STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Honorable R. Markley Dennis, Jr.
Circuit Court Judge

C.A. No. 2013-CP10-00088
Ct. App. No. 2013-001673

Beverly C. Moore-Rowe

Appellant,

v.

Bon Secours-St. Francis Xavier Hospital, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours St. Francis Health System, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours Health System, Inc., d/b/a Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Roper St. Francis Foundation, d/b/a Roper St. Francis Healthcare, Bon Secours-St. Francis Health System Foundation, Inc., d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., d/b/a Roper St. Francis Healthcare, Byron N. Bailey, M.D., Christine C. Thompson, M.D., a/k/a Christine Thompson, M.D., Charleston Neurosurgical Associates, LLC, Mt. Pleasant Anesthesia Associates, PA, Charleston Surgery Center Limited Partnership, d/b/a Charleston Surgery Center, Tammy McGraw, CRNA, also known as Tammy McGraw Speicher, CRNA, Nurse Anesthesia of South Carolina, LLC, Jeffery S. Wager, CRNA, Tricoastal Healthcare Billing and Management, Inc., and Steven Heath Cobb, Respondents.

Respondents.

Initial Brief of Respondents

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

STATEMENT OF THE ISSUES ON APPEAL

The Defendants/Respondents would restate the issues on appeal as follows:

I. Did the Trial Court properly dismiss the Plaintiff's Notice of Intent to File Suit for medical malpractice because she failed to contemporaneously file an expert witness affidavit in compliance with S.C. Code §15-79-125(A)?

A. Did the Trial Court correctly hold that the 45-day grace period allowed by S.C. Code Ann. §15-36-100(C)(1) does not apply to excuse her failure to contemporaneously file the expert affidavit required by §15-79-125(A)?

B. Did the Trial Court properly dismiss the Plaintiff's Notice of Intent to File Suit medical malpractice on the additional sustaining ground, that she did not file an affidavit within the 45-day exception/extension allowed under §15-36-100(C)(1)?

II. Did the Trial Judge properly exercise his discretion in dealing with the Plaintiff's informal, *ex parte* request for him to recuse himself?

STATEMENT OF THE CASE[1]

The Plaintiff Beverly Moore-Rowe, proceeding *pro se*, filed a Notice of Intent to File Suit on January 7, 2013, asserting medical malpractice claims arising out of cervical spine surgery purportedly performed at Bon Secours St. Francis Hospital on January 7, 2010. [ROA ___; Complaint, C/A No. 2013-CP-10-00088.] She did not contemporaneously file an expert affidavit as required by §15-79-125(A).

Named as defendants are a laundry list of entities allegedly affiliated with the Hospital, but improperly named, to wit: Bon Secours-St. Francis Xavier Hospital, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours St. Francis Health System, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours Health System, Inc., d/b/a Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Roper St. Francis Foundation, d/b/a Roper St. Francis Healthcare, Bon Secours-St. Francis Health System Foundation, Inc., d/b/a Roper St. Francis Healthcare, Roper Hospital, Inc., d/b/a Roper St. Francis Healthcare. ("The Hospital Defendants.") Also named as Defendants are:

- Byron N. Bailey, M.D., a neurologist, along with his practice group, Charleston Neurosurgical Associates, LLC;
- Christine C. Thompson, M.D, an anesthesiologist;
- Charleston Surgery Center Limited Partnership and Mt. Pleasant Anesthesia Associates, P.A., alleged to be Dr. Thompson's "groups";

[1]The issues involve only procedural facts and thus, the underlying facts of the medical treatment are not relevant and no separate Statement of the Facts is necessary.

- Jeffery S. Wager, a Certified Registered Nurse Anesthetist;
- Tricoastal Healthcare Billing and Management, Inc., alleged to be Wager's group;
- Tammy McGraw a/k/a Tammy McGraw Speicher, a Certified Registered Nurse Anesthetist;
- Nurse Anesthesia of South Carolina, LLC, alleged to be McGraw's Group; and
- Steven Heath Cobb, an MUSC student nurse anesthetist.

The Hospital Defendants filed a motion to dismiss on March 13, 2013. [ROA ___;Motion.] Bon Secours Health System, Inc., Bon Secours St. Francis Hospital, and Bon Secours St. Francis Health System Foundation, Inc., which were parties to the motion filed by the Hospital Defendants on March 13, also filed a separate motion to dismiss on April 1, 2013, as there existed some dual representation of the Hospital Defendants, which counsel for the parties did not appreciate at the time of filing. [ROA ___; Motion to Dismiss.] Steven Heath Cobb filed a motion to dismiss on March 15, 2013.[2] [ROA ___; Motion.] The Defendant Charleston Surgery Center Limited Partnership d/b/a Charleston Surgery Center filed a motion to dismiss on March 27, 2013. [ROA ___; Motion.] Dr. Bailey and his practice group filed a motion to dismiss on April 3, 2013. [ROA ___; Motion.] Defendants Nurse Anesthesia of South Carolina LLC, Wager, and McGraw filed a motion to dismiss on April 15, 2013.[3] [ROA ___; Motion.] Dr. Thompson filed a motion to dismiss on April 22, 2013. [ROA ___; Motion.] [4]

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[2] This Defendant also raised an issue arguing that MUSC, as the state agency employer, would be the proper party defendant under the S.C. Tort Claims Act, S.C. Code Ann. §15-78-70. [ROA ___, Motion; see also ROA ___ , Tr. 7-8.]

[3]Defendants Wager and McGraw subsequently withdrew their motion to dismiss in order to preserve an issue of jurisdictional defect for insufficient service of process. [ROA ___; Motion to Withdraw, filed May 31, 2013.]

[4] Mt. Pleasant Anesthesia Associates, P.A. and Tricoastal Healthcare Billing and Management Group, Inc. have not appeared.

Each of these Defendants based their motion to dismiss on the ground that the Plaintiff had not contemporaneously filed an expert affidavit in compliance with §15-79-125(A).

The motions to dismiss were set for a hearing on May 31, 2013. On May 25, 2013, prior to the hearing date, the Plaintiff mailed a letter directly to the Trial Judge's law clerk asking that the Judge recuse himself from hearing the pending motion in both their cases. The Judge wrote to the Plaintiff, informing her that her letter was considered an *ex parte* communication and must be shared with all parties. The Trial Judge had the correspondence filed with the Court and copies sent to all counsel of record. [ROA ___; Letters.]

After oral argument, the Trial Court granted the motions and dismissed the Notice of Intent as to all Defendants on the grounds: (1) the Plaintiff failed to file an expert affidavit contemporaneously with her Notice of Intent to File Suit as mandated by §15-79-125; and (2) any exception to the contemporaneous filing found in § 15-36-100 is not applicable in this case.[5] [ROA ___; Order, filed July 3, 2013.] The Plaintiff timely filed a Notice of Appeal.[6]

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[5] The Trial Court also ruled that the dismissal rendered moot the issue of insufficient service of process on Defendants Wager and McGraw.

[6] The Defendants would also note for the Court's clarification that the Plaintiff's Husband, Arthur Peter Rowe filed a pro se complaint asserting a loss of consortium claim on the same day that his Wife filed her Notice of Intent. [C/A 2013-CP-10-00090.] His Complaint was dismissed on the grounds that (1) he failed to file a Notice of Intent to File Suit before filing his Complaint in compliance with §15-79-125(A); and (2) he failed to timely submit the requisite expert affidavit required by §15-79-125(A) and/or 15-36-100(C)(1). The Husband filed a Notice of Appeal which is separately pending in this Court. [Appellate Case No. 2013-001682.]

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE PLAINTIFF'S NOTICE OF INTENT TO FILE SUIT FOR MEDICAL MALPRACTICE BECAUSE SHE FAILED TO CONTEMPORANEOUSLY FILE AN EXPERT WITNESS AFFIDAVIT IN COMPLIANCE WITH §15-79-125(A).

A. The 45-day grace period allowed by §15-36-100(C)(1) does not apply to excuse her failure to contemporaneously file the expert affidavit required by §15-79-125(A).

The issues in this case involve interpretation and application of two sections of Act No. 32, passed by the General Assembly in 2005, which are codified at §15-79-125 and §15-36-100. Section 15-79-125 is part of a chapter governing medical malpractice actions that imposes pre-suit filing requirements, including a requirement that a plaintiff shall contemporaneously file a notice of intent to file suit and an expert affidavit prior to filing any civil action. S.C. Code Ann. §15-79-125(A) provides, in pertinent part, that:

> (A) 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....

Section 15-36-100 is as an amendment to the South Carolina Frivolous Civil Proceedings Sanctions Act which added provisions requiring that an expert affidavit be filed contemporaneously with any complaint alleging professional negligence; however, subsection (C)(1) provides for an exception in certain circumstances that allows a plaintiff a 45-day grace period to supplement her complaint. S.C. Code Ann. § 15-36-100 provides, in pertinent part, that:

> (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: [requirements as to experts] ...
>
> (B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G),

> the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.
>
> (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.

These statutory provisions have been the subject of several reported appellate decisions in medical malpractice cases: *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013); *Grier v. AMISUB of S.C., Inc.,* 397 S.C. 532, 725 S.E.2d 693 (2012); *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), *cert. granted.*

The Plaintiff does not dispute that she must comply with §15-79-125(A) before she can file a lawsuit for professional medical malpractice, [Brief, p. 9], and, it is undisputed that she did not contemporaneously file an expert witness affidavit with her Notice. Notwithstanding the clear applicability of §15-79-125(A), the Plaintiff asserted in her Notice that §15-36-100(C)(1) applies and allows her to supplement her Notice with the required affidavit at a later time:

> 4. **AFFIDAVIT OF EXPERT WITNESS.**
>
> The Affidavit of the Expert Witness required under S.C. Code Section 15-79-125 is not being provided at this time pursuant to S.C. Code Section 15-36-100(C)(1). The Plaintiff is informed and believes that the applicable statute of limitations on one or more claims alleged in the Complaint, which is attached to this Notice Of Intent to File Suit as **Exhibit** A, will expire within ten (10) days of the date of the

> filing of the Complaint, and that due to time constraints, an affidavit of an expert could not be prepared. The Plaintiff is informed and believes that S.C. Code Section 15-36-100(C)(1) is applicable to enable the Plaintiff to supplement the pleadings with the required affidavit. [ROA ___.]

The Trial Court held that any exception to the contemporaneous filing found in §15-36-100 is not applicable in this case, relying on the precedent in *Ranucci v. Crain*, which specifically dealt with the affidavit provisions of §15-79-125 and §15-36-100. In *Ranucci*, the Court held that: "The affidavit requirements invoked by section 15–79–125 govern only authorship and content. They do not permit a potential plaintiff to file her expert witness's affidavit after she files her Notice of Intent to File Suit." 723 S.E.2d at 247. The Plaintiff acknowledges the holding in *Ranucci*, but argues for its reversal. Notably, as of the filing of this Initial Brief, the Supreme Court has granted a petition for a writ of certiorari to review the decision in *Ranucci*. The Defendants maintain that, apart from the precedent of the *Ranucci* opinion, this case should begin and end with the statutory provisions of §15-79-125 and §15-36-100.

The use of the term "contemporaneously" in §15-79-125(A) clearly mandates that the plaintiff must file a Notice of Intent and expert witness affidavit together at the same time, and the language of "subject to the affidavit requirements established in §15-36-100" refers to who constitutes an expert and the contents of the expert's opinion, not to the timing of the affidavit. In *Grier*, the Supreme Court noted that §15-75-125 provides no specifics for the expert affidavit, but rather, directs the reader to §15–36–100 as to the contents of the affidavit:

> Read plainly and strictly, section 15–79–125(A) simply requires the contemporaneous filing of both the notice and the affidavit. While this statute supplies several requirements for the notice, it does not speak at all to what is required for the affidavit beyond stating that it is "subject to the affidavit requirements established in Section 15–36–100." ... By its very terms, this statute imposes no content requirements for the expert affidavit and specifically delegates that task to section 15–36–100.

725 S.E.2d at 697.

The language of §15-36-100(B) mandates that a plaintiff must file an expert affidavit as part of the complaint, but that section begins with the preface "except as provided in Section 15-79-125" – clearly providing that §15-79-125 applies separately – as a predicate – to medical malpractice actions.

The plain language of §15-36-100(C)(1) provides an exception to the contemporaneous filing requirements of subsection (B) where the statute of limitations is expiring within 10 days. But, again, subsection (B) has its own exception as provided in §15-79-125. Thus, this exception does not apply to excuse the requirement that an expert affidavit must be filed contemporaneously with the Notice of Intent in medical malpractice actions. In addition, §15-36-100(C)(1) provides that 45-day grace period is allowed "after the filing of the ***complaint***," but there is no language in either statute allowing the Plaintiff 45-days to supplement her notice with the affidavit required by §15-79-125.

In *Ross*, the Supreme Court addressed the mediation requirement in §15-179-125 and held 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." 744 S.E.2d at 547. While the issues are different, the Supreme Court's reminder that §15-79-125 is to be strictly construed supports the conclusion that while the requisite contents of the expert affidavit are governed by §15-36-100(C)(1), the contemporaneous filing requirement is not subject to the 45-day grace period exception under §15-36-100(C)(1).

The Plaintiff argues that "[t]he exception to the contemporaneous filing requirement must be intended to alleviate the hardship in the interests of justice when a party injured by professional negligence is not able to obtain the required Affidavit before the expiration of the applicable statute of limitations as is the case at hand." [Brief, p. 8.] However, the Legislature has enacted relatively

restrictive provisions applying specifically to medical malpractice claim, which produce perceptively harsh results, and the Court has upheld those provisions. For example, the Court rejected challenges to the statute of repose[7] that applies in medical malpractice actions, even where it may bar a potential claim before a plaintiff has knowledge, directly or by exercise of due care, that an injury has been inflicted. *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821, 822 (1989). The Court reasoned that the statute of repose "bears a rational relationship to a legitimate legislative objective: reduction of liability exposure and, thereby, fostering the delivery of quality health care services." *Id.* at 822. The same reasoning applies to the presuit mediation efforts mandated in medical malpractice actions – apart from other professional negligence actions – and to the contemporaneous filing requirement found § 15-79-125.

B. The Plaintiff did not file an affidavit within the 45-day grace period allowed under §15-36-100(C)(1).

For the sake of argument, even if §15-36-100(C)(1) is applicable to the affidavit that must be filed with the presuit Notice of Intent in medical malpractice claims, it does not grant an indefinite delay for the Plaintiff to find an expert and procure the requisite affidavit. The plaintiff has 45 days after the filing of the notice to supplement the pleadings with the affidavit. The Notice of Intent was filed on January 7, 2013, and as of the hearing date on May 31, 2013, the Plaintiff had not had submitted any expert affidavit. In fact, the Plaintiff has never proffered an expert affidavit.

Ultimately, however, the reality of the Plaintiff's situation, as she revealed at the hearing, is that she could not get an affidavit because of the cost: "[T]he Legislature has established a law that makes it almost impossible for a regular citizen to make a medical malpractice case regardless of their injuries, because of the twenty to thirty thousand dollar payout that has to go to pay an

[7] S.C. Code Ann. §15-3-545.

expert witness." [ROA ___; Tr. 10:11-14.] "I tried to get an affidavit of merit and I tried to get a medical expert and I was unable to do that."[8] [ROA ___; Tr. 12:12-14.] Whether or not cost was actually a factor, §15-36-100(C)(1) simply does not provide for an exception for a plaintiff's financial limitations in securing an expert affidavit.

II. THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION IN DEALING WITH THE PLAINTIFF'S INFORMAL REQUEST FOR HIM TO RECUSE HIMSELF.

On a threshold point, the Plaintiff has not preserved any issue related to Trial Court's handling of the recusal issue. First, the Plaintiff did not properly file a motion for recusal, but attempted an inappropriate *ex parte* communication with the Trial Court through a letter directly to his law clerk as "Personal and Confidential." Second, the Plaintiff did not raise any objection to Judge Dennis presiding when she appeared at the hearing on May 31st. *See* Rule 7(b)(1), SCRCP (motion shall be in writing or made in open court); *see also: Hundley v. Rite Aid of South Carolina Inc.,* 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct.App.2000) (finding motions must be made on the record to be preserved for review by an appellate court)). Third, if the letter could be considered a proper motion, the Trial Court did not make a ruling on it and the Plaintiff did not file a Rule 59(e) motion. *See Browder v. Browder*, 382 S.C. 512, 675 S.E.2d 820, 826 (Ct. App. 2009) (issue not preserved for appellate review where it was not ruled upon by the trial court and no Rule 59(e) motion was made). Ultimately, however, the Plaintiff's letter did not show any evidence of bias or prejudice to disqualify the Trial Judge.

A presiding judge should disqualify himself if his impartiality might reasonably be questioned where he has a personal bias or prejudice against a party. *Murphy v. Murphy,* 319 S.C.

[8] She also complains in her brief that she was not able to find an attorney to represent her. [Brief, p. 6.] She also claims in her request for Americans with Disabilities Accommodation that she has contacted over 40 attorneys that would not take her case. [Filed March 7, 2014.]

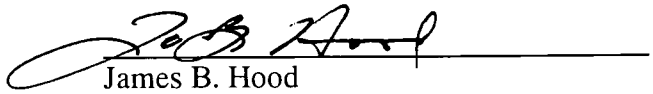
324, 461 S.E.2d 39, 42 (1995). The party seeking recusal must show some evidence of bias or prejudice that stems from an extrajudicial source and results in decisions based on information other than what the judge learned from his participation in the case. *Roper v. Dynamique Concepts, Inc.,* 316 S.C. 131, 447 S.E.2d 218, 223 (Ct.App.1994). A judge's failure to disqualify himself will not be reversed on appeal in the absence of any such evidence of judicial prejudice. *Ellis v. Procter & Gamble Dist. Co.,* 315 S.C. 283, 433 S.E.2d 856, 857 (1993).

The Plaintiff asserted in her letter that Judge Dennis was prejudiced against her because he presided in an action she brought against her church in 2007. [ROA ___. Referencing C/A No. 2007-CP-10-243]. More specifically, she alleged that her attorney in that action had informed her that Judge Dennis had *sua sponte* issued a Protective Order sealing the Church's records produced in discovery. However, she goes on to allege that the Clerk's Office records show that the Protective Order was, in fact, a consent order signed by Judge Young at the end of the case. Thus, the letter, on its face, did not state any plausible grounds for Judge Dennis to recuse himself. *See also: Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 321 S.E.2d 179, 183 (Ct. App. 1984) (recusal not required where party received adverse ruling from a judge in a prior proceeding).

CONCLUSION

Based on the foregoing, the Defendants respectfully submit that the Trial Court's dismissal of the Notice of Intent to File Suit should be affirmed because the Plaintiff did not file an expert witness affidavit as required by §15-79-125(A).

Respectfully submitted,



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