

2012-CP-10-5366

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL DISTRICT

Johnny Eades and Barbara Eades,  
  
Plaintiffs,

Civil Action No: 2012-CP-10-5366 (NOI)

vs.

Palmetto Cardiovascular and Thoracic,  
PA; James M. Benner, MD; Mark J. Epler,  
MD; Trident Medical Center, LLC;  
Columbia/HCA Healthcare Corporation of  
South Carolina; HCA Healthcare-South  
Carolina; Trident Medical Center; Trident  
Health System; Palmetto Primary Care  
Physicians, LLC; Trident Emergency  
Physicians, LLC; Brian R. Whirreth, MD;  
Patricia Campbell, MD; Christine E.  
McNeal, MD; Matthew Wallen, MD;  
Charleston Radiologists, PA; Joseph M.  
Mullaney, MD; Tri-County Radiology  
Associates, PA; and Troy Marlon, M.D.

Defendants.

ORDER

FILED  
2013 AUG 16 PM 12:38  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

THIS MATTER CAME BEFORE THE COURT on July 18, 2013, for a hearing on a Motion to Dismiss the Notice of Intent to File Suit on behalf of the above named Defendants. Present at the hearing were Gary L. Cartee on behalf of the Plaintiffs; William McDow on behalf of Defendants Palmetto Primary Care Physicians, Trident Emergency Physicians, Patricia Campbell, M.D.<sup>1</sup>, and Matthew Wallen, M.D.<sup>2</sup>; Perry M. Buckner, IV, also on behalf of Trident Emergency Physicians; Darren K. Sanders on behalf of Palmetto Cardiovascular & Thoracic, PA and James M. Benner, M.D.; and

<sup>1</sup> Counsel for Plaintiffs has agreed not to name Dr. Campbell in any potential Summons & Complaint since she has never been served.

<sup>2</sup> Counsel for Plaintiffs has agreed not to name Dr. Wallen in any potential Summons & Complaint since he has never been served.

KLH  
8/9/13

Jason Ward on behalf of Mark J. Epler.

This case is an alleged medical malpractice action. On August 15, 2012, Plaintiffs filed a Notice of Intent to File Suit alleging injuries as a result of medical malpractice against Defendants. No expert witness affidavit was contemporaneously filed therewith. On August 17, 2012, Plaintiffs' counsel filed Supplemental Answers to Interrogatories and included the affidavit of Dr. Paul Skudder.

At the hearing, Defendants Palmetto Primary Care Physicians, Trident Emergency Physicians, Patricia Campbell, M.D., and Matthew Wallen, M.D., voluntarily withdrew their arguments with regard to the statute of limitations. Having reviewed the Defendants' Motions and Supporting Memoranda of Law, the Court makes the following findings:

I. **The expert affidavit was not contemporaneously filed with the Notice of Intent to File Suit.**

In 2005, as part of comprehensive tort reform, the South Carolina General Assembly enacted S.C. Code Ann. § 15-79-125, which requires that a medical malpractice plaintiff must initially file a Notice of Intent to File Suit together with an affidavit of an expert witness prior to filing a Summons and Complaint. Section 15-79-125(A) also provides that such contemporaneous expert affidavit must comport with the affidavit requirements of section 15-36-100. Section 15-36-100 contains provisions concerning the content of the affidavit as it relates to section 15-79-125, but contains no procedural alternatives to section 15-79-125 with regard to filing the affidavit.

The Court of Appeals recently explored this distinction in Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012). There, Ranucci filed a Notice of Intent to File Suit against Dr. Crain prior to filing the affidavit of a medical expert, which she did forty-

2/11  
8/9/13

five (45) days later. Id. In her Notice, Ranucci attempted to invoke the provisions of section 15-36-100(C)(1)<sup>3</sup> by indicating that "time constraints" prevented her from contemporaneously filing the affidavit of a medical expert and that she would file such an affidavit within forty-five days or her allegations of negligence would be within the "ambit of common knowledge and experience" so that Dr. Crain's conduct could be evaluated without the assistance of special learning. Id. The circuit court granted Dr. Crain's motion to dismiss Ranucci's Notice of Intent for failure to timely file the medical expert's affidavit. Id. The Court of Appeals affirmed. Id.

Applying principles of statutory interpretation, the Court of Appeals held sections 15-79-125 and 15-36-100 do not conflict. Each statute governs a distinct time period during the litigation process, and those time periods are consecutive. Id. Section 15-36-100 "institutes, on the one hand, substantive requirements for the authorship and content of affidavits by expert witnesses and, on the other, procedural requirements relating to such affidavits **when filed with a complaint.**" Id. (emphasis added). Therefore, the Court of Appeals held that section 15-79-125 "invokes only the provisions of section 15-36-100 governing the preparation and content of the affidavit," while "[t]he plain language of section 15-36-100, which ties the filing of affidavits under the statute to a complaint or other initial pleading, prevents the remaining provisions from applying to an affidavit filed pursuant to section 15-79-125." Id. Accordingly, the Court of Appeals held that Ranucci failed to comply with section 15-79-125's contemporaneous

<sup>3</sup> Section 15-36-100(C)(1) provides in pertinent part:

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. . . .

3  
JUT  
8/19/13

filing requirement because she filed her expert affidavit after filing her Notice of Intent. The contemporaneous filing requirement mandated the expert affidavit be filed "at the same time as the Notice of Intent to File Suit." Id.

Similarly, this Court finds Plaintiffs' Notice of Intent to File Suit should be dismissed for failing to file the expert affidavit contemporaneously with their Notice of Intent to File Suit. On August 15, 2012, Plaintiffs filed their Notice of Intent. In the Notice, at paragraph 3, the following appears:

Counsel for Plaintiff has reason to believe that the statute of limitations would run within 10 days of the date of this filing, and because of the constraints of time an affidavit of an expert cannot be filed at this time, and it is the intention of Counsel for Plaintiff to file an expert affidavit within the time prescribed by the applicable statute (45 days from filing of this Notice of Intent to File Suit).

(See Ex. A). Similar to Ranucci, Plaintiffs attempted to find safe harbor in the provisions of section 15-36-100(C)(1). As a result, Plaintiffs' failure to file the affidavit contemporaneously with the Notice of Intent is fatal to their claim. The holding in Ranucci is clear—the expert affidavit must be filed with the Notice of Intent to File Suit. This Court finds the failure to file the expert affidavit at the same time as the Notice of Intent to File Suit requires dismissal of this matter because the affidavit was not filed contemporaneously with the Notice of Intent to File Suit. See City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.").

AKH  
8/9/13

II. The expert affidavit does not comply with S.C. Code Ann. § 15-36-100 with regard to Dr. Campbell and Dr. Wallen.

Although this Court finds the expert affidavit did not comply with the statutory contemporaneous filing requirement, an additional ground for dismissal was raised by Defendants. The above named Defendants argued before this Court that the expert affidavit submitted by Plaintiffs failed to meet the additional requirements required by section 15-36-100. This Court agrees that even if Plaintiffs' expert affidavit were timely filed, the affidavit is defective because it does not comport with the content requirements of section 15-36-100(A). Thus, the affidavit is insufficient to provide the requisite expert testimony to support the Notice of Intent to File Suit.

Section 15-36-100 requires that an expert completing an affidavit be "licensed by an appropriate regulatory agency to practice his or her profession" and be board certified in the "area of practice or specialty about which the opinion on the standard of care is offered." Section 15-36-100(A)(1), (A)(2)(a) (emphasis added). If the expert is not board certified, he still must "have actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in" the active practice of medicine in the area or specialty, teaching in the area or specialty, or a combination of the two. Section 15-36-100(A)(2)(b) (emphasis added).

Plaintiffs submitted the affidavit of Dr. Paul Skudder, a medical doctor licensed in the states of Vermont, Massachusetts, and New York, as well as in the District of Columbia. (See Ex. B). Dr. Skudder indicates he has practiced medicine for more than the past five years dealing with issues including "occluded arteries, aneurysms, and related medical issues." Id. Dr. Skudder also indicates that he holds board

2/11  
8/9/13

certifications from the American Board of Surgery, with special qualifications in Vascular Surgery, and Surgical Critical Care. Id. Dr. Skudder's affidavit does not indicate he has "actual professional knowledge and experience" in the practice areas of Dr. Campbell and Dr. Wallen. Dr. Skudder's affidavit fails to provide the proper qualifications, required by section 15-36-100, that would permit Dr. Skudder to present an expert opinion about Dr. Campbell and Dr. Wallen.

Because the affidavit does not contain the substantive content requirements of section 15-36-100, it is insufficient to supply the required affidavit in section 15-79-125. This Court hereby finds the Notice of Intent to File Suit is properly dismissed for failure to provide an expert affidavit which comports with the affidavit requirements of section 15-36-100.

Defendants' Motion to Dismiss is GRANTED as to the claims presented by Plaintiffs. Plaintiffs' claims as to the above named Defendants are hereby DISMISSED.

IT IS SO ORDERED!

This the 9<sup>th</sup> day of August, 2013

  
THE HONORABLE KRISTI LEA HARRINGTON  
NINTH JUDICIAL CIRCUIT