

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. Supreme Court

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.

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Shannon Ranucci, Appellant,

v.

Corey K. Crain, Respondent.

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 4935
Heard December 7, 2011 – Filed January 25, 2012

AFFIRMED

Eric Christopher Davis and Michael E. Atwater, both
of Rock Hill, for Appellant.

Lee Cannon Weatherly, of Charleston, for
Respondent.

her Notice. He further contended the statute of limitations procedurally barred Ranucci from filing an action against him for her injuries because her expert witness's affidavit was defective.

On July 23, 2009, Ranucci filed an affidavit of Dr. Boortz-Marx (Affidavit), indicating Dr. Boortz-Marx practiced medicine in the areas of Anesthesiology and Anesthesiology Pain Management. Dr. Boortz-Marx averred Dr. Crain had violated the applicable standard of care by failing to document Ranucci's informed consent. Subsequently, Dr. Crain filed a supplemental memorandum pointing out Ranucci had not explained the "time constraints" that prevented her from timely filing an expert's affidavit¹ and adding to his grounds for dismissal the various deficiencies in the filing and substance of the Affidavit.

On August 13, 2009, the circuit court heard arguments on Dr. Crain's motion. The parties extensively argued both procedure and substance. In an order dated September 21, 2009, the circuit court found Ranucci failed to file the Affidavit timely as required by section 15-79-125 and granted Dr. Crain's motion to dismiss the Notice. However, because the Notice and Affidavit did not constitute an "action," the circuit court denied Dr. Crain's motion to dismiss based upon the applicable statute of limitations.

On October 5, 2009, Ranucci filed a motion to alter or amend the judgment seeking clarification of the circuit court's interpretation of sections 15-36-100 and 15-79-125. The circuit court denied the motion but stated the two statutes "operate independently of each other, and . . . [section] 15-36-100 does not offer a procedural alternative to [section] 15-79-125." This appeal followed.

¹ In his supplemental memorandum and at the hearing on his motion, Dr. Crain pointed out Ranucci retained counsel in this matter prior to August 9, 2006, when her counsel requested her medical records from Dr. Crain.

Terms that are clear and unambiguous on their face leave no room for statutory construction, and we must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). However, when two statutes conflict, a specific statute prevails over a more general statute. Spectre, LLC v. S.C. Dep't of Health & Env'tl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010).

B. Professional Negligence and Medical Malpractice Filings

Section 15-79-125(A) of the South Carolina Code (Supp. 2010) imposes prelitigation filing requirements upon individuals intending to file suit for medical malpractice:

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. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File

of the statute of limitations is considered timely and provides no basis for a statute of limitations defense."

Subsections C, E, and F detail additional rules pertaining to filing and challenging affidavits filed pursuant to subsection B:

(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. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and

with Rule 12(a), South Carolina Rules of Civil Procedure.

Finally, subsection G states section 15-36-100 applies to twenty-two specific professions, including medical doctors.

C. Analysis

We affirm the circuit court's dismissal of Ranucci's Notice for her failure to comply with the contemporaneous filing requirement of section 15-79-125. "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden, 326 S.C. at 561, 486 S.E.2d at 495. The language at issue here is both clear and explicit.

This appeal turns upon the proper application of two statutes that treat related situations and reference one another. Here, section 15-36-100 establishes the procedure for commencing suits for professional negligence against professionals in twenty-two different areas, including medical doctors. § 15-36-100(B), (G). By contrast, section 15-79-125 deals specifically with prelitigation requirements for medical malpractice actions. § 15-79-125(A).² Medical malpractice is a type of professional negligence and, therefore, falls within the domain of both statutes. See Doe v. Am. Red Cross Blood Servs., S.C. Region, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989) (recognizing physicians and other medical professionals are subject to professional negligence actions). Despite the apparent confusion generated by their internal cross-references, these statutes do not conflict. Each statute governs a distinct time period during the litigation process, and those time periods are consecutive. Section 15-79-125 controls the portion of the process that commences with the filing of a Notice of Intent to File Suit and ends with prelitigation mediation. If the parties are unable to resolve their dispute through mediation, section 15-36-100 guides them through the

² Both statutes were added to the South Carolina Tort Claims Act by Act. No. 32, 2005 S.C. Acts 133.

79-125.³ 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.⁴ Section 15-79-125 is silent as to any procedures for challenging an affidavit filed with a Notice of Intent to File Suit. 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.

Nothing 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 15-36-100.⁵ 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.

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

³ See, e.g., § 15-36-100(A)(3), (C)(1) & (2).

⁴ See, e.g., § 15-36-100(C)(1), (E), (F).

⁵ Ranucci's contention that section 15-79-125 establishes the affidavit and Notice of Intent to File Suit as alternative initial pleadings to be used in commencing a lawsuit for medical malpractice is unpersuasive. This interpretation would obviate the need for section 15-36-100 to apply directly to medical malpractice actions. She misinterprets the prefatory language in section 15-36-100(B), "[e]xcept as provided in Section 15-79-125," as supporting her proposition. Not only does other language in section 15-36-100 fail to support this assertion, but section 15-79-125 clearly states its scope is limited to prelitigation matters. Furthermore, section 15-79-125(E) sets forth a timetable for filing suit should mediation fail.

CONCLUSION

We find sections 15-36-100 and 15-79-125 operate independently of one another, except that section 15-79-125 relies upon the provisions of section 15-36-100 concerning the preparation and content of an affidavit of a medical expert. Therefore, we find the circuit court did not err in this case when it dismissed the Notice for Ranucci's failure to comply with the contemporaneous affidavit filing requirement of section 15-79-125. Accordingly, the decision of the circuit court is

AFFIRMED.

KONDUROSO, J., concurs.

FEW, C.J., concurring: I concur with the majority's interpretation of the statutes at issue in this appeal. However, I believe our interpretation requires the conclusion that the statute of limitations has expired on any civil action Ranucci might have brought for malpractice. Therefore, the issues raised in this appeal are moot, and I would dismiss the appeal.

It is fundamental to our system of justice that a civil action must be commenced within the applicable statute of limitations. S.C. Code Ann. § 15-3-20(A) (2005) ("Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued"); Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system."). A civil action is commenced by the filing and service of a summons and complaint. § 15-3-20(B); Rule 3(a)(1), SCRCPP. The statute of limitations on a medical malpractice action is three years. S.C. Code Ann. § 15-3-545(A) (2005). Ranucci's medical malpractice action accrued no later than June 10, 2006, and no civil action has ever been commenced.

participating in the mediation. Anticipating the possibility that a prospective plaintiff may need a court order to force the mediation, the statute provides that "[t]he circuit court has jurisdiction to enforce the provisions of this section." § 15-79-125(D).

These provisions give a prospective medical malpractice plaintiff the tools to complete the necessary steps to commence a medical malpractice lawsuit within the statute of limitations. There is no provision of law, however, which would allow a prospective plaintiff to commence any civil action five-and-a-half years after the statute of limitations began to run. Even if this court ruled in Ranucci's favor, we could grant no more relief than to declare that the Notice was properly filed, and the circuit court erred in ruling to the contrary. We could never enable a summons and medical malpractice complaint to be filed and served before June 10, 2009.⁷ Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy . . ."). The case is over, and the issues raised in this appeal are moot.

⁷ Ranucci appears to have filed even the Notice after the expiration of the statute of limitations. According to that document, Ranucci began experiencing pain in her right breast. After an ultrasound, her gynecologist referred her to Dr. Crain for a biopsy, which was performed on June 7, 2006. According to Ranucci's Notice, "[s]ubsequent to the biopsy, the Plaintiff suffered severe pain with her respirations." This "severe pain with her respirations" appears to have been of a different character and a different intensity from the previous "pain in her breast." Thus, the statute of limitations would have begun to run as soon as she felt the different character of pain, not several days later when the cause of the pain was confirmed to be a collapsed lung. See Knox v. Greenville Hosp. Sys., 362 S.C. 566, 571-72, 608 S.E.2d 459, 462 (Ct. App. 2005) (holding the statute on a medical malpractice action began to run upon the experience of pain the patient recognized to be different, not when the cause of the pain was subsequently diagnosed). It therefore appears that the statute of limitations expired even before the Notice was filed on June 8, 2009.

MEMORANDUM IN SUPPORT OF PETITION

This matter was heard on December 7, 2011 and the Opinion of the Court filed on January 25, 2012 as Opinion No. 4935. Pursuant to Rule 221, SCACR, the Petitioner/Appellant files this petition for rehearing and respectfully represents that:

I. The Court of Appeals misapprehended the clear language of section 15-79-125 by stating in its opinion that:

“[S]ection 15-79-125(A) invokes only the provisions of 15-36-100 governing the preparation and content of the affidavit.” (emphasis added)

This finding, judicially rewrites the language of the statute and interjects verbiage that cannot be found or substantiated anywhere in the statute itself.

Section 15-79-125(A) clearly and unequivocally states that the contemporaneous filing of a Notice of Intent to File Suit and an affidavit of an expert are “subject to the affidavit requirements established in Section 15-36-100.” This language is inclusive of the entire statute rather than limiting it to a particular subsection of the statute.

Terms that are clear and unambiguous on their face leave no room for statutory construction, and we must apply the statute according to its literal meaning. Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (“Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature’s language.”). “An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in

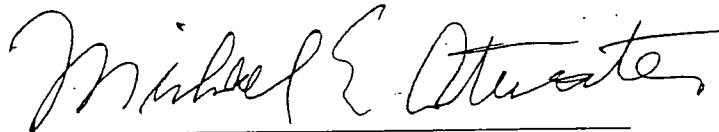
Such an affidavit is a threshold requirement a medical malpractice claimant must satisfy in order to seek disclosure of sensitive and often highly technical information. However, it does not appear to carry any additional significance that would necessitate implementing measures to test the authorship or content of the affidavit.”

First and foremost, in finding that there are no circumstances whatsoever which would allow the filing of the expert affidavit other than contemporaneously with the Notice of Intent to File Suit, the Court of Appeals has effectively given the affidavit the import that without it, the Notice of Intent to File Suit has no significance. It is the Notice of Intent to File Suit which acts to toll the applicable statute of limitations. If the Notice of Intent itself does not, as the Court of Appeals states, accomplish this function; then the contemporaneous filing of the Affidavit is also given the significance of tolling the statute of limitations and substantially affecting the substantive and procedural rights of the Plaintiff to proceed with an action to recover damages for professional negligence of the doctor.

The Court’s interpretation that the affidavit *[D]oes not appear to carry any additional significance that would necessitate implementing measures to test the authorship or content of the affidavit* (emphasis) completely ignores the legislature’s intent to require that the affidavit itself have very particular and meaningful effect in its content and imprimatur of authority by its author. By attempting to cut out and exclude relevant portions of Section 15-36-100 in their application to Section 15-79-125, the Court effectively states that the remedies provided by 15-36-100 for a defective or faulty

WHEREFORE, the Petitioner/Appellant herein respectfully Petitions this Honorable Court to Rehear and Reconsider the issues in this matter and to substitute its prior opinion with a new one REVERSING the decision of the Circuit Court Judge below and stating and clarify the law as requested herein.

Respectfully Submitted,



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February 9, 2012

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SC Court of Appeals

cc: Eric Christopher Davis, Esquire
Michael E. Atwater, Esquire
Lee Cannon Weatherly, Esquire

FILED

MARCH 15, 2012

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN FINDING THAT A MEDICAL EXPERT AFFIDAVIT WAS NOT TIMELY FILED WHEN PLAINTIFF HAD FILED SAME WITHIN 45 DAYS OF THE FILING OF A NOTICE OF INTENT TO FILE SUIT WHICH WAS FILED WITHIN 10 DAYS OF THE STATUTE OF LIMITATIONS?
- II. DID THE LOWER COURT ERR IN FINDING THAT S.C. CODE ANN. §15-79-125 AND §15-36-100 OPERATE INDEPENDENTLY OF EACH OTHER?

STATEMENT OF THE CASE

This medical malpractice case was initiated with the filing of a Notice of Intent to File Suit pursuant to S.C. Code of Laws (Ann.) § 15-79-125 on June 8, 2009. Paragraph D of the Notice of Intent to File Suit included a notice pursuant to S.C. Code of Laws (Ann.) § 15-36-100(C)(1) stating that the pleading was being filed within 10 days of the applicable statute of limitations and that due to time constraints an affidavit of the expert could not be prepared. Further reference was made to the statutory provisions of S.C. Code of Laws (Ann.) § 15-36-100(B) stating that an affidavit of the expert would be filed within 45 days.

On July 23, 2009, the Plaintiff (Ranucci) filed the expert Affidavit of Richard L. Boortz-Marx, M.D. within 45 days of filing the Notice of Intent to File Suit.

On July 16, 2009, prior to Ranucci's filing of her expert's affidavit, the Defendant (Dr. Crain) filed an Answer to the Notice of Intent to File Suit along with a Motion to

pursuant to Rule 59(e) SCRCP, when in fact, his clarification of the prior order was the remedy sought by the Plaintiff in her Rule 59(e) Motion.

The Plaintiff filed this appeal on November 19, 2009.

medical doctors in subsection (G)(7) as a profession which is included within the mandates of the statute.

After a hearing on Dr. Crain's motion and a subsequent Motion filed by Ranucci pursuant to Rule 59(e), SCRCivP; the lower court ruled in error in favor of Dr. Crain.

(R. 42-46), Transcript of Record of Hearing dated August 13, 2009 (R. p. 56, lines 3-7; p. 56 lines 23-25 – p. 57. Lines 1- 4; p. 59, lines 24-25-p. 60, lines 1-16- p. 61, lines 16-25 – p. 62, lines 1-3), and Transcript of Record of Hearing dated November 12, 2009 (R. p. 78, lines 22-25- p. 79, lines 1-12; p. 79, lines 16-25- p.80, lines 1-25- p. 81, lines 1-9- p. 85, lines 7 -19- p. 86, lines 22-25- p. 87, lines 1-10- p. 88, lines 2 - 7) that Sections 15-36-100 and 15-76-125 must be read and construed together to give them their statutory meaning and intent. Ranucci argued that a correct reading of both sections requires that the tolling provisions in Section 15-36-100(C)(1) are applicable to the filing of an expert affidavit in a medical malpractice action initiated pursuant to Section 15-79-125(A) when (1) the Notice of Intent to File Suit is filed within ten days of the applicable Statute of Limitations and the Plaintiff alleges that there was not sufficient time to prepare an affidavit of the expert, and (2) an affidavit comporting with the requirements of 15-36-100(B) is subsequently filed within forty-five days of the filing of the Notice of Intent.

The resolution of this dispute lies within the ambit of two primary issues: (1) statutory interpretation of Sections 15-36-100 and 15-79-125; and (2) notice and compliance with filing deadlines in regard to the medical malpractice action.

A. Interpretation of Sections 15-36-100 and 15-79-125

i. Rules of Statutory Construction

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Coastal Conservation v. Dept. of Health, 380 S.C. 349, 365 (Ct.App. 2008).

In South Carolina, the court's foremost duty is to determine the intent of the

manifest purpose. Coastal, 380 S.C. at 367.

When reasonably possible, statutes in apparent conflict should be interpreted to allow both to stand. Coastal, 380 S.C. at 368.

Courts will reject statutory interpretations that lead to absurd results clearly unintended by the legislature or that defeat the plain legislative intent. Peake, 375 S.C. at 599.

ii. Applying the Rules to the Statute

The process of initiation of a Medical Malpractice Action is spelled out in two different statutes which refer to one another in their language. Both of these statutes were passed within one single act of the legislature, being Act No. 32 of 2005.

S.C. Code Ann. § 15-79-125(A) reads: *(emphasis added)*

“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. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File

evidence at the time of the filing of the affidavit.

This subsection of Section 15-36-100 mandates that an expert affidavit must be filed in order to initiate a legal proceeding alleging professional negligence. It also outlines the specific information and requirements of the expert affidavit which must be filed pursuant to Sections 15-79-125 and 15-36-100.

Specific reference is made in this subsection to the professionals to whom this subsection applies regarding the submission of an expert affidavit as a prerequisite to the initiation of legal proceedings for damages arising as a result of professional negligence. This subsection directs that it is applicable to “*a professional licensed by or registered with the State of South Carolina and listed in subsection (G)*”.

S.C. Code Ann. § 15-36-100(G) reads: *(emphasis added)*

(G) This section applies to the following professions:

- (1) architects;*
- (2) attorneys at law;*
- (3) certified public accountants;*
- (4) chiropractors;*
- (5) dentists;*
- (6) land surveyors;*
- (7) medical doctors;*
- (8) marriage and family therapists;*
- (9) nurses;*
- (10) occupational therapists;*

S.C. Code Ann. § 15-79-125(A) reads in part: *(emphasis added)*

"...the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness..."

However, there is a tolling provision in S. C. Code Ann. § 15-36-100(C)(1) which is applicable to both of the aforementioned sections.

S.C. Code Ann. § 15-36-100(C)(1) reads in part: *(emphasis added)*

"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....."

Reading all of the sections together as required by our rules of statutory construction, it becomes abundantly clear that the tolling provision of Section 15-36-100(C)(1) is equally applicable to the initial filing requirements of both sections 15-79-125 and 15-36-100.

It is not possible to read Section 15-79-125 by itself and ascertain all of the requirements mandated by the legislature for filing a medical malpractice action. It is for this reason that 15-79-125 explicitly incorporates Section 15-36-100 in its entirety.

iii. Ranucci's Compliance with Statutory Filing Deadlines

II. THE LOWER COURT ERRED IN FINDING THAT S.C. CODE ANN. §15-79-125 AND §15-36-100 OPERATE INDEPENDENTLY OF EACH OTHER

It is not possible to read Section 15-79-125 by itself and ascertain all of the requirements mandated by the legislature for filing a medical malpractice action. It is for this reason that 15-79-125 explicitly incorporates Section 15-36-100 in its entirety.

Statutes are to be read together given their plain meaning. Any conflicting rule goes to inclusion not to exclusion. These statutes are both part of the same Act and all statutes in an act are required to be read together to give the Act its proper purpose.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY

S. Jackson Kimball, Special Circuit Court Judge

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Case No. 2009-CP-46-2484

MAY 16 2012

Shannon Ranucci, Appellant,

S.C. Supreme Court

v

Corey K. Crain, M.D., Respondent

BRIEF OF RESPONDENT

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Attorneys for Appellee

- A. Dr. Boortz-Marx is not a qualified expert pursuant to S.C. Code Ann. Ann. § 15-79-125 and/or S.C. Code Ann. Ann. § 15-36-100. . .19
- B. The substance of Dr. Boortz-Marx's expert affidavit does not comply with the requirements of S.C. Code Ann. Ann. § 15-36-100 because the affidavit failed to properly outline an instance of "negligence" which would support the allegations in the Complaint and failed to establish proximate cause between the alleged negligent act and the alleged damages.21

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The Honorable S. Jackson Kimball heard the oral argument on the Motion to Dismiss on August 13, 2009. After considering argument of counsel and all matters of record before the Court, Judge Kimball granted the Motion to Dismiss and issued an order dated September 21, 2009. Judge Kimball noted in his Order that "I find and conclude that an affidavit was not timely filed, and that Appellant has not met the requirements of the statute. Thus, the Defendant is entitled to dismissal of the Notice, and to have the same stricken by the Clerk of Court from the file book." Order of the Honorable S. Jackson Kimball, p. 1.

On October 5, 2009, the Appellant filed a Motion to Alter or Amend Judgment seeking clarification of the prior order. After a hearing on the Motion to Alter or Amend Judgment on November 12, 2009, Judge Kimball issued a Statement of Judgment by the Court dated November 13, 2009, which clarified his previous order by stating that "S.C. Code Ann. Ann. § 15-79-125 and 15-36-100 operate independently of each other, and that § 15-36-100 does not offer a procedural alternative to § 15-79-125." Statement of Judgment, p. 1.

The Appellant filed a Notice of Appeal on November 19, 2009, and filed the Appellant's Initial Brief on February 3, 2010.

STATEMENT OF FACTS

The Appellant filed a Notice of Intent to File Suit against Dr. Crain on June 8, 2009 alleging that Dr. Crain, a surgeon, was professionally negligent in performing a surgical medical procedure on June 7, 2006. Notice of Intent to File Suit, p. 1-2. The Appellant retained counsel at least thirty-four months before filing her Notice of Intent to File Suit. See Attorney Atwater's Request for Medical Records, p. 1. The Appellant did

certified only in anesthesiology and anesthesiology pain management. Affidavit of Richard L. Boortz-Marx, M.D., p. 1. Dr. Boortz-Marx stated that he has been active in the area of anesthesiology and pain medicine for 17 years, but made no mention of practicing or being active in Dr. Crain's medical specialty of surgery. Id. Finally, Dr. Boortz-Marx opined that Dr. Crain violated the standard of care only by "not having documented evidence of duly informed consent." Id. Dr. Boortz-Marx's affidavit is silent as to any knowledge or expertise relating to the standard of care exercised by surgeons, like Dr. Crain, regarding the process of informed consent with surgical patients. Dr. Boortz-Marx's affidavit is silent as to any similarity between the standard of care of physicians of his expertise and background and surgeons such as Dr. Crain.

Additionally, Appellant did not allege or state any cause of action for failure to provide informed consent in Appellant's Notice of Intent to File Suit. Notice of Intent to File Suit, p. 1-2. Rather, the sole allegation against Dr. Crain is that he was negligent in performing a surgical biopsy of the Appellant's breast tissue. Id. at p. 1. Dr. Boortz-Marx's affidavit does not reference any alleged negligence relating to the performance of a surgical biopsy.

ARGUMENT

Standard of Review

This Court should affirm the Trial Court's grant of Dr. Crain's Motion to Dismiss because the Appellant failed to comply with the mandatory statutory requirements and conditions precedent to filing a medical malpractice cause of action. The appellate court "applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." Capital City Ins. Co. v. BP Staff, Inc.,

Malpractice Statute, the plaintiff is also required to contemporaneously file an expert affidavit with the Notice of Intent to File Suit pleading. The Medical Malpractice Statute specifically states:

Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the Appellant 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

S.C. Code Ann. § 15-79-125(A) (emphasis added).

There is no provision in the Medical Malpractice Statute allowing for any delayed filing of the required expert affidavit. The South Carolina Supreme Court has held that it "cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007). To allow a subsequently filed affidavit would be an improper construction of this statute which is contrary to its plain and ordinary meaning. Because the Appellant failed to properly file an expert affidavit with her Notice of Intent to File Suit, suit was not properly filed under the Medical Malpractice Statute on June 8, 2009.

The Appellant is attempting to invoke the tolling provision of S.C. Code Ann. § 15-36-100 (hereinafter "the Professional Malpractice Statute") to excuse her failure to properly file an expert affidavit with her Notice of Intent to File Suit. However, based on the clear language of the Professional Negligence Statute, the Medical Malpractice Statute controls when it comes to the timing of the filing of the expert affidavit. Specifically the Professional Negligence Statute, S.C. Code Ann. § 15-36-100(B), states:

"Except as provided in Section 15-79-125, in an action for damages alleging

file an expert affidavit within 45 days of filing the Notice of Intent if the expiration of the statute of limitations is imminent is not supported by the rules of statutory interpretation. If possible, when two statutes appear to conflict, the statutes should be construed in a way that allows both to stand and gives effect to each. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Further, in a conflict between a specific statute and a general statute, the more specific statute is controlling. See, e.g., Rodriguez v. Romero, 363 S.C. 80, 86, 610 S.E.2d 488, 491 (2005) (noting that more specific provisions are controlling); Heffner v. Destiny, Inc., 321 S.C. 536, 538, 471 S.E.2d 135, 136 (1995) (explaining that, where a general statute conflicts with a specific statute, the specific statute is controlling); Nat'l Adver. Co. v. Mount Pleasant Board of Adjustment, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994) (noting that specific laws prevail over general laws).

When the South Carolina legislature enacted tort reform in 2005, they enacted two separate statutes that control professional malpractice generally and medical malpractice specifically, S.C. Code Ann. § 15-79-125 and S.C. Code Ann. § 15-36-100. S.C. Code Ann. § 15-79-125, or the Medical Malpractice Statute, is specific solely to medical malpractice actions while S.C. Code Ann. § 15-36-100, or the Professional Negligence Statute, applies to a variety of professional malpractice cases. The Medical Malpractice Statute specifically outlines the steps that must be taken "prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice." (emphasis added). The Professional Malpractice Statute does not require these additional steps to be completed before a complaint is filed. Although the Professional Malpractice Statute generally requires an expert affidavit to be filed contemporaneously

court looks to the statute's language as a whole in light of its manifest purpose." Ex parte Cannon, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009). Moreover, the court can look at the legislative history surrounding the passage of the bill. Id.

The Medical Malpractice Statute and the Professional Malpractice Statute were both passed into law on April 4, 2005 in the "South Carolina Noneconomic Damages Awards Act of 2005" also known as S.C. Senate Bill No. 83 or Act No. 32. Prior to the enactment of S.C. Code Ann. § 15-36-100 and § 15-79-125 in 2005, ten drafts of the senate bill 83 were introduced. Of these ten drafts, only four of the drafts contained changes to either § 15-36-100 or § 15-79-110, et seq. The first draft of the bill, introduced on December 15, 2004, contained no reference to the Medical Malpractice Statute. See Senate Bill 83, December 15, 2004. However, the December 15, 2004, draft did include the text of the Professional Malpractice Statute regarding the filing of an affidavit and the provision allowing for the delayed filing of the affidavit. Id. A new version of the bill was introduced on February 2, 2005, which merely added definitions to § 15-79-110, and made no other significant changes to the original draft of the bill. See Senate Bill 83, February 2, 2005. Notably, on March 2, 2005, a version of § 15-79-125 was added to the bill which included the "Notice of Intent to File Suit" requirement but did not include the contemporaneous expert affidavit requirement. See Senate Bill 83, March 2, 2005. Importantly, on March 17, 2009, a new draft of the bill was introduced which added "Except as provided in Section 15-79-125" to the beginning of S.C. Code Ann. § 15-36-100(B) and also added the contemporaneous expert affidavit requirement to § 15-79-125(A). See Senate Bill 83, March 17, 2009. The March 17,

in medical malpractice actions. Had the legislature intended for the Professional Negligence Statute to control the timing requirements for expert affidavits, the final revisions would not have been made and the specific language exempting the Medical Malpractice Statute from the affidavit timing provisions of the Professional Negligence Statute would not have been added. Even if the Court is not convinced by the plain language of the statutes, the legislative history of the Bill clearly shows the legislature's intention to require contemporaneous filings of affidavits in medical malpractice cases. As the Appellant failed to comply with this law, Dr. Crain respectfully requests this Court to affirm the trial court's grant of Motion to Dismiss.

D. Even if this Court determines that S.C. Code Ann. § 15-36-100 applies to allow a delayed filing of an expert affidavit in certain circumstances, permitting a delayed filing in the instant case would not comport with the spirit of the law.

Even should the Court determine that S.C. Code Ann. 15-36-100 allows a party filing a medical malpractice action to file a delayed expert affidavit under Subsection (B), they should not allow this particular Appellant to benefit from this provision as her actions are contrary to the spirit of the law. The contemporaneous affidavit exception listed in Subsection (C) of the Professional Negligence Statute provides for a situation where "because of time constraints, the Appellant alleges that an affidavit of an expert could not be prepared." S.C. Code Ann. § 15-36-100 (C)(1). However, the record below establishes that there were no such time restraints on the Appellant in this case and no justification for the delay in obtaining the expert affidavit.

The purpose of the contemporaneous expert affidavit, the Notice of Intent to File Suit, and the pre-suit mediation requirements in the "South Carolina Noneconomic Damages Awards Act of 2005" is to attempt to resolve medical malpractice actions prior

Professional Negligence Statute. However, the Appellant is asking the Court to reward her for delaying the filing of the Notice of Intent until the last possible day and then waiting until the last possible day to provide a legally insufficient affidavit of a physician who does not practice in the same area of medicine as the Defendant. Additionally, the affidavit does not establish the qualifications of Dr. Boortz-Marx to render any opinion of alleged negligence on the part of Dr. Crain. The Appellant's actions are directly contrary to the purpose of the tort reform intended by the legislature in 2005, and the Appellant should not be rewarded for acting in such contrast to the spirit of the law. The spirit of S.C. Code Ann. § 15-36-100(C)(1) was surely to assist Appellants whose counsel was retained just before the statute of limitations was to expire and could not procure an expert affidavit in time. This is clearly not the situation in this matter.

On the basis of fairness, equity, and law, this Court should find that the Appellant was under no time constraints that would allow them the protection of S.C. Code Ann. § 15-36-100(C)(1) to file an expert affidavit after the Notice of Intent to File Suit. Therefore, the Appellant's claims were properly dismissed by the trial court.

II. DISMISSAL OF APPELLANT'S CASE WAS ALSO APPROPRIATE BECAUSE, WHEN APPELLANT EVENTUALLY FILED AN EXPERT AFFIDAVIT, SHE DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. The South Carolina Supreme Court has held that "a respondent-the 'winner' in the lower court-may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716,

practice or specialty in which the opinion on the standard of care is offered;

or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given . . .

(emphasis added). Under South Carolina's common law, a physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing in the same or similar circumstances. Durham v. Vinson, 360 S.C. 639, 650-51, 602 S.E.2d 760, 766 (2004). Additionally, medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. Specifically, a plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendant's field of medicine under the same or similar circumstances and (2) the defendant departed from the recognized and generally accepted standards. Pederson v. Gould, 288 S.C. 141, 143-44, 341 S.E.2d 633, 634 (1986) (emphasis added). In addition to this common law requirement, Section 15-36-100(A) requires an expert to either be board certified in the area of practice or specialty at issue or have actual or professional knowledge and experience in this area.

In the current matter, Dr. Crain is a surgeon. Under the common law and the regulations of Section 15-36-100, he is held to the standard of care for surgeons. However, the Appellant's expert is an anesthesiologist who practices in the areas of pain management and palliative care. In his affidavit, the Appellant's expert does not state that he has any training or is board certified in surgery as required under Subsection

establish proximate cause between the alleged negligent act and the alleged damages.

The Appellant claims the protection of S.C. Code Ann. 15-36-100 (B) and (C)(1) to file an affidavit after her filing a Notice of Intent to File Suit. However, she has failed to meet the requirements of these sections with the substantive content of her expert affidavit signed by Dr. Boortz-Marx.

(1) Dr. Boortz-Marx's Affidavit does not support the Complaint

The Appellant makes one claim for negligence in her Notice of Intent to File Suit. She states:

Dr. Crain performed a biopsy on June 7, 2006. Subsequent to the biopsy, the Appellant suffered severe pain with her respirations. On June 10, 2006, an x-ray indicated that the Appellant had a collapsed lung as a result of the negligent execution of the biopsy.

Notice of Intent to File Suit, p. 1. However, in Dr. Boortz-Marx's affidavit, he cites a completely different alleged deviation from the standard of care. He minimally writes that Dr. Crain deviated from the standard of care by "not having documented evidence of duly informed consent." The Appellant's Notice of Intent to File Suit alleges that Dr. Crain negligently performed the breast biopsy on June 7, 2006. However, the Appellant's expert's affidavit does not support this allegation, but instead makes a totally different and separate allegation regarding informed consent. The affidavit is silent as to the affiant's knowledge of the standard of care of surgeons regarding informed consent.

Even if the Appellant has the protection of Subsection (C)(1) of the Professional Negligence Statute to file a delayed affidavit, she has not met the requirement of Subsection (B) which requires a plaintiff to "file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to

informed consent.”¹ This sole and incredibly minimal statement does not include any statements regarding proximate cause or the factual basis for the claim. To effectively allege one act of negligence, Dr. Boortz-Marx’s affidavit, would need to state that, if Dr. Crain had documented duly informed consent, the Appellant’s injuries might have been avoided. It does not. Further, his affidavit would have to give the factual basis for such an allegation. It does not. In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. David v. McLeod Regional Medical Center, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). As the Appellant’s claims do not rise above generic allegations and conjecture they must be dismissed by this Court.

The Appellant has failed to properly support the negligence alleged in the Notice of Intent to File Suit with an expert affidavit. Additionally, the expert affidavit did not properly name an instance of negligence or establish the element of proximate cause. Moreover, the expert affidavit did it meet the requirements of Subsection (B) of the Professional Negligence Statute by outlining the factual basis of the expert’s claim of failure to document duly informed consent.

CONCLUSION

There are numerous grounds on which this Court could affirm the trial court’s grant of summary judgment including (1) the failure to contemporaneously file the expert affidavit in spite of apparently substantial time in which to do so, (2) the failure to file an expert affidavit of a qualified expert, or (3) the failure to file an expert affidavit which properly supports the negligence alleged in the complaint or to even allege that

¹ The Appellant’s medical records are replete with documentation of the Appellant’s informed consent for the breast biopsy performed on June 7, 2006.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2009-CP-46-2484

Shannon Ranucci Appellant,

v.

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

REPLY BRIEF OF APPELLANT

Eric C. Davis
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1470 Ebenezer Road
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(803) 326-2000
Attorneys for the Appellant

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S.C. Court of Appeals

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S.C. Supreme Court

TABLE OF AUTHORITIES

CASES

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) 7

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Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 438,
472 S.E.2d 612, 615 (1996) 16

Huff v. Jennings, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995) 16

On July 16, 2009, prior to Ranucci's filing of her expert's affidavit, the Defendant (Dr. Crain) filed an Answer to the Notice of Intent to File Suit along with a Motion to Dismiss. The Defendant's Answer alleged that the Plaintiff failed to comply with the mandatory requirements of S.C. Code of Laws (Ann.) §§ 15-79-120, 15-79-125, and 15-36-100 by failing to file an expert affidavit contemporaneously with the Notice of Intent to File Suit. The Defendant specifically pled and asserted that the tolling provisions of Section 15-36-100 are inapplicable. The Defendant's Motion to Dismiss was predicated upon the non-contemporaneous filing of the expert affidavit and alleged defects in the affidavit itself.

The motion to dismiss was heard by the Honorable S. Jackson Kimball on August 13, 2009 and he issued an order dated September 21, 2009 finding that "an affidavit was not timely filed, and that Plaintiff has not met the requirement of the statute."

On October 5, 2009, the Plaintiff filed a Notice of Motion and Motion to Alter or Amend Judgment seeking clarification of the prior order. In this motion, the Plaintiff specifically requested a declaration as to whether or not Judge Kimball had ruled that the provisions of S.C. Code of Laws (Ann.) § 15-36-100 are applicable in part, or in its entirety, to the filing of an expert affidavit as referenced in S.C. Code of Laws (Ann.) § 15-79-125.

A hearing on the Plaintiff's motion was convened by the Honorable S. Jackson Kimball on November 12, 2009.

Judge Kimball entered an Order on November 13, 2009 stating that "S.C. Code Ann. §15-79-125 and 15-36-100 operate independently of each other, and that §15-36-

STATEMENT OF FACTS

The Appellant (Ranucci) was a patient of the Respondent (Dr. Crain) who had been referred for a needle biopsy of her breast. As a result of Dr. Crain's negligent performance of the procedure, Ranucci discovered that her lung had been punctured and collapsed causing her serious pain and loss of ability to breathe along with the need for additional medical treatment and expense, prolonged administration of potent medications, emotional and physical suffering, physical disability of a temporary and permanent nature, and impairment of income earning capacity.

On June 8, 2009, which was less than ten days from the expiration of the Statute of Limitations, Ranucci filed and served a Notice of Intent to File Suit against Dr. Crain which complied with the mandates of S.C. Code of Laws (Ann.) §§ 15-79-125(A) and 15-36-100(B), (C)(1), (G). Within 45 days of such filing, Ranucci filed an affidavit of expert Richard L. Boortz-Marx, M.D. which detailed the opinion to a legal degree of medical certainty that Dr. Crain had violated the standard of medical care and practice by not having documented evidence of duly informed consent.

Dr. Crain filed a Motion to Dismiss claiming that the tolling provisions of § 15-36-100(B), (C)(1), (G) were inapplicable to medical malpractice actions against medical doctors.

Ranucci responded citing as authority that § 15-79-125(A) explicitly incorporates the entirety of § 15-36-100 regarding the pre-suit mandates for a professional malpractice action. Ranucci further cited as authority that § 15-36-100(B) explicitly includes medical doctors by reference to § 15-79-125 and by reference to § 15-36-100(G) which lists

ARGUMENTS

I. THE RESPONDENT'S INTERPRETATION OF S.C. CODE (ANN.) §§ 15-36-100 AND 15-79-125 DOES NOT REFLECT THE PLAIN MEANING OF THE STATUTES AND WOULD NOT LEAD TO A RESULT WHICH PROPERLY IMPLEMENTS THEIR LEGISLATIVE INTENT.

- (A) The Respondent's contention that "only certain" provisions of Section 15-36-100 are applicable to the operation of Section 15-79-125 requires an assumption that is clearly contradicted by the language of both code sections.

In the Respondent's Initial Brief, the respondent attempts to cleverly manipulate the meaning of the affidavit filing requirements of Section 15-79-125 by "emphasizing" the operative language relating to contemporaneous filing and "ignoring" the modifying language of the very same sentence.

The Respondent presents the language of the statute with his own emphasis thusly:

"Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the Appellant 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"

(Initial Brief of Respondent, p. 10)

The Respondent ignores the modifying and qualifying language which immediately follows the text which he chooses to emphasize. Reading the statute properly and fairly as the legislature intended it to read, the correct reading of the statute mandates that the verbiage which is emphasized by the Respondent is statutorily "subject to the affidavit requirements established in Section 15-36-100" (emphasis added).

- (8) marriage and family therapists;
- (9) nurses;
- (10) occupational therapists;
- (11) optometrists;
- (12) osteopathic physicians;
- (13) pharmacists;
- (14) physical therapists;
- (15) physicians' assistants;
- (16) professional counselors;
- (17) professional engineers;
- (18) podiatrists;
- (19) psychologists;
- (20) radiological technicians;
- (21) respiratory therapists; and
- (22) veterinarians.”

The language, “this section”, refers to Section 15-36-100 in its entirety and not solely to any specific subsection. If the legislature had intended for only specific subsections of this statute to apply to medical doctors, it could have specifically said so here. Not only does this subsection specifically list “medical doctors” as being subject to this statute, but it further includes the professions enumerated as (4), (7), (9), (10), (11), (12), (13), (14), (15), (16), (18), (19), (20),

applicable to persons desiring to commence an action against a professional to whom the statute applies (including medical doctors). This section specifically allows for a later filing of the expert affidavit when the pleadings which commence the action are filed within 10 days of the applicable statute of limitations. It is this section which the Respondent asserts is not applicable to medical doctors, despite the irrefutable evidence that Section 15-79-125 references and incorporates Section 15-36-100 in its entirety.

Subsection (D) of Section 15-36-100 creates a statutory exception to the affirmative defense of expiration of the Statute of Limitations. This is a necessary protection for the Plaintiff due to the additional requirements and obligations which are created by these two statutes. Without this protection, the Defendant could object to a technical deficiency of the expert's affidavit and the Plaintiff would be in peril of a loss of the cause of action due to assertion of the affirmative Statute of Limitations defense.

Subsection (E) of Section 15-36-100 creates a statutory remedy for a Plaintiff who files an expert affidavit which is allegedly defective. This subsection also grants the trial court the authority to extend the time in which an affidavit may be filed based upon the needs of justice.

(C) The Respondent erroneously reads the language of S.C. Code Ann. §15-36-100(B)(1) as a "term of exclusion" when, in fact, the verbiage operates as a "term of inclusion".

The Respondent improperly relies upon the language in the first sentence of S. C. Code Ann. § 15-36-100(B) to support his argument that medical doctors

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 the filing of the affidavit.”

Owing to the fact that S. C. Code Ann. § 15-79-125 mandates the filing of a *Notice of Intent* contemporaneously with an affidavit, it becomes evident that the initial phrase of subsection (B) is an acknowledgment of the distinction between the distinctive pleadings which are employed to initiate a cause of action under the two separate statutes.

(D) The Respondent’s contention that the trial court properly ruled that Sections 15-36-100 and Section 15-79-125 operate independently of one another would leave the Respondent without the specific remedy which he seeks to enforce in this matter.

In the Statement of Judgment issued by the trial court on November 13, 2009, Judge Kimball specified that “S.C. Code Ann. § 15-79-125 and 15-36-100 operate independently of each other, and that 15-36-100 does not offer a procedural alternative to § 15-79-125.” (R. p. 2)

The Respondent contends that the trial judge’s ruling as stated above was correct and should be affirmed by the appellate court. In direct contrast to this provision, the Respondent seeks the affirmation of a dismissal which is predicated upon a different statutory construction. Respondent argues that the Appellant’s case was properly dismissed for failure to comply with S.C. Code Ann. §15-79-125 and that §15-36-100 is inapplicable. However, a thorough reading of §15-79-125 leads to the inarguable conclusion that there is no statutory provision which

Rule 56 instead of Rule 12. (R. p. 71, lines 10-25- p. 72, line 1).

In response to Appellant's Counsel's assertion, the trial judge stated that "I don't – I don't see that these documents have anything to do with this motion."

(R. p. 72, lines 2-3).

Appellant contends that this argument is frivolous, has no basis in the law of this case, and is submitted to confound and confuse the substantive issues which are properly on the record. Appellant further contends that the Respondent's inclusion of these documents in the Record on Appeal is violative of an Order of the Supreme Court dated August 13, 2007.

III. THE APPELLATE COURT SHOULD NOT CONSIDER AND RULE UPON THE RESPONDENT'S ADDITIONAL SUSTAINING GROUNDS WHICH WERE NOT RULED UPON BY THE LOWER COURT.

In his Initial Brief of the Respondent, Dr. Crain asks this court to rule upon matters which were not ruled upon by the trial court below. It is recognized that "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. *Y'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716 (2000).

The Appellant respectfully submits that based upon the facts of this case, that it would not be proper and fair and that the court should decline to do so.

The matters which the Respondent seeks to have the court rule upon were thoroughly discussed and argued by both parties. (R. p. 52, line 25- p. 53, lines 1-25- p.

clarification.

The Appellant contends that there are sufficient grounds for the appellate court to reverse the decision of the trial judge and therefore, it is not necessary to address the additional sustaining grounds which are presented here by the Respondent. "The appellate court may or may not wish to address such grounds when it reverses the lower court's decision." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d716 (2000) (citing) *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 438, 472 S.E.2d 612, 615 (1996) (reversing lower court and declining to discuss additional sustaining grounds); *Huff v. Jennings*, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct.App. 1995) (reversing lower court's decision and discussing additional sustaining ground).

Notwithstanding the aforementioned arguments, the Appellant recognizes that the appellate court may choose to address the Respondent's additional sustaining grounds and address them as follows:

A. Dr. Boortz-Marx is a qualified expert pursuant to S.C. Code Ann. § 15-79-125 and/or S.C. Code Ann. § 15-36-100.

The Respondent makes reference to numerous South Carolina appellate court opinions which pre-date the Statute and Act controlling this matter and, as such, have no precedential value to this case.

The controlling statute is S.C. Code of Laws § 15-36-100. Subsection (A), (1), (2)(a) and (B).

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

informed consent. The Appellant contends that these statements under oath satisfy the requirements of subsections (2)(a) and (B) § 15-36-100 and complete the requirements of the statute for an affidavit of a medical expert as defined therein.

The standard of medical care relating to duly informed consent is a general standard which is applicable throughout the medical profession.

B. The substance of Dr. Boortz-Marx's affidavit complies with the requirements of S.C. Code Ann. § 15-36-100.

The Respondent cites case law from 1978 in his argument which he contends stands for the premise that the alleged violation of the standard of medical care must have been the proximate cause of the Appellant's alleged injuries and damages. Again, the Respondent's reliance of case law prior to 2005 is misplaced and erroneous. In passing into Law Act 32 of 2005, the South Carolina legislature specifically created a statutory scheme by which a cause of action against a licensed professional in South Carolina (to include a medical doctor) may be initiated. In doing so, the legislature gave an extra measure of protection to these professions which did not exist prior to the statute. There is no other requirement other than compliance with the actual mandate of the statute in order to legally initiate legal proceedings.

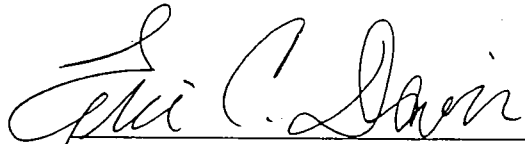
Absent language in the statute which requires specific verbiage outlining a causal connection in the affidavit, the affidavit cannot be found to be legally insufficient for not specifically stating so.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the trial judge relating to the contemporaneous filing of the expert affidavit, decline to make findings of fact which were not made by the trial judge below and deny the Respondent's request to rule upon additional sustaining grounds which were not pursued by the Respondent when he had additional opportunities to do so at the trial court level.

Respectfully Submitted,

April 23, 2010



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Attorneys for the Appellant

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YORK COUNTY, SC

Shannon Ranucci vs. Corey K Crain

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other:
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other:

IT IS ORDERED AND ADJUDGED:

- See attached order;
- Statement of Judgment by the Court:

This matter came before me on November 12, 2009, upon Plaintiff's motion pursuant to Rule 59(e), S.C.R.C.P., asking the Court to alter or amend the Court's Order filed September 23, 2009. Representing the parties were: Eric Davis for Plaintiff; and, Lee Weatherly for Defendant.

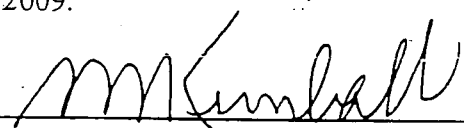
Upon considering the arguments of counsel, I find no matter presented that was not addressed by the Court expressly or by clear implication in the prior order. I further find no basis for reconsideration or amendment of the Court's ruling in the prior order. I will clarify that I conclude that S.C. Code Ann. § 15-79-125 and 15-36-100 operate independently of each other, and that § 15-36-100 does not offer a procedural alternative to § 15-79-125.

Therefore, it is ordered that Plaintiff's Motion pursuant to Rule 59(e), S.C.R.C.P., be denied.

AND IT IS SO ORDERED.

Dated at York, South Carolina, this November 13, 2009.

Court Reporter: Wanda Nelson


S. JACKSON KIMBALL, SPECIAL CIRCUIT JUDGE

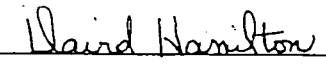
This judgment was entered on the 17th of November 2009, and a copy mailed first class this 17th of November, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

✓ Eric C. Davis Attorney at Law 1470 Ebenezer Rd Rock Hill, SC 29732

D Gary Lovell Jr Carlock Copeland Semler & Stair, LLP 40 Calhoun Street Ste 400 Charleston, SC 294013531

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


David Hamilton - Clerk of Court

nature along with expensive medical treatment and procedures and impairment of income earning capacity.

C. **STANDARD INTERROGATORIES – Rule 33(b)(1) – (7), SCRPC:**

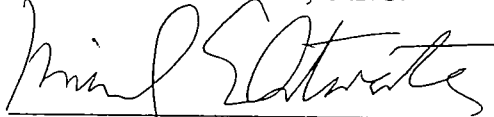
The information specified in the standard interrogatories found in the above-referenced rule is attached hereto.

D. **AFFIDAVIT OF EXPERT TO BE SUPPLEMENTED – S.C. CODE OF LAWS (ANN.) § 15-36-100(C)(1):**

The applicable statute of limitations to file the claim stated herein will expire within ten days of the filing of this pleading and, because of time constraints, an affidavit of an expert could not be prepared. The Plaintiff will supplement these pleadings with an affidavit as described in S.C. Code of Laws (Ann.) § 15-36-100(B) within forty-five days of the filing of this pleading unless, upon motion, the trial court, after hearing and for good cause, extends the time as the court determines justice requires; or alternatively, unless the pleaded specifications of negligence involve subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

McKin

ATWATER & DAVIS, L.L.C.



Michael E. Atwater, Esquire
Attorney for the Plaintiff
1470 Ebenezer Road
Rock Hill, SC 29732
(803) 326-2000

Dated this 5th day of June, 2009

Rock Hill, SC

No Statement in possession of the Plaintiff.

- (d) A.J. Garcia, M.D.
Piedmont GYN/OB
200 South Herlong Avenue
Rock Hill, SC 29732

No Statement in possession of the Plaintiff.

- (e) Kippi Graham, TECH; Bethany Rose, RN; Connie McIntyre, RN; Sherry K. Cabe, RAD; Richard A. Kramer, US; Matthew A. Call, RAD; Charlene Gregory, US; Jonathan L. Lake, PA; George R. Bruce, RN; Patty Anderson, ADMIN; Maik Schoefuss; Debbie Norton, RN; Phillip DAviles, PA; CC Barr, ADMIN
Piedmont Medical Center
222 S. Herlong Ave.
Rock Hill, SC 29732

2. Set forth a list of photographs, plats, sketches or other prepared documents in the possession of the party that relate to the claim or defense in the case.

ANSWER:

- (a) Medical records and reports of Piedmont Surgical Associates; 12 pages.
- (b) Medical records and reports of Piedmont GYN/OB; 3 pages.
- (c) Medical records and reports of Carolinas Healthcare System; 63 pages.
- (d) Medical records and reports of Piedmont Medical Center; 95 pages.

3. In cases involving personal injury set forth the names and addresses of all physicians who have treated the party and all hospitals to which the party has been committed in connection with said injuries and also set forth a statement of all medical costs involved.

ANSWER:

- (a) Peter Chaug, M.D.; C. Chaug, M.D.; Mwatabu Terrell, M.D.; J. Sasnett, R.N.; Christy Adams, R.N.; Ross Bellavia, M.D.; K. Craig, R.N.; Ramsey, M.D.; Rajiv Sharma, M.D.; K. Beach, R.N.; K. Gross, M.D.; Amin, M.D., Deborah Agisim, M.D.; Janice Philpot, R.N.;
Carolinas Healthcare System
P.O. Box 32861
Charlotte, NC 28232-2861

\$4,641.25

- (b) Corey K. Crain, M.D.; Steven Thies, M.D.
Piedmont Surgical Assoc.

observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

(a) Shannon Ranucci is the Plaintiff in this matter and she will testify as to the facts and circumstances surrounding the negligent treatment which she received from the Defendants and the damages she suffered as a result thereof.

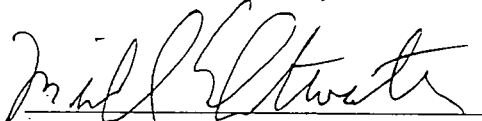
(b) Corey K. Crain, M.D. is the Defendant in this matter. It is not known to the Plaintiff as to what this defendant will testify.

(c) Each of the Plaintiff's medical providers listed in response to interrogatory #3 above (exclusive of the Defendants) are expected to testify as to their treatment of the Plaintiff, their knowledge of the Plaintiff's symptomology and any causation therefore (to include violation of any medical standards of care by the Defendants), and any other knowledge which is within the scope of their expertise which is relevant to the issues contained herein.

(d) Dr. Richard Boortz-Marx is expected to testify as to his training, experience and expertise in the areas of medicine in which he practices and as to the relevant standards of care and the breach of such standards by the Defendants.

These interrogatories are deemed to be continuous and ongoing and shall be supplemented or modified as required up until and including the trial of this matter.

ATWATER & DAVIS, L.L.C.



Michael E. Atwater, Esquire
Attorney for the Plaintiff
1470 Ebenezer Road
Rock Hill, SC 29732
(803) 326-2000

Dated this 8th day of June, 2009

Rock Hill, SC

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

FILED RECEIVED
2009 JUN 18 PM 4:56 CASE NO. 09-CP-46- 2484

Shannon Ranucci,

Plaintiff,)

v.)

Corey K. Crain, M.D.,)

Defendant.)

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

PLAINTIFF'S RESPONSES TO
PRODUCTION OF DOCUMENTS
REQUESTS OF DEFENDANT

TO THE ABOVE-NAMED DEFENDANT;

The Plaintiff above-named, through her undersigned attorney, hereby responds to the Defendant's standard requests to produce and permit the inspection, copying and/or photographing of the following documents, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure as follows:

1. Each document identified in your answer to Defendant's Interrogatory No. 1.

ANSWER: None

2. Each document identified in your answer to Defendant's Interrogatory No. 2.

ANSWER: Medical bills and reports consisting of 173 pages attached hereto.

3. Each document identified in your answer to Defendant's Interrogatory No. 5.

ANSWER: See response to number 2 above.

4. Each document identified in your answer to Defendant's Interrogatory No. 7.

ANSWER: See response to number 2 above.

13 Sp #1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK	)	CASE NO.: 09-CP-46-2484
)	
SHANNON RANUCCI)	
)	
Plaintiff,	)	ANSWER TO NOTICE OF INTENT TO FILE
	)	SUIT
vs.	)	(Jury Trial Demanded)
)	
COREY K. CRAIN, M.D..)	
)	
Defendant.)	

COMES NOW Corey Crain, M.D., Defendant in the above-styled Civil Action, and present this Answer to the Notice of Intent to File Suit and shows the Court as follows:

FIRST DEFENSE

Plaintiff has failed to comply with the mandatory requirements of South Carolina Statutes 15-79-120, 15-79-125, 15-36-100 and other conditions precedent to filing the Notice of Intent to File Suit alleging professional negligence. Plaintiff has failed to file an affidavit of a duly qualified expert setting forth at least one act of alleged negligence contemporaneous with her filing of the Notice of Intent to File Suit. The tolling provisions of 15-36-100 are inapplicable. The Statute of Limitations on this matter has expired. Therefore, the Notice of Intent to File Suit and all claims against this Defendant should be dismissed.

SECOND DEFENSE

At all times relevant to the matters complained of in the Notice of Intent to File Suit, this Defendant exercised that degree of professional skill and care required of him by law.

THIRD DEFENSE

There is no causal connection between any alleged act or omission on the part of this Defendant and any injury or damage claimed by Plaintiff.

Wherefore, having fully responded to the Complaint, Defendant Crain demands a trial by a jury as to any appropriate issue and that he be dismissed from this action.

Respectfully submitted,

CARLOCK, COPELAND & STAIR,
L.L.P.

By: 

D. GARY LOVELL, JR.
State Bar No.: 69293
LEE C. WEATHERLY
State Bar No.: 71109

Attorneys for Defendant

40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

ARGUMENT AND CITATION OF AUTHORITY

South Carolina law requires Plaintiff to file a Notice of Intent to Sue pleading or otherwise comply with South Carolina law, before filing her Complaint alleging professional negligence by this medical doctor defendant. Plaintiff is required under SC Statute 15-79-125 to file a Notice of Intent to File Suit pleading placing the Defendant on notice of their intent to pursue a medical malpractice claim. Subsection (A) of that Code Section states "**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...**" (Emphasis added). There is no provision in Section 125 providing additional time for a plaintiff to obtain the expert affidavit after the filing of the Notice of Intent to File Suit pleading or allowing for the filing of that affidavit by amendment subsequent to the filing of that pleading. In fact, that express language of the statute state the exact opposite. It requires the two pleadings to be filed contemporaneously with each other. Plaintiff has failed to do so, and thus the Notice of Intent to File Suit is defective on its face and must be dismissed with prejudice.

Section 15-36-100 does not work with Section 15-79-125 to provide for an extension of the contemporaneous filing requirements of Section 15-79-125. Section 15-36-100 only applies to establish the substantive requirements of the expert affidavit that is to be attached to the Notice of Intent to File Suit. In Subsection Section (A) of 15-36-100, the required qualifications of the expert witness executing the affidavit are set forth in detail. Subsection (B) and (C) referenced by Plaintiff as providing the tolling of the affidavit requirement relate only to actions against health care facilities or professionals other than medical doctors. Medical doctors are

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

SIXTEENTH JUDICIAL CIRCUIT

Shannon Ranucci,)

Civil Action No.: 2009-CP-16-2484

Plaintiff,)

AFFIDAVIT OF RICHARD L. BOORTZ-MARX, M.D.

v.)

(SC Code of Laws (Ann.) 15-36-100(B)

Corey K. Crain, M.D.,)

Defendants.)

FILED - RECEIVED
2009 JUL 23 PM 2:52
DAVID HAMILTON
CLERK, C.P. & C.S.
YORK COUNTY, SC

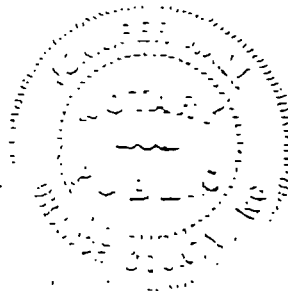
I, Richard L. Boortz-Marx, M.D. first being duly sworn, depose and say that:

1. I am a medical doctor in the State of North Carolina having been duly licensed to practice by the North Carolina Board of Medical Examiners with license number 2006-01920 and my license is in good standing.
2. I have been involved in the active practice of Medicine for the past 17 years and practice in the area of Anesthesiology and Pain Medicine. I am board certified in Anesthesiology and Anesthesiology Pain Management.
3. I have hospital privileges at ~~Presbyterian Hospital, Presbyterian Hospital Huntersville, Presbyterian Hospital Matthews and Presbyterian Orthopaedic Hospital.~~ University of North Carolina Hospitals.
4. I have reviewed the records relating to the above-referenced matter and it is my opinion to a legal degree of medical certainty that the defendants named herein violated the standards of medical care and practice by NOT HAVING DOCUMENTED EVIDENCE OF DULY INFORMED CONSENT.

Richard L. Boortz-Marx
Richard L. Boortz-Marx, M.D.

Sworn to and subscribed before me this 23rd day of July, 2009.

Jennifer Nell LS Notary Public ~~for~~ My commission Expires October 8, 2011
County of Orange
State of North Carolina



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK	)	CASE NO.: 09-CP-46-2484
)	
SHANNON RANUCCI)	
)	
Plaintiff,)	
	)	DEFENDANT'S SUPPLEMENTAL
vs.	)	MEMORANDUM IN SUPPORT OF HIS
	)	MOTION TO DISMISS
)	
COREY CRAIN, M.D.)	
)	
Defendant.)	

COMES NOW Corey Crain, M.D., Defendant in the above-styled civil action, and presents this Supplemental Memorandum in Support of his Motion to Dismiss and shows the Court as follows:

FACTS

The Plaintiff filed her Notice of Intent to File Suit against Dr. Crain on June 8, 2009 alleging that Dr. Crain, a surgeon, was professionally negligent in performing a surgical medical procedure on June 7, 2006. The Plaintiff has been represented by counsel, for her claim against Dr. Crain, since at least August 9, 2006. See Attorney Atwater's Request for Medical Records (Attached as Exhibit A). The Plaintiff did not contemporaneously file an affidavit of an expert witness with the Notice of Intent to File Suit. In the Notice of Intent, the Plaintiff contended that she was unable to obtain the required expert affidavit setting forth at least one act of negligence of Defendant due to "time constraints". See Plaintiff's Notice of Intent to File Suit (Attached as Exhibit B) The "time constraints" that the Plaintiff was under, even though she retained counsel in this matter at least thirty-four months before suit was filed, were not disclosed.

In her Responses to Standard Interrogatories, attached to her Notice of Intent to File Suit, the Plaintiff named Dr. Richard L. Boortz-Marx as her expert witness in this case but, as stated

ARGUMENT

I. Contemporaneous Filing in Medical Malpractice Cases is Mandatory

A. S.C. Code § 15-79-125 and S.C. Code § 15-36-100

When the South Carolina legislature enacted tort reform in 2005 they enacted two separate statutes that control professional malpractice and medical negligence cases, S.C. Code § 15-79-125 and S.C. Code § 15-36-100. S.C. Code § 15-79-125 (hereinafter the "Medical Malpractice Statute") is specific solely to medical malpractice actions, while S.C. Code § 15-36-100 (hereinafter the "Professional Negligence Statute") applies to a variety of professional malpractice cases. Under the Medical Malpractice Statute the law requires a Plaintiff to file a Notice of Intent to Sue pleading before filing a Complaint alleging professional negligence by this medical doctor defendant. Under the Professional Negligence Statute a Notice of Intent to File Suit is not required. Under the Medical Malpractice Statute, the Plaintiff is also required to contemporaneously file an affidavit with the Notice of Intent to Sue. The Medical Malpractice Statute, S.C. Code § 15-79-125(A), specifically states:

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... (Emphasis added).

There is no provision in the Medical Malpractice Statute allowing for any delayed filing of the required expert affidavit.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) The plain and clear meaning of the Medical Malpractice Statute is that the "Plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness. . ."

believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. (Emphasis added)

It is clear that the exception of Subsection (C) only relates to claims filed under Subsection (B) of the Professional Negligence Statute, not the Medical Malpractice Statute which is specifically excluded from the provisions of Subsection (B). Simply put, the extension allowed by Subsection (C) only relates to claims filed under the Professional Negligence Statute and not the Medical Malpractice Statute. To abolish the contemporaneous affidavit requirement of the Medical Malpractice statute and extend the extension allowance of the Professional Negligence Statute would not only be an impermissible expansion of the Professional Negligence Statute's scope, it would be directly contrary to the plain and unambiguous limitations included in the two statutes. To allow the delayed filing of an affidavit in a medical malpractice case against a physician would completely negate the clear language of the Medical Malpractice Statute.

B. Legislative History

Legislative enactments are to be construed as they are written, and, unless there is an ambiguity in the legislation, legislative history should not be considered in construing a particular piece of legislation. See Timmons v. S.C. Tricentennial Commission, 254 S.C. 378, 175 S.E.2d 805 (1970). The Defendant believes that the language of the Medical Malpractice Statute clearly mandates contemporaneous filing of an expert affidavit. However, should this Court determine that the language of the Medical Malpractice Statute and the Professional Negligence Statute gives rise to doubt or uncertainty as to the legislative intent, the search for that intent may range from a variety of sources. The legislature's intent may be gathered from a reading of the statute as a whole in the light of the circumstances and conditions existing at the time of its enactment. One way to determine that intent is to review the legislative history

enacted the Legislature added the contemporaneous affidavit filing requirement, providing no exceptions for delayed filing, for medical malpractice cases. They did so, even though there was an affidavit provision already in place for general professional negligence cases.

It is clear from the actions of the Legislature, by adding the contemporaneous affidavit requirement to the Medical Malpractice Statute and exempting the Medical Malpractice Statute from the affidavit delay provisions of the Professional Negligence Statute, that they did not intend to allow delayed filings of expert affidavits in medical malpractice actions. Had the Legislature intended to have medical malpractice action's affidavit timing requirements controlled by the Professional Negligence Statute, the final revisions would not have been made and the specific language exempting the Medical Malpractice Statute from the affidavit timing provisions of the Professional Negligence Statute would not have been added. Even if the Court is not convinced by the plain language of the statutes, the legislative history of the Bill clearly shows that the last minute additions to the Bill were intended to require contemporaneous filings of affidavits in medical malpractice cases. As the Plaintiff failed to comply with this law before the statute of limitations expired on her claim, her claim must be dismissed.

C. Spirit of the Law

Even should the Court determine that S.C. Code 15-36-100 allows a party filing a medical malpractice action to file a delayed expert affidavit under Subsection (B), they should not allow this particular Plaintiff to benefit from this provision as their actions are contrary to the spirit of the law. The contemporaneous affidavit exception listed in Subsection (C) of the Professional Negligence Statute provides for a situation where "because of time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared." S.C. Code § 15-36-100

provisions of the Professional Negligence Statute. However, in this matter the Plaintiff is asking the Court to reward them for delaying the filing of the Notice of Intent to Sue until the last possible day and then waiting until the last possible day to provide the most scant affidavit imaginable from a physician who does not practice in the same area of medicine as the Defendant. The Plaintiff's actions are directly contrary to the purpose of the tort reform intended by the legislature in 2005, and the Court should not reward the Plaintiff for acting in such contrast to the spirit of the law. The spirit of S.C. Code § 15-36-100(C)(1) was surely to assist Plaintiffs whose counsel was retained just before the statute of limitations was to expire and could not procure an expert affidavit in time. This is clearly not the situation in this matter.

On the basis of equitable fairness this Court should find that the Plaintiff was under no time constraints that would allow them the protection of S.C. Code § 15-36-100(C)(1) to file an expert affidavit after the Notice of Intent to File Suit or after the statute of limitations has expired. The Plaintiff's claims should be dismissed as allowed by S.C. Code § 15-36-100(C)(1) should the Court determine that the Professional Negligence Statute applies to this case.

II. Plaintiff has not complied with filing requirement of S.C. Code 15-36-100

Even if the Plaintiff's claim for medical malpractice is governed by S.C. Code § 15-36-100, and they are allowed to enjoy the affidavit delay provision of Section (C)(1), they failed to meet the forty-five day deadline for filing the expert affidavit after the pleadings are filed. The Plaintiff faxed the Defendant's attorney on the forty-fifth day after filing their Notice of Intent to File Suit. However, serving the opposing party with a copy of the affidavit is not what the statute requires; it requires filing with the Court. S.C. Code § 15-36-100(C)(1) specifically says:

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 time constraints, the plaintiff alleges that an

The Medical Malpractice Statute, S.C. Code 15-79-120(A), states that “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.” Those “expert affidavit requirements” in Section 15-36-100 outline the qualifications necessary in South Carolina for an expert to be authorized to provide an affidavit in support of an action for professional negligence and the Defendant’s required procedures to challenge a defective affidavit. Specifically, Subsection (A) provides that an “expert witness” means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

- (1) Is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; **and**
- (2) (a) **is board certified** by a national or international association or academy which administers written and oral examinations for certification **in the area of practice or specialty in which the opinion on the standard of care is offered**; or
(b) **has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given** . . . (Emphasis added)

Under South Carolina’s common law, a physician commits malpractice by not exercising that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing in the same or similar circumstances. Durham v. Vinson, 360 S.C. 639, 650-51, 602 S.E.2d 760, 766 (2004). Additionally, medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist. Specifically, a plaintiff alleging medical malpractice must provide evidence showing (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners **in the defendant’s field of medicine** under the same or similar

medical malpractice and the case must be dismissed. As Dr. Boortz-Marx's affidavit fails to meet the requirements of Section 15-26-100, the Plaintiff's case should be dismissed for failure to state a claim.

B. Dr. Boortz-Marx failed to properly outline an instance of "negligence" as required by S.C. Code 15-36-100.

The Plaintiff claims the protection of S.C. Code 15-36-100 (B) and (C)(1) to file an affidavit after her filing a Notice of Intent to File Suit and after the applicable Statute of Limitations has expired. However, she has failed to meet the requirements of these sections with the substantive content of her expert affidavit signed by Dr. Boortz-Marx.

1. Dr. Boortz-Marx's Affidavit does not support the Complaint

The Plaintiff makes one claim for negligence in her Notice of Intent to File Suit. She states:

Dr. Crain performed a biopsy on June 7, 2006. Subsequent to the biopsy, the Plaintiff suffered severe pain with her respirations. On June 10, 2006, an x-ray indicated that the Plaintiff had a collapsed lung as a result of the negligence execution of the biopsy. See Exhibit B.

However, in Dr. Boortz-Marx's affidavit he cites a completely different deviation from the standard of care. He minimally writes that Dr. Crain deviated from the standard of care by "not having documented evidence of duly informed consent." See Exhibit D. The Plaintiff's Notice of Intent to File Suit alleges that Dr. Crain negligently performed the breast biopsy on June 7, 2006. However, the Plaintiff's expert's affidavit does not support this allegation, but instead makes a totally different and separate allegation regarding informed consent.

Even if the Plaintiff has the protection of Subsection (C)(1) of the Professional Negligence Statute to file a delayed affidavit, she has not met the requirement of Subsection (B) to "file . . . an expert affidavit of an expert witness which must specify at least one negligent act

the availability of the Plaintiff's full medical record, Dr. Boortz-Marx was only able to provide one deviation from a standard of care of unknown origins: "not having documented evidence of duly informed consent."¹ See Exhibit D. This sole and incredibly minimal statement does not include any statements regarding proximate cause or the factual basis for the claim. Dr. Boortz-Marx's affidavit, to effectively allege one act of negligence, would need to state that should Dr. Crain have documented duly informed consent, the Plaintiff's injuries might have been avoided. It does not. Further, his affidavit would have to give the factual basis for such an allegation. It does not. In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. David v. McLeod Regional Medical Center, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). As the Plaintiff's claims do not rise above generic allegations and conjecture they must be dismissed by this Court.

The Plaintiff has failed to properly support their claim of negligence in the Notice of Intent to File Suit with an expert affidavit. Additionally, the affidavit that the Plaintiff provided to the Defendant's attorney, but did not file, did not properly name an instance of negligence which included the element of proximate cause, nor did it meet the requirements of Subsection (B) of the Professional Negligence Statute by outlining the factual basis of the expert's claim of failure to document duly informed consent.

Conclusion

The plain meaning of the Medical Malpractice Statute, S.C. Code § 15-79-125, requires a plaintiff to file a contemporaneous expert affidavit with the required Notice of Intent to Sue. As the Plaintiff failed to properly file such an affidavit with their Notice of Intent to Sue, suit was

¹ The Plaintiff's medical records are replete with documentation of the Plaintiff's informed consent for the breast biopsy performed on June 7, 2006. However, that topic and documentation of such consent is not discussed or provided in this memorandum as it is not directly relevant to the issue of compliance with South Carolina law, but rather is relevant to the strength of the Plaintiff's expert's opinion.

WHEREFORE, Defendant Crain requests that the Court grant oral argument on this matter and enter an order dismissing the Notice of Intent to file Suit and the claims against Defendant Crain with prejudice.

This ____ day of August, 2009.

Respectfully submitted,

CARLOCK, COPELAND & STAIR,
L.L.P.

By: 

D. GARY LOVELL, JR.
State Bar No.: 69293
LEE C. WEATHERLY
State Bar No.: 71109

Attorneys for Defendant

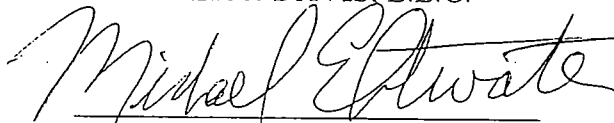
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401-3531
843-727-0307

b.) Whether S.C. Code of Laws (Ann.) § 15-36-100 is applicable in any manner to the operation of § 15-79-125, then, is it applicable in its entirety or not; and

c.) If it is contended that only certain portions of § 15-36-100 are applicable to the operation of § 15-79-125, what statutory language is relied upon for this conclusion; and

d.) Whether or not the tolling provision of § 15-36-100(c)(1), regarding the filing of an affidavit of a medical expert is applicable to a lawsuit against a medical doctor when the Notice of Intent to File Suit is filed within 10 days of the applicable Statute of Limitations and includes a statement that an affidavit could not be obtained due to time constraints, modified the contemporaneous filing requirement of S.C. Code of Laws (Ann.) § 15-79-125 by allowing an additional 45 days in which to file the expert affidavit.

ATWATER & DAVIS, L.L.C.



Michael E. Atwater, Esquire
Attorney for the Plaintiff
1470 Ebenezer Road
Rock Hill, SC 29732
(803) 326-2000

Dated this 5th day of October, 2009

Rock Hill, SC

Michael 59 (e) page 2 of 2

The Court is clear that its reason for granting the Defendant's Motion to Dismiss is because the Plaintiff failed to comply with the plain and ordinary meaning of S.C. Code § 15-79-125, which mandates a Plaintiff file an expert affidavit in conjunction with the Notice of Intent. The Court went on to deny the Defendant's Motion to Dismiss based on the expiration of the statute limitations. The Court stated that this motion was not ripe, as an "action," as defined by S.C. Code Ann. § 15-3-530, did not yet exist in this matter. Therefore, under the Court's order, the Plaintiff is not prohibited from properly filing a Notice of Intent to Sue under S.C. Code § 15-79-125 in the future.

The Plaintiff is requesting that the Court expand on its ruling to cover aspects of S.C. Code § 15-36-100 that were not addressed in the Court's order. However, it is clear from the text of the Order of the Court that the Court's ruling was based on the clear and plain meaning of S.C. Code § 15-79-125. All of the questions presented by the Plaintiff are, at best, peripheral and have no true impact on the Court's ruling. The Plaintiff is essentially asking the Court to issue an advisory opinion of dicta regarding issues not at the crux of this matter.

Although the Plaintiff neglected to draft and file a written response to the Defendant's Motion to Dismiss, all of the issues raised by the Plaintiff in her Motion were raised at length by her attorney at the motion hearing on August 13, 2009. It is also important to note that, as the Plaintiff has still neglected to file with the Court her delayed expert affidavit, she has not complied with the provisions of the statute that she asked be explained, S.C. Code § 15-36-100(C)(1). This being so, Defendant argues that there is no reason for the Court to decipher a statute with which the Plaintiff has yet to comply. The Court has clearly considered all of the Plaintiff's arguments, and South Carolina law does not require the trial court to address each of the Plaintiff's arguments individually in its order. See Armstrong v. Union Carbide, 308 S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
)	
SHANNON RANUCCI,	)	CASE NO.: 09-CP-46-2484
)	
PLAINTIFF,)	
	)	PLAINTIFF'S REPLY TO DEFENDANT'S
V.	)	MEMORANDUM IN OPPOSITION TO
	)	PLAINTIFF'S MOTION TO ALTER OR
COREY CRAIN, M.D.,	)	AMEND JUDGMENT
)	
DEFENDANT.)	
_____)	

COMES NOW the Plaintiff above-named, by and through her undersigned counsel, and Replies to the Defendant's Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Judgment saying:

FACTS

A hearing was held upon the Defendant's Motion to Dismiss this matter on August 13, 2009. At the hearing upon the motion, Plaintiff argued that S.C. Code of Laws (Ann.) § 15-36-100 was applicable to the filing of the expert affidavit and modified the requirements of S.C. Code of Laws (Ann.) § 15-79-125 regarding the contemporaneous filing of the expert affidavit when the Notice of Intent to File Suit was filed within ten days of the statute of limitations for the actions which are the basis of the lawsuit. The defendant argued that S.C. Code of Laws (Ann.) § 15-79-125 was the only applicable statute relating to the filing of an expert affidavit where a medical doctor was the defendant in the cause. The Plaintiff pointed to the language in the final section of S.C. Code of Laws (Ann.) § 15-36-100 which specifically states that the statute is applicable to medical doctors. The Plaintiff argued that the plain meaning of the language in S.C. Code of Laws (Ann.) § 15-79-125 which incorporates S.C. Code of Laws (Ann.) § 15-36-100, combined with the clear language that this statute was applicable to medical doctors, could only mean that the enlargement of time to file the expert affidavit was applicable to this case. Additionally, the Plaintiff argued that any other reading of the statute would create a special right to medical doctors

applicability of S.C. Code of Laws (Ann.) § 15-36-100 to the filing of the expert affidavit. In fact, Judge Kimball's order erroneously begins with the premise that the Defendant's Motion to Dismiss was predicated upon S.C. Code of Laws (Ann.) § 15-36-100. This is incorrect since the Defendant argued at the hearing on the motion that S.C. Code of Laws (Ann.) § 15-36-100 had no applicability whatsoever as to the filing of the expert affidavit in the instant case against a medical doctor.

The Defendant further argues in his Memorandum in Opposition that Judge Kimball's ruling regarding the statute of limitations would leave the Plaintiff with the ability to file an expert affidavit contemporaneously with a Notice of Intent to File suit pursuant to S.C. Code of Laws (Ann.) § 15-79-125. This contention has no merit whatsoever. In the first instance, Judge Kimball did not issue a ruling as to whether or not the statute of limitations had run in this matter. Judge Kimball ruled that a motion to dismiss based upon the statute of limitations was not applicable because no action had been commenced based upon his interpretation of the contemporaneous filing requirements of S.C. Code of Laws (Ann.) § 15-79-125. Any subsequent filing of the expert affidavit by the Plaintiff after the court's ruling would have taken place after the three year period of limitation contemplated in both of the applicable statutes and would therefore fail in the face of an assertion of the affirmative defense of expiration of the statute of limitations.

In response to the Plaintiff's motion for the court to alter or amend its Order to specifically address the applicability of S.C. Code of Laws (Ann.) § 15-36-100 to the instant case; the Defendant asks the Court to refuse this request based upon the decisions of the South Carolina Court of Appeals in Armstrong v. Union Carbide, 308 S.C. 235, 237-238, 417 S.E.2d 597, 599 (Ct. App. 1993) and Hansel v. National States Ins. Co., 313 S.C. 266, 437 S.E.2d 159 (Ct. App. 1993). However, the defendant's reliance on these cases is in error. In Armstrong, the appellant filed a motion pursuant to Rule 59(e), SCRCivP asking the Circuit Court to alter or amend its prior Order based upon the premise that the Circuit Court's Order did not separately list and address each of the 29 exceptions which the appellant had raised in its

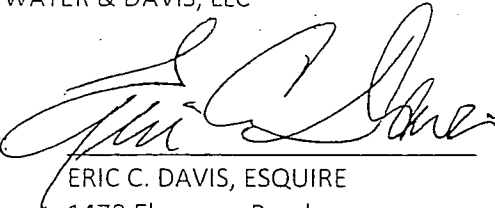
modify the contemporaneous filing requirement by adding an additional 45 days in which to file the expert affidavit when the Notice of Intent is filed within 10 days of the expiration of the three year statute of limitations and the Plaintiff asserts that the time constraints necessitate a subsequent filing.

WHEREFORE, Plaintiff Shannon Ranucci renews her request as set forth in her motion pursuant to Rule 59(e), SCRCivP and further requests that the relief sought in the Defendant's Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Judgment be denied.

This 3d day of November, 2009.

Respectfully Submitted,

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By: 

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Attorney for the Plaintiff

Rock Hill, SC

1 THE COURT: This is the Defendant's motion.

2 MR. LOVELL: Good morning, Your Honor, Gary Lovell
3 here for Doctor Crain.

4 THE COURT: Yes, sir.

5 MR. LOVELL: The issues in this case are very similar
6 to the one that you heard earlier with Mr. Hood. In this
7 case it involves a notice of intent to file suite in a
8 medical malpractice case. And to briefly to go over the
9 chronology, Your Honor, on June the 7th of - -

10 THE COURT: By the way I have now found my copies of
11 what I was looking for in this case.

12 MR. LOVELL: Having practiced in Georgia when they did
13 the expert affidavit I'm seeing it now in South Carolina
14 and you are obviously plowing new ground with all of this..

15 THE COURT: But that's different in that the expert in
16 this case is an anesthesiologist or something like that
17 - - -

18 MR. LOVELL: Yes, Your Honor.

19 THE COURT: - - - isn't that right? Okay.

20 MR. LOVELL: And my client is a surgeon.

21 THE COURT: Right. Go ahead.

22 MR. LOVELL: The chronology of events in June 7th of
23 '06 Doctor Crain performed a needle core biopsy on the
24 plaintiff. She developed and it was discovered a couple of
25 days later a hemothorax and that was then treated through

1 relates to whether or not Section 15 79 125 allows a
2 plaintiff to file a notice of intent without the expert
3 affidavit being filed contemporaneously with the notice.
4 And, Judge, I know you heard a lot of this earlier from the
5 case you heard earlier but just to briefly summarize under
6 the Notice of Intent statute as enacted in 2005 before an
7 action can be brought against a doctor for malpractice
8 plaintiff has to put them on notice that they intend to sue
9 them. The statute specifically says they have to
10 contemporaneously file an affidavit of an expert setting
11 forth one act of alleged negligence and the expert
12 affidavit as I interpret and our position is has to comply
13 with 15 36 100 which sets forth all the things about they
14 have to be in the same medical specialty, et cetera, et
15 cetera. We think that the affidavit requirement that it be
16 filed contemporaneously in 125 does not allow the plaintiff
17 the benefits that are provided under Section 100. If they
18 don't have the affidavit because the statute is going to
19 expire that they get forty-five days or can petition the
20 court for even more time. And we cited in our supplemental
21 memorandum some of the history of the -- what I call the
22 Medical Malpractice Tort Reform statutes. In the first two
23 versions that were put before the legislature as proposed
24 there was not inclusion in there of a notice of intent
25 requiring contemporaneous filing of an expert affidavit.

1 THE COURT: Help me here. What -- the other side of
2 that argument is would it be correct to say even if we
3 assume that the other side of the argument is right that
4 you get forty-five days that all is does it that it extend
5 it forty-five days; right?

6 MR. LOVELL: Yes, Your Honor. Assuming I mean
7 obviously I don't agree with that but if you accept that
8 you get forty-five days to file a proper affidavit which
9 goes back to another argument I have as to sort of a second
10 argument in this case. But we believe that if you
11 interpret the statute the way the legislature intended as
12 it relates to medical doctors they are excepted from the
13 general professional definitions and provisions of 36-100
14 and they say as to medical doctors you have to go through
15 this particular proceeding for whatever reason. You know
16 is it tort reform; is it insurance premiums or what the
17 legislature clearly says this allows them to have the
18 advantage of the notice of intent they find out they are
19 going to be sued the statute gets tolled you go through the
20 mediation and all of that and many of these cases get
21 resolved. Had the legislature chosen for 36-100 to apply
22 they wouldn't have even needed 125. That's our primary
23 first argument, Your Honor.

24 THE COURT: I understand.

25 MR. LOVELL: The second argument relates to and not

1 MR. LOVELL: Right. And, Your Honor, one corollary
2 with that is negligence in any action but in medical
3 malpractice requires a showing of at least one act of
4 breach of standard of care that is causally connected with
5 the injury that has to be set forth in the affidavit under
6 the definition of alleged act of negligence. This one is
7 filed as to any causal negligence. It simply says an
8 alleged breach of an informed consent duty doesn't - -

9 THE COURT: All right hold on one second.

10 MR. LOVELL: Yes, Your Honor.

11 THE COURT: All right the causal connection would be
12 implied by the statute I guess. Is that what you are
13 saying?

14 MR. LOVELL: My argument would be Your Honor, for an
15 affidavit to be appropriate it would have to say words to
16 the effect I find that the doctor breached the standard of
17 care in failing to properly do informed consent and that it
18 was a cause of the ultimate injury or damages claimed by
19 the plaintiff.

20 THE COURT: Cause the statute says the plaintiff must
21 file as part of the complaint an affidavit of an expert
22 witness which must specify at least one negligent act or
23 omission claimed to exist and the factual basis for each
24 claim based on the available evidence at the time of the
25 filing of the affidavit. And you would have me infer from

1 court's benefit. Thank you, Your Honor.

2 THE COURT: Yes, sir. All right, Mr. Atwater.

3 MR. ATWATER: Your Honor, if I understand his argument
4 correctly first off he's saying that the forty-five days
5 did not apply and that is saying that 15 -- 15-79-125 does
6 not reference and take into affect the requirements of 15-
7 36-100.

8 THE COURT: No it's not.

9 MR. ATWATER: For one - -

10 THE COURT: No it's not. A possible reading of 15-79-
11 125 when it refers to an affidavit of an experts -- subject
12 to the affidavit requirements established in 15-36-100
13 simply refers back to the content. That's one construction
14 of it and I've already got a -- I don't know whether you
15 were here or not but I already have a case where I've got
16 to figure out whether that language is to be construed just
17 like I just said or whether some how it incorporates the
18 language of C 1 and that's not a slam dunk either way.

19 MR. ATWATER: I understand what you are saying, Your
20 Honor. Then let's go directly to 15-36-100. And you were
21 referring to C 1 of 15-36-100; is that correct, Your Honor?

22 THE COURT: I was referring to both of them.

23 MR. ATWATER: Okay. 15-36-100 B which is the statute
24 which is referred to 15-79-125 referring to the affidavit
25 itself B says in an action for damages alleging

1 me that you have to infer from that that there has to be
2 some connecting up of the negligent act with what happened
3 to the patient. In this case patient; it could be a house
4 if it was an engineer.

5 MR. ATWATER: Yes, Your Honor. Your Honor, I agree in
6 the ultimate issue that His Honor is getting to that there
7 should be proof that the actual -- the breach that is
8 listed in the affidavit is casually connected to the
9 medical negligence and in this case it is. But I do not
10 read the statute to say that simply because it is connected
11 which we say it is that it has to carry that language in
12 the affidavit itself.

13 THE COURT: Now the doctor's affidavit that was
14 submitted didn't say that. It didn't make a casual
15 connection if my recollection is correct. Let me see if I
16 can find it. I know I've read it.

17 MR. ATWATER: Your Honor, I've already said that it
18 does not.

19 THE COURT: Okay. Here it is. It's a form affidavit
20 and his only response is not having documented evidence of
21 duly informed consent.

22 MR. ATWATER: Which is breach of medical standard
23 care, Your Honor.

24 THE COURT: Certainly it is but it wouldn't be of any
25 use unless it approximately caused injury to the plaintiff.

1 even - I don't know how the court could construe -- I mean
2 I understood His Honor's argument that if you look at 15-
3 79-125 in a total vacuum and did not look at the fact that
4 100 B also said that this applies to any professional
5 action against anybody listed in G and G is medical
6 doctors. And also C 1 specifically states the
7 contemporaneous filing -- filing requirement does not apply
8 in a case in which a period of limitation will expire
9 within ten days. I don't know how any reading of 15-36-100
10 B and C 1 could ever along with G listing medical doctors
11 could ever be construed to say that that contemporaneous
12 filing requirement is not extended for the forty-five day
13 period. They're not contending that it wasn't filed
14 within the statute of limitations. They are not contending
15 that it wasn't filed within ten days of filing the statute
16 of limitations. They are contending that - -

17 THE COURT: That the forty-five day period doesn't
18 apply; is that right?

19 MR. LOVELL: Yes, sir.

20 THE COURT: As the -- that was the case in another
21 case we've already heard this morning.

22 MR. ATWATER: Yes, Your Honor, but I understand in
23 that one they didn't meet the time requirement anyway. And
24 I don't know when His Honor said they didn't meet the time
25 requirement I don't know whether they were talking about

1 against a medical doctor if you file it within ten days
2 then you got this forty-five day extension which we met.
3 Thank you, Your Honor.

4 And now, Your Honor, now referring back to His Honor's
5 reference to Section 15-36-100 A. To A one requires that
6 he be licensed by an appropriate regulatory agency to
7 practice in his or her profession in the location in which
8 the expert practices or teaches and I don't believe that
9 that's being questioned in this regard.

10 Is that correct?

11 MR. LOVELL: I have no idea. I go on the face of the
12 affidavit. He says he's a doctor so I assume he is.

13 MR. ATWATER: Okay. He's either board certified by a
14 national or international association or academy which
15 administers written and oral examinations. And, Your
16 Honor, this is the most important part. For certification
17 in the area of practice for specialty about which the
18 opinion on the standard of care is offered and the opinion
19 on the standard of care is specifically informed consent.
20 It's not surgery. The standard of care is informed consent
21 and that is a standard that applies across the entire
22 medical profession. And that is the standard of which he
23 is clearly qualified to give an opinion on, Your Honor. It
24 goes on to say that under B he has actual professional
25 knowledge and experience in the area of practice or

1 MR. LOVELL: We filed the motion at the time we filed
2 our response to the notice to -- the notice of intent.

3 THE COURT: The motion was filed July the 21st looks
4 like to me.

5 MR. LOVELL: Yes, sir.

6 THE COURT: Okay. Mr. Lovell, would you agree that if
7 the issue gets down to the deficiency in the affidavit that
8 he is still within time to deal with that?

9 MR. LOVELL: Your Honor, I can't agree to that for
10 this reason. This deficiency in the affidavit - -

11 THE COURT: I'm not asking you to agree with Mr.
12 Atwater. If there is a deficiency in an affidavit and it
13 within thirty days - -

14 MR. ATWATER: Of service, Your Honor, I didn't get it
15 on the 21st.

16 THE COURT: Well I'm assuming it would be -- I don't
17 know what the -- let's see what the affidavit of mailing
18 says. I don't have an affidavit of mailing with this. It
19 may be less.

20 MR. LOVELL: Your Honor, I apologize, I didn't bring
21 that part of the file.

22 THE COURT: All right. Well nevertheless it does seem
23 to me that I do have the discretion to extend the time - no
24 he has a right to cure the defect, the alleged defect by
25 amendment within thirty days of service of the motion. And

1 against a medical doctor here are the requirements. Plain
2 meaning of 100 I don't see how it can be read any way than
3 what it says. So - -

4 THE COURT: Well - -

5 MR. ATWATER: - - - with the fact that we filed within
6 the statutory time; with the fact that we filed the
7 affidavit within the statutory time I think that the only
8 issue that is really here which I would certainly say it is
9 not defective is whether or not the affidavit is defective
10 itself. And as His Honor said anyone can choose to infer
11 that it must say it's casually connected. I will tell the
12 court that that is the casual connection but in the same
13 fact that the statute doesn't require that it say that is
14 the casual connection. One other thing, Your Honor,
15 because - -

16 THE COURT: Let me deal with these things one at a
17 time please. Mr. Lovell, the reference in 125 to the
18 affidavit requirements established in 15-36-100 is it --
19 what is it -- I want to try not to make it a leading
20 question -- what is your position about the application of
21 SubSection E?

22 MR. LOVELL: Your Honor, our position is that
23 SubSection E would not apply in that scenario.

24 THE COURT: Why not?

25 MR. LOVELL: Because the affidavit requirements

1 about the loss that you file against any other professional
2 you have to have attached to that an affidavit of an expert
3 witness.

4 THE COURT: I understand.

5 MR. LOVELL: Which must meet the requirements of
6 SubSection A of the same code section. But when you get to
7 C or the subsequent one those are referencing actions
8 against other professionals in which you don't go through
9 notice of intent. All you have to do is file a complaint
10 with the expert affidavit.

11 THE COURT: It seems to me that it is reasonable and I
12 hadn't thought about it in the prior case I guess because
13 it doesn't apply but it does seem to me there is no - it
14 does seem to me that in 15-79-125 if you exclude a
15 reference back to SubSection E - the right to refer back to
16 SubSection E or to rely on SubSection E that there is a
17 little bit of Russian roulette. You file an - you get one
18 shot at filing an affidavit. You file an affidavit that
19 meets some requirement we'll say of A and B of 100 but if
20 you are wrong that is if the affidavit is challenged on
21 some technical basis that's the only shot you got. That
22 doesn't seem fair to me and it does seem to me like E ought
23 to apply. I may be wrong. As we all know already I guess
24 from today there is no case interpreting all of this.

25 MR. LOVELL: Yes, sir, Your Honor, absolutely.

1 THE COURT: Well - -

2 MR. ATWATER: It doesn't limit it; it says 100.

3 THE COURT: What it says is the affidavit of an expert
4 witness subject to the affidavit requirements established
5 in 15-36-100. That's what it says.

6 MR. ATWATER: Yes, Your Honor.

7 THE COURT: "One reading of that is it only invokes B.
8 Another reading is that it evokes A and B.

9 MR. ATWATER: Your Honor, I don't - -

10 THE COURT: Another reading is it invokes A, B, C and
11 E. It's a difficult thing to read.

12 MR. ATWATER: We would contend, Your Honor, that if
13 the legislature intended it only invoke certain parts of
14 100 not the entire statute itself that it would have
15 spelled those out.

16 THE COURT: I think that is a reasonable thing to say.

17 MR. ATWATER: Thank you, Your Honor. Your Honor, one
18 other thing. I got this in the form of an answer. Someone
19 has been making a reference to a motion to dismiss. I
20 haven't seen one if that's what we are here on. What I got
21 was an answer which listed this actual - -

22 THE COURT: I've got a motion to dismiss.

23 MR. LOVELL: Yea we filed a motion to dismiss at the
24 time we filed the answer to the notice of intent.

25 MR. ATWATER: Okay.

1 here.

2 THE COURT: I don't - I don't see that these documents
3 have anything to do with this motion.

4 MR. ATWATER: I don't either, Your Honor, but they
5 were entered into the motion and they were also argued in
6 the form of a Laches argument which basically Laches
7 meaning the plaintiff is not entitled to the applicable
8 statute of limitations.

9 MR. LOVELL: Your Honor, I think the issue that is
10 contained solely within the pleadings is whether this
11 affidavit should have been filed with the notice of intent
12 the things we covered about the extension. This goes to
13 his attempt to then come back later and supplement the
14 affidavit or invoke the ten day rule saying oh we didn't
15 have time to get the affidavit they've had the records for
16 three years. That has nothing to do with the primary focus
17 of our argument is are they entitled to get to invoke - -

18 THE COURT: He hasn't argued that yet.

19 MR. ATWATER: I'm sorry, Your Honor.

20 THE COURT: Have you argued that? We didn't have
21 time?

22 MR. ATWATER: Your Honor, that's in the affidavit. I
23 mean that's in the - -

24 THE COURT: It is in his motion. Well in the
25 memorandum that's true.

1 defective affidavit was filed on the 21st and then sent to
2 me. The statute says that I have thirty days from being
3 served that to correct a defective - -

4 THE COURT: Affidavit.

5 MR. ATWATER: Affidavit. Unless His Honor is
6 intending to rule at this moment I need to - I guess I just
7 need to assume that because that time is running against
8 me. Do you see what I'm saying?

9 THE COURT: It is. What do you need to assume?

10 MR. ATWATER: That there is a defect without a ruling.

11 THE COURT: I can't - -

12 MR. ATWATER: That's unfortunately a weird statute
13 Your Honor, I just wanted to point that out.

14 THE COURT: You have to do what you think you need to
15 do.

16 MR. ATWATER: Yes, Your Honor. It's a weird - it
17 doesn't say that once he files it until you make a ruling
18 on it then I get thirty days. It says once he files it and
19 serves it on me is how I read it which is totally from all
20 the civil jurisprudence that we normally do because usually
21 a defendant would file a motion and then the judge would
22 have to rule upon it and then based upon his ruling whether
23 it was defective or not defective you would have a time
24 period but this doesn't say when the court does that. This
25 says when I'm served with his opinion that it's defective.

1 to the extent this motion stands or falls based a defective
2 affidavit that time won't run until I rule on whether the
3 affidavit is in quotes defective what ever that means.

4 MR. ATWATER: Thank you, Your Honor.

5 THE COURT: In the statute.

6 MR. LOVELL: Thank you, Your Honor.

7 THE COURT: Now that does not have anything to do with
8 whether I find that you are just not entitled to protection
9 at all.

10 MR. ATWATER: I understand, Your Honor.

11 THE COURT: Okay. That's it.

12 MR. LOVELL: Thank you, Your Honor.

13 MR. ATWATER: Thank you, Judge.

14 -- END OF TRANSCRIPT OF RECORD --

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1 THE COURT: All right this is Case No. 2009-CP-46-2484
2 Shannon Ranucci against Corey Crain. Mr. Davis, first of
3 all tell me what your status is? Are you now the sole
4 attorney for the plaintiff?

5 MR. DAVIS: That's correct, Your Honor.

6 THE COURT: All right. You need to file something
7 with the court. I know Mr. Atwater is off the record.

8 MR. DAVIS: I filed a reply.

9 THE COURT: Mr. Atwater can't practice.

10 MR. DAVIS: Right.

11 THE COURT: What have you done?

12 MR. DAVIS: Well I just filed a reply. Do I need to
13 send a letter saying I - -

14 THE COURT: It doesn't matter to me. We are going to
15 hear it today.

16 MR. DAVIS: In the reply to defendant's memorandum it
17 was from me.

18 THE COURT: I'm not concerned with that today as a
19 formality.

20 MR. DAVIS: Okay. I'll send something to the Clerk.

21 THE COURT: All right. Okay, Mr. Davis.

22 MR. DAVIS: Yes, Your Honor. Today we are here on a
23 59 E motion. Specifically the main thing that we are
24 asking for is that the court ruled on what it was taking
25 under advisement at the last hearing. I believe it was on

1 versus Weave it goes all the way back to 1987 with the
2 Supreme Court uses it in further cases but it says the
3 primary rule -- if you look on Page 5 of that case Small
4 versus Weave that I handed up it says on the top of the
5 page the primary rule of construction which all other rules
6 for statutory construction are subservient requires that
7 the legislative intent must prevail if it can be reasonably
8 discovered in the language. Further it says when
9 construing statute language the statute must be read as a
10 whole. The statute in sections which are part of the same
11 general statutory law of this state must be construed
12 together and each one given effect if it can be done by any
13 reasonable construction. You can read further construing
14 the statute as a whole in an attempt to determine
15 legislative purpose and in this act we find the legislature
16 and that's what they decided in that one case. But when I
17 looked at this that the law, that the case law with what
18 the general assembly said in its acts I said to myself I
19 said what's the difference between 15-79-125 and 15-36-100?
20 Well the difference that I see is that in 15-79-125 you are
21 allowed presuit discovery. No presuit discovery in 15-36-
22 100. You are allowed mediation before you file a complaint
23 in 15-79-125 that you are not allowed in 15-36-100. What
24 that would mean is that a medical professional or health
25 care professional gets the - gets a benefit that an

1 MR. DAVIS: Yea. They both look the same as far as
2 that.

3 THE COURT: Hold on. 125 requires the filing of a
4 notice of intent to file suit in a medical malpractice case
5 - - -

6 MR. DAVIS: Yes, Your Honor.

7 THE COURT: - - - prior to which one is not permitted
8 to file a complaint.

9 MR. DAVIS: That's correct.

10 THE COURT: Okay. So the difference in a medical mal
11 practice at least for the sake of talking about it in a
12 medical malpractice case is that prior to filing -- prior
13 to being permitted to file a suite one has to file a notice
14 of intent to file a suit.

15 MR. DAVIS: Yes, Your Honor.

16 THE COURT: And the other things.

17 MR. DAVIS: Yes, Your Honor.

18 THE COURT: All right. Now the problem in Mr.
19 Atwater's case was that Mr. Atwater didn't file an
20 affidavit of an appropriate physician; right?

21 MR. DAVIS: I believe your order was that he did not
22 file -- timely file it and that's what we're here today on.

23 THE COURT: Refresh my memory. Let me get Mr. Lovell
24 to hear me since he may remember more than the rest.

25 MR. WEATHERLY: Your Honor, I am Lee Weatherly.

1 MR. WEATHERLY: Your Honor, the plaintiff had sent us
2 forty-five days after filing the notice of intent to file
3 suit he had sent us a copy of an expert affidavit.

4 THE COURT: Yea.

5 MR. WEATHERLY: Now it was our contention at the
6 hearing that it was an insufficient expert affidavit. That
7 he had sent it to us on July 23rd.

8 THE COURT: Tell me about the timely part.

9 MR. WEATHERLY: Your Honor, it was our contention that
10 the - -

11 THE COURT: Not only contention but what -- well just
12 let me read the statute. Hold on a second.

13 MR. WEATHERLY: You ask to why you determined it was
14 untimely?

15 THE COURT: Yes.

16 MR. WEATHERLY: Because the statute says that it has
17 to be contemporaneous with the filing of the notice of
18 intent.

19 THE COURT: Right.

20 MR. WEATHERLY: And it was not a contemporaneous
21 filing.

22 THE COURT: You all have a seat and let me read the
23 statute.

24 (PAUSE.)

25 THE COURT: So essentially the affidavit Mr. Atwater

1 you file a complaint against lawyers, accountants, - -

2 THE COURT: Engineers, CPA's, - -

3 MR. DAVIS: Whatever those things are. But fifteen of
4 the professionals listed in G of 15-36-100 which says at
5 this section, not part of the section, but this section
6 applies to the following professions. Number Seven is
7 medical doctors.

8 THE COURT: Yes, sir.

9 MR. DAVIS: But fifteen of those are health care
10 professions. You've got pathetic physicans which are DO's
11 and you have physical therapist; physician's assistants,
12 all these people. And if you look at D it carves out a
13 special thing about life and health care facilities alleged
14 to be liable based upon the acts or the inaction of a
15 health care professional which is licensed by the state.

16 THE COURT: SubSection which?

17 MR. DAVIS: - - - of SebSection G. SubSection B.

18 THE COURT: B?

19 MR. DAVIS: Mentions specifically health care
20 facility.

21 THE COURT: Right.

22 MR. DAVIS: So if a medical malpractice is only
23 controlled by 15-71-25 why are they mentioning health care
24 professionals in B? And if B applies then C applies as
25 well and G applies on medical doctors for the entire

1 requirement of 15-79-125. Is that the answer?

2 MR. DAVIS: That would be the answer. Not what we are
3 looking for not that we read it as but I understand what
4 your ruling is now. Your ruling before just said that 15-
5 79-125 had this contemporaneous and we wanted to make sure
6 that you -- I understand you took under advisement whether
7 C and D applied to medical doctors.

8 THE COURT: The advisement rule was resolved by the
9 order.

10 MR. DAVIS: But the order didn't speak specifically to
11 that and we wanted to make sure we had a record on appeal
12 about whether 15-36-100 C. You're saying that did modify
13 it - -

14 THE COURT: You now have it.

15 MR. DAVIS: I do have it now.

16 THE COURT: And as I said before we started I wish
17 somebody would appeal this so we can figure out how to
18 apply it.

19 MR. DAVIS: All right. Well thank you, Your Honor.

20 THE COURT: All right. Mr. Weatherly I want you to
21 send me an order that in effect says I considered -- never
22 mind. I'll do a Form 4.

23 MR. WEATHERLY: Okay, Your Honor. If you change your
24 mind let me know and I will just add that to the test of
25 the order you already drafted.

**A ACCIDENT AND INJURY LAW PRACTICE OF
ATWATER AND DAVIS, L.L.C.**



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MICHAEL E. ATWATER, ESQ.
ERIC C. DAVIS, ESQ.

August 9, 2006

Piedmont Surgical Associates
200 South Herlong Avenue
Suite G
Rock Hill SC 29732

Re: My Client: Shannon Ranucci
DOB: March 12, 1984
DOL: June 7, 2006

To Whom It May Concern:

Please be advised that we represent the above-named person for injuries sustained in an accident.
Please provide us with the following:

- Medical records dated 6-7-06 to the present.
- Billing statement dated _____ to the present.
- Itemized billing for services from date of accident.
- Complete set of all medical records.
- All hospital records.
- All hospital itemized billing statements.
- Physical therapy records dated _____ to the present.
- Records previously requested on _____.
- Copies of prescription records dated _____ to the present.
- Statement for charges incurred in fulfilling this request, if any.

With kindest personal regards,

Emma Henselbecker
Secretary for Atwater & Davis, L.L.C.

Enclosures:

- Medical Authorization
- Check for prepayment of records.
- Other: _____