THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronald Grubb as PR of the Estate of Joyce Grubb,
Appellant,

v.

Clarendon Memorial Hospital, Respondent

Appellate Case No: 2011-201946

Appeal from Clarendon County
The Honorable George C. James, Jr., Circuit Court Judge

Memorandum Opinion No: 2013-MO-034
Heard December 4, 2013-Filed December 18, 2013

PETITION FOR REHEARING

Appellant hereby petitions this Court for a re-hearing based upon the following grounds:

I. The Court overlooked the issue of whether S.C. Code Ann. §15-79-125 creates a separate and distinct procedural path for litigants to travel prior to allowing a traditional lawsuit to be brought. That being said, if the court had addressed that issue the Court would have then determined that the Respondent in this case was required to take some affirmative action under the procedural path created by S.C. Code Ann. §15-79-125 or any relief sought there under would be waived.

II The Court overlooked the issue of whether or not the Respondent waived any objection to the delay in mediating the case which is evidenced by the consent order entered into by Appellant and Respondent.

II. The Court overlooked that the plain meaning of Section 15-79-125.

Appellant hereby attaches a Memorandum in Support of the Petition for Rehearing.

January 17, 2014

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MEMORANDUM IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appellant hereby attaches this Memorandum in Support of his Petition for Rehearing:

I. The Court overlooked the issue of whether S.C. Code Ann. §15-79-125 creates a separate and distinct procedural path for litigants to travel prior to allowing a traditional lawsuit to be brought. That being said, if the court had addressed that issue the Court would have then determined that the Respondent in this case was required to take some affirmative action under the procedural path created S.C. Code Ann. §15-79-125 or any relief sought there under would be waived.

When the Legislature enacted S.C. Code Ann. §15-79-125, they created a separate and distinct pre-suit procedural process which all litigants intending to bring a Medical Malpractice claim in a South Carolina Court must adhere to. That procedure includes the filing of a notice of intent, a supporting affidavit, service of the same and mediation. However, the statute also provides for discovery and extensions of time. When a party fails to put the other party on notice of a defense they intend to assert, the law in general presumes waiver of that defense. In this case it is undisputed that the Respondent never filed a motion to compel mediation, never filed a motion to dismiss the Notice of Intent to File Suit or any responsive pleading of any kind in that action. Since the Statute of limitations defense was never asserted in the Notice of Intent action Appellant would assert that it was waived. The defense of statute of limitations is an affirmative defense and must be pleaded in order to be asserted. *Dunbar* v. *Carlson,* 341 S.C. 261, 533 S.E.2d 913 (S.C.App. 2000), Rule 8, SCRCP. Rule 8(c) SCRCP sets forth a rule requiring that parties assert certain defenses in their responsive pleadings or the same are waived. Rule 8(c) states:

> **c) Affirmative Defenses; Reply.** In pleading to a preceding pleading, a party ***shall set forth affirmatively*** *the defenses:* accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, ***statute of limitations***, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation. A party may file a reply to any of the foregoing affirmative defenses.

Rule 8 SCRCP. (Emphasis added).

Appellant was entitled to notice during the pendency of the Notice of Intent to File Suit Action that Respondent was asserting the statute of limitations as a defense.

This rule has been construed time and time again to require that a party plead the defense of statute of limitations or the defense is waived. In this case the Respondent did not plead the statute of limitations as a defense in the Notice of Intent to File Suit action. It is clear under South Carolina law that the statute of limitations must be pled for a party to avail themselves of the defense. Affirmative defenses set forth in Rule 8(c) SCRCP must be pleaded and may not be bootstrapped by defendants. Failure to properly plead insufficiency of service of process waives the defense of service of process and statute of limitations. *Unisun Insurance v. Hawkins,* 342 S.C. 537, 537 S.E.2d 559 (S.C. App. 2000). Statute of limitations defense is required to be pleaded to be asserted. *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (S.C. App. 2000). Failure to plead an affirmative defense set forth in Rule 8(c) SCRCP is considered a waiver of the defense. The defense of laches, much like statute of limitations, is an affirmative defense that must be pleaded. Rule 8(c), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (S.C. 2002).

As stated by the Court in *Davie v. Atkinson*, 313 S.E.2d 648, 281 S.C. 102 (S.C. App. 1984):

> The appealed order is fatally erroneous because the reason for entry of judgment for respondents is based upon appellants' causes of action being barred by the statutes of limitation; this defense was not pleaded by respondents and therefore not available to them. A statute of limitation is an affirmative defense which must be raised by answer. Section 15-13-360, S.C.Code of Laws, 1976. Furthermore, a limitation statute is a statute of grace, permitting the avoidance and evasion of liability in applicable cases; and while given recognition when pleaded, it has never been favored by the courts. *Scovill v. Johnson,* 190 S.C. 457, 3 S.E.2d 543 (1939).
> *Davie v. Atkinson*, 313 S.E.2d 648, 281 S.C. 102 (S.C. App. 1984)

Although Respondent did plead statute of limitations in the answer filed to the complaint. Appellant would assert that S.C. Code section 15-79-125, created a pre-suit procedure that has been recognized by our Supreme Court and that the statute of

limitations was required to be asserted in that procedural path and should not be allowed to be raised later in the civil action for the first time.

II. The Court overlooked the issue of whether or not the Respondent waived any objection to the delay in mediating the case which is evidenced by the consent order entered into by Appellant and Respondent.

The Court did not address the issue of whether the Respondent waived the statute of limitations by agreeing that the parties would delay mediation in the case until such time as the Respondent's motion to dismiss asserted in the answer to the civil action could be decided. (R. p. 45). Our Courts have long disfavored the defense of statute of limitations. As stated above our Courts have strictly required that the defense of statute of limitations be asserted or it is considered waived. Further, our courts have treated the statute of limitations as a notice statute. *Hughes v. Water World Water Slide, Inc.*, 442 S.E.2d 584, 314 S.C. 211 (S.C. 1994) (Amendment correcting name of corporation allowed to relate back to original date of filing even though corporation was not properly named in the original pleadings that were served on the last day before the statute of limitations ran).

Appellant asserts that Respondent waived the statute of limitations defense by agreeing that mediation should be delayed until after their motion was disposed of. Clearly the Supreme Court has ruled that mediation is not required within the 120 day period set forth in the statute. *Ross v. Waccamaw Community Hosp.*, 744 S.E.2d 547, 404 S.C. 56 (S.C. 2013). In *Ross* the Court specifically stated:

> Section 15-79-125 of the South Carolina Code requires a pre-suit mediation process for medical malpractice claims. The statute further requires that the pre-suit mediation conference be completed within a 120-day period, which may be extended for an additional 60-day period. This appeal presents the question of whether the failure to

complete the mediation conference in a timely manner divests the trial court of subject matter jurisdiction and requires dismissal. We hold that the failure to complete the mediation conference in a timely manner does not divest the trial court of subject matter jurisdiction and dismissal is not mandated. We reverse the contrary decision of the trial court and remand for the pre-suit mediation process to be completed.
Ross v. Waccamaw Community Hosp., 744 S.E.2d 547, 404 S.C. 56 (S.C. 2013).

Appellant asserts that the Court overlooked this specific ruling because the outcome of *Ross* and the outcome of the case at bar cannot be reconciled. In *Ross* the parties did not mediate within the 180 day period because of scheduling conflicts. After the time expired the opposing party refused to mediate. The Court in *Ross* specifically held that failure to hold the mediation within the 180 (120 plus 60) day period did not warrant dismissal. It appears that the Court in that ruling was not willing to accept the Respondent's position that the expiration of the 180 day period reinstated the statute of limitations. In the case at bar the Respondent affirmatively agreed that mediation should not be held until their motion was heard and still relied upon the fact that mediation had not been held to assert the defense of statute of limitations. That works a severe unfairness to the Appellant and the Court should not allow the same just as it would not allow S.C. Code Ann. §15-79-125 to as a trap.

To accept the view advanced by Respondents would lead to an absurd statutory construction. Specifically, Respondents would have this Court construe section 15-79-125 as a trap for plaintiffs with potentially meritorious claims. Given the pressures of practicing law for even the moderately busy practitioner, completion of the mediation conference in a timely manner will not always be achievable. Respondents' interpretation is ripe for mischief, as defendants could easily thwart timely completion of the mediation conference, and then seek dismissal of the Notice of Intent and reinstatement of the statute of limitations. A mandated penalty of dismissal, as urged by Respondents, for lack of subject matter jurisdiction is fundamentally at odds with the language and purpose of section 15-79-125.

Ross v. Waccamaw Community Hosp., 744 S.E.2d 547, 404 S.C. 56 (S.C. 2013).

III. The Court overlooked that the plain meaning of Section 15-79-125.

The Court overlooked the long standing law of the state of South Carolina that the words of a statute must be given their literal meaning. Questions of statutory interpretation are questions of law, which the Appellate Court is free to decide without any deference to the lower Court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011). It is well-established that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the Courts are bound to give effect to the expressed intent of the legislature." *Id.* Thus, the Appellate Court should follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that the Appellate Court should look beyond the statute's plain language. *Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011).

There is no question that S.C. Code Ann. §15-79-125 provides that the statute of limitations is tolled upon the filing of a Notice of Intent to File Suit. That provision specifically states that by following that procedure "Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations." (emphasis added). S.C. Code Ann. §15-79-125. It is the Appellants position that the Court overlooked that specific provisions of S.C. Code Ann. §15-79-125 in its decision. Further, the Court has held that failure of a litigant to hold mediation within 180 days of the filing of the Notice of Intent to File Suit is not fatal. *Ross v. Waccamaw Community Hosp.*, 744 S.E.2d 547, 404 S.C. 56 (S.C.

2013). In fact the Court Ruled in *Ross* that 'the statute is silent as to the consequences of the parties' failure to [mediate within 180 days]." *Ross v. Waccamaw Community Hosp.*, 744 S.E.2d 547, 404 S.C. 56 (S.C. 2013).

Appellant would assert that if the Court is required to give the words of a statute their literal meaning and the Court has ruled that the statute provides for no penalty for failure to mediate within 180 days. Based upon those two principals mentioned, in the case at bar (1) the statute of limitations was tolled upon the filing of the Notice of Intent to File Suit, and (2) the failure of the parties to mediate carried no statutory penalty. Based upon those principals the ruling of the lower court dismissing the case based upon the statute of limitations cannot be affirmed. When a statute under its plain and ordinary meaning can be given effect the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. *Anderson v. South Carolina Election Com'n,* 725 S.E.2d 704, 397 S.C. 551 (S.C. 2012)

IV. Conclusion

Based upon the foregoing the Appellant petitions the Court to grant her request for a rehearing to reconcile the ruling in the case at bar with other and prior rulings of this Court.

January 17, 2014

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and Memorandum in Support of Appellant's Petition for Rehearing on the above-listed Respondent by depositing a copy of it in the United States Mail, postage prepaid on January 17, 2014, addressed to Respondent's attorneys of record, as detailed below.

January 17, 2014

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