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.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Section 15-79-125 of the South Carolina Code mandates that certain acts take place before someone can file a medical malpractice case. Among other things, it requires a prospective plaintiff to file an expert's affidavit and a document that gives notice of the plaintiff's intent to eventually file suit.

The question presented is whether the Court of Appeals erred in concluding that the language of this statute is clear and that this statute operates independently of a different section of the Code, section 15-36-100, which contains a grace period for expert affidavits when the statute of limitations is about to expire. These two statutes were enacted together, they reference one another, and both of them directly reference medical malpractice cases.

Construing these statutes to operate independently, the Court of Appeals affirmed the dismissal of Shannon Ranucci's pre-suit notice. Ms. Ranucci did not filed an expert's affidavit at the same time she filed her notice. Instead, she sought to use the grace period from section 15-36-100.

STATEMENT OF THE CASE

Shannon Ranucci claims that Dr. Corey Crain committed malpractice when he treated her in June of 2006. According to Ms. Ranucci, she suffered a collapsed lung as a result of Dr. Crain's negligence.

In June of 2009, Ms. Ranucci filed notice of her intent to bring a lawsuit against Dr. Crain. The notice contained a brief statement of her malpractice allegations, and the notice also claimed that the statute of limitations was about to expire. Because the statute of limitations was about to expire, the notice informed that Ms. Ranucci intended to supplement

her filing by providing her expert's affidavit within 45 days. The notice cited section 15-36-100 as authority for this procedure. See (App.pp.92-93) (the notice).

In July of 2009, Dr. Crain filed an answer to Ms. Ranucci's notice. He also filed a motion to dismiss. In both documents, Dr. Crain argued that Ms. Ranucci's notice was defective because section 15-79-125 requires the notice and the expert's affidavit to be filed "contemporaneously," which Dr. Crain took to mean "simultaneously." Dr. Crain agreed that section 15-36-100 provides a grace period for such affidavits if the statute of limitations is about to expire, but he argued that medical malpractice suits are governed solely by section 15-79-125. See (App.pp.101-06) (the answer and the motion to dismiss).

On July 23, 2009, Ms. Ranucci filed the affidavit of Dr. Richard Boortz-Marx. (App.p.107). This was exactly 45 days after she filed her original notice with the circuit court. Ms. Ranucci's initial filing had identified Dr. Boortz-Marx as one of her potential expert witnesses. (App.p.96).

On August 13, 2009, the circuit court conducted a hearing on the motion to dismiss.

On September 23, 2009, the circuit court granted the motion.

The circuit court's order of dismissal is not lengthy. It reasons that Ms. Ranucci did not file Dr. Boortz-Marx's affidavit in a timely fashion and that because the affidavit was untimely, Dr. Crain was entitled to have Ms. Ranucci's notice of her future suit dismissed. (App.p.90).

Ms. Ranucci asked the circuit court to alter this judgment. (App.pp.126-27). Dr. Crain opposed Ms. Ranucci's motion, see (App.pp.128-130), and the circuit court denied the motion after conducting a hearing in November of 2009. Here again, the circuit court's order

is not lengthy. It reasons that these two statutes, section 15-79-125 and section 15-36-100, operate "independently" of one another. (App.p.91).

Ms. Ranucci appealed this decision to the Court of Appeals, and the Court of Appeals conducted oral argument on December 7, 2011.

On January 25, 2012, the Court of Appeals issued a 2-1 decision that affirmed the circuit court.

The majority of the Court of Appeals reasoned that these two statutes were clear and that they did not conflict with one another. The majority also reasoned that each statute governed a distinct period of time; one controlled the pre-suit process, the other did not apply until the plaintiff filed a complaint. The majority held that these statutes operate independently and that section 15-79-125 only incorporates the parts of section 15-36-100 that relate to the preparation and contents of an expert's affidavit. In the majority's view, this means that the grace period contained in section 15-36-100(C) does not apply to the affidavit that a future medical malpractice plaintiff must file under section 15-79-125. See *Ranucci v. Crain*, 397 S.C. 168, 168-179, 723 S.E.2d 242, 242-48 (Ct. App. 2012); also included in the Appendix at pages 1-13.

The concurring judge would have found the case to be moot because no lawsuit has ever been commenced against Dr. Crain and the statute of limitations has long-since expired. 397 S.C. at 179, 723 S.E.2d at 248; also at (App.p.13).

There is more to the broader history of this case, but this description has endeavored to present only those facts that are relevant to the question on which this Court granted certiorari.

ARGUMENT

The central premise of the decision below is mistaken. The language of these two statutes is *not* clear. A reasonable person cannot determine how these statutes operate. Several different readings are plausible. This means that these statutes are ambiguous and that this Court must use more than the plain meaning rule to discern the purpose behind them. If multiple readings are reasonably possible, the plain language does identify a winner.

Once the Court undertakes this exercise, the error of the decision below should become apparent. These statutes were enacted by the same piece of legislation. They reference one another repeatedly, and they both reference medical malpractice cases. These statutes were designed to force expert witnesses into the earliest stages of professional negligence suits, and they were also designed to create a pre-suit period in medical malpractice cases for minimal discovery and mediation. These shared purposes are obvious. No reasonable person could take a contrary view.

The decision of the Court of Appeals relies on a purpose that is much less obvious. Indeed, it relies on a purpose that is doubtful. 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 negligence case *except* a case against a medical doctor. It might be reasonable to treat medical malpractice cases differently in *some* respects, but it makes no sense that they be treated differently in *this* respect. If this absurdity was not obvious on its face, it becomes obvious when this construction is applied to the other parts of these statutes. There is no reason to take ambiguous statutes and construe them to create meaningless chaos. The better view is to read these statutes to work sensibly and in harmony.

A. The Court of Appeals Erred When it Held That the Language of Section 15-36-100 and Section 15-79-125 Was Clear and Explicit. Different Readings of These Statutes Are Reasonably Possible.

The Court of Appeals reasoned that the language of these statutes was clear and that despite the confusion in the way they are written, the statutes do not conflict. (App.p.9). With the utmost respect for the Court of Appeals, that reasoning is mistaken. A reasonable person cannot read these statutes literally and determine how they operate with any certainty. Several different readings are reasonably possible.

i. It is not clear that failing to file an affidavit requires dismissal of the pre-suit notice or stops the statute of limitations from being tolled.

Subsection (A) of section 15-79-125 is the part of the statute that requires the future plaintiff in a medical malpractice case to file an expert's affidavit and a notice of intent to file a lawsuit. The text of this subsection does not make it obvious that failing to file the affidavit is a fatal defect.

The statute uses mandatory language—it uses the word "shall." The statute also instructs that the notice and the expert's affidavit must be filed "contemporaneously."

But section 15-79-125(A) also says that the statute of limitations is tolled as soon as the pre-suit notice is filed. The language seems clear, and it is written in the singular. The statute provides "[f]iling the [notice] tolls all applicable statutes of limitations."

In light of this language, a reasonable reader could take the view that tolling is not tied to the affidavit at all. Instead, tolling hinges on the notice. If the legislature had a different intent, it would have been easy to express that intent through clear verbiage.

This construction may seem hypertechnical, but it is not. This Court has applied this view in similar situations.

For example, Rule 203 of the appellate court rules governs the contents of a notice of appeal and provides that a notice of appeal "shall" contain several pieces of information. The rule also provides that the notice "shall" be accompanied by certain attachments. See Rule 203(d)(1)(B) and (e), SCACR. Despite this mandatory language, this Court has held that a technical defect such as the omission of a mandatory piece of information is not automatically fatal to an appeal. See *State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002) (notice of appeal listed the wrong county and was served on the wrong lower court). Though the word "shall" in Rule 203 denotes mandatory requirements, deficiencies are judged by a rule of reason that does not work injustice as long as the appellant honors the rule's spirit.

This may not be what the legislature intended. The legislature may not have intended to allow any flexibility in section 15-79-125. But one cannot disqualify a rule of reason without a reasonable justification, and the language of the statute does not offer one. This statute contains several requirements. It requires the affidavit, it requires that the notice include certain information, and it requires responses to the standard interrogatories. It is not obvious that omitting any of these things is a *fatal* defect. Here, the statute is silent.

This Court has noted this statute's silence before. In *Ross v. Waccamaw Community Hospital*, several doctors argued that if the parties did not complete the pre-suit mediation within the statute's deadline, that failure deprived the court of jurisdiction over the case. This Court rejected that argument, and in the course of doing so, it noted that the statute does not mandate a particular penalty. 404 S.C. 56, 64-65, 744 S.E.2d 547, 551-52 (2013).

ii. It is not clear that these statutes govern different periods of litigation. If read literally, one of them is mostly irrelevant to a medical malpractice case.

Section 15-36-100 governs complaints in certain types of professional negligence lawsuits. Subsection (G) lists the professions covered by the statute, and this list includes medical doctors. See § 15-36-100(G)(7).

The Court of Appeals held that this statute does not apply until a medical malpractice plaintiff has filed a complaint, but a reasonable reading of subsection (B) suggests otherwise. The first sentence of subsection (B) instructs that "*Except* as provided in section 15-79-125 . . ." the plaintiff in a professional negligence suit must file an expert's affidavit as a part of his or her complaint. (Emphasis added). This clause opens with an exclusion. It says that this subsection—the requirement that the complaint include an expert's affidavit—applies only as long as the complaint is *not* a medical malpractice complaint.

This interpretation is bolstered by a literal reading of section 15-79-125. Subsection (E) of that statute provides that if the pre-suit mediation is not successful, the prospective plaintiff may initiate a case "by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure." There is nothing here about requiring a medical malpractice plaintiff to file an expert's affidavit with his or her complaint, and the rules of civil procedure do not contain any such requirement.

This reading makes the reference to "medical doctors" in subsection (G) of 15-36-100 mostly useless because nearly every section of *that* statute discusses the affidavit that is supposed to be filed with the complaint. That said, this is a perfectly reasonable construction of these statutes' plain language. It is how they operate if they are taken literally.

iii. The incorporation language in section 15-79-125 is unclear. If it only covers *part* of section 15-36-100, Dr. Crain lacks a vehicle to challenge the notice.

Section 15-79-125(A) instructs that the affidavit that a prospective plaintiff must file is "subject to the affidavit requirements in section 15-36-100." The Court of Appeals held that this language only incorporates the parts of section 15-36-100 that relate to the preparation and contents of an expert's affidavit. (App.p.10). Here again, the language of the statute is unclear.

There are no affidavit "requirements" in section 15-36-100. The first part of the statute is a subsection that defines who may be an expert witness. See § 15-36-100(A). This is presented as a definitional provision; it is not presented as a list of requirements for the affidavit. And if the intent of section 15-79-125 was to incorporate subsection (A) of section 15-36-100, that would have been very easy to accomplish. The statute would simply reference the subsection directly.

Subsection (B) contains one provision—only one—that approaches an affidavit "requirement." It requires that the affidavit specify at least one negligent act or omission.

It seems sensible enough that section 15-79-125 would incorporate this provision, but as the previous section of this brief describes, a literal reading of subsection (B) suggests that it does *not* apply. The first sentence of section 15-36-100(B) says that it applies *except* as provided in section 15-79-125. Thus, section 15-79-125 (allegedly) points to section 15-36-100(B), and section 15-36-100(B) responds that it applies except as instructed in 15-79-125. This is nonsense. Moreover, if the intent of section 15-79-125 was to incorporate only subsection (B), or perhaps both (A) and (B), here again, that would have been easy to write.

The other sections of the statute provide a grace period if the statute of limitations is about to expire, see §§ 15-36-100(C) & (D), offer vehicles for dealing with defective (or non-existent) affidavits, see §§ 15-36-100(E) & (F), and explain when an affidavit is not required at all, see § 15-36-100(C)(2). There are no "requirements" to borrow from these sections.

This selective incorporation causes even more confusion. Consider how Dr. Crain challenged Ms. Ranucci's pre-suit notice. Dr. Crain responded to Ms. Ranucci's notice by filing a motion to dismiss and a document that he titled an "answer." See (App.pp.101-06). Section 15-79-125 contains no language that contemplates either of these filings. At no point does the statute mention an answer or announce that a *potential* defendant (because there is not even a lawsuit yet) can challenge the sufficiency of the future plaintiff's pre-suit filings.

The statute *does* say that the circuit court has the jurisdiction to enforce it, see section 15-79-125(D), but a reasonable person could read this language different ways. The context suggests that it contemplates the court being able to enforce the rules of discovery and the requirement of mandatory mediation. It is less clear that this enforcement power includes hearing a motion to dismiss a lawsuit that has not even been filed.

Here is the point: when read literally, these statutes are not clear. While individual subsections may seem straightforward if they are considered in isolation, that clarity evaporates once the reader attempts to discern how all of the parts of these statutes interact with one another. Several different readings are reasonably possible, and the Court must thus use more than these statutes' plain language to discern the purpose behind them and how they were intended to operate. As the next section of this brief describes, only one reading is fair, reasonable, follows the legislature's most likely purpose, and avoids an absurd result.

B. The Court Should Hold That a Medical Malpractice Plaintiff Satisfies the Affidavit Requirement at the *Pre*-suit Stage—not at the Complaint Stage—and That Section 15-79-125 Incorporates *All* of Section 15-36-100, Including the Grace Period.

This is a statutory interpretation question, and as the Court is aware, the principal aim of statutory interpretation is to give effect to the legislature's intent. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). What the legislature says in a statute is the best evidence of the legislature's intent, and all rules of construction are subject to the principle that if the legislature's intent can be discovered, that intent must prevail. *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007).

This Court has previously written that it will construe a statute's language in light of the statute's intended purpose. The Court has also written that it will not construe a statute in a way that leads to a result that is so absurd that the legislature could not have intended it. *Kiriakides v. United Artists Communications*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). In short, this case requires the Court to determine what the legislature meant to accomplish in these two statutes and then to read these two statutes to further those ends.

i. The Court should hold that these statutes have a shared purpose and were intended to completely incorporate one another.

In beginning this inquiry, the Court should note that these statutes were enacted together. Section 15-79-125 was added to the Code by Act No. 32 of 2005. This same legislation amended section 15-36-100 to its present form. See 2005 S.C. Acts 133. [1]

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[1]The Court of Appeals described these statutes as parts of the Tort Claims Act, see (App.p.8, n.2), but this description is inaccurate. The Tort Claims Act is contained in chapter 78 of title 15 of the Code. See S.C. Code Ann. § 15-78-10 (2005).

Because these statutes were enacted together, they must have been designed to operate together. This is evident from their temporal connection, the fact that they reference one another, and the fact that they both profess to apply to suits against medical doctors. These statutes cover the same subject matter, and this Court has instructed that statutes of the same subject matter must be construed together to produce a single, harmonious result. *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

When read reasonably, the shared purpose of these statutes is obvious. These statutes were designed to force expert witnesses into the earliest stages of several types of professional negligence cases, and they were also designed to create a pre-suit period in medical malpractice cases for minimal discovery and mediation. No reasonable person could take a contrary view. Every section of these statutes seems designed to further these goals.

Section 15-36-100 does most of the work. It creates an orderly procedure where expert affidavits are injected into the earliest stages of a dispute. It also allows a defendant to challenge an allegedly defective affidavit, and it instructs that a defendant can move to dismiss the proceedings if the plaintiff has not complied with the affidavit requirement or has acted in an otherwise deficient manner. This is the heavy lifting. This section has the definitions, the enforcement mechanisms, and the penalties for non-compliance.

Section 15-79-125 gives medical malpractice cases special treatment, but these cases differ in only one respect. In these cases, the prospective parties must participate in a pre-litigation process. This involves sharing information before a suit is filed, and the by-product is that the affidavit procedure occurs earlier than it would normally occur. This is the same sort of affidavit and the same sort of process, it is just occurring at the pre-suit

stage—not at the complaint stage. This reading gives purpose and effect to all of section 15-79-125, and it also gives purpose and effect to all of section 15-36-100.

This is the only sensible plan that the legislature could have been following, and this construction requires these statutes to completely incorporate one another. When the statutes are read this way, they operate in a manner that is even-handed and fair. Under this reading, the grace period in section 15-36-100 *must* apply. If these two statutes operate together, it follows that everything from both statutes is on the table.

The Court of Appeals rejected this argument for two reasons. First, the court observed that when section 15-36-100 speaks of challenging a defective affidavit, it speaks of the defendant making that challenge along with his or her responsive pleading. See (App.p.11) (referencing section 15-36-100(C)). The court reasoned that this part of section 15-36-100 could not apply because there is no responsive pleading to a pre-suit notice.

This argument misreads the statute. The closing sentence of subsection (C)(1) says that filing a motion to dismiss will *stay* the deadline for an answer. This does not mean that a defendant may not file a motion to dismiss *unless* there is a deadline for an answer. The Court of Appeals put a limit in the statute that is not there, and Dr. Crain needs subsection (C) to apply because that is how he gets a vehicle to challenge a defective notice.

Another shortcoming of this argument is that it fails to account for the statute's likely purpose. If these statutes were intended to inject experts into these cases at the earliest stages, what reason would cause the legislature to draft an orderly process to challenge the affidavits in most professional cases, but not all of them? Why would there be detailed enforcement procedures for all professional negligence cases except cases against doctors?

The second reason the Court of Appeals believed that these statutes operated independently was that it believed they had different purposes. The court opined that section 15-79-125 was designed to allow the potential plaintiff to gather information while shielding him or her from the fear of losing the right to file suit. This was different from the purpose the court divined for section 15-36-100, which was to require a plaintiff to craft a viable complaint. (App.pp.11-12). The court reasoned that the legislature allowed the plaintiff to cure the affidavit that is filed with the complaint, but not the affidavit filed with the notice, because the affidavit that is filed with the complaint is more important. *Id.*

This logic is backwards. If the plaintiff is not allowed to cure the affidavit that is filed with the notice, *this* is the affidavit that is the most important. If the prospective plaintiff has no margin for error in the notice (and, by implication, everything that is filed along with the notice), the filings that go with the complaint are the filings that are of less consequence. If this reasoning was not odd enough on its face, it is especially odd in light of the court's professed belief that the purpose of having a pre-suit stage in a medical malpractice case is to gather information. If the first stage is designed to gather information so that the later stages will be more informed, it would make more sense to be tolerant and excuse errors at the beginning, not in the middle.

ii. The contrary interpretation leads to results that are patently absurd.

With the utmost respect for the Court of Appeals, construing these statutes to operate separately leads to results that are so patently absurd that they could not have been intended by the legislature.

For example, if these statutes operate separately, the 45-day grace period provided by section 15-36-100(C)(1) is a nullity in medical malpractice cases. This subsection allows a plaintiff 45 days to secure an affidavit for the complaint if the statute of limitations is about to expire. This will have no practical application in a suit against a doctor—none—because the plaintiff will already have been forced to secure an affidavit during the pre-suit notice stage. The grace at the complaint stage will be cheap grace that is meaningless.

Reading these statutes to operate separately also requires a plaintiff to do that which is redundant and purposeless. The Court of Appeals suggested that the plaintiff in a medical malpractice case must file an expert's affidavit twice; one at the pre-suit stage, then again with the complaint. There cannot be any utility in this. There are not different requirements for the affidavits. This would be re-filing something that everyone already has.

Reading these statutes separately will also create difficulty if the malpractice case involves common knowledge and experience. Although expert testimony is generally required in a medical malpractice case, there is an exception if "the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts." *Green v. Lilliewood*, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978). If section 15-79-125 operates in isolation, it will always require a plaintiff to secure an affidavit at the pre-suit stage. This will even be true when an affidavit is not required for the complaint because of the common knowledge exception. Section 15-36-100(C)(2) accounts for this exception, but section 15-79-125, when read literally and in isolation, does not.

Finally, the upshot of the decision of the Court of Appeals is that although the statutory law contains a statute of limitations for a medical malpractice case, the limitations

period is really not what the statute says it is.[2] Suppose that a plaintiff with a potential medical malpractice case walks into a law office the day before the limitations period is set to expire. If any lawyer will get involved in such a plaintiff's case, it will be a rare lawyer or a rare case. The limitations period will be nebulous. It will rely on things that may be outside of the prospective plaintiff's control.

Reading these statutes separately creates meaningless redundancy and chaos. Reading them together creates an orderly process that is meaningful and fair. Because the latter view embodies the legislature's most likely intention, the latter view should prevail.

CONCLUSION

The central premise of the decision below is mistaken. When read literally, the plain language of these two statutes is *not* clear. These statutes were designed to force expert witnesses into the earliest stages of professional negligence suits, and they were also designed 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 have a shared purpose and were intended to completely incorporate one another. This Court should accordingly reverse.

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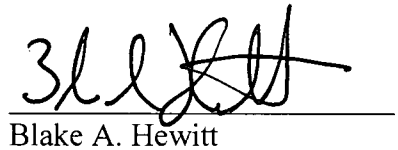
[2]The applicable statute of limitations is S.C. Code Ann. § 15-3-545 (2005).

November 7, 2013

Respectfully submitted,



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

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