bardo v. Liss, 614 S.E.2d 101 (Ga. App. 2005) 7, 8

Berry v. Padden, 84 So.3d 1145 (Fla. Dist. Ct. App. 2012) 1, 2

Elsberry Equipment Co. v. Short, 211 N.E.2d 463 (Ill. App. 1965) 5

Fujian Mach. & Equip. Imp. & Exp. Corp. v. US, 178 F. Supp.2d 1305 (2001) 15

Hilton Lumber Co. v. Atlantic Coast Line R. Co., 53 S.E. 823 (N.C. 1906) 5

Holmes v. Michigan Capital Med. Ctr., 620 N.W.2d 319 (Mich. App. 2000) 10, 11

Insurance Group Committee v. Denver & R. G. W. R. Co., 329 U.S. 607 (1947) 15

Lindberg v. Health Partners, Inc., 599 N.W.2d 572 (Minn. 1999) 8, 9

Lookshin v. Feldman, 127 S.W.3d 100 (Tex. App. 2003) 13, 14

Strickland v. U.S., 423 F.3d 1335 (C.A. Fed. 2005) 15

Supreme Lodge K. P. v. Few, 76 S.E. 91 (Ga. 1912) 5

Thigpen v. Ngo, 558 S.E.2d 162 (N.C. 2002) 11, 12, 13

STATUTES

78th Leg., R.S. ch. 204, § 10.09, 2003 Tex. Gen. Laws 864 13

M.C.L.A. 600.2912d 10, 11

Minn. Stat. Ann. § 145.682 9

N.C.G.S. § 1A–1, Rule 9(j) (1999) 11, 12, 13

O.C.G.A. § 9-11-9.1 .... 7, 8

Section 766.203(2), Fla. Stat. (2006) 1

S.C. Code Ann. § 15-36-100 (Supp. 2012) 3, 4, 5, 6, 7, 8

S.C. Code Ann. § 15-79-125 (Supp. 2012) 3, 4, 6

Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon 2005) 14

ARGUMENTS

I. SOUTH CAROLINA'S NOTICE OF INTENT PROCEDURE IS MEANINGFULLY DIFFERENT FROM THE PROCEDURES OF OTHER STATES

The Hospital's Brief cites to cases from other jurisdiction in support of the assertion that failing to attach the expert's affidavit to the NOI prior to the expiration of the statute of limitations is fatal to a claim. This view was also expressed by Chief Judge Few in his concurrence in *Ranucci v. Crain*. 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012). (Hospital Resp. Br. p. 13). The Court should not be persuaded. The foreign cases rely upon laws that are meaningfully different from South Carolina's law.

For instance, *Berry v. Padden* arose under **Florida**'s pre-suit notification scheme. 84 So.3d 1145 (Fla. Dist. Ct. App. 2012). Florida's statute provides:

> **Presuit investigation by claimant.** – Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:
>
> (a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and
>
> (b)Such negligence resulted in injury to the claimant.
>
> Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a *verified written medical expert opinion* from a medical expert ... at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

Section 766.203(2), Fla. Stat. (2006) (emphasis by the court). The problem in *Berry* was two-fold. First, a letter from the expert containing the opinion was not verified, which was a requirement at the time under the Florida NOI statute. Further, and more

importantly, Florida's NOI scheme provided further:

> If the court finds that the notice of intent to initiate litigation mailed by the claimant is not in compliance with the reasonable investigation requires of §§ 766.201 – 766.212, including a review of the claim and a *verified written medical expert opinion* by an expert witness as defined in § 766.202, the court *shall* dismiss the claim....

Section 766.706(2), Fla. Stats. (2006) (emphasis by the court). Florida's courts have held that the failure to file a properly verified medical opinion letter is not fatal to a plaintiff's cause of action as long as the requirement is met before the expiration of the statute of limitations. The *Berry* court noted:

> In this case, the plaintiffs provided the defendant's with only an *unverified*, corroborating medical expert opinion prior to the expiration of the statute of limitations. Accordingly, we affirm the trial court's order dismissing the plaintiffs' complaint with prejudice for failure to provide a properly verified corroborating expert opinion prior to the expiration of the statute of limitations.

Berry, at 1147 (emphasis by the court).

Unlike South Carolina, Florida's statutory law does not incorporate procedures from a general professional negligence statute. Instead, Florida's NOI procedures contain (1) the requirement that the affidavit be filed "at the time the notice of intent to initiate litigation is mailed" and (2) *an express mandate* that the court dismiss a case where the verified affidavit is not included with the NOI.

South Carolina's statute is different. Our NOI statute provides:

> (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.

S.C. Code Ann. § 15-79-125 (Supp. 2012) (emphasis added). The NOI and the affidavit must therefore be "contemporaneously" filed. Furthermore, the "affidavit requirements established in Section 15-36-100" are as follows:

> (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.

S.C. Code Ann. § 15-36-100 (Supp. 2012). Thus, a "licensed health care facility" is covered under the general professional negligence statute, and the expert affidavit must be filed "as part of the complaint."

Unlike the Florida scheme, South Carolina's statute does not say *when* this affidavit must be filed. South Carolina's statute just says that it be "part of the complaint." The phrase "as part of the complaint" is not defined, but the reason the legislature chose this language, as opposed to "with the complaint" or "at the same time as the complaint" is that all that is required is that the professional be put on notice of the specifics of the claim and be assured that the plaintiff has sufficient expert evidence to

support those specifics.

Here, the expert affidavit was filed *prior to* the complaint, and while the complaint may have received a different case number, it is absurd to declare these matters are completely separate. It is similarly absurd to dismiss a complaint when the only alleged error is failing to re-file something that has already been filed. At the time the complaint in this case was filed and served, all defendants had in hand an affidavit from an expert which met the "affidavit requirements established in Section 15-36-100."

Other provisions of Section 15-36-100 inform further the requirements surrounding the affidavit contemplated by that section and imported into the Medical Malpractice Act through Section 15-79-125(A). Section 15-36-100 provides:

> (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.

S.C. Code Ann. § 15-36-100 (C) (emphasis added).

The term "contemporaneous" is not defined in the professional negligence or the Medical Malpractice statutes. In other contexts, the term does not mean "simultaneous" or "coincident," but implies a longer period of time establishing the two occurrences as part of the same transaction. *Cf. Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) (noting that "construing contemporaneous instruments together" (including instruments executed at different times) means that if there are any provisions in one instrument limiting or affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated); *Supreme Lodge K. P. v. Few*, 76 S.E. 91 (Ga. 1912) (holding the word "contemporaneous" does not mean "simultaneous" or "coincident" but meant a longer period of time than is implied in the words "simultaneous" and "coincident"); *Elsberry Equipment Co. v. Short*, 211 N.E.2d 463, 468 (Ill. App. 1965) (noting the word "contemporaneous" means "so proximate in time as to grow out of, elucidate and explain the quality and character of the transaction, or an occurrence within such time as would reasonably make it a part of the transaction"); *Hilton Lumber Co. v. Atlantic Coast Line R. Co.*, 53 S.E. 823 (N.C. 1906) (upholding jury charge under so-called "Equality Clause" of the "Traffic Act" and the Interstate Commerce Clause "[t]hat the word contemporaneous in the statute did not mean the exact day, hour, or necessarily month, but that it meant a period of time through which the shipment of goods or freights were made by plaintiff at one rate, and by other shippers at another rate.").

The legislature's use of the term "contemporaneous" rather than a more limited

term such as "simultaneous," "coincident," "at the same time," or even "with the complaint," is significant. In this case, the defendants had possession of the expert affidavit at the time the complaint was filed, or contemporaneously with that filing. This procedure substantially complies with the requirements set forth in the statute.

Other portions of Section 15-36-100 further describe requirements related to the expert affidavit. For instance, the statute provides:

> (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.

S.C. Code Ann. § 15-36-100(D). There is no dispute that Appellant filed an affidavit "within the period specified in this section" by providing that affidavit prior to filing the complaint. Thus, although the affidavit was filed after the statute of limitations expired, it is timely and provides no basis for the statute of limitations defense in this case.

Section 15-36-100 adds other requirements to the affidavit that are imported into the Medical Malpractice statute by Section 15-79-125(A):

> (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.

S.C. Code Ann. § 15-36-100 (F) (Supp. 2012). Therefore, so long as the defendants have

an affidavit that meets the requirements of Section 15-36-100 "within the time required pursuant to" Section 15-36-100 (as happened in this case), even the failure to file that affidavit with the complaint is not fatal to a claim in South Carolina if the plaintiff establishes that failure was due to a mistake. Of course, here Appellant *did* file the affidavit "contemporaneously" with the complaint since it was filed and served upon the defendants after the NOI but before the complaint was filed.

The Hospital cites cases from other states, but these cases are also meaningfully distinct from the case at hand. (Hospital Resp. Br. P. 17, n. 4). For instance, *Bardo v. Liss*, 614 S.E.2d 101 (Ga. App. 2005) involved the affidavit requirements under **Georgia**'s professional negligence statute, which provides:

> (a) In any action for damages alleging professional malpractice against:
>
> > (1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;
> >
> > * * *
> >
> > (3) 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 Georgia and listed in subsection (g) of this Code section,
>
> The plaintiff shall be required to file *with the complaint* an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

O.C.G.A. § 9-11-9.1 (emphasis added).

The plaintiff in *Bardo* filed *no* affidavit either prior to or "with the complaint," nor did the plaintiff attempt to cure the defect before the trial court dismissed as provided by the statute. The Georgia Court of Appeals noted that because the trial court ruled

before any attempt to cure, its ruling was "on the merits" and therefore with prejudice, as provided by the statute. See § 9-11-9.1 (b) (failure to file an affidavit within period specified in Code section requires that "the complaint *shall be* dismissed for failure to state a claim") (emphasis added). See also *Bardo* (a dismissal for failure to state a claim in Georgia is a dismissal on the merits and is with prejudice).

Our Medical Malpractice statute contains no provision similar to the Georgia statute. There is no mandatory dismissal, and under the general professional negligence statute, the complaint is merely "subject to dismissal," allowing a meaningful opportunity to remedy technical violations or errors that have run afoul of the letter, but not the spirit, of the rule. *See* S.C. Code Ann. § 15-36-100(C)(1) ("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 ... that the plaintiff has failed to file the requisite affidavit, the complaint is *subject to dismissal* for failure to state a claim.") (emphasis added).

The **Minnesota** scheme addressed in *Lindberg v. Health Partners, Inc.*, 599 N.W.2d 572 (Minn. 1999) also differs significantly from South Carolina's procedures. The Minnesota statute provides:

> **Subd. 2. Requirement.** In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), *serve upon defendant with the summons and complaint* an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

Minn. Stat. Ann. § 145.682 (emphasis added). Thus, the affidavit must be "served" upon the defendant, and the service must be made "with the summons and complaint." The statute provides further:

> **Subd. 6. Penalty for noncompliance.** (a) Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.
>
> (b) Failure to comply with subdivision 2, clause (2), results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.
>
> (c) Failure to comply with subdivision 4 because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:
>
> > (1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;
> >
> > (2) the time for hearing the motion is at least 45 days from the date of service of the motion; and
> >
> > (3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

Minn. Stat. Ann. § 145.682. Importantly, the issue in *Lindberg* was whether a plaintiff filed a sufficient affidavit within the statutory period of 180 days mandated dismissal. In South Carolina, however, the affidavit must be filed "contemporaneously" with the complaint, and the failure to do so results in the action being "subject to" dismissal. The affidavit need not be served "with the complaint," and there is no provision in South Carolina's Medical Malpractice statute that mandates dismissal for noncompliance.

Hospital cites to *Holmes v. Michigan Capital Medical Center*, 620 N.W.2d 319 (Mich. App. 2000) in support of its argument. (Hospital Resp. Br. p. 17, n. 4). *Holmes* was decided under **Michigan**'s medical negligence statute, which provides:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney *shall file with the complaint* an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [M.C.L.A. § 600.2169 (setting standards for expert witnesses in medical malpractice actions)]. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> > (a) The applicable standard of practice or care.
> >
> > (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
> >
> > (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
> >
> > (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.
>
> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

M.C.L.A. 600.2912d (emphasis added).

The issue in *Holmes* was whether complaints filed *without* the affidavit of merit tolled the statute of limitations; the Michigan Court of Appeals concluded it did not. In the present case, Appellant filed the affidavit before filing and serving the complaint, so

that the defendants had the affidavit of merit contemporaneously with the complaint. *Holmes* is meaningfully distinct from this case.

The **North Carolina** case Hospital cites, *Thigpen v. Ngo*, 558 S.E.2d 162 (N.C. 2002), is also distinguishable from this case in a meaningful way. *Thigpen* was decided under Rule 9(j) of the North Carolina Rules of Procedure, which provides:

> **(j) Medical malpractice.**--Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 *shall be dismissed unless*:
>
> > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
> >
> > (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
> >
> > (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.
>
> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for

> a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

N.C.G.S. § 1A–1, Rule 9(j) (1999) (emphasis added). The Court in *Thigpen* explained this Rule as follows:

> The General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

558 S.E.2d at 166.

The procedure in North Carolina is different from that in South Carolina. Instead of a pre-suit NOI, the plaintiff in a North Carolina case must allege, as part of the complaint, that the available medical records "have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, *and the motion is filed with the complaint*."

Rule 9(j), NCRP (emphasis added). Thus, to comply with Rule 9(j), a plaintiff would have to have an expert willing to testify after reviewing the records and would have to move for qualification of that expert at the same time the plaintiff files the complaint. There is no affidavit requirement, and there is no provision that these documents be filed "contemporaneously." Rather, there is a mandate that the documents be filed at the same time. *Thigpen*, then, is distinct from this case in a meaningful way.

Lastly, Hospital cites to a **Texas** case, *Lookshin v. Feldman*, 127 S.W.3d 100 (Tex. App. 2003), which arose under the former "Texas Medical Liability and Insurance Improvement Act" (the Act) (repealed effective September 1, 2003, 78th Leg., R.S. ch. 204, § 10.09, 2003 Tex. Gen. Laws 864, 884). Subsection 13.01(d) of the Act read as follows:

> Not later than the later of the 180th day after the date on which a health care liability claim is filed ... the claimant shall, for each physician or health care provider against whom a claim is asserted:
>
> > (1) furnish to counsel for each physician or health care provider one or more expert reports, with a curriculum vitae of each expert listed in the report; or
> >
> > (2) voluntarily nonsuit the action against the physician or health care provider.

Lookshin, at 103. The *Lookshin* Court added that:

> As penalties for a claimant's non-compliance with this subsection, subsection 13.01(e) of the Act provided as follows:
>
> If a claimant has failed to, for any defendant physician or healthcare provider, to (sic) comply with Subsection (d) of this section within the time required, the court shall, on the motion of the affected physician or health care provider, enter an order awarding as sanctions against the claimant or the claimant's attorney:

> (1) the reasonable attorney's fees and costs of court incurred by that defendant;
>
> (2) the forfeiture of any cost bond respecting the claimant's claim against that defendant to the extent necessary to pay the award; and
>
> (3) the dismissal of the action of the claimant against that defendant with prejudice to the claim's refiling.

Id. (citing § 13.01(e) of the Act). Thus, the plaintiff under the Texas scheme in place prior to 2003 had to provide an expert report together with a CV within 180 days of filing the complaint or the court would dismiss and award sanctions. These provisions are largely preserved under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (Vernon 2005), although the period of time has been reduced from 180 to 120 days. Still, the Texas procedures that underlie the *Lookshin* case are vastly different, and not instructive of, the procedures that adhere in South Carolina.

This Court should not be persuaded to follow decisions from other states. Those decisions are based upon language and procedures that are meaningfully distinct from the procedures found in South Carolina's statutes. These statutes all have their own nuances, and many of them contain grace periods in which a litigant can cure defects in his or her filings. The question before this Court is specific to South Carolina – is it a fatal defect if a medical negligence plaintiff fails to re-give the defendant an affidavit that he already has? For the reasons described in the Appellant's principle brief, the answer should be "no."

II. THE ARGUMENT THAT THIS COURT SHOULD OVERRULE ITS DECISION IN *RANUCCI* IS PRESERVED FOR THIS COURT'S REVIEW

Hospital contends that because Appellant did not argue to the trial court that *Ranucci* was wrongly decided, the request that this Court revisit and overrule *Ranucci* is not preserved for appeal. (Hospital Resp. Br. pp. 17-18). This argument should not be persuasive.

The circuit court below was bound by this Court's ruling in *Ranucci*, and could not disregard it. *See City of Florence v. Berry*, 62 S.C. 469, 40 S.E. 871, 873 (1902) (judgment of supreme court is binding authority in all subsequent similar cases until it is overruled by competent authority). *Cf. Insurance Group Committee v. Denver & R. G. W. R. Co.*, 329 U.S. 607 (1947) (when matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court); *Strickland v. U.S.*, 423 F.3d 1335, 1338 n. 3 (C.A. Fed. 2005) (ordinarily, a trial court may not disregard its reviewing court's precedent, subject to two narrow exceptions: if the circuit's precedent is expressly overruled by statute or by a subsequent appellate court decision; thus, a trial judge who believes an appellate court decision contravenes other precedent may do no more than criticize those opinions, urging en banc revision); *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp.2d 1305, 1313 (2001) (stating that "a trial court may not disregard the controlling precedent of its appellate court where an intervening Supreme Court decision merely casts doubt on the continuing viability of that precedent, rather than directly overruling it").

Thus, presenting an argument to the circuit court requesting it to disregard

Ranucci would have been a futile act. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 546–47 (2000) (noting parties are not required "to engage in futile actions in order to preserve issues for appellate review").

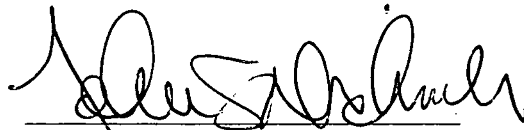
The statutes in this case were enacted as part of the same scheme, and should be read in harmony, not discord. *See Southern Ry. Co. v. South Carolina State Highway Dept.*, 237 S.C. 75, 82, 115 S.E.2d 685, 689 (1960) (the rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes that are contemporaneous). *Ranucci* reads these statutes as operating independently, in violation of this settled rule of statutory construction. The circuit court could do nothing about that ruling except, at worst, criticize it. Appellant was not required to ask the circuit court to rule that *Ranucci* was wrongly decided because to do so would be futile – the circuit court must follow this Court's precedent, right or wrong.

Accordingly, the Court should reject Hospital's argument that Appellant may not request that this Court revisit *Ranucci*, engage in *en banc* review, and overrule that case.

CONCLUSION

The foreign cases the Hospital cited were controlled by foreign statutes that are different from South Carolina law. Further, the Court should reject Hospital's contention that the Appellant may not argue against this Court's decision in *Ranucci.* The Court should reverse the Circuit Court's judgment and should remand the matter for further proceedings consistent with this Court's ruling.

Respectfully submitted,



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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

Case No. 2012-CP-10-558

Vicki L. Wilkinson, ... Appellant,

v.

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

PROOF OF SERVICE

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

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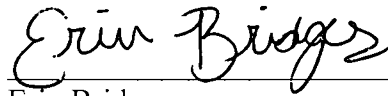

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