THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-0558

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.

FINAL BRIEF OF RESPONDENT EAST COOPER COMMUNITY HOSPITAL, INC., D/B/A EAST COOPER REGIONAL MEDICAL CENTER

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II. Did the circuit court err in concluding that ECCH timely and properly raised the statute of limitations defense as part of ECCH's answer and motion to dismiss in the present proceeding instead of attempting to litigate the issue as part of pre-litigation mediation?

III. Did the circuit court err in alternatively dismissing Wilkinson's complaint for her failure to file an expert affidavit contemporaneously with her complaint as mandated by section 15-36-100(B) of the South Carolina Code?

STATEMENT OF THE CASE

In 2005, the General Assembly enacted section 15-79-125 of the South Carolina Code, setting forth the parameters for mandatory pre-litigation mediation in medical malpractice actions, and section 15-36-100 of the South Carolina Code, setting forth new requirements for initiating litigation alleging professional negligence generally. 2005 S.C. Act No. 32.

Section 15-79-125(A) expressly requires a party bringing medical malpractice claims to first initiate mandatory pre-litigation mediation by filing a Notice of Intent to File Suit ("NOI") contemporaneously with an expert affidavit addressing the purported negligent acts or omissions giving rise to the claims. Section 15-36-100(B) expressly requires a party bringing *any* professional negligence claims, including claims against medical doctors or healthcare facilities, to commence such litigation by filing a complaint contemporaneously with an expert affidavit addressing the purported negligent acts or omissions giving rise to the claims.

On September 1, 2011, Appellant Vicki L. Wilkinson ("Appellant" or "Wilkinson") filed an NOI against Tenet Healthcare Corp.; Tenet HealthSystem Medical, Inc.; East Cooper

Community Hospital, Inc., doing business as East Cooper Regional Medical Center ("ECCH"); Carolina Aesthetic Plastic Surgery Institute, PA ("Carolina Aesthetic"); and Thomas X. Hahm, M.D. ("Dr. Hahm"). **R.pp.16-32.** The NOI was designated as Case No. 2011-CP-10-6306. **R.p.16.** It is undisputed that Wilkinson did not file an expert affidavit with her NOI, instead stating in her NOI: "No expert affidavit is attached as the statute of limitations is construed to expire shortly. The Plaintiff will file an expert affidavit at a later date." **R.p.16.** In a similar vein, Wilkinson's Response to Interrogatories, attached as an exhibit to her NOI, provides: "Other than all treating medical personnel and any experts named by any other party, *the Plaintiff will decide at a later date after litigation has been commenced* what expert witnesses the Plaintiff will call at trial." **R.p.31, ¶6** (emphasis added). Wilkinson waited until October 5, 2011 to file an expert affidavit. **R.pp.108-113.** A subsequent mediation settlement conference on January 20, 2012 did not resolve Wilkinson's claims. **R.pp.39-40.**

On January 25, 2012, Wilkinson filed a complaint, which was designated as Case No. 2012-CP-10-0558, asserting various causes of action against the defendants named in Wilkinson's NOI arising from a breast implant removal and breast reconstruction procedure performed by Dr. Hahm at East Cooper Regional Medical Center on September 4, 2008. **R.pp.41-50.** Wilkinson failed to file an expert affidavit with her complaint, failed to allege or refer to her NOI in her complaint, and failed to explain why she did not file her expert affidavit with her complaint. **R.pp.41-50.** In fact, to this date, Wilkinson has *never* filed an expert affidavit in Case No. 2012-CP-10-0558.

On February 27, 2012, Carolina Aesthetics and Dr. Hahm answered Wilkinson's complaint and separately moved to dismiss her lawsuit based on the expiration of the statute of limitations. **R.pp.52-62.** On March 5, 2012, ECCH answered Wilkinson's complaint and moved

to dismiss her claims due to both her failure to file an expert affidavit with her complaint and the expiration of the statute of limitations. **R.pp.63-68.** Tenet Healthcare Corp. and Tenet HealthSystem Medical, Inc. were dismissed without prejudice through a consent order filed on April 18, 2012. **R.pp.1-2.**

On May 14, 2012, the circuit court heard the pending motions to dismiss by ECCH, Carolina Aesthetics, and Dr. Hahm. **R.p.97.** ECCH argued, orally and in written briefing, that Wilkinson's lawsuit should be dismissed because (1) the applicable statute of limitations expired on September 4, 2011; (2) Wilkinson's filing of an NOI on September 1, 2011 without an expert witness affidavit failed to toll the statute of limitations under section 15-79-125(A) of the South Carolina Code; and (3) Wilkinson failed to file an expert witness affidavit with her complaint as required by section 15-36-100(B) of the South Carolina Code. **R.pp.71-78; R.pp.98:22-99:25.**

In opposition to the pending motions to dismiss, Wilkinson argued in a written memorandum submitted at the hearing and in oral argument that (1) the issue of whether her NOI tolled the statute of limitations under section 15-79-125(A) may only be raised during pre-litigation mediation **(R.pp.87-88)**; (2) Wilkinson was not required to file an expert affidavit with her complaint as part of Case No. 2012-CP-10-0558 **(R.pp.88-89)**; and (3) an expert witness affidavit need not be filed with an NOI to toll the statute of limitations under section 15-79-125(A) **(R.p.89). R.pp.101:6-105:13.**

On October 2, 2012, the circuit court dismissed Wilkinson's complaint, concluding that "(1) the Plaintiff failed to file an expert affidavit contemporaneously with her Notice of Intent to File Suit as mandated by South Carolina Code Section 15-79-125 and thus the statute of limitations was not tolled; and (2) the Plaintiff failed to file an expert affidavit contemporaneously with her Complaint or within forty-five days thereafter in accordance with

South Carolina Code Section 15-36-100 within the statute of limitations applicable to her claim." **R.pp.6-7.** In its order, the circuit court also noted that Wilkinson did not dispute that the statute of limitations expired on September 4, 2011. **R.p.11.**

With respect to Wilkinson's argument that ECCH waived the statute of limitations defense by participating in pre-litigation mediation, the circuit court explained: "The Defendants did not waive their right to challenge the Plaintiff's defective Notice of Intent to File Suit because the plain language of the statute requires pre-suit mediation and provides no opportunity for Defendants to opt out of pre-suit mediation and contest a defect." **R.p.11.** Thus, the circuit court recognized: "[I]t was proper for the Defendants to raise both the Plaintiff's pre- and post-suit defects after the filing of Plaintiff's Complaint." **R.pp.11-12, note 3.**

Finally, the circuit court explained that "the exception to the requirement that the expert affidavit be filed contemporaneously with the complaint does not apply in this case." **R.p.13.** In this respect, the circuit court concluded that the forty-five day exception to the contemporaneous filing requirement in section 15-36-100(C)(1) of the South Carolina Code did not apply because "the Plaintiff did not provide any explanation whatsoever as to why the expert affidavit was not filed." **R.p.13.** The circuit court also noted that, in any event, Wilkinson failed to file the expert affidavit within forty-five days of filing her complaint. **R.p.13.**

On October 10, 2012, Wilkinson filed a motion to reconsider the circuit court's order dismissing her claims. **R.pp.91-92.** Wilkinson's motion to reconsider simply incorporated her written memorandum and oral arguments by reference. **R.pp.91-92.** On October 16, 2012, the circuit court denied Wilkinson's motion to reconsider. **R.p.15.** Wilkinson received written notice of the order denying her motion to reconsider on October 18, 2012, and served her notice of appeal on November 19, 2012. **R.pp.93-96.**

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 277, 648 S.E.2d 295, 298 (Ct. App. 2007). "The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law." Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

"In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." Baird v. Charleston Cnty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001); see also Byrd v. Irmo High Sch., 321 S.C. 426, 440, 468 S.E.2d 861, 869 (1996) ("The parties' disagreement centers not on the underlying facts of the case, but rather on the interpretation of the law . . . . Therefore, developing the record further would not aid in the resolution of the issues presented.").

This appeal exclusively involves questions of statutory interpretation, which are matters of law for the court. See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl.

Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) ("Statutory interpretation is a question of law."). No factual development is necessary to determine the issues in this appeal, and no party has requested further factual development.

ARGUMENT

I. The circuit court properly dismissed Wilkinson's complaint under the statute of limitations because Wilkinson filed her complaint after the statute of limitations expired and because Wilkinson failed to file an expert affidavit with her NOI as required to toll the statute of limitations under section 15-79-125(A) of the South Carolina Code.

A. The statute of limitations on Wilkinson's claims expired on September 4, 2011.

Section 15-3-545(A) of the South Carolina Code contains the statute of limitations governing medical malpractice actions, which is three years. Dunbar v. Carlson, 341 S.C. 261, 266, 533 S.E.2d 913, 915-16 (Ct. App. 2000). "The three-year statute of limitations begins to run when the facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of hers has been invaded or that some claim against a party might exist." Id. at 266, 533 S.E.2d at 916. "The date on which discovery should have been made is an objective, not subjective, question." Arant v. Kressler, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997). "Additionally, the fact that the injured party does not comprehend the full extent of his injuries is immaterial." Knox v. Greenville Hosp. Sys., 362 S.C. 566, 570-71, 608 S.E.2d 459, 462 (Ct. App. 2005).

Here, Wilkinson alleges that her complications began on September 4, 2008. **R.pp.43-44, ¶¶18-20.** The three-year statute of limitations therefore began at this time and consequently expired on September 4, 2011. As the circuit court noted, Wilkinson never contested this: "The Plaintiff herein alleges negligence committed during a medical procedure performed on September 4, 2008." **R.p.11.** "Therefore, her statute of limitations began on this date and expired on September 4, 2011." **R.p.11.** "The Plaintiff does not contest this." **R.p.11.**

Wilkinson also concedes this issue on appeal: "The NOI noted that claims arose out of injuries incurred on September 4, 2008." **App. Br., p.2.** Thus, this unchallenged ruling is the law of the case. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

B. The plain language of section 15-79-125(A) of the South Carolina Code requires an expert affidavit to be filed contemporaneously with an NOI.

Since it is undisputed that the statute of limitations expired on September 4, 2011, this Court is faced with the question of whether Wilkinson tolled the statute of limitations under section 15-79-125(A) of the South Carolina Code despite her failure to file an expert affidavit with her NOI on September 1, 2011. "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009).

"The primary purpose in construing a statute is to ascertain legislative intent." Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). "A statute should not be construed by concentrating on an isolated phrase." S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "Finally, the Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something." Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008).

Section 15-79-125(A) of the South Carolina Code provides, in pertinent part: "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." (emphasis added).

"Read plainly and strictly, section 15–79–125(A) simply requires the contemporaneous filing of both the notice and the affidavit." Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 539, 725 S.E.2d 693, 697 (2012). It is clear from the use of the word "shall" in section 15-79-125(A) that the contemporaneous filing requirement is mandatory, not optional as Wilkinson appears to contend. See Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement.").

Moreover, when the language of a statute is clear and explicit, "the courts cannot rewrite the statute and inject matters into the statute which are not in the legislature's language." Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970); see also City of Columbia v. Am. Civil Liberties Union of S. Carolina, Inc., 323 S.C. 384, 388, 475 S.E.2d 747, 749 (1996) ("This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.").

When the provisions of section 15-79-125(A) are read as a whole, it is clear that section 15-79-125(A) expressly tolls the statute of limitations *only* when a plaintiff files an NOI *with* the required expert affidavit. Wilkinson disagrees, claiming that the simple filing of an NOI, without regard to substance, tolls the statute of limitations. In support of this argument, Wilkinson isolates the following provision in section 15-79-125(A) from the remainder of that section: "Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations."

Wilkinson's disjointed interpretation of section 15-79-125(A) places form over substance, reads one sentence of section 15-79-125(A) in isolation, and ignores the remaining

provisions in the same section of the same statute. Such an interpretation effectively and improperly renders much of the remaining provisions in section 15-79-125(A), including the contemporaneous filing requirement for an expert affidavit, meaningless or absurd. See Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.").[1]

In short, nothing in section 15-79-125(A) purports to divorce the NOI from the expert affidavit required to initiate mandatory pre-litigation mediation in a medical malpractice action. To do so would improperly turn a mandatory requirement into an option or suggestion.[2] For this reason alone, this Court should affirm the circuit court's order dismissing Wilkinson's claims based on the expiration of the statute of limitations.

C. The forty-five day "safe harbor" to the contemporaneous filing requirement for expert affidavits filed with a complaint under section 15-36-100 of the South Carolina Code

[1] For instance, Wilkinson's interpretation of section 15-79-125(A) would omit any requirement that the expert affidavit be *served* on the named defendants, since nothing in the remaining provisions of section 15-79-125 separately addresses the service of an expert affidavit, and the fourth sentence of section 15-79-125(A) requires that the "Notice of Intent to File Suit must be served upon all named defendants . . . ." No other provision of section 15-79-125 makes reference to the filing or service of the expert affidavit, instead referring to the filing and service of the NOI. Thus, it is clear from a reading of section 15-79-125 in its entirety that, after mandating that an expert affidavit be filed contemporaneously with the NOI, the remaining provisions therein treat the expert affidavit as part of the NOI. Otherwise, a plaintiff would be required to file an NOI contemporaneously with an expert affidavit, but then serve only the NOI. It would be absurd to require that a plaintiff file an expert affidavit, but not serve it. See Enos v. Doe, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

[2] The express and mandatory nature of the contemporaneous affidavit requirement in section 15-79-125(A) distinguishes the present case from Grier, 397 S.C. at 540, 725 S.E.2d at 698, in which the Supreme Court of South Carolina declined to judicially impose a requirement that the affidavit also address causation: "We do not doubt that requiring the affidavit to contain an opinion regarding causation furthers these important goals. Nevertheless, the statute is unambiguous and we are confined to what the statute says, not what it ought to say, for we have no right to modify a statute's application 'under the guise of judicial interpretation.'"

does not apply.

Wilkinson further contends that a forty-five day "safe harbor" provision for expert affidavits in section 15-36-100(C)(1) of the South Carolina Code should apply equally to expert affidavits filed under section 15-79-125(A). To the contrary, nothing in either section 15-79-125 or section 15-36-100 suggests that any "safe harbor" applies to the contemporaneous filing requirement in section 15-79-125(A).

"Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." Greene v. S.C. Election Comm'n, 314 S.C. 449, 452, 445 S.E.2d 451, 453 (1994). "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010).[3]

As previously discussed, section 15-79-125(A), applicable to medical malpractice claims specifically, requires an expert affidavit and *NOI* to be filed contemporaneously. On the other hand, section 15-36-100(B) of the South Carolina Code, applicable to all professional negligence claims, requires an expert affidavit and a *complaint* to be filed contemporaneously.

By its express terms, the so-called "safe harbor" provision in section 15-36-100(C)(1) provides relief only from the contemporaneous filing requirement in section 15-36-100(B) and only under certain enumerated circumstances: "The contemporaneous filing requirement of

[3] Wilkinson suggests that the distinction between general and specific statutes is inapplicable when the statutes are enacted as part of the same legislative scheme. This is simply not so. See, e.g., Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465 (2010) (applying specific provisions of section 5-7-200 of the South Carolina Code instead of general provisions in section 5-15-50, while noting in a footnote that the two statutes were originally enacted together).

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." (emphasis added) "In such a case, the plaintiff has forty-five days *after the filing of the complaint* to supplement the pleadings with the affidavit." § 15-36-100(C)(1) (emphasis added).

Section 15-36-100(C)(1) says nothing about the contemporaneous filing requirement in section 15-79-125(A) and, in the absence of such express language, these differently-worded statutes should be interpreted differently. See 73 Am. Jur. 2d Statutes § 122 ("[T]he use of differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended.").

In addition, while Wilkinson points to a clause in section 15-79-125(A) stating that the expert affidavit filed with the NOI is "subject to the affidavit requirements established in Section 15-36-100," the forty-five day safe harbor is, simply put, not a *requirement* for expert affidavits. The generally accepted definition of the word "requirement" is something which is required, necessary, or essential to the existence or occurrence of something else. Nothing in section 15-36-100(C)(1) is required, necessary, or essential to the existence or occurrence of the expert affidavit in section 15-79-125(A). On the other hand, the substantive mandates for the preparation and content of expert affidavits in several remaining provisions of section 15-36-100, especially section 15-36-100(A), are required, necessary, or essential to the existence or occurrence of the affidavit.

D. This Court's decision in Ranucci likewise supports the circuit court's conclusion that Wilkinson's NOI was ineffective to toll the statute of limitations.

This Court's decision in Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012),

squarely concludes that the filing of an NOI without an expert affidavit has no legal effect. In other words, a plaintiff, such as Wilkinson or Ranucci, who neglects to file an expert affidavit with the plaintiff's NOI fails to comply with section 15-79-125(A) and concomitantly fails to toll the statute of limitations in section 15-3-545(A).

In Ranucci, 397 S.C. at 169, 723 S.E.2d at 243, the plaintiff (Ranucci) suffered severe pain after a needle biopsy by the defendant on June 7, 2006. On June 8, 2009, Ranucci filed her NOI. Id. Like Wilkinson in the present case, Ranucci did not include an expert affidavit with her NOI, instead simply stating in her NOI that "time constraints" prevented her from doing so. Id. at 170, 723 S.E.2d at 243.

Also as in this case, Ranucci attempted to file an expert affidavit after filing her NOI and after the statute of limitations expired. Id. Nevertheless, the circuit court granted defendant's motion to dismiss Ranucci's NOI for her failure to contemporaneously file an expert affidavit. Id. Ranucci appealed, raising many of the same arguments as Wilkinson, and this Court affirmed. Id.

On appeal, the Court of Appeals explained: "Section 15–79–125 enables potential litigants to identify likely causes of action, gather information, and pursue a resolution of their medical malpractice disputes through mediation, while shielding the potential plaintiff from the fear of losing his or her right to file suit." Id. at 177-78, 723 S.E.2d at 247. "An affidavit filed pursuant to this section serves as notice to potential defendants of the claim and qualifies potential plaintiffs and defendants to engage in prelitigation discovery." Id. at 178, 723 S.E.2d at 247. "Such an affidavit is a threshold requirement a medical malpractice claimant must satisfy in order to seek disclosure of sensitive and often highly technical information." Id.

The Court of Appeals continued: "The record clearly reflects Ranucci filed her Affidavit

forty-five days after she filed her Notice." Id. "By filing her Affidavit after her Notice, Ranucci failed to comply with the contemporaneous filing requirement of section 15–79–125." Id. "Accordingly, the circuit court did not abuse its discretion in dismissing her Notice." Id. at 178-79, 723 S.E.2d at 247.

In a footnote, this Court explained that the circuit court's dismissal of the NOI "is equivalent to striking it from the court's records." Id. at 179 note 6, 723 S.E.2d at 247 note 6. Moreover, in his concurring opinion, Chief Judge Few agreed "with the majority's interpretation of the statutes at issue in this appeal," explaining that this interpretation "requires the conclusion that the statute of limitations has expired on any civil action Ranucci might have brought for malpractice." Id. at 179, 723 S.E.2d at 248.

The same result should apply here. As the circuit court in the present lawsuit recognized, Wilkinson's NOI should be disregarded because Wilkinson failed to contemporaneously file her expert affidavit with the NOI. As a result, as Chief Judge Few's concurring opinion in Ranucci emphasizes, the statute of limitations here expired on September 4, 2011, barring the lawsuit Wilkinson filed on January 25, 2012. See also Berry v. Padden, 84 So. 3d 1145, 1146-47 (Fla. Dist. Ct. App. 2012) ("The law is well-established that a properly verified, corroborating medical expert opinion must be provided by the plaintiff to the defendant prior to expiration of the statute of limitations.").

This Court's decision in Ranucci also expressly disposes of Wilkinson's argument that the "safe harbor" in section 15-36-100(C)(1) applies to affidavits filed under section 15-79-125(A): "The plain language of section 15–36–100, which ties the filing of affidavits under that statute to a complaint or other initial pleading, prevents the remaining provisions from applying to affidavits filed pursuant to section 15–79–125." Id. at 177, 723 S.E.2d at 246. "Provisions

concerning affidavits filed pursuant to subsection B or the contemporaneous filing provision of subsection B do not apply to affidavits filed under the authority of section 15–79–125." Id. "Similarly, provisions requiring parties to file additional documents contemporaneously with an 'initial responsive pleading' are meaningless in the context of section 15–79–125, in which no initial pleading yet exists." Id. at 177, 723 S.E.2d at 246-47.

"Section 15–79–125 is silent as to any procedures for challenging an affidavit filed with a Notice of Intent to File Suit." Id. at 177, 723 S.E.2d at 247. "Rather than signifying adoption of the provisions in section 15–36–100, we find this silence denotes those provisions do not apply to affidavits filed in compliance with section 15–79–125." Id. "[Ranucci's] argument that the affidavit requirements of section 15–36–100 permitted her to file the Affidavit late without violating section 15–79–125 is unpersuasive." Id. at 178, 723 S.E.2d at 247. "The affidavit requirements invoked by section 15–79–125 govern only authorship and content." Id. "They do *not* permit a potential plaintiff to file her expert witness's affidavit after she files her Notice of Intent to File Suit." Id. (emphasis added).

Pursuant to Ranucci, this Court should affirm the circuit court's dismissal of Wilkinson's claims due to the expiration of the statute of limitations.

E. This Court should not revisit or overrule Ranucci, a decision which is supported not only by the rules of statutory interpretation, but also by the purpose underlying section 15-79-125.

This Court should firmly reject Wilkinson's invitation to overrule Ranucci, whether this Court sits as a panel or *en banc*. With respect to panel review, this Court's established precedent emphasizes that one panel may not overrule another. See Mr. T v. Ms. T, 378 S.C. 127, 131, 662 S.E.2d 413, 415 (Ct. App. 2008) ("[T]his court, sitting as a three judge panel, lacks the authority to rule against prior published precedent without en banc review."). This precedent should apply

as a matter of prudence, regardless of any jurisdictional issues. See, e.g., McMellon v. United States, 387 F.3d 329, 334 (4th Cir. 2004) ("While we recognize that a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel, we believe that, as a matter of prudence, a three-judge panel of this court should not exercise that power.").

With respect to *en banc* review under Rule 219, SCACR, there is no other opinion from this Court addressing, much less conflicting with, Ranucci that would necessitate consideration by the full court, and the pending petition for certiorari review to the Supreme Court in Ranucci will permit that Court to determine whether any exceptional issues warrant a second look.

Furthermore, it is clear that the Ranucci opinion properly harmonizes the mandatory *pre-litigation* mediation requirements for medical malpractice claims under section 15-79-125 with the independent *litigation* requirements for professional negligence actions under section 15-36-100. On the other hand, as set forth *supra*, Wilkinson's interpretation of these statutes reads certain provisions in isolation and renders other provisions without practical effect.

Moreover, the requirement that a plaintiff file an expert witness affidavit contemporaneously with her NOI is not, as Wilkinson suggests, a mere statutory technicality. Instead, as Wilkinson herself emphasizes: "These provisions suggest that the shared intent of these statutes was to involve a proposed expert *in the earliest stages of these disputes* . . . ." **App. Br. p.14** (emphasis added).

In the context of a medical malpractice case, the contemporaneous filing requirement for expert affidavits in section 15-79-125(A) helps not only protect medical professionals against frivolous claims, but also ensures, from the get-go, the effectiveness of and full participation in the pre-litigation mediation process, with a look to avoiding litigation entirely. See Ranucci v.

Crain, 397 S.C. at 177-78, 723 S.E.2d at 247 ("Section 15–79–125 enables potential litigants to identify likely causes of action, gather information, and pursue a resolution of their medical malpractice disputes through mediation, while shielding the potential plaintiff from the fear of losing his or her right to file suit."); Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 63, 744 S.E.2d 547, 550 (2013) ("It is clear that the Legislature enacted section 15–79–125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims."); Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 539, 725 S.E.2d 693, 697-98 (2012) ("It correctly notes that one of the major goals behind these requirements is to curtail frivolous litigation by ensuring plaintiffs only present colorable claims.").

In fact, the expert affidavit is *the driving force behind* the pre-litigation mediation process articulated in section 15-79-125. It ensures that both parties will "come to the table" understanding not only the plaintiff's allegations, but also that these allegations have some arguably legitimate basis. This Court observed in Ranucci that filing an NOI without an expert affidavit would have no *legal* effect. Similarly, if the parties were required to participate in pre-litigation mediation based on an NOI without an expert affidavit, the NOI would also have no *practical* effect.

As a result, the contemporaneous filing requirement for expert affidavits in section 15-79-125(A) sits in stark contrast to the separate requirement in section 15-79-125(C) that the parties mediate within 120 days of service of the NOI (or obtain an extension), which the Supreme Court of South Carolina characterized as a "non-jurisdictional procedural defect" in Ross, 404 S.C. at 64, 744 S.E.2d at 551. Unlike the 120-day mediation provision, the expert

affidavit impacts the substance of the mediation, not just its timing.[4]

Finally, Wilkinson failed to preserve her argument against the Ranucci decision for appeal. "An issue may not be raised for the first time on appeal, but must have been raised to the trial judge and ruled on to be preserved for appellate review." Spahn v. Town of Port Royal, 326 S.C. 632, 636, 486 S.E.2d 507, 509 (Ct. App. 1997) aff'd as modified, 330 S.C. 168, 499 S.E.2d 205 (1998). "Issues not raised in the trial court will not be considered on appeal." Id. In Spahn, the Court of Appeals held that the appellant failed to preserve his argument that the common law doctrine of assumption of the risk "should no longer act as a complete defense in a negligence case" because the appellant failed to raise the issue in the trial court. Id.

As in Spahn, Wilkinson never raised the issue of Ranucci's viability to the circuit court, only its applicability to the specific facts of the present case. See id. ("At the trial court level, Spahn argued only that assumption of risk was not applicable to the facts of this case. Spahn did not argue that with the adoption of comparative negligence, the doctrine of assumption of risk no longer remains a complete defense.").

While Wilkinson failed to preserve this issue for appeal, it is also clear, as previously

[4] Other courts addressing the import of expert affidavits in similar contexts likewise conclude that the filing of an expert affidavit as a precondition to or requirement of a lawsuit alleging medical malpractice is substantive, not procedural or formalistic. Cf. Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 578 (Minn. 1999) (characterizing expert affidavit requirement as substantive); Bardo v. Liss, 614 S.E.2d 101, 104 (Ga. 2005) ("Where a party fails to file the required affidavit with the original complaint, the provisions of OCGA § 9-11-9.1 do not permit the party to add the affidavit by amendment."); Holmes v. Michigan Capital Med. Ctr., 620 N.W.2d 319, 322 (Mich. Ct. App 2000) ("Plaintiffs' claim was time-barred because plaintiffs' April 20, 1998, attempt to remedy their failure to file the affidavit of merit occurred beyond the limitation period."); Thigpen v. Ngo, 558 S.E.2d 162, 166 (N.C. 2002) ("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."); Lookshin v. Feldman, 127 S.W.3d 100, 105 (Tex. App. 2003) ("We hold that appellants' failure to file an expert report within 180 days of filing their lawsuit left the trial court with no discretion but to dismiss their suit with prejudice.").

discussed, that Ranucci harmonizes section 15-79-125 and section 15-36-100 by giving practical effect to each provision therein utilizing well-recognized concepts of statutory interpretation; Ranucci should not be revisited or overruled.

II. The circuit court correctly concluded that ECCH timely and properly raised the statute of limitations defense as part of ECCH's answer and motion to dismiss in the present proceeding instead of attempting to litigate the issue as part of pre-litigation mediation.

Wilkinson also argues that ECCH waived the statute of limitations defense by participating in mandatory pre-litigation mediation under section 15-79-125 of the South Carolina Code.

"A waiver is a voluntary and intentional abandonment or relinquishment of a known right." King v. James, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010). "In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned." Id. "Waiver may arise by expression or by implication." Lawrimore v. Am. Health & Life Ins. Co., 276 S.C. 112, 118, 276 S.E.2d 296, 299 (1981). "Where an implied waiver is claimed, caution must be exercised." NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995).

A party does not waive a statute of limitations defense by engaging in discovery, including the discovery of medical records. See Maxwell v. Genez, 350 S.C. 563, 571, 567 S.E.2d 496, 500-01 (Ct. App. 2002) rev'd on other grounds, 356 S.C. 617, 591 S.E.2d 26 (2003) ("The correspondence of the parties, however, involved routine discovery issues relating to medical records. We find no evidence that either Genez or Doe indicated an intention to waive their rights to assert the statute of limitations nor do we find any evidence the defendants induced the Maxwells not to file a timely motion to restore."). Moreover, a party does not waive a statute of limitations defense by waiting to file a motion to dismiss until after the limitations period

expires. City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 234, 599 S.E.2d 462, 466 (Ct. App. 2004) (appellant did not waive statute of limitations by waiting until after the statute of limitations expired to file a motion to dismiss).

Here, no express waiver is asserted. Wilkinson appears to rely on the doctrine of implied waiver. Significantly, the statute of limitations in this case expired *before* Wilkinson even served the NOI on ECCH. Consequently, Wilkinson cannot argue that Wilkinson was somehow misled by ECCH's participation in mandatory pre-litigation mediation. This differentiates the present case from Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 63-63, 744 S.E.2d 547, 551 (2013), which suggests that defense counsel's express agreement to extend the 120 day mediation deadline under section 15-79-125(C) might trigger principles of waiver and estoppel to assert plaintiff's non-compliance with that deadline, and from Mende v. Conway Hosp., Inc., 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991), which recognized that defense counsel's express consent to a voluntary order of dismissal without prejudice after the statute of limitations had run waived defendant's right to assert the statute of limitations as a defense when the plaintiff immediately re-filed her complaint.

As the circuit court additionally recognized, there is no express procedure for challenging the sufficiency of an NOI or expert affidavit under section 15-79-125. **R.p.11.** There are no pleadings required in pre-litigation mediation, and nothing in section 15-79-125 requires a party to assert an affirmative defense or move to dismiss an NOI prior to litigation to avoid the risk of waiving such defense or motion in any ensuing litigation. See King, 388 S.C. at 30, 694 S.E.2d at 42 ("In order for a party to waive a right, the party must have known of the right and known that the right was being abandoned.").[5]

[5] This Court's decision in Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012) is the

A judicially-imposed requirement that a defendant such as ECCH raise any available affirmative defenses or objections to an NOI as part of pre-litigation mediation would disserve one of the primary purposes of section 15-79-125—the resolution of medical malpractice actions *without* litigation. Such a rule would not only encourage defendants in medical malpractice cases to litigate issues relating to an NOI instead of engaging in mediation, it would outright force them to. In the absence of any legislative intent to the contrary, the far better approach is to permit a medical malpractice defendant to raise such issues in the normal course of litigation *if* mediation is unsuccessful and *if* litigation ensues. See, e.g., Roberts v. Mecosta Cnty. Gen. Hosp., 642 N.W.2d 663, 669 (Mich. 2002) ("[N]owhere does the statute provide that a defendant must object to any deficiencies in a notice of intent before the complaint is filed. In the absence of such a statutory requirement, we do not have the authority to create and impose an extrastatutory affirmative duty on the defendant. The role of the judiciary is not to engage in legislation. The Legislature did not require that an objection to a notice of intent must be raised before a certain stage of the litigation.").

Finally, section 15-79-125(C) provides, in relevant part: "Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process." See Ross, 404 S.C. at 63, 744 S.E.2d at 550 ("Significantly, the General Assembly expressly

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first reported decision in South Carolina recognizing a situation in which the defendant moved to dismiss a plaintiff's NOI as part of pre-litigation mediation instead of waiting to assert the defense of the statute of limitations in the ensuing litigation. Ranucci was decided on January 25, 2012, after the mandatory pre-litigation mediation in this case had terminated on January 20, 2012. **R.pp.39-40.** In addition, this Court in Ranucci expressly recognized that "no initial pleading yet exists" during pre-litigation mediation and that "[s]ection 15–79–125 is silent as to any procedures for challenging an affidavit filed with a Notice of Intent to File Suit." Id. at 177, 723 S.E.2d at 247.

identified the SCADRR as the governing procedural rules, which favor pretrial dispute resolution in lieu of litigation."); Rule 1, SCADRR ("These rules shall be construed to secure the just, speedy, inexpensive, and collaborative resolution in every action to which they apply."); Rule 8(a)(2), SCADRR (protecting even admissions made in the course of mediation from disclosure in subsequent litigation). It would defeat these purposes to punish parties for participating in mandatory pre-litigation mediation without first litigating all available defenses to the lawsuit.

Based on the foregoing, the circuit court correctly concluded that ECCH timely and properly raised the defense of the statute of limitations in the present lawsuit.

III. The circuit court correctly dismissed Wilkinson's complaint for her failure to file an expert affidavit contemporaneously with her complaint as mandated by section 15-36-100(B) of the South Carolina Code.

As an alternative ground for dismissing Wilkinson's complaint, the circuit court held that Wilkinson failed to comply with the requirement in section 15-36-100(B) of the South Carolina Code that "in an action for damages alleging professional negligence . . . 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 filing of the affidavit."

It is undisputed that Wilkinson failed to file an expert witness affidavit with her complaint or at any time thereafter. While Wilkinson contends that she should not have been required to file an expert witness affidavit with her complaint because she previously filed an affidavit as part of mandatory pre-litigation mediation under section 15-79-125(A), this Court has recognized that "[n]othing in either statute suggests the legislature intended an affidavit filed pursuant to section 15–79–125 to affect a plaintiff's obligation to file a similar affidavit later 'as part of the complaint' pursuant to section 15–36–100." Ranucci v. Crain, 397 S.C. 168, 177, 723

S.E.2d 242, 247 (Ct. App. 2012). "Rather, the legislature clearly intended the two statutes to operate independently of one another and in distinct time frames, with the specific exception that they share the criteria for preparing affidavits of expert witnesses." Id.

This reading is supported by language in section 15-36-100(B) requiring that an expert affidavit include "the factual basis for each claim based on the available evidence *at the time of filing of the affidavit.*" (emphasis added). Since section 15-79-125 permits the parties to subpoena documents and depose witnesses as part of pre-litigation mediation, the factual basis and available evidence relating to a plaintiff's claims may change between the time the expert affidavit in section 15-79-125 is filed and the time the expert affidavit in section 15-36-100(B) is filed. As a result, the expert witness may have amended his opinions, solidified his opinions, or changed his mind entirely.

This Court recognized the differing purposes behind each affidavit in Ranucci, 397 S.C. at 177, 723 S.E.2d at 247: "This intent is further reflected in the effects of each statute's provisions on the process of resolving medical malpractice claims and on the parties' rights." "Section 15–79–125 enables potential litigants to identify likely causes of action, gather information, and pursue a resolution of their medical malpractice disputes through mediation, while shielding the potential plaintiff from the fear of losing his or her right to file suit." Id. at 177-78, 723 S.E.2d at 247. "An affidavit filed pursuant to this section serves as notice to potential defendants of the claim and qualifies potential plaintiffs and defendants to engage in prelitigation discovery." Id. at 178, 723 S.E.2d at 247. "By contrast, section 15–36–100 requires the plaintiff to craft a viable complaint supported by the sworn testimony of a qualified expert witness." Id. "Because an affidavit filed pursuant to this section is 'part of the complaint,' it is a pleading for the purpose of the circuit court's evaluation of motions and the merits of the

plaintiff's case." Id.

Notwithstanding the foregoing, Wilkinson contends she may circumvent the contemporaneous filing requirement in section 15-36-100(B) by complying with the forty-five day safe harbor provision in section 15-36-100(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." Id.

This argument fails for a number of alternative reasons. First, Wilkinson did not file an expert affidavit within forty-five days of her complaint. Second, the statute of limitations expired on September 4, 2011, so there is no basis on which Wilkinson could argue that the statute of limitations would expire within ten days of filing the suit.[6] Third, Wilkinson never alleged any time constraints prohibited her from attaching an affidavit to her complaint. Instead, Wilkinson averred that she did not need to file an affidavit with her complaint.

Finally, contrary to Wilkinson's assertions on appeal, the circuit court properly dismissed Wilkinson's complaint *with* prejudice under section 15-36-100(F). This section provides, in pertinent part: "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

[6] Wilkinson would not have satisfied the ten day requirement triggering the forty-five day safe harbor under section 15-36-100(C)(1) even if the statute of limitations had been tolled under section 15-79-125(A) because section 15-79-125(E)(2) clarifies that Wilkinson was required to file suit within sixty days after the termination of mediation *or* prior to the expiration of the statute of limitations, whichever is later. If the NOI filed on September 1, 2011 tolled the statute of limitations, the statute of limitations would therefore have expired on January 23, 2012—three days after the mediation terminated. Wilkinson filed suit on January 25, 2012.

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.*" (emphasis added). Wilkinson never claimed she failed to file an expert affidavit due to mistake, and she also never averred she possessed an expert affidavit complying with section 15-36-100(B) at the time she filed suit.[7] As previously mentioned, she simply averred that she should not have to file an affidavit.

Nor does Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006) afford Wilkinson any relief. Initially, as previously discussed, section 15-36-100(F) mandates dismissal with prejudice except under the circumstances enumerated therein. Spence therefore does not apply. Moreover, unlike the plaintiff in Spence, Wilkinson never moved or requested to amend her complaint to attach an expert affidavit or otherwise. See id. at 128, 628 S.E.2d at 880 ("Owner 2 in a motion made pursuant to Rule 59(e), SCRCP, asked the circuit court to grant her at least fifteen days to file and serve an amended complaint instead of dismissing the complaint with prejudice."). Instead, Wilkinson filed the present appeal. See id. at 130, 628 S.E.2d at 881 (recognizing the plaintiff waives her right to amend her complaint when she appeals instead of seeking to file and serve an amended complaint).

On the other hand, like the plaintiff in Spence, whom the Supreme Court held would *not* be permitted to amend her complaint, Wilkinson fails to present any additional factual allegations or a different theory of recovery in support of her claims. See id. at 130, 628 S.E.2d

[7] Specifically, Wilkinson never averred that she had an expert affidavit to file with her complaint that included "the factual basis for each claim based on the available evidence *at the time of the filing of the affidavit.*" The expert affidavit filed on October 5, 2011 would not comply with this requirement, as it would have been based only on the available evidence several months prior to January 25, 2012.

at 881-82 (appellate court may permit appellant to re-file complaint notwithstanding expiration of statute of limitations after dismissal by circuit court when the plaintiff presents additional factual allegations or a different theory of recovery). Wilkinson simply wants a "do-over," which is not permitted.

Based on the foregoing, the circuit court correctly dismissed Wilkinson's complaint for her failure to contemporaneously file an expert affidavit under section 15-36-100(B).

Conclusion

Under either the plain language of the statutes in question or this Court's decision in Ranucci, the circuit court's dismissal of Wilkinson's claims on the basis of the statute of limitations and her failure to file an expert affidavit contemporaneously with her complaint should be AFFIRMED.

Respectfully Submitted,

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November 13, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-0558

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 COUNSEL

The undersigned certifies that the Final Brief of Respondent East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center, enclosed herewith, complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondent East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center** on Appellant Vicki L. Wilkinson; Respondent Carolina Aesthetic Plastic Surgery Institute, PA; and Respondent Thomas X. Hahm, M.D., by depositing a copy of them in the United States Mail, postage prepaid, on November 13, 2013, addressed to their respective attorneys of record, as follows:

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