THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
S. Jackson Kimball, Special Circuit Court Judge

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

Shannon Ranucci, ... Petitioner,

v.

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

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-0558

Vicki L. Wilkinson.....Appellant,

v.

East Cooper Community Hospital, Inc., d/b/a
East Cooper Regional Medical Center;
Carolina Aesthetic Plastic Surgery Institute, PA; and
Thomas X. Hahm, M.D.....Respondents.

SOUTH CAROLINA HOSPITAL ASSOCIATION'S AMICUS BRIEF

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The South Carolina Hospital Association ("the SCHA") is a private, not-for-profit organization made up of some one-hundred (100) member hospitals and health systems and approximately nine-hundred (900) individual members. The SCHA was created in 1921 to serve as the collective voice of the state's hospital community. The SCHA is proud to be part of the state's hospital industry, with the stated goal of adding value to hospitals' efforts to care for the people of South Carolina. The SCHA's mission is to support its members in creating a world-class health care delivery system for the people of South Carolina by fostering high quality patient care and service as effective advocates for the hospital community.[1]

An *amicus curiae* brief from the SCHA in these matters is desirable because the issues presented to the Court directly affect the legal environment in which each of SCHA's member's operate and, thus, impact their ability to provide world-class health care to the citizens of the South Carolina. This Court has never addressed the issues raised by these matters. The holding in these cases will apply to all future medical malpractice cases in South Carolina, many of which will be filed against the SCHA's members.

[1] The substance of this statement is derived from the South Carolina Hospital Association's website, which is found at www.scha.org/about. (last viewed May 15, 2014).

STATEMENT OF THE ISSUES ON APPEAL

I. Does S.C. Code Ann. § 15-79-125 require the filing of a Notice of Intent to File Suit *and* an expert witness affidavit contemporaneously therewith in order to trigger pre-litigation discovery and mediation, as well as toll the applicable statute of limitations?

II. When pre-litigation mediation pursuant to S.C. Code Ann. § 15-79-125 is unsuccessful and a medical malpractice law suit is initiated, does S.C. Code Ann. § 15-36-100 require the filing of an additional expert witness affidavit contemporaneously with the plaintiff's complaint?

STATEMENT OF THE CASE

The arguments in this brief address the issues raised in two cases pending before this Court. Resolution of these issues will necessarily involve this Court's interpretation of S.C. Code Ann. §§ 15-79-125 and 15-36-100, which independently require that a plaintiff in a medical malpractice action file an expert affidavit *prior to* initiating an action and *upon* initiating an action, respectively. The Appellants in the matters before the Court collectively failed to meet both of these requirements and their cases were dismissed by the lower courts.

I. *Ranucci v. Crain*

On June 8, 2009, Appellant Shannon Ranucci ("Ranucci") filed a Notice of Intent against Respondent Dr. Corey K. Crain ("Dr. Crain"), asserting that, on June 7, 2006, Dr. Crain committed medical malpractice while performing a surgical procedure on Ranucci. Ranucci failed to file any expert witness affidavit with her Notice of Intent, but alleged that "time constraints" prevented her from doing so.

On July 16, 2009, Dr. Crain answered Ranucci's Notice of Intent, while simultaneously moving to dismiss the Notice of Intent for Ranucci's failure to file a contemporaneous expert witness affidavit in accordance with section 15-79-125(A). On July 23, 2009, Ranucci filed an expert witness affidavit.

On September 21, 2009, The Honorable S. Jackson Kimball granted Dr. Crain's motion to dismiss the Notice of Intent, concluding: "[A]n affidavit was not timely filed, and [Ranucci] has not met the requirements of the statute." Judge Kimball continued: "Thus, [Dr. Crain] is entitled to dismissal of the Notice, and to have the same stricken by the Clerk of Court from the file book." After Judge Kimball denied Ranucci's motion to reconsider on November 12, 2009, Ranucci appealed the decision on November 19, 2009.

On January 25, 2012, the court of appeals affirmed Judge Kimball's decision. Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), reh'g denied (Mar. 15, 2012). This Court granted certiorari to review the decision of the court of appeals.

II. Wilkinson v. E. Cooper Comm. Hosp., Inc.

On September 1, 2011, Appellant Vicki L. Wilkinson ("Wilkinson") filed a Notice of Intent against Respondents East Cooper Community Hospital, Inc., doing business as East Cooper Regional Medical Center ("ECCH"); Carolina Aesthetic Plastic Surgery Institute, PA; and Thomas X. Hahm, M.D. Wilkinson alleged in her Notice of Intent that the above-named respondents committed medical malpractice during a surgical procedure performed by Dr. Hahm at a hospital owned and operated by ECCH on September 4, 2008.

As is the case in the Ranucci matter, Wilkinson failed to file any expert witness affidavit with her Notice of Intent, instead simply alleging that "the statute of limitations is construed to expire shortly." Wilkinson waited until October 5, 2011 to file an expert witness affidavit. Although the parties engaged in prelitigation mediation, the mediation settlement conference on January 20, 2012 did not resolve Wilkinson's claims. Consequently, on January 25, 2012, Wilkinson filed a medical malpractice action against Respondents, but failed to file an expert witness affidavit with her complaint.

Respondents filed an answer, but also moved to dismiss Wilkinson's claims based on, among other things, the expiration of the statute of limitations and her failure to contemporaneously file an expert witness affidavit with her complaint. On May 14, 2012, the Honorable R. Markley Dennis, Jr. heard the pending motions, and, on October 2, 2012, Judge Dennis dismissed Wilkinson's complaint for, among other things, failing to toll the statute of limitations by filing a Notice of Intent without an expert witness

affidavit and failing to file an expert witness affidavit contemporaneously with her complaint. Wilkinson filed a motion to reconsider, which Judge Dennis denied. On November 19, 2012, Wilkinson served her notice of appeal, and, pursuant to Rule 204(b), SCACR, this Court certified the appeal for direct review.

ARGUMENT

On April 4, 2005, the South Carolina General Assembly enacted what is generally known as the Tort Reform Act. Act No. 32, 2005 S.C. Act No. 32. Among other things, the Tort Reform Act adopted what has been codified as S.C. Code Ann. § 15-36-100, which established new procedures for initiating various kinds of professional malpractice suits. See S.C. Code Ann. § 15-36-100(G). In addition, however, the General Assembly also mandated – by way of the Tort Reform Act – that medical malpractice actions are, specifically, subject to an additional level of procedure. Namely, pursuant to section 15-79-125, medical malpractice actions are subject to a mandatory pre-litigation discovery and mediation period, which is not required in any other type of professional malpractice action described in section 15-36-100.

The General Assembly's passage of the Tort Reform Act, including the two-step procedure applicable to medical malpractice actions under sections 15-79-125 and 15-36-100, unquestionably establishes the General Assembly's intent to shield South Carolina's medical providers from frivolous, unmeritorious, and unsupported lawsuits;[2] but also ensure all parties—plaintiffs and defendants—have the opportunity to participate in *substantive* efforts to resolve medical malpractice claims without resorting to litigation. See Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 744 S.E.2d 547, (2013) ("It is clear

[2] This is not the only way in which the General Assembly chose to treat medical malpractice actions differently than other professional malpractice actions. For instance, it should be noted that, as part of the Tort Reform Act, the General Assembly also adopted the South Carolina Noneconomic Damage Awards Act of 2005, codified at sections 15-32-200 to -240 of the South Carolina Code. See Tort Reform Act, §2. This section of the Tort Reform Act implements, among other things, caps on non-economic damages in medical malpractice actions, but not in other professional negligence actions. Thus, it is clear the General Assembly intended a broader range of reforms to apply to medical malpractice cases than to professional negligence cases generally.

that the Legislature enacted section 15–79–125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims.").

This appeal involves only questions of statutory interpretation, which are matters of law for the Court to decide without deference to the courts below. See S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). "The primary purpose in construing a statute is to ascertain legislative intent." Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 608 S.E.2d 425, (2005). As explained below, it is clear that the General Assembly intended for both sections 15-79-125 and 15-36-100 to establish specific requirements that must be satisfied independent of one another when asserting medical malpractice claims. Respondents in the actions at issue in these cases did not follow one or several of these requirements and their cases were dismissed. For the reasons below, this Court should affirm the decisions of the lower courts.

I. Section 15-79-125(A) of the South Carolina Code unambiguously requires a plaintiff who alleges medical malpractice to contemporaneously file a Notice of Intent to File Suit *and* an expert witness affidavit in order to trigger pre-litigation discovery and mediation, as well as toll the applicable statute of limitations.

According to the unambiguous language of section 15-79-125(A), "[p]rior to 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." This specific action does two things: (1) initiates the statutorily required pre-suit discovery and mediation of medical malpractice actions, and (2) tolls the statute of limitations for filing a civil suit if pre-litigation mediation is unsuccessful. Without the

contemporaneous filing of the Notice of Intent *and* expert affidavit, neither of these things is accomplished.

a. S.C. Code Ann. § 15-79-125 requires the filing of an expert affidavit and Notice of Intent in order to trigger pre-litigation mediation.

The framework of section 15-79-125(A) makes clear that pre-litigation discovery and mediation commence upon the contemporaneous filing of "a Notice of Intent to File Suit and an affidavit of an expert witness . . . ." Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693, (2012) ("Read plainly and strictly, section 15–79–125(A) simply requires the contemporaneous filing of both the notice and the affidavit."). This unambiguous mandate for a contemporaneous filing of an expert witness affidavit along with the Notice of Intent triggers the pre-suit discovery and mediation period, which is intended to ensure that medical malpractice defendants receive ample notice of the claims against them and have a full opportunity to evaluate the *substance* behind such claims *before* engaging in pre-litigation discovery and, ultimately, mediation. See S.C. Code Ann. § 15-79-125(B) ("After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.").

The contemporaneous filing requirement provides medical malpractice defendants with sufficient time to investigate the merits of the plaintiff's claims before incurring significant costs and expenses. Accordingly, the contemporaneous filing of a Notice of Intent *and* an expert affidavit as envisioned by section 15-79-125(A) is the gatekeeper for

medical malpractice claims under the Tort Reform Act. It triggers the deliberate process clearly intended by the General Assembly wherein meritorious claims against medical providers can be resolved with minimal discovery and without the necessity of full-blown litigation. An interpretation of section 15-79-125(A) without regard for the gatekeeping role of the expert affidavit requirement would place form over substance. The obvious intent of the requirement is to effectively curb wasted litigation expenses. To ignore the requirement that an expert affidavit be filed contemporaneously with a Notice of Intent would, in many instances, cause the parties to engage in an effort to resolve claims without the benefit of an expert's illumination of the merits of a claim. This would make medical malpractice claims more costly to all parties and eviscerate the intent of the General Assembly in passing the Tort Reform Act.

b. S.C. Code Ann. § 15-79-125 requires the contemporaneous filing of an expert affidavit and Notice of Intent in order to toll the statute of limitations.

An expert affidavit must be filed contemporaneously with a Notice of Intent not only to commence pre-litigation discovery and mediation, but also to toll the applicable statute of limitations. While section 15-79-125(A) states that "[f]iling the Notice of Intent to File Suit tolls the applicable statute of limitations," without express mention of the expert affidavit; it is clear from this statement's context that the term "Notice of Intent to File Suit" also includes the contemporaneously filed expert affidavit.

For instance, section 15-79-125(A) provides, in pertinent part: "The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure." Nothing else in section 15-79-125 addresses service of an expert witness affidavit. Thus, reading the term "Notice of Intent" in this context so as to exclude the

expert witness affidavit would negate any mandate that the expert witness affidavit be served. Thus, when section 15-79-125(A) states that "[f]iling the Notice of Intent to File Suit tolls the applicable statute of limitations," it necessarily includes the filing of an expert witness affidavit. To draw a different conclusion would be absurd, and must be rejected by this Court. See Enos v. Doe, 380 S.C. 295, 669 S.E.2d 619, (Ct. App. 2008) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

Based on the foregoing, the SCHA asserts that section 15-79-125(A) unequivocally requires that a medical malpractice plaintiff file an expert witness affidavit contemporaneously with the plaintiff's Notice of Intent *both* to trigger pre-litigation discovery and mediation *and* to toll the statute of limitations. For that reason, the decisions of the lower courts should be affirmed.

II. If the pre-litigation mediation that is mandated by section 15-79-125 is unsuccessful and a medical malpractice law suit is filed, section 15-36-100 requires the plaintiff to – once again – file an expert witness affidavit contemporaneously with the plaintiff's complaint.

When a medical malpractice claim is not resolved by way of the pre-litigation mediation mandated by section 15-79-125(C), the individual alleging malpractice may commence a civil action. But, he or she must do so pursuant to section 15-36-100, which requires that an expert affidavit be filed as "part of" a plaintiff's professional negligence complaint. S.C. Code Ann. § 15-36-100(B). The definition of "professional negligence" includes claims against medical providers, such as physicians and nurses. See S.C. Code Ann. § 15-36-100(G)(7), (9).

To the extent that Appellants in these matters contend that the expert affidavit requirement in section 15-36-100(B) is inapplicable to medical malpractice actions, this argument would render the General Assembly's express inclusion of claims against licensed health care facilities in section 15-36-100(B) and the incorporation by reference of claims against physicians and nurses in section 15-36-100(G)(7) and (9) unnecessary and meaningless. This argument has no merit. See Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 727 S.E.2d 418, (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.").

Instead, it is clear that sections 15-79-125(A) and 15-36-100(B) require two separate affidavits be filed in medical malpractice actions—one to commence pre-litigation discovery and mediation, and another to commence the subsequent litigation if mediation fails. This dual expert affidavit requirement is unique to claims against medical professionals (as opposed to all other claims of professional negligence) and demonstrates that the General Assembly intended in the Tort Reform Act to afford additional protections to medical malpractice defendants. As discussed above, this special treatment of medical malpractice claims was intended by the General Assembly and is not unique to the expert affidavit situation. See S.C. Code Ann. § 15-32-200, *et seq.* (establishing caps on damages in medical malpractice actions, but not doing so for other types of professional malpractice claims).

a. Legislative history makes clear that S.C. Code Ann. § 15-36-100 requires the filing of an expert affidavit that is in addition to the expert affidavit filed pursuant to S.C. Code Ann. § 15-79-125.

The legislative history of the Tort Reform Act supports the notion that two affidavits are required in a medical malpractice action, while only one in other

professional malpractice cases. Prior to the enactment of sections 15-36-100 and 15-79-125 as part of the Tort Reform Act, ten (10) drafts of Senate Bill No. 83, which would become the Tort Reform Act, were introduced. Of these ten drafts, only four contained changes to either section 15-36-100 or section 15-79-125. The first draft of the bill, which was introduced on December 15, 2004, included a requirement that the plaintiff in a professional negligence action file an expert witness affidavit contemporaneously with the plaintiff's complaint. S.B. 83, 116th Gen. Assemb., Reg. Sess. (S.C. Dec. 15, 2004). This requirement was eventually codified in section 15-36-100(B).

This first draft also included a forty-five (45) day conditional exemption to the contemporaneous filing requirement for the expert affidavit in section 15-36-100(B). This draft of the bill would have allowed for the delayed filing of the affidavit only when the complaint was being filed within ten (10) days of the statute of limitations.

On March 2, 2005, the language that was eventually incorporated into section 15-79-125 was added to the bill. The initial, draft language included the mandate that a medical malpractice plaintiff file a Notice of Intent to File Suit; however, this version of the bill did not require a contemporaneous expert affidavit be filed with the Notice of Intent. S.B. 83, 116th Gen. Assemb., Reg. Sess. (S.C. Mar. 2, 2005). But, on March 17, 2005, a new draft of the bill was introduced, adding, "Except as provided in Section 15-79-125" to subsection B of section 15-36-100 and also adding the contemporaneous expert affidavit requirement in section 15-79-125(A). S.B. 83, 116th Gen. Assemb., Reg. Sess. (S.C. Mar. 17, 2005). The March 17, 2005, draft represents the final version of the bill as it concerns section 15-36-100 and section 15-79-125.

The March 17, 2005 amendments demonstrate that the General Assembly considered the interaction between section 15-36-100 and 15-79-125 when creating its final draft of the law. But, unlike in section 15-36-100(B), the General Assembly included no exemptions to the contemporaneous affidavit requirement in section 15-79-125(A). While the General Assembly could easily have incorporated the conditional exemption in section 15-36-100(C)(1) into section 15-79-125 by reference, it did not. Instead, the General Assembly specifically included language in section 15-79-125 mandating that an expert affidavit be filed contemporaneously with a Notice of Intent—with no exemptions. By including a conditional exemption to affidavits filed under section 15-36-100(B), but excluding such an exemption from section 15-79-125, the General Assembly established its intent that the two affidavits be distinct.

b. A plain reading of the relevant, unambiguous statutory language makes clear that S.C. Code Ann. § 15-36-100 requires the filing of an expert affidavit that is in addition to the expert affidavit filed pursuant to S.C. Code Ann. § 15-79-125.

Section 15-36-100(B) requires that an expert affidavit filed when initiating a civil action must include "the factual basis for each claim based on the available evidence *at the time of filing of the affidavit*." (Emphasis added). Importantly, section 15-79-125(B) permits the parties to subpoena documents and depose witnesses as part of prelitigation discovery, such that the factual basis and available evidence relating to a plaintiff's claims may change between the time the expert affidavit in section 15-79-125(A) is filed and the time the expert affidavit in section 15-36-100(B) is filed. As a result, the expert witness may have amended his opinions, solidified his opinions, or changed his mind entirely as a result of facts learned during the pre-litigation discovery period. It is

because of this pre-litigation discovery that a second and distinct affidavit must be filed when initiating a medical malpractice action pursuant to S.C. Code Ann. § 15-36-100.

Thus, both the legislative history of the Tort Reform Act and the plain language of the statutes clearly indicate that the legislature intended to require contemporaneous filings of expert affidavits with *both* the Notice of Intent *and* the subsequent complaint in the event the claims remain unresolved after pre-litigation mediation.

CONCLUSION

Based on the foregoing, the SCHA respectfully urges this Court to enforce the procedural safeguards deliberately enacted by the General Assembly to protect medical malpractice defendants from the time, expense and unnecessary burden of frivolous lawsuits, as well as to encourage all parties in a medical malpractice claim to fully utilize the pre-litigation discovery mediation process. This result can only be obtained by recognizing that a medical malpractice plaintiff is required to contemporaneously file an expert affidavit with the plaintiff's Notice of Intent and, to the extent the claims are unresolved and a law suit is initiated, contemporaneously file an expert affidavit informed by the pre-litigation discovery contemporaneously with the plaintiff's complaint. For these reasons, this Court should affirm the decisions of the lower courts.

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Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Amicus Brief complies with Rule 211(b), SCAR.

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SOUTH CAROLINA HOSPITAL ASSOCIATION'S PROOF OF SERVICE

I certify that I served the **South Carolina Hospital Association's Petition for Leave to File Amicus Brief** and **South Carolina Hospital Association's Amicus Brief** by depositing copies of the same in the United States Mail, postage prepaid and by electronic mail, on the 15th day of May, 2014 addressed to their attorneys of record as follows:

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