

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.

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DISMISSING THIS CASE UNDER THE SOUTH CAROLINA CODE AND THIS COURT'S DECISION IN *RANUCCI V. CRAIN*, 397 S.C. 168, 723 S.C. 242 (CT. APP. 2012)?
 - A. SHOULD THIS COURT OVERRULE *RANUCCI V. CRAIN*, 397 S.C. 168, 723 S.C. 242 (CT. APP. 2012)?
 - B. SECTION 15-79-125 AND THE APPLICABLE STATUTE OF LIMITATIONS DO NOT BAR THIS ACTION.
 - C. APPELLANT'S COMPLAINT IS NOT BARRED UNDER SECTION 15-36-100.
- II. DOES THE SUPREME COURT'S DECISION IN *SPENCE V. SPENCE*, 368 S.C. 106, 628 S.E.2D 869 (2006) COUNSEL IN FAVOR OF AN OPPORTUNITY TO CURE ANY DEFECTS RATHER THAN DISMISS?

STATEMENT OF THE CASE

On September 1, 2011, Vicki L. Wilkinson (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. Hahn, 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.” (NOI). 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. (R. p. 19). 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. (R. p. 30). 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. (R. pp. 33-37).

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. (R. p. 108). On October 6, 2011, the Hospital’s lawyers filed a notice of appearance. (R. p. 38). 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. (R. p.

114). 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. (R. p. 40, ¶ 7).

On January 25, 2012, Appellant filed a summons and complaint against all defendants named in the NOI. (R. p. 1). 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. (R. p. 51). On February 27, 2012, CAPSI and Doctor filed an Answer to the Complaint (R. p. 52) and also moved to dismiss on the grounds that the applicable statute of limitations had expired. (R. p. 61). 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. (R. p. 67, ¶ 35).

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. (R. pp. 114-157).

On March 28, 2012, Hospital acknowledged service of the Summons and Complaint upon it. (R. p. 69). On April 18, 2012, Appellant filed a consent order of dismissal without prejudice of defendants Tenet Healthcare Corp. and Tenet Healthsystem Medical, Inc. (R. p. 1). 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. (R. p. 71). CAPSI and Doctor filed a memorandum in support of their motion to dismiss raising the same issues. (R. p. 79). Both motions relied heavily upon this Court's decision in *Ranucci v. Crain*, 397 S.C. 168, 723 S.C. 242 (Ct. App. 2012).

Appellant filed a Memorandum in Opposition to the Motions: (R. p. 85).

Appellant contended *Ranucci* was not controlling because it was meaningfully distinct from this case. 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 granting the motions on the following bases:

- (1) Appellant failed to file an expert affidavit contemporaneously with her NOI as mandated by Section 15-79-125 so that the statute of limitations was not tolled (R. pp. 6, 11);

- (2) Appellant failed to file an expert affidavit contemporaneously with her Complaint or within forty-five days (or within the statute of limitations) in accordance with Section 15-36-100 (R. pp. 6, 12);
- (3) *Ranucci v. Crain* held the forty-five day grace period for filing the affidavit applies to filing the Complaint under Section 15-36-100 but not to the pre-litigation procedures under Section 15-79-125 (R. pp. 8-11);
- (4) The statute of limitations was not tolled in this case because although the NOI was filed before the limitations period ran, Appellant failed to contemporaneously file the affidavit and even though she filed the affidavit within forty-five days, that grace period under Section 15-36-100 applies to complaints only and not NOIs. (R. p. 11);
- (5) The fact that the parties participated in pre-litigation mediation as mandated by Section 15-79-125 was “of no consequence to the Defendants’ Motions to Dismiss.” The Defendants did not waive their right to challenge the defective NOI “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.” (R. p. 6);
- (6) Neither Section 15-79-125 nor *Ranucci* require that a defendant contest pre-suit defects prior to suit being filed, so that it was proper for Defendants to raise both the Appellant’s pre-suit and post-suit defects after the filing of Appellant’s complaint (R. pp. 11-12, n. 3);
- (7) Because the affidavit filed pursuant to Section 15-36-100 is part of the

complaint, it is a pleading for purposes of the court's evaluation, and an affidavit filed with the NOI does not satisfy the contemporaneous filing requirements of Section 15-36-100 (R. p. 12);

- (8) The exception to the expert affidavit requirement under Section 15-36-100(C)(1) does not apply because Appellant provided no explanation as to why no affidavit was attached to the Complaint (R. p. 13);
- (9) All of Appellant's causes of action arise under the umbrella of medical malpractice under Section 15-36-100 (R. p. 13, n. 6);
- (10) Notwithstanding Appellant's failure to comport with Section 15-36-100, the statute of limitations expired on September 4, 2011, without having been tolled by a properly filed NOI so that the Complaint filed in January 2012 was filed too late (R. p. 14).

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, SCRCP. Appellant requested that the circuit court specifically address each of the arguments Appellant made. (R. p. 91). On October 16, 2012 the circuit court entered an order summarily denying the Motion. (R. p. 15).

Appellant thereafter served and filed a notice of appeal.

ARGUMENTS

Review of this case should begin with a revisit to *Ranucci v. Crain*, 397 S.C. 168, 723 S.C. 242 (Ct. App. 2012), *cert. pending*. The trial court dismissed the case below on the basis that *Ranucci* mandated dismissal. Appellant asserts that *Ranucci* was wrongly decided and is founded upon a misreading of the applicable statutory scheme. The Court should hear this matter *en banc*¹ and overrule *Ranucci*.

The Court should then hold that the statutes at issue in this case do not mandate dismissal because (1) Appellant timely filed the Notice of Intent (NOI) and that event tolled the applicable statute of limitations under the express language of Section 15-79-125(A); (2) the “affidavit requirements” found in Section 15-36-100 that apply to Section 15-79-125(A) include the 45-day grace period for filing an expert affidavit, which was

¹ This Court stated recently 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”). This 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 overrules its own precedent. In any event, Appellant intends to suggest the matter be heard *en banc* as provided by Rule 219(b), SCACR, in accordance with the practice adopted by this Court in *Mr. T v. Ms. T* and *State v. Hoyle*.

done in this case; (3) because the affidavit in this case was filed within 45 days of the NOI and before the Complaint was filed, the affidavit was filed “within the period specified in” both Section 15-36-100(C)(1) and (D), and operates to “supplement the pleadings” for purposes of those sections.

I. THE TRIAL COURT ERRED IN DISMISSING THIS CASE UNDER THE SOUTH CAROLINA CODE AND THIS COURT’S DECISION IN *RANUCCI V. CRAIN*, 397 S.C. 168, 723 S.C. 242 (CT. APP. 2012)

A. THIS COURT SHOULD OVERRULE *RANUCCI V. CRAIN*

At the outset of this appeal the Court should revisit its decision in *Ranucci* and should overrule the case. *Ranucci* is based upon an incorrect reading of Sections 15-79-125 and 15-36-100. Under the plain language of both statutes, the sections should be read *in pari materia* and should not be divorced from each other as was done in *Ranucci*.

This appeal once again tests the interplay between the two “presuit notice” statutes – one which deals with a pre-filing procedure for medical malpractice suits, and a separate statute which deals with all “professional negligence” lawsuits. The statute governing professional negligence lawsuits requires that an expert witness’s affidavit be filed along with a plaintiff’s complaint, *see* S.C. Code Ann. § 15-36-100(B) (Supp. 2009), and the statute contains a “safe harbor” provision that allows a plaintiff to file a complaint without the accompanying affidavit *if* the plaintiff alleges that an affidavit of an expert could not be prepared *and* there is a good faith basis to believe that the statute of limitations on a claim stated in the complaint will expire within ten days. *See* § 15-36-100(C)(1).

The Court should overrule *Ranucci* and reverse the order below for two reasons. First, the plain language of the professional negligence statute indicates that the legislature intended its “safe harbor” provision to apply to medical malpractice lawsuits because that statute specifically references suits against “medical doctors.” See § 15-36-100 (G)(7). That interpretation also most-closely honors the Legislature’s likely intent behind the professional negligence statute and the medical malpractice statute. That intent was to involve a proposed expert in the earliest stages of these disputes and to create a pre-lawsuit period in medical malpractice actions allowing discovery and an avenue for parties to resolve their disputes outside of formal litigation. These statutes were passed together, reference one another, should be construed together, and should be construed in a manner that avoids an absurd result.

Second, if the *Ranucci* decision is correct that the “safe harbor” provision of the professional negligence statute does not apply to medical malpractice actions, the proper remedy would be for the trial court to allow a plaintiff who had not filed an expert’s affidavit a brief time period to provide such an affidavit. This is because the critical event to toll the statute of limitations is the filing of the NOI, and the medical malpractice statute says nothing about the penalty for the failure to file an expert’s affidavit at the same time a plaintiff files his notice. The Supreme Court of South Carolina’s decision in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) suggests that a plaintiff should generally be given an opportunity to cure defects in his pleadings if the statute of limitations has expired. This relief would be unnecessary in this case because the Plaintiff has already filed an expert’s affidavit.

B. THE PLAIN LANGUAGE OF THE PROFESSIONAL NEGLIGENCE STATUTE INDICATES THAT ITS “SAFE HARBOR” PROVISION APPLIES TO MEDICAL MALPRACTICE LAWSUITS

Ranucci depends on the premise that the professional negligence statute (§ 15-36-100) and the medical malpractice statute (§ 15-79-125) operate independently of each other and apply in two different contexts and at two different times. This argument is contrary to the plain language of the professional negligence statute, overlooks the more likely legislative intent behind the professional negligence statute and the medical malpractice statute, and leads to an absurd result.

1. BY ITS TERMS, THE PROFESSIONAL NEGLIGENCE STATUTE APPLIES TO MEDICAL MALPRACTICE ACTIONS

Among other functions, the professional negligence statute defines “expert witness” as the term is used in the statute, *see* § 15-36-100(A); sets forth the requirement that an affidavit of an expert accompany the filing of a complaint which states a claim for professional negligence, *see* § 15-36-100(B); and establishes the “safe harbor” provision for filing an affidavit late. *See* § 15-36-100(C). The statute additionally provides for possible dismissal in the event of a failure to file an expert’s affidavit, *see* § 15-36-100(C), and instructs that so long as an affidavit is filed within the “safe harbor” period, there is no basis for a statute of limitations defense. *See* § 15-36-100(D). The professional negligence statute instructs that it applies to “actions for damages alleging professional negligence,” *see* § 15-36-100(B), and says that the statute applies to a number of professions, including “medical doctors.” *See* § 15-36-100(G)(7).

There is more to the statutory framework. The provision of the professional

negligence statute requiring that a plaintiff file an expert's affidavit as part of his complaint directs a plaintiff with a potential claim for medical malpractice to file his affidavit according to the instructions contained in the medical malpractice statute. *See* § 15-36-100(B) (referencing § 15-79-125(A)). The medical malpractice statute contains the instructions that a lawsuit for medical malpractice is to be preceded by the plaintiff filing a NOI and that the expert's affidavit is to accompany that notice. *See* § 15-36-100(B) (referencing § 15-79-125(A)). The filing of the plaintiff's notice initiates a pre-litigation period of discovery and a mandatory attempt at resolving the potential medical malpractice dispute outside of formal litigation. *See* § 15-79-125(B) & (C). This is the distinction between these types of suits. The first step in a lawsuit against *most* professionals is to file an expert's affidavit along with a complaint. The first step in a lawsuit against a medical doctor is to file an affidavit with a NOI.

The professional negligence statute's inclusion of "medical doctor" indicates that the statute applies – in its entirety – to medical malpractice suits. *See* § 15-36-100(G)(7). The professional negligence statute establishes the general construct for *all* professional negligence lawsuits, and the medical malpractice statute supplements and completes this construct by adding the features of the NOI, a pre-lawsuit period of discovery, and a forum for alternative dispute resolution to medical malpractice cases. If this were not the case, the professional negligence statute's listing of "medical doctors" would be completely meaningless. The courts do not read statutory language in a manner that renders it without meaning or containing idle verbiage or superfluous language. *Lee v. Thermal Engineering Corp.*, 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). *See also Cain*

v. Nationwide Property and Cas. Ins. Co., 378 S.C. 25, 661 S.E.2d 349 (2008) (in construing a statute, appellate court must presume that the Legislature did not intend to perform a futile thing). This has been the rule in South Carolina for nearly 200 years. *State v. Helfrid*, 11 S.C.L. (2 Nott & McC.) 233 (S.C. Const. Ct. App. 1820) (“it is a fair conclusion that the Legislature did not intend it to be understood as mere idle verbiage”).

The reference to “medical doctors” in the professional negligence statute, however, is not meaningless. Instead, the professional negligence statute performs the heavy-lifting of both statutes in a number of ways: Defining “expert witness,” *see* § 15-36-100(A); providing the “safe harbor” provision when the statute of limitations will soon expire, *see* § 15-36-100(C); allowing a defendant to request dismissal if an expert’s affidavit is not filed (or not timely filed), *see* § 15-36-100(C)(1); describing how to deal with affidavits that are allegedly defective, *see* § 15-36-100 (E); and instructing that a dismissed lawsuit may not be initiated after the expiration of the statute of limitations “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 [was] the result of a mistake.” *See* § 15-36-100(F). The medical malpractice statute provides *none* of the context and procedure for this process. By divorcing these statutes from one another, the *Ranucci* decision not only reads the specific reference to “medical doctors” out of the professional negligence statute, it also cuts the “safe harbor” provision, the provision dealing with deficient affidavits, and the provision detailing a defendant’s ability to seek dismissal of a lawsuit completely off from use in medical malpractice suits.

The *Ranucci* Court’s analysis finds no refuge in the maxim that a specific statute

will prevail over a more general statute, *see, e.g., Wilder v. S.C. State Hwy. Dep't*, 228 S.C. 448, 454-55, 90 S.E.2d 635, 638 (1955), because *both* of these statutes deal *specifically* with medical malpractice lawsuits. These statutes should not be read in discord; they should be read in harmony. *See, e.g., Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) (noting “[i]t is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.”). These principles also have a long lineage in the law of this State. As the Constitutional Court of Appeals noted in 1799:

* * * That it is a rule of construction, applicable as well to statutes as to deeds, *ut res magis valeat quam pereat*. Such interpretation ought to be made of them as to preserve every part of them in force, and give effect to their several provisions, rather than such a construction as must necessarily destroy or make void any part, for the purpose of forcing into agreement and consistency the other parts. And that statutes made *in pari materia*, ought to be liberally and beneficially expounded, to advance the objects in view, and give consistent effect to every part of them, so as to reconcile every seeming contradiction, if possible, and give force to the whole; and not so as to do away, as null and void, every repugnant particle in one statute, for the purpose of giving effect to an arbitrary construction of another, which construction must necessarily set one at variance with the other.

Carpenter v. Kennedy, 2 S.C.L. (1 Brev.) 25 (S.C. Const. Ct. App. 1799). *See* Black’s Law Dictionary 1687 (9th ed. 2009) (“*ut res magis valeat quam pereat*” means “to give effect to the matter rather than having it fail”).

Accordingly, the Court should read all of the provisions of the professional negligence statute as applying to medical malpractice cases.

2. READING THE STATUTES AS OPERATING INDEPENDENTLY IS CONTRARY TO THEIR SHARED LIKELY INTENT AND LEADS TO AN ABSURD RESULT

The professional negligence statute and the medical malpractice statute were enacted as part of the same legislation, *see* Act No. 32, 2005 S.C. Acts 133, and these statutes create special rules for the initiation of professional negligence lawsuits generally and for medical malpractice lawsuits specifically. This legislation, through these two statutes, requires the filing of expert affidavits at the outset of any adversarial proceeding involving a claim for professional negligence (including actions against “medical doctors”), provides a procedure for challenging deficient affidavits in all professional negligence actions, and provides an avenue for possible dismissal in the event of non-compliance with the statutory scheme. In the case of a potential lawsuit for medical malpractice, the legislation provides *additionally* for a pre-litigation period of discovery and a mandatory mediation.

These provisions suggest that the shared intent of these statutes was to involve a proposed expert in the earliest stages of these disputes and to create a pre-lawsuit period in medical malpractice actions allowing discovery and establishing a forum for resolving disputes outside of formal litigation. Reading these statutes to operate in tandem most closely honors that legislative intent.

All rules of statutory construction “are subservient to the one that the legislative intent must prevail,” *Baggerly v. CSX Transportation, Inc.*, 370 S.C. 362, 373, 625 S.E.2d 97, 103 (2006), and the Court will reject an interpretation of a statute that would “lead to a result so plainly absurd that it could not possibly have been intended by the

Legislature.” *Id.* at 373, 625 S.E.2d at 103. If the constant in the equation is that a plaintiff with a lawsuit is facing the immediate expiration of the statute of limitations, it would be absurd to provide a plaintiff in a garden variety lawsuit for professional negligence with a forty-five day grace period to file his expert’s affidavit but to deny a medical malpractice plaintiff with the same grace period. It would also be absurd to overlook the professional negligence statute’s specific reference to “medical doctors.” *See* § 15-36-100(G)(7). With respect to allowing a plaintiff a grace period for procuring an expert’s affidavit, there is no reason the Legislature would arbitrarily distinguish a professional negligence suit directed at a medical doctor from all other professional negligence suits.

3. IT IS NOT LIKELY THAT THE LEGISLATURE INTENDED A FORTY-FIVE DAY GRACE PERIOD TO APPLY TO EVERY KIND OF PROFESSIONAL NEGLIGENCE SUIT BUT MEDICAL MALPRACTICE

The holding of *Ranucci* depends upon the view that the Legislature *must* have intended the affidavit requirement of the medical malpractice statute to be mandatory. It is not likely that this was the Legislature’s intention. It is reasonably clear that in adding the expert affidavit requirement to the Medical Malpractice Act, the Legislature intended for experts to be involved in the earliest stages of medical malpractice lawsuits. For the run-of-the-mill professional negligence action, those suits begin with a complaint.

This legislation created the new process of a *Notice of Intent to File Suit* (NOI) that would apply in medical malpractice cases. The easy conclusion is that in adding an expert affidavit requirement to the first stage of the medical malpractice statute, the

Legislature sought to clarify that the affidavit requirement of the professional negligence statute would be modified to come not with the plaintiff's complaint, but with the filing of his or her NOI. That the Legislature *must* have intended this contemporaneous filing requirement to be *mandatory* is a conclusion that, at least from the plaintiff's perspective, does not necessarily follow. If a plaintiff with a potential lawsuit walks into a lawyer's door two days before the statute of limitations expires, it is arbitrary and illogical for the Legislature to have intended that the plaintiff has only two days to secure an expert's affidavit if the suit is against a medical doctor but forty-five days if the suit is against any other kind of professional listed in the statute. This would be an absurd result.

The *Ranucci* decision parses these statutes too finely and makes the assumption that what could simply have been loose drafting represents a deliberate expression of Legislative purpose. When the professional negligence statute is read on its own, the statute sets forth the numerous requirements for an expert's affidavit; requires filing an affidavit as a part of a complaint; provides for dismissal (but only in the event that an affidavit is not filed "within the period specified in *this subsection*"), § 15-36-100(C)(1) (emphasis added); provides for possible dismissal in the event that an affidavit is defective (but only dismissal of "the plaintiff's *complaint*"), § 15-36-100(E) (emphasis added); and limits remedial relief that can be afforded by the trial court (but only "[i]f a plaintiff fails to file an affidavit as required by *this section*"). § 15-36-100(F) (emphasis added).

When the medical malpractice statute is read on its own, it incorporates only "the affidavit requirements established in [the professional negligence statute]," § 15-79-

125(A); requires the filing of an expert's affidavit along with the plaintiff's NOI; and sets forth *no* remedy for the plaintiff's failure to do so other than that "[t]he circuit court has jurisdiction to enforce the provisions of this section." *See* § 15-79-125(D).

On the other hand, when the medical malpractice statute and the professional negligence statute are construed together and in harmony, these statutes create an orderly procedural construct wherein expert affidavits are present in the earliest stages of the disputes, where a defendant can challenge an allegedly defective affidavit, where a defendant can move to dismiss adversarial proceedings in the event that a plaintiff does not comply with the expert affidavit requirement, and where a plaintiff in a potential medical malpractice lawsuit engages in a pre-litigation process of sharing information and attempting to resolve the dispute informally. It is absurd to read these statutes in a way that overlooks the professional negligence statute's express reference to lawsuits against "medical doctors," allows a "safe harbor" period in every class of professional negligence lawsuit save a lawsuit against a medical doctor, and provides a specific mechanism for enforcing these requirements in every class of professional negligence lawsuit except for a lawsuit against a medical doctor.

This Court should accordingly revisit its holding in *Ranucci* that the professional negligence statute and the medical malpractice statute operate independently of each other. The Court should overrule *Ranucci*, and hold that the plain language of the professional negligence statute indicates that all of the sections affecting the affidavit procedure, including its "safe harbor" provision, apply to medical malpractice lawsuits.

II. IF THE “SAFE HARBOR” PROVISION DOES NOT APPLY TO MEDICAL MALPRACTICE ACTIONS, THE PROPER REMEDY WOULD GENERALLY BE FOR THE COURT TO ALLOW A PLAINTIFF A BRIEF PERIOD OF TIME TO FILE THE EXPERT’S AFFIDAVIT BEFORE A PLAINTIFF’S COMPLAINT IS DISMISSED WITH PREJUDICE

If the Court adheres to *Ranucci* and concludes that the medical malpractice statute operates independently of the professional negligence statute, the Court should nevertheless reverse the grant of the motion to dismiss for two reasons. First, the medical malpractice statute has *no* provision allowing for dismissal of a NOI. Such authority is found in the professional negligence statute, but dismissal there is permissive. Second, the Supreme Court of South Carolina’s decision in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) suggests that a plaintiff should generally be given an opportunity to cure defects in his pleadings if the statute of limitations has expired.

A. THE MEDICAL MALPRACTICE STATUTE DOES NOT REQUIRE A THAT THE COURT DISMISS A NOTICE OF INTENT TO FILE SUIT IF IT WAS FILED WITHOUT AN EXPERT’S AFFIDAVIT; THE PROVISION ALLOWING FOR DISMISSAL UNDER RULE 12, SCRPC, IS FOUND IN THE PROFESSIONAL NEGLIGENCE STATUTE AND IS PERMISSIVE

Neither the medical malpractice statute which imposes the affidavit requirement (§ 15-79-125) nor any statute in Chapter 79 of Title 15 of the South Carolina Code – the Chapter titled “Medical Malpractice Actions” – describes a process for dismissing a NOI. *See* S.C. Code Ann. §§ 15-79-110, -125, and -130 (Supp. 2012). These statutes provide no specific remedy for this procedural error other than that “[t]he circuit court has jurisdiction to enforce the provisions of [the medical malpractice statute].” *See* § 15-79-125(D).

The Legislature enacted the entirety of this chapter in the same legislation which amended the professional negligence statute to its current form. *See* Act No. 32, 2005 S.C. Acts 133, 141-147. If *Ranucci* correctly held that the professional negligence statute and the medical malpractice statute operate independently of one another, it is anyone's guess why the Legislature would have chosen to spell out a specific remedy for the failure to abide by the affidavit requirements of one of these statutes and not the other.

Complicating matters is the fact that Respondents invoked Rule 12(b)(6) of the South Carolina Rules of Civil Procedure as the vehicle for their motion to dismiss. (Motion of CAPS dated 2/27/12; Memorandum of East Cooper dated 5/7/12). By its terms, Rule 12(b)(6) is a vehicle for attacking a *claim* presented in a party's *pleading* for failing to state facts sufficient to constitute a cause of action. Appellant's NOI is not a pleading, *see* Rule 7, SCRCP(a) (defining pleadings), and although it is required to be served in the same manner as a summons and a complaint, *see* § 15-79-125(A), the NOI is not a complaint and does not set forth a claim. The professional negligence statute instructs that Rule 12 is an available vehicle for moving to dismiss a plaintiff's complaint if the plaintiff fails to comply with *that* statute's affidavit requirement, *see* § 15-36-100(C)(1), (E), and (F); and the professional negligence statute discusses the appropriate procedure for challenging allegedly defective affidavits, *see* § 15-36-100(E); but defendants in medical negligence cases cannot use these provisions of this statute while avoiding the application of its "safe harbor" provision. If medical malpractice defendants are in the professional negligence statute for a penny, they should be in it for a pound.

The dismissal provision of the professional negligence statute is also expressly

permissive. The statute provides that if a plaintiff fails to comply with the affidavit requirement, the plaintiff's complaint is "*subject to* dismissal for failure to state a claim." See § 15-36-100(C)(1) (emphasis added). A common meaning of "subject," when used as an adjective, is "exposed to." THE NEW MERRIAM-WEBSTER DICTIONARY 714 (1989). This suggests that dismissal is not mandatory and that the court has the discretion to permit a plaintiff to cure the defect. Compare *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007) (North Carolina court noted that "subject to" dismissal means that dismissal is one possible sanction and does not mandate automatic dismissal); *Capps v. NW Sign Industries of North Carolina, Inc.*, 186 N.C. App. 616, 652 S.E.2d 372 (N.C. Ct. App. 2007) (noting that the phrase "an appeal is 'subject to' dismissal for rules violation" does not mean "shall" be dismissed; rather, "subject to" means that dismissal is one possible sanction and some sanction, other than dismissal, may be appropriate). The legislature's use of the phrase "subject to dismissal" demonstrates that dismissal is not mandatory but permissive within the court's discretion. Had the legislature intended to remove that discretion the legislature could have provided the complaint "must be dismissed" or some similar language.

Accordingly, under the circumstances of this case, if *Ranucci* is correct then there is no authority for the court to have dismissed this matter for the failure to file the affidavit at the same time as the NOI, and even so, the appropriate action would have been to permit Appellant the opportunity to cure any perceived defect.

B. WHERE THE STATUTE OF LIMITATIONS HAS EXPIRED, *SPENCE V. SPENCE* INSTRUCTS THAT A PLAINTIFF SHOULD GENERALLY BE GRANTED AN OPPORTUNITY TO AMEND HIS PLEADINGS BEFORE HIS LAWSUIT IS DISMISSED FOR A FAILURE TO STATE A CLAIM

The case of *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) involved a lawsuit arising out of a real estate transaction. Among the many defendants were two individuals who had purchased the property in question not from the plaintiff, but from the parties who had previously purchased the property from the plaintiff. *Id.* at 114-115, 628 S.E.2d at 873-74 (referring to these defendants collectively as “Owner 4”). The trial court dismissed the plaintiff’s lawsuit against these subsequent purchasers on the grounds that the complaint “[gave] rise to no reasonable interpretation other than that [the subsequent purchasers] were bona fide purchasers for value.” *Id.* at 116, 628 S.E.2d at 874. The subsequent purchasers had raised their affirmative defense of “bona fide purchaser for value” in the context of a motion to dismiss filed pursuant to Rule 12(b)(6), SCRPC.

The *Spence* court instructed that “[w]hen a complaint is dismissed under Rule 12(b)(6) ... [t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint.” *Id.* at 129, 628 S.E.2d at 881. This issue arose because the trial court in *Spence* had dismissed the subsequent purchasers from the lawsuit with prejudice and the plaintiff had asked for fifteen days to file an amended complaint instead of dismissing the complaint with prejudice. *Id.* at 128, 628 S.E.2d at 880. In *Spence*, the Supreme Court held that a when the statute of limitations has expired, an appellate court which affirms the dismissal of a claim should grant the plaintiff a reasonable period of

time in which to amend the complaint “when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief could be granted.” *Id.* at 130, 628 S.E.2d at 881-82.

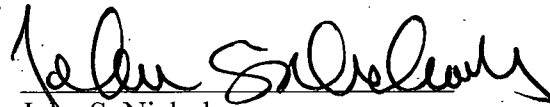
Because *Spence* deals with an appellate court’s discretion to allow a plaintiff an opportunity to amend the complaint, the case is an imperfect parallel. But it is an instructive parallel. The rule of *Spence* favors resolution of claims on the merits rather than on the grounds that a pleading was defective. That is the approach that the court should take in this case.

Appellant filed a complaint that, in fact, stated facts sufficient to constitute a cause of action. Appellant also filed an expert’s affidavit shortly after filing the NOI (and therefore “within the period specified in [the] section”) so there was *no* prejudice to the Respondents. The rule of *Spence* instructs that the Appellant’s failure to file the affidavit at the same time as her NOI did not require dismissal, and any defect has already been cured. The defense the respondents are asserting is purely technical, and what is more, it is of the “gotcha” variety. Their argument takes a legislative scheme with a purpose and design that is relatively reasonable and turns it into a complicated dance where any technical misstep results in the death of a plaintiff’s claim. This result cannot be what the legislature intended.

CONCLUSION

This 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.

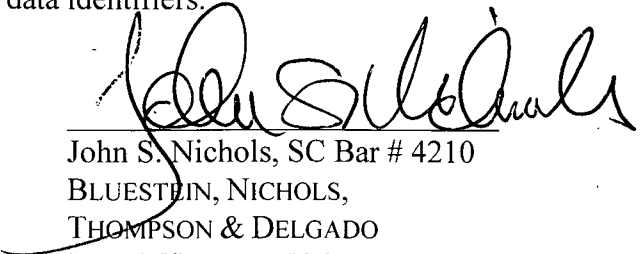
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the
Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13,
2007, Supreme Court Order regarding personal data identifiers.

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PROOF OF SERVICE

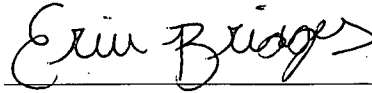
The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Final Brief of Appellant* and *Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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A handwritten signature in cursive script that reads "Erin Bridges". The signature is written in black ink and is positioned above a horizontal line.

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