THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
DEC 23 2013
S.C. Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Opinion No. 4935 (S.C. Ct. App. filed Jan. 25, 2012)

Shannon Ranucci, ... Petitioner,

v.

Corey K. Crain, M.D., ... Respondent.

REPLY BRIEF

Eric C. Davis
ERIC C. DAVIS, PA
528 12th Street
West Columbia, SC 29169
(803) 939-1340
(803) 939-1339 (facsimile)

Daryl G. Hawkins
LAW OFFICE OF
DARYL G. HAWKINS
1331 Elmwood Ave., Ste 305
Columbia, SC 29201
(803) 733-3531
(803) 744-1949 (facsimile)

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Opinion No. 4935 (S.C. Ct. App. filed Jan. 25, 2012)

Shannon Ranucci, ... Petitioner,

v.

Corey K. Crain, M.D., ... Respondent.

REPLY BRIEF

Eric C. Davis
ERIC C. DAVIS, PA
528 12th Street
West Columbia, SC 29169
(803) 939-1340
(803) 939-1339 (facsimile)

Daryl G. Hawkins
LAW OFFICE OF
DARYL G. HAWKINS
1331 Elmwood Ave., Ste 305
Columbia, SC 29201
(803) 733-3531
(803) 744-1949 (facsimile)

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Petitioner

TABLE OF CONTENTS

Arguments 1

A. To understand and explain the statutes in question, the Court must examine *all* of section 15-36-100 and *all* of section 15-79-125, not just one subsection of one of these two statutes 2

B. Literal readings of section 15-36-100 and section 15-79-125 create conflicts and inconsistencies, but Ms. Ranucci's interpretation fulfills a statutory purpose that is cogent and consistent 3

C. Strict construction requires the Court to interpret these statutes in a way that minimizes the restrictions they impose on a plaintiff's common law rights 6

D. This Court should reject the alleged additional sustaining grounds. No lawsuit has been filed, no factual record exists, and there is no reason Ms. Ranucci should not be allowed to amend any defects in this affidavit (if any in fact exist) 7

Conclusion 8

TABLE OF AUTHORITIES

Cases

Beaufort County v. South Carolina State Election Commission,
395 S.C. 366, 718 S.E.2d 432 (2011) 2, 3

Crosby v. Glasscock Trucking Co.,
340 S.C. 626, 532 S.E.2d 856 (2000) 6

Grier v. AMISUB of South Carolina,
397 S.C. 532, 725 S.E.2d 693 (2012) 1, 2, 4, 6

Laurens County School Districts 55 & 56 v. Cox,
308 S.C. 171, 417 S.E.2d 560 (1992) 3

Ross v. Waccamaw Community Hospital,
404 S.C. 56, 744 S.E.2d 547 (2013) 1, 2, 5, 6

Statutes and Other Authorities

S.C. Code Ann. § 15-36-100 (Supp. 2012) . . . . passim

S.C. Code Ann. § 15-79-125 (Supp. 2012) . . . . passim

Rule 12, South Carolina Rules of Civil Procedure 5

ARGUMENT

The respondent says that the notice of intent statute has clear language and straightforward application. This is not true, and the respondent knows it. This Court has already examined this statute on two previous occasions. *Grier v. AMISUB of South Carolina* was the first. *Ross v. Waccamaw Community Hospital* was the second. A decision in this case will be at least number three on this list, and there may well be other decisions in the interim.[1] This is a fair amount of protracted litigation for a statute whose language is allegedly so very plain.

For a law aimed at helping dispute *resolution*, the notice of intent statute has instead proved to be a formidable source of dispute *creation*. In *Grier*, the respondent (a hospital) argued that the notice had to be dismissed if the expert's affidavit did not express an opinion on proximate cause. In *Ross*, the respondents (two doctors) argued that the notice had to be dismissed if the mediation conference was not conducted within the statute's deadline. This Court rejected these arguments, and rightfully so. The Court has recited that this law was designed to help resolve valid cases quickly and to discourage frivolous filings, but as far as appellate litigation has been concerned, the statute has not been used that way. Instead, the medical community seems to be pressing the view that any technical defect with respect to this statute should summarily destroy any malpractice case, regardless of the case's merit.

Just like the defendants in *Grier* and *Ross*, the respondent in the present case is seeking a cheap and easy win. And just as the result was to deny this request to the *Grier* and

---

[1]*Grubb v. Clarendon Memorial Hospital* involves section 15-79-125 and was argued in the December 2013 term of court. This Court decided the case in an unpublished opinion filed on December 18, 2013. See Op. No. 2013-MO-034.

Ross defendants, so too should this Court deny this respondent the victory by default that he seeks. There is no cogent reason—none—why the legislature would allow a grace period for all expert affidavits except the affidavit associated with the pre-suit notice of a medical malpractice case. The respondent's interpretation of these statutes is counter-textual, inconsistent, unreasonable, and absurd. And though the respondent's brief promises clarity, this is a promise that it cannot, and does not, deliver.

A. To understand and explain the statutes in question, the Court must examine *all* of section 15-36-100 and *all* of section 15-79-125, not just one subsection of one of these two statutes.

The respondent invites this Court to look only at subsection (A) of the notice of intent statute. Citing this court's decision in *Grier*, the respondent offers that the language of this subsection is clear and that it plainly requires the contemporaneous filing of both the notice and the affidavit.

Ms. Ranucci has already conceded this point. Viewed in isolation, the language of subsection (A) is absolutely clear. This Court noted as much in *Grier*, see 397 S.C. 532, 539, 725 S.E.2d 693, 697 (2012), and Ms. Ranucci's primary brief stated exactly the same thing. Individual subsections of both section 15-36-100 and section 15-79-125 are completely straightforward as long as those subsections are considered by themselves. See (Br. of Petitioner, p. 9) (stating this position). On this point, there is no disagreement.

But this Court does not perform statutory construction by examining individual subsections in a vacuum. Instead, "[t]he true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of [the statute's] manifest purpose." *Beaufort County v. South*

Carolina State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (quoting *Laurens County Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992)). The problem with the literal reading that the respondent proposes is that it is feeble. As the next section of this reply explains, it cannot bear the weight of meaningful scrutiny.

B. Literal readings of section 15-36-100 and section 15-79-125 create conflicts and inconsistencies, but Ms. Ranucci's interpretation fulfills a statutory purpose that is cogent and consistent.

As the Court looks at the other subsections of these statutes to determine the manifest purpose that led to their enactment, how does the respondent resolve the tension between section 15-79-125(E) and his construction of section 15-36-100(B)? Section 15-79-125(E) instructs that the plaintiff will eventually initiate a medical malpractice case by filing a complaint "pursuant to the South Carolina Rules of Civil Procedure," but the respondent's construction of section 15-36-100(B) will require the plaintiff to again file an expert's affidavit (potentially the same one) as a part of her complaint. This requirement is *not* found in the rules of civil procedure. Why does the plain language of section 15-79-125(E) not prevail? The answer cannot be that this reading makes part of section 15-36-100 useless, because the respondent's end game is to render the grace period in that same statute useless.

Why does the part of section 15-36-100(B) that reads "[e]xcept as provided in [the notice of intent statute]" *not* mean that section 15-36-100's contemporaneous filing requirement applies to all professional negligence cases *except* medical malpractice cases? Also, why is it better to read the term "affidavit requirements" in the notice of intent statute as a narrow reference rather than a broad reference to the requirements for an affidavit's contents, its preparation, its filing, its exemption from filing, and the requirements by which

its defects may be challenged? All of these could fairly be called "requirements." Indeed, every part of section 15-36-100 relates uniquely and exclusively to "affidavits." Cf. *Grier*, 397 S.C. at 537, 725 S.E.2d at 696 (observing that section 15-79-125 provides no specifics for affidavits but "directs the reader to section 15–36–100.").

Finally, let us assume that an affidavit must *always* be filed, without exception, at the same time as the notice of intent.[2] Why does the failure to honor this requirement mandate dismissal of the notice? Nothing in the text of section 15-79-125(A) requires that the notice be dismissed on account of defects. The statute is silent on this point. No other part of section 15-79-125 or section 15-36-100 treats technical defects during a dispute's early stages as automatically fatal. What is the textual source or the potential rationale for the argument that unlike all of the other mandatory requirements in these two statutes, technical defects that occur during a pre-suit stage for alternative dispute resolution are uniquely (and automatically) fatal? These are arguments to which the respondent has no lucid answer.

The Court of Appeals suggested that the purpose of treating the pre-suit stage differently is that the expert's pre-suit affidavit is just a notice document. (App.pp.11-12). That would be a fair point but for the fact that it has at least two shortcomings. First, it does not answer why dismissal is mandated in the case of a *delayed* affidavit such as one supplied 45 days late. Why is delayed notice automatically fatal to the ADR process? Second, the court's reasoning does not explain why a defendant gets to file a dispositive motion like a

---

[2]Ms. Ranucci continues to firmly believe that this is an implausible assumption. For example, there is no reason why the legislature would provide a common knowledge exemption to the affidavit requirement at the complaint stage, but not at the pre-suit notice stage. See § 15-36-100(C)(2) (the common knowledge exception for the complaint).

motion to dismiss during a pre-suit process that is supposed to be *in*formal. The court's reasoning seems counterproductive to a process with simple aims: notice and mediation.

The respondent says the legislature might have believed that a doctor would be disadvantaged if he lost 45 days off of the 120-day deadline for conducting the pre-suit mediation. Of course, the Court will recall as this statute was construed in *Ross*, a judge has the discretion to extend this deadline further. See 404 S.C. 56, 66, 744 S.E.2d 547, 552 (2013). The respondent's reasoning does not make sense; if a medical malpractice plaintiff has to re-file an affidavit along with his or her complaint, the normal operation of the section 15-36-100's grace period and the rules of civil procedure will require some defendants to file an *answer* to the plaintiff's malpractice *complaint* without ever having seen the expert's affidavit.[3] Why would the legislature think it acceptable for a doctor to have to answer a complaint before the affidavit has been filed, but view it as intolerably *un*acceptable for a doctor to get the expert's affidavit 45 days into the 4 month window for mediation, which can still be extended further? This is not a consistent rationale or a cogent scheme.

In *Ross*, the Court wrote that this statute was intended to foster the settlement of valid medical malpractice claims and discourage the filing of frivolous ones. 404 S.C. at 63, 744 S.E.2d at 550. Ms. Ranucci's interpretation does not violate this purpose; her reading fulfills it. This is why the Court should read section 15-79-125 as incorporating all of the "affidavit requirements" statute, section 15-36-100, including its grace period. This is the only view that is consistent, reasonable, and faithful to the statute's intended purpose.

---

[3]There is a 45-day grace period for the expert's affidavit if the statute of limitations is about to expire, see section 15-36-100(C)(1), but under the rules of civil procedure, the defendant's answer is due within 30 days of service of the complaint. See Rule 12(a), SCRCP.

C. Strict construction requires the Court to interpret these statutes in a way that minimizes the restrictions they impose on a plaintiff's common law rights.

The respondent says that these statutes should be strictly construed. He is absolutely correct, but his argument is the result of expansive construction, not strict construction.

If these statutes created a cause of action that was unknown to the common law, they would be construed in a way that kept that cause of action narrow. See *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000) (describing why the wrongful death statute is to be construed narrowly). The statutes in the present case are different; they change the common law by *restricting* a plaintiff's common law right to bring a negligence claim for medical malpractice. *Grier*, 397 S.C. at 536-39, 725 S.E.2d at 696-97. A strict construction requires reading these statutes in the way that imposes the *least* restrictions on a plaintiff's common law rights. It preserves as much of the common law as possible, and it protects a plaintiff's right to access the court system to the greatest extent possible.

The results and reasoning in *Ross* and *Grier* honor this same spirit. Both decisions read these statutes narrowly and in a way that minimizes the modification to the common law and avoids creating "a trap for plaintiffs with potentially meritorious claims." *Ross*, 404 S.C. at 63, 744 S.E.2d at 550. In arguing that Ms. Ranucci has committed a technical violation that mandates dismissal of her pre-suit notice, it is the respondent who asks this Court to depart from the spirit of these previous decisions, not Ms. Ranucci.

The respondent professes to desire strict construction, but then he adds a mandatory penalty of dismissal to section 15-79-125(A), he broadens section 15-79-125(E)'s language about filing a complaint, and he reasons that there must be a vehicle to challenge a deficient

notice even though there is no such vehicle *anywhere* in the statute. This construction is suited to fit the respondent's needs. It is not strict, and it is not principled.

D. This Court should reject the alleged additional sustaining grounds. No lawsuit has been filed, no factual record exists, and there is no reason Ms. Ranucci should not be allowed to amend any defects in this affidavit (if any in fact exist).

The respondent raises four arguments that he suggests constitute additional sustaining grounds. First, he claims that the affidavit Ms. Ranucci offered is defective because it was not from an expert in Dr. Crain's area of specialty. Second, he claims that the affidavit did not support the negligent act that Ms. Ranucci alleged in her notice of intent. Third, he requests dismissal because the pre-suit mediation has never occurred. Fourth, he contends that the statute of limitations has expired.

The Court should reject each of these arguments.

As far as the statute of limitations is concerned, this is an affirmative defense that a defendant must plead and prove. Not only is there no factual record in this case, no lawsuit has ever been filed. This argument embodies a concept that is truly novel: a defendant moving for summary judgment before a plaintiff ever files a complaint.

On the failure to conduct mediation, Ms. Ranucci filed her pre-suit notice on June 8, 2009, and the circuit court filed its order dismissing the notice on September 23, 2009—109 days later. The parties did not pass the mediation deadline, and while only Dr. Crain knows whether he would have been willing to participate in mediation at the same time that he was asking to have Ms. Ranucci's pre-suit notice dismissed, surely he will agree that Ms. Ranucci did not need to arrange any mediation *after* the circuit court dismissed her notice.

Finally, as to the alleged defects in the contents or authorship of this expert's affidavit, nothing in section 15-79-125 requires that the pre-suit notice and the affidavit pertain to the same negligent act. If the pre-suit phase is truly a phase where additional investigation and discovery will occur, it is reasonably possible that a claim might change in its scope during this process. There is also no obvious substantive deficiency with this expert's affidavit. See (App.p.107). Nothing suggests that Dr. Boortz-Marx is not qualified to offer an expert opinion about the standard of care for obtaining a patient's informed consent, regardless of his or the respondent's area of practice.

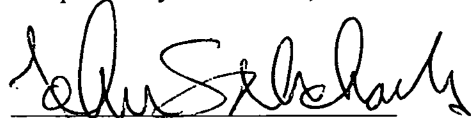
CONCLUSION

This case is about getting something for nothing. The respondent wants to win this potential suit without defending it, and he also wants to win based on a technical defect and without any regard for the underlying case's merit.

The problem with the respondent's argument is that it divines legislative intent out of what might just as well have been sloppy drafting. Nobody is arguing that any of the language in section 15-79-125(A) is meaningless. The argument is that just like the other provisions of the Tort Reform Act of 2005, the language in this subsection should be read in a way that is reasonable and does not create absurdities or traps. And while the respondent says that Ms. Ranucci did not fall into any sort of trap and that she is not as sympathetic as the hypothetical plaintiff who steps inside a lawyer's office the day before the statute of limitations will expire, the respondent still cannot answer this hypothetical. As for Ms. Ranucci, we cannot judge at this stage whether she is a sympathetic figure or whether she is not. That judgment will rely on a factual record, and there is no such record here.

The central premise that the Court of Appeals followed is mistaken. When these statutes are read in their entirety, the plain language does *not* clearly explain how they operate or mandate that Ms. Ranucci's pre-suit notice be dismissed. These statutes were designed to force expert witnesses into the earliest stages of professional negligence suits and to create a pre-suit period in medical malpractice cases for minimal discovery and mediation. There is no reason why the legislature would have intended for plaintiffs to have a grace period to get an expert's affidavit in every professional case *except* a case against a medical doctor, and there is only one reading of these statutes that is fair, reasonable, follows the legislature's most likely purpose, and avoids an absurd result. These statutes were intended to operate together and incorporate one another, and the Court should not imply fatal consequences in a law that restricts the common law rights of citizens unless the legislature affirmatively states that non-compliance is lethal. As her primary brief requested, Ms. Ranucci asks this Court to reverse.

Respectfully submitted,



December 20, 2013

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO

Eric C. Davis
ERIC C. DAVIS, PA

Daryl G. Hawkins
LAW OFFICE OF
DARYL G. HAWKINS

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Opinion No. 4935 (S.C. Ct. App. filed Jan. 25, 2012)

Shannon Ranucci, ... Petitioner,

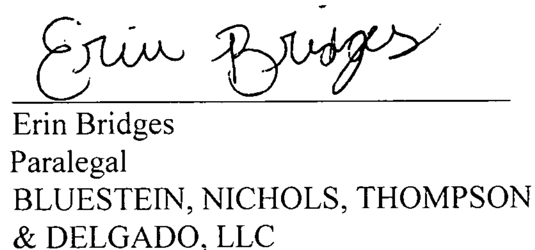
v.

Corey K. Crain, M.D., ... Respondent.

PROOF OF SERVICE

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

Lee Cannon Weatherly, Esquire
D. Gary Lovell, Jr., Esquire
Carlock Copeland & Stair, LLP
40 Calhoun St., Suite 400
Charleston, SC 29401



December 23, 2013
Columbia, South Carolina

Erin Bridges
Paralegal
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC