

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAY 27 2014

Appeal from Union County  
Court of Common Pleas

**S.C. Supreme Court**

John C. Hayes, III, Circuit Court Judge

Case No. 2011-CP-44-00074

Sarah Dawkins,

Appellant,

v.

Union Hospital District (a.k.a. Wallace Thomson Hospital),

Respondent.

**PETITION FOR REHEARING**

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(a.k.a. Wallace Thomson Hospital)*

COMES NOW the Respondent, Union Hospital District (a.k.a. Wallace Thomson Hospital)<sup>1</sup> (the “Hospital”), by and through its attorneys, pursuant to Rule 221, SCACR, and, upon the grounds set forth herein, hereby petitions this Honorable Court for rehearing of this appeal, which the Court decided via published opinion filed April 9, 2014; specifically, Dawkins v. Union Hospital District, Op. No. 27380 (S.C. Sup. Ct. filed April 9, 2014) (Shearouse Adv. Sh. No. 14 at 59).

### **INTRODUCTION**

Most respectfully, rehearing should be granted. The Court’s opinion reflects that it overlooked or misapprehended a number of material points—chief among them, that the law controlling the issue raised by the Appellant’s challenge to the circuit court’s dismissal of her complaint is statutory law, not common law, and that, contrary to, and irreconcilable with, the essential factual premise of the Court’s decision, the Appellant unequivocally averred that she had begun receiving medical care at the time of her alleged injury—resulting in unfair prejudice to the Hospital via the erroneous disposition of this appeal. More broadly, left as is, the Court’s opinion will result in undue problems for the bench and bar, and, indeed, the public, by confusing our State’s law in the area of medical malpractice litigation.

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<sup>1</sup> The Respondent is properly identified as Union Hospital District d/b/a Wallace

## ARGUMENT

- I. **Respectfully, the Court overlooked or misapprehended a number of material points, resulting in unfair prejudice to the Hospital via the erroneous disposition of this appeal.**
  - A. **This section of the Hospital’s petition addresses these three (3) points:**
    1. **The law controlling the issue raised by the Appellant’s challenge to the circuit court’s dismissal of her complaint is statutory law, not common law, and the controlling statutory law requires affirmance of the circuit court’s dismissal.**
    2. **In framing, and deciding, the issue on appeal solely under common law principles, without regard to the controlling statutory law, the Court improperly disregarded the presumptive correctness of the circuit court’s decision, relieved the Appellant of the burden that was rightfully hers to affirmatively show any claimed reversible error, and, indeed, found reversible error (incorrectly) on a basis that was not preserved for review—or even actually advanced by the Appellant on appeal.**
    3. **Even under the Court’s common-law driven analysis, the Appellant’s claim against the Hospital is nonetheless rightfully classified as one sounding in medical malpractice, not ordinary negligence.**

This appeal follows the circuit court’s dismissal of the Appellant’s complaint on the basis of its finding that the Appellant’s claim against the Hospital was subject to, and that the Appellant had not complied with, the **statutory** pre-suit requirements for medical malpractice actions set forth in S.C. Code Ann. § 15-79-125. (R. pp. 1-5; *see also* R. pp. 9-11.)<sup>2</sup>

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Thomson Hospital.

<sup>2</sup> Technically, according to her notice of appeal, the Appellant “appeals the order of the Honorable John C. Hayes, III dated April 4, 2012.” The referenced order is the circuit court’s order denying the Appellant’s motion for reconsideration of its prior dismissal of her case. (R. pp. 9-11.) The Appellant’s notice of appeal does not actually include the circuit court’s dismissal itself. Rule 203(e)(1)(C), SCACR, requires that the notice of appeal set forth “[t]he date of the order, judgment, or sentence from which the

In her principal appellate brief, the Appellant stated the issue on appeal as follows: “Did the Circuit Court err in dismissing [the Appellant’s] complaint for failing to comply with the pre-suit Notice of Intent To Sue procedures **under the South Carolina Code** for medical malpractice cases where the matter as pled does not constitute a claim for medical negligence **within the meaning of the Act?**” (App. Br. p. 1) (emphasis added.) And, addressing an issue-preservation challenge, the Appellant offered the following in her reply brief:

The entire basis for the motion to dismiss was that the claim is, in essence, a “medical malpractice” claim for purposes of the Notice of Intent (NOI) statute. **The counter to that argument was that the allegations of the complaint do not meet the definition of “medical malpractice” such that the NOI statute applies. To**

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appeal is taken,” and Rule 203(d)(1)(B)(ii), SCACR, requires that “[a] copy of the order(s) and judgment(s) to be challenged on appeal,” accompany the filing of the notice of appeal, “if they have been reduced to writing.”

Service of a proper notice of appeal is a jurisdictional requirement. Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 96, S.E.2d 795, 797 (2008) (“The key jurisdictional provision of the appellate court rules is found in Rule 203, SCACR . . . .”); Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.”); *see also* Conner v. City of Forest Acres, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (2002) (finding that the Court of Appeals erred in granting the appellant’s motion to correct the record and accepting backdated notice of appeal, and, therefore, dismissing from the appeal two “defendants” that had not been timely served with a notice of appeal naming them as “respondents”). Also, as this Court recently explained in Atlantic Builders and Contractors, LLC v. Lewis, “[u]nder the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed order will become the law of the case.” 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012).

Here, it occurs to the Hospital that, since service of a proper notice of appeal is a jurisdictional requirement, if the Court finds that it is without jurisdiction to review the circuit court’s dismissal (because only the order denying reconsideration was included in the Appellant’s notice of appeal), affirmance of the dismissal is required in a manner analogous to the two-issue rule, in that the unappealed dismissal would be the law of the case.

resolve this contention, one must look at the statute itself, which contains a definition of that term. . . . [T]he meaning of the term “medical malpractice” for purposes of the NOI statute is at the heart of the dispute in this case. In ruling upon the arguments presented on appeal . . . **this Court must engage in statutory construction** because the statute is ambiguous.

(App. Reply Br. p. 1) (emphasis added.)

Similarly, in its brief, the Hospital stated the following issue: “Whether the Lower Court properly dismissed [the Appellant’s] action for failure to state a claim upon which relief could be granted because her Amended Complaint alleges medical malpractice but she failed to comply with the pre-suit requirements set forth in S.C. Code Ann. § 15-79-125 prior to filing her Amended Complaint.” (Resp. Br. 1.)

Indeed, in the facts/procedural background section of its opinion, the Court recounted that “[t]he trial court granted the Hospital’s motion to dismiss, holding that **Appellant’s claim fell within the broad definition of ‘medical malpractice’ found in section 15-79-110(6) . . . trigger[ing] the NOI and expert affidavit requirements found in section 15-79-125.** Because Appellant did not comply with those requirements, the trial court dismissed her action.” *Dawkins, supra*, at 61 (emphasis added). The Court further noted that the Appellant “does not dispute that she failed to comply with the requirements of section 15-79-125; rather, **she contends that her claim does not involve ‘medical malpractice,’** and, as such, the requirements in section 15-79-125 do not apply to her claim.” *Dawkins, supra*, at 61, n. 1 (emphasis added).

Yet, the Court went on to state the issue on appeal with no mention of the controlling statutory law,<sup>3</sup> and proceeded to decide this appeal based upon its

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<sup>3</sup> Specifically, the Court stated the issue on appeal as follows: “Whether

determination of where the Appellant’s claim fell relative to the analytical line separating medical malpractice from ordinary negligence, which it determined solely in reference to **common law** principles that it gleaned from various judicial decisions. Dawkins, supra, at 62-65.

What follows is the only portion of the Court’s analysis that in any way addressed South Carolina’s **statutory** pre-suit requirements for “medical malpractice”<sup>4</sup> actions:

**Thus**, we emphasize that not every action taken by a medical professional in a hospital or doctor’s office necessarily implicates medical malpractice and, consequently, the requirements of section 15-79-125. While providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony. However, at all times, the medical professional must “exercise ordinary and reasonable care to insure that no unnecessary harm [befalls] the patient.” Papa v. Brunswick Gen. Hosp., 517 N.Y.S.2d 762, 763–64 (App. Div. 1987). The statutory definition of medical malpractice found in section 15-79-110(6) does not impact medical providers’ ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence.

Dawkins, supra, at 63-64 (emphasis added) (internal footnote omitted).

Emphasis on the adverb “Thus” highlights a defect in the Court’s analysis. “Thus” modifies the language that follows by making clear its relationship to, and dependency upon, the Court’s analysis that preceded it—which analysis, again, did not in any way address the statutory law of South Carolina. Thus, the Court erred when it reversed the circuit court on the basis of its finding that the specific statutory

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Appellant’s cause of action sounds in medical malpractice or ordinary negligence?” Dawkins, supra, at 62.

<sup>4</sup> As the Court indeed recognizes in this passage, “medical malpractice” was

requirements in issue are not applicable to the Appellant's claim without ever actually engaging in any substantive consideration of those specific statutory requirements. Bray v. Marathon Corp., 356 S.C. 111, 117, 588 S.E.2d 93, 96, n. 6 (2003) ("Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute.").<sup>5</sup>

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expressly defined by the legislature in § 15-79-110(6).

<sup>5</sup> For that matter, in framing/deciding the issue on appeal solely under common law principles, without regard to the controlling statutory law, the Court improperly disregarded the presumptive correctness of the circuit court's decision, relieved the Appellant of the burden that was rightfully hers to affirmatively show any claimed reversible error, and, indeed, found reversible error (incorrectly) on a basis that was not preserved for review—or even actually advanced by the Appellant. See Atlantic Builders, 398 S.C. at 329, 730 S.E.2d at 285 ("[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court."); Elam, 361 S.C. at 23, 602 S.E.2d at 779-80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("An appellate court may not, of course, *reverse* for any reason appearing in the record.") (emphasis in original); Weaver v. Recreation Dist., 328 S.C. 83, 88, 492 S.E.2d 79, 82 (1997) (affirming issue pursuant to authority providing that trial court's findings come to appellate court with presumption of correctness, with the burden being on the appellant to demonstrate reversible error); Horton v. Greyhound Corp., 241 S.C. 430, 438, 128 S.E.2d 776, 781(1962) ("On appeal, the presumption is that the case was decided correctly in the trial court."); State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

As is well illustrated by the above quotation from her reply brief—putting aside the question of whether the argument was preserved for review—the Appellant argued on appeal that the circuit court erred in finding that her claim was subject to the requirements of § 15-79-125, because the **statutory definition of medical malpractice in § 15-79-110(6) should not be construed so as to include her claim**, expressly stating that, "**[t]o resolve this contention, one must look at the statute itself, which contains a definition of that term.**" (App. Reply Br. p. 1) (emphasis added.) Indeed, this point is also well illustrated by the Court's own description of the Appellant's contention: "she contends that **her claim does not involve 'medical malpractice,' and, as such, the requirements in section 15-79-125 do not apply to her claim.**" Dawkins, *supra*, at 61, n. 1 (emphasis added). (The Hospital notes the Court's use of quotation marks, making clear its reference to "medical malpractice" as a statutorily-defined term.)

The Appellant simply never advanced—to this Court or the circuit court—the

Moreover, there is an analytical gap between the Court’s reasoning—that “[t]he statutory definition of medical malpractice found in section 15-79-110(6) does not impact medical providers’ ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care”<sup>6</sup>—and its finding that the Appellant’s claim is not subject to the statutory requirements at issue. Respectfully, this reasoning, which expresses a proposition of **substantive law** as to the lack of statutory impact upon the ordinary duty of care, is beside the point, because it says nothing of the **procedural** impact—upon which this case turns<sup>7</sup>—when a claim falls within the statutory definition of medical malpractice set forth in § 15-79-110(6).

As this Court has recognized, “[a]s part of the Tort Reform Act of 2005 Relating to Medical Malpractice, the Legislature enacted section 15-79-125 of the South Carolina Code, which requires a medical malpractice plaintiff to file and serve a Notice of Intent to File Suit . . . before the plaintiff may initiate a civil action . . . [that must be] accompanied by an affidavit of an expert witness identifying at least one negligent act or omission claimed to exist . . . ,” and, “[f]ollowing service of the Notice of Intent, the parties are required to participate in a mediation conference.” Ross v. Waccamaw Community

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point on which the Court founded its decision, i.e., that, **regardless of** the statutory definition of medical malpractice in § 15-79-110(6), this statutory definition “does not impact medical providers’ ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care.” Dawkins, supra, at 63-64. (And, of course, the circuit court did not rule on this point. (R. pp. 3-5, 9-11).) Indeed, the Appellant’s issue statement, which frames her appellate theory “that the matter as pled does not constitute a claim for medical negligence **within the meaning of the Act,**” (App. Br. p. 1) (emphasis added) does not make analytical room for the Court’s reasoning that her claim operates notwithstanding the meaning of the Act. *See* Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

<sup>6</sup> Dawkins, supra, at 63-64.

Hosp., 404 S.C. 56, 59, 744 S.E.2d 547, 548 (2013) (internal citations, including footnote, omitted). “It is clear,” the Court observed, “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.” Id. at 63, 744 S.E.2d at 550 (emphasis added). “**Only if** the matter cannot be resolved through mediation **may** a plaintiff thereafter initiate a civil action by filing a summons and complaint.” Id. at 60, 744 S.E.2d at 549 (emphasis added).

To properly determine, then, whether the requirements of § 15-79-125 apply to the Appellant’s claim necessarily requires substantive consideration of the statutory framework at issue—not analysis of the common law. Bray, 356 S.C. at 117, 588 S.E.2d at 96, n. 6. Indeed, that the Court did not substantively consider this statutory framework here stands in stark contrast to the analysis that it has previously employed in other cases involving this legislation.

When called upon to determine whether the expert-witness affidavit accompanying an NOI was required to include an opinion on causation, the Court viewed this issue to be “purely one of statutory interpretation.” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 752 S.E.2d 693, 695 (2012). When again called upon to consider the impact of statutory requirements upon medical malpractice procedure—specifically, to determine if the time period for pre-suit mediation set forth in § 15-79-125(C) was a jurisdictional issue—the Court likewise viewed this as a question of statutory interpretation. Ross, 404 S.C. at 62, 744 S.E.2d at 550.

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<sup>7</sup> (*See* App. Br. p. 8 (“This legislation was designed to provide pre-complaint

Consequently, this Court has already identified principles of statutory construction pertinent to this case:

The issue before us is purely one of statutory interpretation. “Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.” *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (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, 85, 533 S.E.2d 578, 581 (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.* (quotation omitted). Thus, we must 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 we look beyond the statute’s plain language. *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

In ascertaining the meaning of language used in a statute, we presume the General Assembly is “aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *see also Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (“[W]hen Congress uses language with a settled meaning at common law, Congress ‘presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.” (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952))).

Finally, statutes in derogation of the common law

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procedures . . . .”) (emphasis added.)

are to be strictly construed. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Under this rule, a statute restricting the common law will “not be extended beyond the clear intent of the legislature.” *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Statutes subject to this rule include those which “limit a claimant’s right to bring suit.” 82 C.J.S. *Statutes* § 535.

397 S.C. at 535-36, 725 S.E.2d at 695-96; *see also* Ross, 404 S.C. at 62-63, 744 S.E.2d at 550.

Giving substantive consideration to the statutory framework in issue, it is patent that the requirements of § 15-79-125 are not tied to common law, they are tied to the express, statutory definition of “medical malpractice.” *See* § 15-79-125(A) (imposing requirements “[p]rior to filing or initiating a civil action alleging injury or death as a result of **medical malpractice . . .**”) (emphasis added). Indeed, in pertinent part, the title of the legislature’s 2005 tort reform act advises that it was, among other things, “**AN ACT TO AMEND THE CODE OF LAWS AND SOUTH CAROLINA, 1976, . . . BY ADDING CHAPTER 79 TO TITLE 15 SO AS TO DEFINE KEY TERMS, PROVIDE FOR MANDATORY MEDIATION, AND TO PERMIT BINDING ARBITRATION . . .**”. 2005 Act No. 32 (emphasis added via underline) (bold print and capitalization in original). The key term ““Medical malpractice”” is defined by § 15-79-110(6) to mean “doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.” There can be no doubt that the Appellant’s claim against the Hospital “alleg[es] injury . . . as a result of [the “doing [of] that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health

care provider or health care institution would do in the same or similar circumstances.” S.C. Code Ann. § 15-79-110(6) & -125(A).

Regardless of common law approaches to differentiating between medical malpractice and ordinary negligence—which approaches, it should be noted, appear to have been formulated to determine the substantive requirements to prove the plaintiff’s claim, as opposed to procedural requirements to pursue the plaintiff’s claim, and, which, of course, are not in reference to South Carolina’s controlling statutory law<sup>8</sup>—with regard to the requirements of § 15-79-125, “medical malpractice” means what our legislature has expressly defined it to mean. Indeed, as the Grier Court noted, the legislature is presumed to be aware of the common law, and, nonetheless, here, with particular regard to the reform-minded statutory scheme at issue, the legislature expressly identified and set forth the definition of “medical malpractice” that it intended to apply. The Appellant’s claim easily fits within its embrace.<sup>9</sup>

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<sup>8</sup> See, e.g., Dawkins, *supra*, at 63 (“Thus many states’ courts distinguish between medical malpractice and ordinary negligence actions by determining whether expert testimony is **necessary to aid the jury’s determination of fault, particularly with respect to the ‘duty’ and ‘causation’ elements of the claim.**”) (emphasis added).

<sup>9</sup> Out of an abundance of caution, the Hospital notes that § 15-79-110(2) defines “Health care institution” to “mean[] an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, and a renal dialysis facility, and that § 15-79-110(3) defines “Health care provider” to “mean[] a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or any similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.”

There can be no doubt that the Hospital is a “health care institution” under § 15-79-110(2). See also § 15-79-110(4) (defining “Hospital”). Likewise, there can be no doubt that the “intake nurses” referenced in the Appellant’s complaint are “health care providers.” (R. p. 13 (¶ 5).) And, in any event, the Appellant has not presented this Court with any argument that her claim does not present a challenge to the action or inaction of a statutorily-defined “health care institution” or “health care provider”—nor was any such argument ruled upon by the circuit court. Accordingly, any potential argument in this regard is precluded from consideration in this appeal. See Elam, 361

That the Appellant's claim fits within the statutory definition of medical malpractice is indeed shown by the Appellant's need to argue on appeal that this statutory definition is ambiguous, requiring its construction by the Court, which construction, the Appellant contends, should be strict, because the statutory framework in issue is in derogation of the common law. (App. Br. pp. 8-9; *see also* App. Reply Br. p. 1.)

Besides noting this implicit concession in the Appellant's argument, the Hospital contends, as an initial matter, that the argument is not preserved for this Court's review. Again, "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam, 361 S.C. at 23, 602 S.E.2d at 779-80. A review of the record on appeal makes clear that the Appellant did not raise any argument to the circuit court about ambiguous statutory language or limiting statutory application via strict construction on account of the derogation of common law rights. (R. pp. 24-31, 32-42, 48-69.) In any event, however, the statutory definition of medical malpractice is not ambiguous.

According to the Appellant, the definition is ambiguous because "[t]here is no direction about what is meant by the phrase 'doing *that* which' in reference to the actions that give rise to medical malpractice." (App. Br. p. 8) (emphasis in original.) This language is not, however, ambiguous; rather, it is adaptable—by design—so as to accomplish the broad treatment of the subject matter intended by the legislature by accommodating the range of potential unreasonable acts or omissions of "health care

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S.C. at 23, 602 S.E.2d at 779-80; Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (issue not argued in the brief is deemed abandoned and precludes consideration on appeal).

providers” or “health care institutions” that may be alleged to have caused injury.<sup>10</sup>

While the Appellant may wish that the subject “legislation was designed to provide pre-complaint procedures for tort claims arising out of professional services involving a matter of medical science,”<sup>11</sup> the legislation simply does not express such a design. *Cf. Grier*, 397 S.C. at 540, 725 S.E.2d at 698 (“[W]e are confined to what the statute says, not what it ought to say, for we have no right to modify a statute’s application under the guise of judicial interpretation.”). And, if it was indeed the legislative intent to accomplish the Appellant’s suggested result, the legislature was certainly capable of stating this expressly, which, of course, it did not. *See, e.g., Taylor v. S.C. Dep’t of Motor Vehicles*, 382 S.C. 567, 570, 677 S.E.2d 588, 590 (2009) (if legislature had intended certain result in a statute, it would have said so); *Giannini v. S.C. Dep’t of Transp.*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008) (same); *accord State v. Curtis*, 356 S.C. 622, 591 S.E.2d 600 (2004) (legislature, had it chosen to do so, could easily have specified certain result in statute).

Moreover, such intent is not, as the Appellant claims, “reflected in the provision of the statutory scheme relieving a plaintiff from the NOI requirements where the underlying tort involves matters of common knowledge.” (App. Br. p. 8.) Even assuming, *arguendo*, that S.C. Code Ann. § 15-36-100(C)(2) relieves the plaintiff from filing an expert-witness affidavit when the alleged negligence falls within common

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<sup>10</sup> And, it should be remembered, that even the rule that statutes in derogation of the common law are to be strictly construed, is aimed at determining the intent of the legislature. *Grier*, 397 S.C. at 536, 725 S.E.2d at 696 (“Under this rule, a statute restricting the common law will ‘not be extended beyond the clear intent of the legislature.’”) (quoting *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). Again, the legislature’s intent to broadly define medical malpractice for purposes of tort reform is clear.

knowledge, there is no basis whatsoever to support the Appellant’s contention that it relieves the plaintiff entirely “from the NOI requirements,” which, of course, beyond the expert-witness affidavit, include, as § 15-79-125 makes clear, filing and serving of the NOI and participation in pre-suit mediation. *See Ross*, 404 S.C. at 59, 744 S.E.2d at 548 (“Section 15-79-125 of the South Carolina Code requires a pre-suit mediation process for medical malpractice claims.”)

As the Court has recognized, plain and unambiguous statutory language must be followed unless “applying the words literally leads to a result **so patently absurd** that the General Assembly **could not have intended it.**” *Grier*, 397 S.C. at 536, 725 S.E.2d at 695 (emphasis added). The statutory language that controls this case is plain and unambiguous, and its literal application here cannot be said to lead to a result so patently absurd that the legislature could not have intended it. Thus, it “must” be followed, the Court having “no right to impose another meaning.” *Grier*, 397 S.C. at 535-36, 725 S.E.2d at 695 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

Indeed, putting aside the statutory definition—which, to be clear, though, controls in any event—even under the common-law driven analysis that the Court used in its opinion, the Appellant’s claim is rightfully classified as sounding in medical malpractice.

This is not a case about an injury alleged to have been caused by a dangerous condition upon the Hospital’s premises (such as a falling ceiling tile, or an improperly maintained hallway or parking lot, or a water puddle or other foreign substance or hazard on a floor), nor is it a case about an injury caused by some other type of alleged negligent

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<sup>11</sup> (App. Br. p. 8.)

conduct posing the same threat to patients as well as non-patients (such as serving a turkey sandwich infected with salmonella); rather, this case is about an injury alleged to have been caused by negligent conduct after the Appellant “arrived at the hospital via ambulance”<sup>12</sup> “for the expressed purpose of receiving medical attention for [the particular medical conditions of] headaches and the inability to maintain balance or walk”<sup>13</sup> as well as “possible symptoms of stroke,”<sup>14</sup> and “was placed,” away from non-patients (such as “her family,” which “could not accompany her”) “in the emergency room,”<sup>15</sup> and, despite “the intake nurses [being] informed of the conditions surrounding her admittance,” “[i]n response to the noted ailments,” the Appellant was improperly “left unattended and unmonitored until proper tests could be performed or . . . the appropriate fall Hospital procedures were put in place.”<sup>16</sup>

Even viewing the facts and the reasonable inferences that can be drawn therefrom in the light most favorable to the Appellant, it is nonetheless clear that the claim set forth in the Appellant’s complaint is not rooted in ordinary negligent conduct posing the same threat to patients and non-patients alike, nor even conduct posing the same threat to all patients. Instead, the Appellant’s claim is rooted in conduct related to the provision of emergency medical services posing a specific threat (falling) to a specific patient (the Appellant) on account of the Appellant’s particular medical conditions (i.e., “the conditions surrounding her admittance;”<sup>17</sup> the “noted ailments,”<sup>18</sup> for which she “checked

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<sup>12</sup> (R. p. 12 (¶ 3).)

<sup>13</sup> (R. p. 12 (¶ 3).)

<sup>14</sup> (R. p. 13 (¶ 6).)

<sup>15</sup> (R. p. 13 (¶ 3).)

<sup>16</sup> (R. p. 13 (¶ 5).)

<sup>17</sup> (R. p. 13 (¶ 5).)

<sup>18</sup> (R. p. 13 (¶ 5).)

into the [Respondent's] Hospital for the expressed purpose of receiving medical attention"<sup>19</sup>) for which she then and there presented.

And, it must be remembered, this is all in the specific context of a hospital emergency room—in which setting, the Hospital submits, the Court's reference to "routine care,"<sup>20</sup> i.e., "routine [emergency] care," is rendered an oxymoron. In this setting, the process of triage to determine the priority of patients' treatments based on the respective severity of their conditions is necessary for a hospital's efficient and effective provision of emergency medical services and allocation of resources available therefor, and necessarily must be carried out on an ongoing basis as new patients arrive and/or patients' conditions change.

Even "intake"<sup>21</sup> and "place[ment] in the emergency room"<sup>22</sup> necessarily involved and began the exercise of clinical judgment with respect to the Appellant's care in response to the Appellant's particular medical conditions, and in relation to the specific threat of falling posed to the Appellant, such that, "at the time and place [when and where the Appellant alleges negligence],"<sup>23</sup> the exercise of this judgment is necessarily implicated. Whether framed in terms of not following (some vague and nondescript) "policies and procedures,"<sup>24</sup> not keeping a "watchful eye on [the Appellant],"<sup>25</sup> or not

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<sup>19</sup> (R. p. 12 (¶ 3).)

<sup>20</sup> See Dawkins, *supra*, at 64 (referring to "nonmedical, administrative, ministerial, or routine care" as subjecting medical providers to claims sounding in ordinary negligence).

<sup>21</sup> (R. p. 13 (¶ 5).)

<sup>22</sup> (R. p. 13 (¶ 3).)

<sup>23</sup> (R. p. 14 (¶ 12).)

<sup>24</sup> (R. p. 14 (¶ 12.a).)

<sup>25</sup> (R. p. 14 (¶ 12.b).)

“tak[ing] any precautionary actions . . . to insured the [Appellant’s] safety,”<sup>26</sup> the exercise of this clinical judgment must be evaluated by a jury to determine the merit of the Appellant’s negligence claim.

As the Court advises in its opinion, “many states’ courts distinguish between medical malpractice and ordinary negligence actions by determining whether expert testimony is necessary to aid the jury’s determination of fault, particularly with respect to the ‘duty’ and ‘causation’ elements of the claim.” Dawkins, *supra*, at 63. Under the circumstances of this case, because evaluation of the exercise of this clinical judgment in the emergency-room setting is outside of the common knowledge of lay jurors, the only way that a jury could justly determine fault is with the benefit of expert testimony. Consequently, this case sounds in medical malpractice, not ordinary negligence, even under the principles of common law that guided the Court’s decision.

The law controlling the issue raised by the Appellant’s challenge to the circuit court’s dismissal of her complaint is statutory law, not common law, and it compels that the circuit court’s decision be (should have been) affirmed. Beyond that, the Court erred in reversing the circuit court on a ground that was not preserved for review and that the Appellant did not actually argue on appeal. Regardless, even under the Court’s common-law driven analysis, the Appellant’s claim is rightfully classified as one sounding in medical malpractice, not ordinary negligence, such that the circuit court’s decision should be (should have been) affirmed.

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<sup>26</sup> (R. p. 14 (¶ 12.c).)

- B. Putting aside the controlling statutory law, even under the Court’s common-law-driven analysis, the Court’s decision is erroneous, because its factual premise is contrary to, and irreconcilable with, Paragraph 11 of the Appellant’s complaint, which makes clear that the Appellant had begun receiving medical care at the time of her alleged injury in the form of “medications that were being administered to [the Appellant] . . . by [the Hospital].”**

The Court began the analysis section of its opinion by noting that differentiating between medical malpractice and ordinary negligence claims “‘depends heavily on the facts of each individual case.’” *Dawkins, supra*, at 62. (internal citation omitted). (And, of course, before beginning its analysis, in setting forth the applicable standard of review from a dismissal pursuant to Rule 12(b)(6), SCRCP, the Court recognized that, because of its procedural posture, the facts of this case must be drawn from the Appellant’s complaint; more specifically, they must be drawn solely from the facts alleged in the complaint, and the inferences reasonably deducible therefrom, when viewed in the light most favorable to the Appellant. *Id.*)

The Court concluded its analysis, and identified the factual premise underlying its decision, as follows:

Here, we find that Appellant’s claim sounds in ordinary negligence and is not subject to the statutory requirements associated with a medical malpractice claim. **Appellant’s complaint makes clear that she had not begun receiving medical care at the time of her injury, nor does it allege the Hospital’s employees negligently administered medical care. **Rather, the complaint states that Appellant’s injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care. Accordingly,** the circuit court improperly classified Appellant’s claim as one sounding in medical malpractice, and its dismissal of her action for failing to comply with the medical malpractice pre-filing requirements found in section 15-79-125 was in error.**

*Dawkins, supra*, at 64-65 (emphasis added) (internal citations and footnote omitted).

Plainly contrary to, and irreconcilable with, the Court’s opinion, however, the Appellant’s complaint<sup>27</sup> does **not** “make[] clear that she had not begun receiving medical care at the time of her injury.” Instead, the plain language of the Appellant’s complaint (in Paragraph 11) makes clear just the opposite: that the Appellant **had begun** receiving medical care at the time of her alleged injury in the form of “medications that **were being administered** to [the Appellant] . . . by [the Hospital].” (R. p. 14 (¶ 11) (emphasis added.)

Notably, during the hearing on the Hospital’s motion to dismiss, the Appellant’s counsel addressed the Appellant’s clear allegation that she was already being administered medications by the Hospital at the time of her alleged injury, stating as follows: “I would also like to point out that in our rules of civil procedures, specifically Rule 11, there is some issues here with respect to our pleading. . . . [T]he reason we put in there about the medications, when [the Appellant] checked in at the intake desk they ask her daughter-in-law who had no knowledge of her medical condition other than the fact that she gave them some idea about some medications that she was taking . . . .” (R. p. 60, line 22 - p. 61, line 15.) Thus, the Appellant’s counsel appears to have recognized the unequivocal position that the Appellant took in her complaint (i.e., that she had, in fact, begun receiving medical care at the time of her alleged injury), and, in an attempting to argue around the same, went so far as to accept responsibility for a violation of Rule 11, SCRCF. *See* Rule 11(a) (providing that “[t]he . . . signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it;

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<sup>27</sup> The Hospital notes that the Appellant’s complaint, i.e., the Appellant’s

and that it is not interposed for delay”).

Simply put, the Court’s factual premise that the “Appellant’s complaint makes clear that she had not begun receiving medical care at the time of her injury,” is untenable in the face of Paragraph 11 of the Appellant’s complaint. Consequently, even if this appeal is to be decided under the common-law driven analysis employed by the Court, as a factual matter, the Court’s decision is clearly erroneous, and the circuit court’s dismissal should be (should have been) affirmed.

**II. Respectfully, the Court’s opinion will result in undue problems for the bench and bar, and, indeed, the public, by confusing our State’s law in the area of medical malpractice litigation.**

The Court “emphasize[d] that not every action taken by a medical professional in a hospital or doctor’s office necessarily implicates medical malpractice and, consequently, the requirements of section 15-79-125.” *Dawkins, supra*, at 63. The Court then explained that, “[w]hile providing medical services to a patient, the medical professional acts in his professional capacity and must meet the professional standard of care, as established by expert testimony,” but that “[t]he statutory definition of medical malpractice found in section 15079-110(6) does not impact medical providers’ ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care. Thus, medical providers are still subject to claims sounding in ordinary negligence.” *Id.* at 63-64.

By dispensing with the requirements of § 15-79-125 in this case without substantive consideration of the statutory framework in issue, the Court appears to have indicated that a claim sounding in common law, ordinary negligence can be pursued

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operative complaint, is, in fact, an amended complaint. (R. p. 12.)

against a health care provider or health care institution without compliance § 15-79-125, **even if the claim falls within the statutory definition of “medical malpractice” in § 15-79-110(6).** On top of that, the Court appears to have done so on the basis of a distinction—which, the Hospital submits, remains unclear—between a medical professional’s provision of “medical services” and a medical provider’s “ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care.” For instance, it is not clear from the Court’s opinion the difference between the provision of “medical services” and “routine care;” nor is it clear where the line is drawn between “medical services” and “nonmedical . . . care” provided by a medical provider.

Respectfully, the Court’s opinion will result in undue problems for the bench and bar, and, indeed, the public, by confusing our State’s law in the area of medical malpractice litigation.

### **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in the Hospital’s previously-filed brief (which the Hospital incorporates herein by reference), the Hospital asks this Court to rehear and reconsider its decision, and to affirm the circuit court’s dismissal of this lawsuit.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,

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Dated: 5/27/14

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Union County  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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Case No. 2011-CP-44-00074

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**RECEIVED**

MAY 27 2014

**S.C. Supreme Court**

Sarah Dawkins,

Appellant,

v.

Union Hospital District (a.k.a. Wallace Thomson Hospital),

Respondent.

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**PROOF OF SERVICE**

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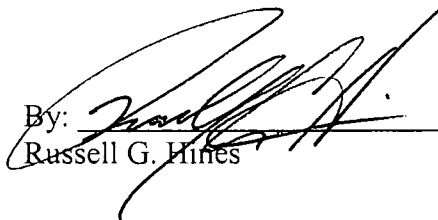
I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the Respondent, Union Hospital District (a.k.a. Wallace Thomson Hospital), do hereby certify that I have served the Respondent's **Petition for Rehearing** on all other parties or counsel of record in this matter by depositing copies of the same in the United States Mail, postage prepaid, on May 27, 2014, addressed as follows:

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