

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

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NOV 27 2013

MOTION TO CERTIFY

**SC Court of Appeals**

Pursuant to Rule 240 and Rule 204(b), SCACR, Vicki L. Wilkinson (“Appellant”) requests that this Court certify her appeal from the Court of Appeals for review. The outcome in this case is controlled by the decision of the Court of Appeals in *Ranucci v. Crain*, 397 S.C. 168, 723 S.C. 242 (Ct. App. 2012). This Court has granted certiorari in *Ranucci* and is currently reviewing the merits of that decision.

If *Ranucci* is affirmed, it will likely require this case to be affirmed. If *Ranucci* is reversed, it will require this case to be reversed. Ms. Wilkinson respectfully submits that judicial economy would be served by this Court certifying the case and holding it in abeyance for disposition once this Court decides *Ranucci*.

## BACKGROUND

This is a medical malpractice case. On September 1, 2011, Appellant filed a Notice of Intent to File Suit ("NOI") pursuant to Section 15-79-125 of the South Carolina Code. The NOI listed several defendants: Tenet Healthcare Corp., Tenet Healthsystem Medical, Inc., East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center ("Hospital"), Carolina Aesthetic Plastic Surgery Institute, PA ("CAPSI"), and Thomas X. Hahm, MD ("Doctor"). The NOI noted that the claims arose out of injuries that incurred on September 4, 2008, and "No expert affidavit is attached as the statute of limitations is construed to expire shortly." The NOI added that "Plaintiff will file an expert affidavit at a later date." The NOI included an "Exhibit A," which provided a "short and plain statement of the facts" outlining the specifications of negligence that caused injury to Appellant. Exhibit A enumerated causes of action for negligence, violation of the SC Unfair Trade Practices Act, fraud, and misrepresentation.

The NOI also had responses to interrogatories attached as an Exhibit. Those responses outlined the names of witnesses, identified the appropriate medical records, and identified treating medical personnel as offering expert evidence. All defendants were timely served with the documents.

On October 5, 2011, Appellant filed an affidavit of John D. Newkirk, MD, setting forth the deviations from the applicable standard of care in Appellant's treatment. On October 6, 2011, the Hospital's lawyers filed a notice of appearance. On November 16, 2011, the Hospital's lawyers sent subpoenas to various healthcare entities to obtain medical records and bills associated with Appellant's treatment. On January 20, 2012, the

parties engaged in the mediation that is mandated by Section 15-79-125. The mediation lasted 12 minutes before the mediator declared an impasse.

On January 25, 2012, Appellant filed a summons and complaint against all defendants named in the NOI. The Complaint mirrored the "Short and Plain Statement of the Facts" that had been attached to the NOI. The lawyer for CAPSI and Doctor accepted service on February 2, 2012. On February 27, 2012, CAPSI and Doctor filed an Answer to the Complaint and also moved to dismiss on the grounds that the applicable statute of limitations had expired. CAPSI and Doctor also served discovery upon Appellant.

On March 2, 2012, Hospital filed an Answer and Motion to Dismiss, also on the ground of the expiration of the applicable statute of limitations. Hospital specifically alleged that Appellant failed to comply with the procedural requirements of Section 15-36-100 because no expert affidavit was attached to the Complaint. Hospital also served discovery upon Appellant. On March 14, 2012, March 30, 2012, and May 2, 2012, Hospital sent additional subpoenas to various healthcare providers who had treated Appellant.

On March 28, 2012, Hospital acknowledged service of the Summons and Complaint upon it. On April 18, 2012, Appellant filed a consent order of dismissal without prejudice of defendants Tenet Healthcare Corp. and Tenet Healthsystem Medical, Inc. On April 19, 2012, CAPSI and Doctor filed and served an Amended Answer to the Complaint.

On May 7, 2012, Hospital filed a Memorandum in Support of its Motion to Dismiss. The basis for the motion was that Appellant failed to attach an expert affidavit

to her Complaint so that the statute of limitations expired. Hospital asserted that the NOI did not toll the statute of limitations because the affidavit was not filed contemporaneously with the NOI, so that the complaint, being filed four months after the expiration of the statute, should be dismissed. Hospital argued alternatively that Appellant's failure to file an affidavit with her Complaint or within 45 days thereafter required dismissal. CAPSI and Doctor filed a memorandum in support of their motion to dismiss raising the same issues. Both motions relied heavily upon *Ranucci*.

Appellant filed a Memorandum in Opposition to the Motions, contending *Ranucci* was not controlling because it was meaningfully distinguishable. Appellant further argued Defendants waived any complaint by completing the pre-litigation procedure under Section 15-79-125 without objection. Appellant also argued that there was substantial if not full compliance with Section 15-36-100. Finally, Appellant asserted she complied with the strict language of Section 15-79-125 so as to avoid dismissal.

On May 14, 2012, the circuit court held a hearing on the motions to dismiss. On, October 2, 2012, the court entered an order that granted the motion to dismiss. This order relied heavily on *Ranucci*. Accordingly, the circuit court granted all Motions to Dismiss the Complaint.

On October 10, 2012 Appellant filed and served a Motion for Reconsideration pursuant to Rules 52 and 59, SCRPC. Appellant requested that the circuit court specifically address each of the arguments Appellant made. On October 16, 2012 the circuit court entered an order summarily denying the Motion. Appellant thereafter served and filed a notice of appeal.

## DISCUSSION

The Record on Appeal and the Final Briefs have been filed so that this appeal has been perfected, but the case has not yet been set for oral argument. The Motions to Dismiss below relied exclusively upon the construction of the “Medical Malpractice Act” that the Court of Appeals articulated in *Ranucci*. Appellant has challenged the application of *Ranucci* to this case, and she has also suggested to the Court of Appeals that *Ranucci* is wrongly decided and should be overruled. Accordingly, Appellant intends to request that the Court of Appeals hear this matter *en banc*.<sup>1</sup>

On September 6, 2013, this Court issued a writ of certiorari to the Court of Appeals to review *Ranucci*. See *Ranucci v. Crain*, Order (S.C. Sup. Ct. filed Sept. 6, 2013) (Appellate Case No. 2012-211188). The parties are currently briefing *Ranucci*.

Rule 204, SCACR, provides:

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

**(b) Certification by Supreme Court.** In any case which is pending before the Court of Appeals, the Supreme Court may, in its discretion, on motion of any party to the case, on request by the Court of Appeals, or on its own motion, certify the case for review by the Supreme Court before it has been determined by the Court of Appeals. *Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.* The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes.

Rule 204(b), SCACR (emphasis added). This Court has already determined to review *Ranucci* pursuant to Rule 242, SCACR, which provides:

**(b) Considerations Governing Review.** A writ of certiorari is not a matter of right, but of sound judicial discretion, *and will be granted only where there are special and important reasons.* The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

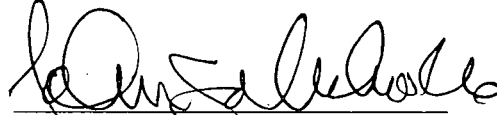
- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR (emphasis added). Hence, the Court has already determined that *Ranucci* involves “special and important reasons” and accordingly issued the writ of certiorari to review that case. This Court’s decision in *Ranucci* will directly control the decision in most of this case, and will significantly impact the remainder of the issues pending before the Court of Appeals. This is, therefore, an “issue of significant public interest or a legal principle of major importance.”

Accordingly, this Court should grant this request and should certify this appeal for

review pursuant to Rule 204.

Respectfully submitted,



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November 25, 2013

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents and the Clerk of the South Carolina Court of Appeals with a copy of the *Motion to Certify* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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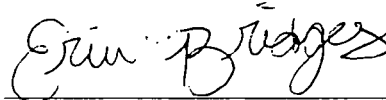
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**SC Court of Appeals**

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The Honorable Jenny Kitchings  
Clerk, South Carolina Court of Appeals  
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Paralegal  
BLUESTEIN, NICHOLS, THOMPSON  
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November 25, 2013  
Columbia, South Carolina



**BLUESTEIN NICHOLS THOMPSON DELGADO LLC**  
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OF COUNSEL  
O. Eugene Powell, Jr.

November 25, 2013

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29211

RE: Vicki Wilkinson v East Cooper Community Hospital, Inc. d/b/a East Cooper  
Regional Medical Center, Carolina Plastic Surgery Institute, PA, and Thomas X.  
Hahm, M.D.  
Case Tracking No.:2012-213464

Dear Mr. Shearouse:

This case is currently pending at the South Carolina Court of Appeals. Please find enclosed for filing the original and seven (7) copies of a motion requesting that the Supreme Court certify the case for review. I have enclosed a proof of service upon counsel of record and the Court of Appeals and a check in the amount of \$25.00 for filing the motion. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

John S. Nichols  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

/emb

Enclosures

cc: Nathan Hughey, Esquire  
James B. Hood, Esquire  
Robert H. Hood, Esquire  
H. Cooper Wilson, III, Esquire  
Deborah H. Shefflied, Esquire  
Lindsay K. Smith-Yancey, Esquire

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