

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY  
COURT OF COMMON PLEAS

**SC Court of Appeals**

HONORABLE R. MARKLEY DENNIS, JR.  
CIRCUIT COURT JUDGE

C.A. NO. 2013-CP-10-00090  
CT. APP. NO.: 2013-001682

**ARTHUR PETER ROWE .....Plaintiff/Appellant**

vs.

**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,.....Defendants/Respondents**

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**REPLY BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES ON APPEAL**

- A. The Trial Court Erred In Granting Defendants' Motions To Dismiss The Appellant's Wife's Notice Of Intent To File Suit On Basis That Plaintiff Failed To Contemporaneously File An Affidavit Of An Expert Witness, And The Dismissal Of The Appellant's Action For Loss Of Consortium.
- B. The Trial Court Erred In In Granting Defendants' Motions To Dismiss The Appellant's Wife's Notice Of Intent To File Suit Due To The Failure To Apply The Exception To Contemporaneous Filing Of The Affidavit Of An Expert Witness Under Section 15-36-100(C)(1) Of The South Carolina Code Of Laws Of 1976, As Amended.
- C. The Trial Court Erred In That The Honorable Judge Markley Dennis Failed To Recuse Himself After His Law Clerk Received A Letter Dated May 22, 2013 From The Wife Of The Plaintiff/Appellant Disclosing Her Fears Of Receiving A Fair And Impartial Determination Due To A Prior Proceeding Before The Same Judge.
- D. The Trial Court's Failure to Deny Respondent's Motions To Dismiss Appellant's Wife's Notice Of Intent To File Suit And Appellant's Lawsuit Based Upon The Forty-Five (45) Day Grace Period Provided At Code Section 15-36-100(C)(1), And The Trial Court's Failure To Exercise The Discretion to Extend the Forty-Five (45) Days Grace Period In the Interests Of Justice, Were Abuses Of Discretion.

## STATEMENT OF THE CASE

On January 7, 2013, the Appellant's wife, Beverly C. Moore Rowe, timely filed and served the Notice of Intent to File Suit at Case Number 2013-CP-10-00088, naming Defendants involved in a medical procedure performed on her as their patient, during her hospital stay that began with her hospital admission on January 7, 2010. As an Exhibit to the Notice of Intent to File Suit, the Plaintiff attached her Summons and Complaint in this action.

On January 7, 2013, the Appellant timely filed and served the Summons and Complaint for loss of consortium based on the action filed by the Appellant's wife, Beverly C. Moore Rowe, at Case Number 2013-CP-10-00088, the Notice of Intent to File Suit, naming Defendants involved in a medical procedure performed on Appellant's wife as their patient, during her hospital stay that began with her hospital admission on January 7, 2010. As an Exhibit to the Notice of Intent to File Suit, the Appellant's wife attached her Summons and Complaint in this action.

Due to the statutory deadline to commence her action in the Court of Common Pleas within the applicable three (3) years statute of limitations, which arguably would have expired on January 7, 2013, the Appellant's wife filed and served the Notice Of Intent to File Suit without filing contemporaneously therewith, an affidavit of an expert, due to the inability to obtain an Affidavit of an expert qualified to render an opinion in her Lawsuit within the applicable three (3) years statute of limitations. The Appellant's Wife relied upon the exception to filing a contemporaneous Affidavit set forth in Section 15-36-100(C)(1). The Notice Of Intent To File Suit included the following paragraph:

“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. “

The Defendants filed Motions to Dismiss on the basis that the Appellant's Wife failure to attach an expert's affidavit to her Notice Of Intent to File Suit, warranting dismissal of her claim and the Appellant's claims, despite the dismissal resulting in their actions being barred by the applicable statute of limitations.

On May 25, 2013, and prior to the Hearing on the Motions to Dismiss, the Appellant's Wife mailed a letter to the Law Clerk of the Honorable Judge Markley Dennis expressing the Appellant's Wife's concerns that he was hearing the Motions in this matter, due to information given to her in an earlier legal proceeding, of which the Plaintiff in that action was also the Appellant's Wife in the earlier action. The Appellant's Wife expressed to the Honorable Judge Markley Dennis her concerns as to receiving a fair and impartial hearing, and anticipated that the Honorable Judge Markley Dennis would recuse himself. To the Appellant's surprise, Judge Markley Dennis heard the Motions with no comment from the bench as to the Appellant's Wife's correspondence.

On May 31, 2013, the Honorable Judge Markley Dennis heard the arguments on the Motions to Dismiss in the Charleston County Courthouse. Upon motions made, the Honorable Judge Markley Dennis granted the Defendant's Motion to Dismiss and the Appellant has filed this Appeal.

The Appellant respectfully submits this Reply Brief in opposition to the Respondent's Brief, by restating the original arguments in Appellant's Initial Brief, with new Issue and Argument D.

## ARGUMENTS

### **A. The Trial Court Erred In Granting Defendants' Motions To Dismiss The Appellant's Wife's Notice Of Intent To File Suit On Basis That Plaintiff Failed To Contemporaneously File An Affidavit Of An Expert Witness, And The Dismissal Of The Appellant's Action For Loss Of Consortium.**

The Appellant respectfully asserts that the trial court erred in granting the Motions to Dismiss filed by the Defendants on the basis that the Appellant's Wife failed to attach an experts' affidavit to the Notice Of Intent to File Suit.

The Appellant's was admitted to the Hospital on January 7, 2010, and it was this hospitalization in which the medical procedures that are the subject of the Appellant's lawsuit occurred. One of the Appellant's wife's symptoms resulting from her medical procedure is a loss of her cognitive and memory brain activity which further delayed the Appellant's wife's own ability to become aware of her injuries from the medical procedure. Nevertheless, and despite diligent effort, the Appellant's wife and Appellant were not able to retain competent legal counsel to undertake representation in this matter.

The Appellant's Wife filed the Notice of Intent to File Suit pursuant to Section 15-79-125 of the South Carolina Code of Laws of 1976, as amended (hereinafter referred to herein as the "Code"). Code Section 15-79-125 provides as follows:

*"(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. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. 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."*<sup>1</sup>

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<sup>1</sup> Section 15-79-125(A) of the S.C. Code of Laws of 1976, as amended.

Code Section 15-79-125(a) specifically provides that “...*the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100,..*”.<sup>2</sup> The language in Code section 15-79-125(a) specifically states that the affidavit is subject to the “affidavit requirements established in Code Section 15-36-100”, which indicates that Code Section 15-36-100 governs the affidavit requirements for the affidavit provided for under Code Section 15-79-125(a). A careful reading of Code Section 15-79-125 will reveal that it is silent as to any requirements as to the affidavit of an expert witness, including any definition of the phrase, “expert witness”. Accordingly one must rely exclusively upon Code Section 15-36-100 in order to comply in any way with the requirement of an Affidavit of an expert witness contained in Code section 15-79-125(a).

Code Section 15-36-100(A) provides the definition of who constitutes the definition of “expert witness”<sup>3</sup>. Paragraphs (B) and (C) of Code Section 15-36-100 address the actual affidavit requirements. Code Section 15-36-100(B) provides as follows:

*“(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*

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<sup>2</sup> Section 15-79-125(A) of the S.C. Code of Laws of 1976, as amended.

<sup>3</sup> (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:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)

(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of sub items (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual’s study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert’s credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert’s credentials pursuant to sub-section (E).

*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.”<sup>4</sup>*

Although Code Section 15-36-100(B) begins, “Except as provided in Section 15-79-125”, Code Section 15-79-125 provides nothing inconsistent to Code Section 15-36-100(B). Accordingly, one must conclude that Code Section 15-36-100(B) controls as to the “Affidavit of an expert witness required in Code Section 15-79-125(A).

Code Section 15-36-100(C)(1) provides as follows:

*“(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.”<sup>5</sup>*

Code Section 15-36-100(C)(1) specifically provides an exception to the “contemporaneous filing requirement of subsection (B) for the good faith belief that the applicable statute of limitations will expire within ten (1) days of the date of filing”<sup>6</sup>. Significantly, Code Section 15-36-100(C)(1) provides the exception to the “contemporaneous filing requirement”, and uses the same choice of word (contemporaneously”) which is not found elsewhere in Code Section 15-36-100(B), but is found in Code Section 15-79-125(A). Accordingly, by its specific language and terms, Code Section 15-36-100 provides the details not provided in Code Section 15-79-125(A). One must read Code Sections 15-79-125 and 15-36-100 together to determine the person qualified to provide the affidavit and the contents of the affidavit itself.<sup>7</sup> The exception by specific reference to contemporaneous filing requirement provides must be a specific reference to the contemporaneous filing requirement set forth in Code Section 15-79-125(A).

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<sup>4</sup> Section 15-36-100(B) of the S.C. Code of Laws of 1976, as amended.

<sup>5</sup> Section 15-36-100(C)(1) of S.C. Code of Laws of 1976, as amended

<sup>6</sup> Section 15-36-100(C)(1) of the S.C. Code of Laws of 1976, as amended

<sup>7</sup> Sections 15-36-100(A), (B) and (C) of S.C. Code of Laws of 1976, as amended.

The exception to the contemporaneous filing requirement of an affidavit of an expert witness set forth in Code Section 15-36-100(C)(1) 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.

A determination that Code Section 15-36-100(C)(1) does not apply to the contemporaneous Affidavit requirement under Code section 15-79-125(A) is not a reasonable interpretation when one recognizes that the Notice of The Intent to File Suit requirement of Code Section 15-79-125(A) is a prerequisite to the filing of the underlying lawsuit.

Code Section 15-79-125(A) provides prerequisites before a Plaintiff can file a lawsuit for professional medical malpractice in the Courts of South Carolina. If the applicable statute of limitations is about to expire in a medical malpractice claim, the Plaintiff must file the Notice of Intent to File Suit first which will toll the running of the statute of limitations during the time of complying with the requirements of Code Section 15-79-125. A Plaintiff needs an Affidavit of an expert witness for the Notice of Right To File Suit before the Plaintiff files the underlying Lawsuit which also requires the expert witness affidavit<sup>8</sup>. The Plaintiff whose statute of limitations was about to expire would not require the protection of the exception provided at Code Section 15-36-100(C)(1) for the underlying lawsuit if the Plaintiff had no such protection when the Plaintiff previously filed the Notice of the Right to File Suit with an Affidavit of the expert witness. The South Carolina Legislature must have intended for the Affidavit requirements of Section 15-36-100 to apply to Code Section 15-79-125, or that language would not have been stated in Code section 15-79-125(A). A determination that Code section 15-36-100(C)(1) does not apply to the contemporaneous affidavit requirement of Code Section 15-79-125, completely negates the benefit to the Plaintiff that that Code section was intended to provide.

**B. The Trial Court Erred In In Granting Defendants' Motions To Dismiss The Appellant's Wife's Notice Of Intent To File Suit Due To The Failure To Apply The Exception To Contemporaneous Filing Of The Affidavit Of An Expert Witness Under Section 15-36-100(C)(1) Of The South Carolina Code Of Laws Of 1976, As Amended.**

The Appellant respectfully directs the Court to the argument set forth at Paragraph A above. Code Section 15-79-125(a) specifically provides that "...*the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100,...*"<sup>9</sup> The language in Code section 15-79-125(a) specifically states that the affidavit is subject to the "affidavit requirements established in Code Section 15-36-100", which indicates that Code Section 15-36-100 governs the affidavit requirements for the affidavit provided for under Code Section 15-79-125(a). A careful reading of Code Section 15-79-125 reveals that it is silent as to any requirements as to the affidavit of an expert witness, including any definition of the phrase, "expert witness". Accordingly one must rely exclusively upon Code Section 15-36-100 in order to discern the affidavit requirements and

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<sup>8</sup> Section 15-36-100(B) of the S.C. Code of Laws of 1976 as amended

<sup>9</sup> Section 15-79-125(A) of the S.C. Code of Laws of 1976, as amended.

to comply in any way with the requirement of an Affidavit of an expert witness contained in Code Section 15-79-125(a).

Paragraphs (B) and (C) of Code Section 15-36-100 address the actual affidavit requirements. Code Section 15-36-100(B) provides as follows:

*“(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.”<sup>10</sup>*

Although Code Section 15-36-100(B) begins, “Except as provided in Section 15-79-125”, Code Section 15-79-125 provides nothing inconsistent to Code Section 15-36-100(B). Accordingly, Code Section 15-36-100(B) controls as to the “Affidavit of an expert witness required in Code Section 15-79-125(A).

Code Section 15-36-100(C)(1) provides as follows:

*“(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.”<sup>11</sup>*

The use of the language, “contemporaneous filing requirement” contained in Code Section 15-36-100(C)(1) is significant and must be applicable to Code Section 15-79-125(A), because the only reference to a contemporaneous filing requirement is found in that Code Section. Code Section 15-36-100(B) makes no reference to a requirement of a contemporaneous filing requirement.

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<sup>10</sup> Section 15-36-100(B) of the S.C. Code of Laws of 1976, as amended.

<sup>11</sup> Section 15-36-100(C)(1) of the S.C. Code of Laws of 1976, as amended

Code Section 15-36-100(C)(1) specifically provides an exception to the “contemporaneous filing requirement of subsection (B) for the good faith belief that the applicable statute of limitations will expire within ten (1) days of the date of filing”<sup>12</sup>. Significantly, Code Section 15-36-100(C)(1) provides the exception to the “contemporaneous filing requirement”, and uses the same choice of word (“contemporaneously”) which is not used in Code Section 15-36-100(B), but is only found in Code Section 15-79-125(A). Accordingly, by its specific language and terms, Code Section 15-36-100 provides the details not provided in Code Section 15-79-125(A). One must read Code Sections 15-79-125 and 15-36-100 together to determine the person qualified to provide the affidavit and the contents of the affidavit itself.<sup>13</sup> The exception by specific reference to contemporaneous filing requirement provides must be a specific reference to the contemporaneous filing requirement set forth in Code Section 15-79-125(A).

The exception to the contemporaneous filing requirement of an affidavit of an expert witness set forth in Code Section 15-36-100(C)(1) must have been included at Code section 15-36-100(C)(1) to alleviate the hardship, in the interests of justice, when a party injured by the professional negligence of others is not able to obtain the required Affidavit which professionals in the same profession are often reluctant to provide, before the expiration of the applicable statute of limitations, as is the case at hand.

A determination that Code Section 15-36-100(C)(1) does not apply to the contemporaneous Affidavit requirement under Code Section 15-79-125(A) is not a reasonable interpretation when one recognizes that the Notice of The Intent to File Suit requirement of Code Section 15-79-125(A) is a prerequisite to the filing of the underlying medical malpractice lawsuit.

Code Section 15-79-125(A) provides prerequisites before a Plaintiff can file a lawsuit for professional medical malpractice in the Courts of South Carolina. If the applicable statute of limitations is about to expire in a medical malpractice claim, the Plaintiff must file the Notice of Intent to File Suit first which will toll the running of the statute of limitations during the time of complying with the requirements of Code Section 15-79-125. A Plaintiff needs an Affidavit of an expert witness for the Notice of Right To File Suit before the Plaintiff files the underlying Lawsuit which also requires the expert witness affidavit<sup>14</sup>. The Plaintiff whose statute of limitations was about to expire would not require the protection of the exception provided at Code Section 15-36-100(C)(1) for the underlying lawsuit if the Plaintiff had no such protection when the Plaintiff previously filed the Notice of the Right to File Suit with an Affidavit of the expert witness. The South Carolina Legislature must have intended for the Affidavit requirements of Section 15-36-100 to apply to Code Section 15-79-125, or that language would not have been stated in Code section 15-79-125(A). A determination that Code section 15-36-100(C)(1) does not apply to the contemporaneous affidavit requirement of Code Section 15-79-125, completely negates the benefit to the Plaintiff that this Code Section was intended to provide.

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<sup>12</sup> Section 15-36-100(C)(1) of the S.C. Code of Laws of 1976, as amended

<sup>13</sup> Sections 15-36-100(A), (B) and (C) of the S.C. Code of Laws of 1976, as amended.

<sup>14</sup> Section 15-36-100(B) of the S.C. Code of Laws of 1976 as amended

The dismissal of a Plaintiff's claim for medical malpractice on the basis of the failure to file contemporaneously an Affidavit of an expert witness with the Notice of the Right To File Suit is not consistent with the purpose and effect of the exception stated in Code Section 15-36-100(C)(1), and appears to reward the most prominent medical professionals with immunity from lawsuits by their patients due to the inability to obtain the affidavit from a qualified expert witness.

The Appellant acknowledges that this Court's opinion in Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242, 2012 (S.C. Ct. App. 2012) is contrary to the position being submitted to this Court in this Appeal. The Appellant respectfully dissents to the opinion of Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242, 2012 (S.C. Ct. App. 2012), and requests that this Court reconsider its opinion that Code Section 15-36-100(C)(1) is not applicable to the contemporaneous filing requirement of Code Section 15-79-125(A). In Ranucci, this Court states that Code Section 15-79-125(A) invokes only the provisions of Code Section 15-36-100 governing the preparation and content of the affidavit.<sup>15</sup> The only affidavit requirements are set forth at Code Section 15-36-100(B). If the exception to the contemporaneous filing requirement of an Affidavit applies solely to the Complaint filed under Code Section 15-36-100(B) and not to the filing of the Notice of the Intent to File Suit under Code Section 15-79-125, then the plaintiff of a professional medical malpractice action will never be entitled to the benefit of Code Section 15-36-100(C)(1) due to the prerequisite to filing the lawsuit of filing the Notice of Intent To File Suit required at Code Section 15-79-125<sup>16</sup>.

**C. The Trial Court Erred In That The Honorable Judge Markley Dennis Failed To Recuse Himself After His Law Clerk Received A Letter Mailed May 25, 2013 By The Wife Of The Plaintiff/Appellant Disclosing Her Fears Of Receiving A Fair And Impartial Determination Due To A Prior Proceeding Before The Same Judge.**

The Appellant submits to this Court that the Honorable Judge Markley Dennis should have recused himself upon receipt by his Law Clerk of the letter from the Appellant's Wife. The Appellant was faced with the dilemma of not making an Ex Parte communication but to raise this concern without causing any embarrassment to the Judge in open Court.

The Appellant's Wife learned that the Honorable Judge Markley Dennis would be hearing the Motions in this matter on May 31, 2013. The Appellant was concerned because she had been the Plaintiff in an earlier case that Judge Markley Dennis was the presiding judge, entitled: "Beverly Christine Moore v. Holy Trinity Church, The Protestant Episcopal Church in the Diocese of South Carolina, The Protestant Episcopal Church, AKA The Episcopal Church USA and The Foreign And Domestic Missionary Society, Charleston County Ninth Circuit Court of Common Pleas 2007-CP-10-243".

The Appellant's Wife mailed the Appellant's letter on May 25, 2013 addressed to the Law Clerk for the Honorable Judge Dennis expressing her concerns due to the prior litigation. The Appellant's letter informed the Honorable Judge Dennis of concerns from what she had been informed by the Attorneys who represented her in the earlier proceedings. The Appellant's Wife

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<sup>15</sup> Ranucci v. Crain, 397 S.C. 168, Page 177

<sup>16</sup> Section 15-79-125(A) of the S.C. Code of Laws of 1976, as amended.

had been informed by her Attorneys that she was not allowed to remove any of the files' contents from their offices, because "Judge Dennis had sealed the Church's discovery records under a **Protective Order**" made under his own volition. The Appellant's Wife was extremely upset about the Order sealing the records because of her desire that the publicity would prevent the perpetrators from relocating to another church and performing the same illegal and unconscionable actions. The belief that Judge Dennis had sealed the record on his own caused the Appellant's Wife to have a lack of confidence in the Honorable Judge Dennis and to fear that the Judge had demonstrated bias in favor of the Defendants in the prior legal action of which she was the Plaintiff.

The Appellant and his Wife are informed and believe that based on the prior proceedings and the information from the lawyers representing her in the earlier proceedings, Judge Dennis should have recused himself.

**D. The Trial Court's Failure to Deny Respondent's Motions To Dismiss Appellant's Wife's Notice Of Intent To File Suit And Appellant's Lawsuit Based Upon The Forty-Five (45) Day Grace Period Provided At Code Section 15-36-100(C)(1), And The Trial Court's Failure To Exercise The Discretion to Extend the Forty-Five (45) Days Grace Period In the Interests Of Justice, Were Abuses Of Discretion.**

The Respondents in their Brief filed with this Court have also raised the issue that the Appellant and Appellant's Wife failed to file an Affidavit provided by an Expert with the Trial Court within the Forty-Five (45) days grace period provided at Code Section 15-36-100(C)(1). The Appellant submits to this Court that this Court should not consider this issue as a basis to affirm the dismissals in favor of the Respondents. The Appellant submits that this Court should rely on this issue to reverse the Trial Court's dismissal of the Appellant's claim and further grant to Appellant an extension of additional time to submit an Affidavit of a Medical Expert.

The Respondents and the Trial Judge, in considering the Forty-Five (45) days grace period provided at Code Section 15-36-100(C)(1), have failed to consider that Code Section 15-36-100(C)(1) contains the following language: "*the trial court, after hearing and for good cause, may extend the time as the court determines justice requires*". This language is evidence that the forty-five (45) days grace period should not be considered as an inflexible deadline or gate-keeping device to exclude litigants from Court, but should be considered as a flexible provision which is designed to alleviate the hardship on litigants when they are not able to comply with the technicality of filing the Affidavit of an Expert Witness. Code Section 15-36-100(C)(1) specifically grants the Court with the discretion to extend the Forty-five (45) days grace period beyond the forty-five (45) days when justice requires. The Appellant submits to this Court that the Appellant's own facts and circumstances, as well as those of his wife, should have been sufficient for the Trial Court to have granted an extension of the Forty-five (45) days grace period in the interest of justice, rather than granting the Respondent's Motions to Dismiss despite the facts and circumstances. The Trial Court's refusal to extend the Forty-five (45) days grace period for the Appellant and his wife to submit an Affidavit from an expert, and the harsh application of the contemporaneous filing requirement should be considered to be abuse of discretion by the Trial Court which should warrant reversal.

The Respondents relied primarily upon the contemporaneous filing requirement set forth at Code Section 15-79-125(a) which specifically provides that “...*the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness*”, and opposed the Appellants’ position that the exception to file provided in Code Section 15-36-100(C)(1) and discussed under Question B of this Reply Brief, was applicable. The Appellant submits to this Court that the language in Code Section 15-36-100(C)(1) which states: “*the trial court, after hearing and for good cause, may extend the time as the court determines justice requires*”, is evidence not only that the forty-five (45) days grace period should not be used as a firm deadline that cannot be extended, in the interests of justice, but also that the contemporaneous filing requirement cannot reasonably be interpreted to be a final gate-keeping bar to the Appellant’s claim. The South Carolina General Assembly must have considered that certain facts and circumstances, such as those present in the Appellant’s case before you, would merit the relaxing of the gate-keeping provisions of the contemporaneous filing requirement of the Affidavit and the forty-five (45) days grace period, when justice requires. The South Carolina General Assembly drafted the Code Section 15-36-100(C)(1) leaving these equitable determinations in the interests of justice to the discretion of the Court. The Trial Court in this case should have exercised this discretion to extend the Forty-five (45) days grace period to submit the Affidavit of the expert in the interests of justice, rather than simply dismissing the Appellants claims based on a firm enforcement of a technicality.

The Appellant submits to this Court that the technical filing requirement of an Affidavit was intended to eliminate frivolous medical malpractice claims lacking any merit. Certainly, the South Carolina General Assembly did not intend for this Affidavit requirement technicality to become a tool used to bar litigants with legitimate and claims with merit and significant adverse consequences, as is the case with the Appellant’s wife. Such use of the Affidavit filing requirement would be contrary to the interests of justice and would have the effect of unjustly rewarding tort-feasers with immunity from the legitimate claims of their victims and former patients.

The Motions to Dismiss filed by the Respondents in this matter forced the Appellants to defend the Motions to Dismiss before they could incur the additional expense of obtaining an Affidavit of an Expert Witness. The Trial Court’s action granting the Respondents’ Motions to Dismiss rather than denying the Motions to Dismiss in the interests of justice reflects an abuse of discretion. In addition, the Trial Court’s failure to consider the facts and circumstances of the Appellant and his Wife and extend the Forty-five (45) days grace period to submit the Affidavit, should be determined by this Court to be an abuse of discretion.

Lastly, if this Court agrees with the Appellant that the forty-five (45) days grace period provided in Code Section 15-36-100(C)(1) applies to relieve the Appellants in their actions in the Trial Court from the contemporaneous filing requirement in Code Section 15-79-125(a), then the Appellant respectfully requests that this Court further exercise its discretion in the interests of justice and reverse the dismissal of the Appellant’s case, remand it back to the Trial Court and grant the Appellant an extension to the Forty-five (45) days grace period of an additional reasonable period of time pursuant to Code Section 15-36-100(C)(1), for the Appellants to obtain and file an Affidavit from an Expert as required.

## CONCLUSION

The Appellant respectfully requests that this Court reverse the Opinion of the trial Court granting the Defendant's Motion to Dismiss Appellant's Action by determining that the exception to the contemporaneous filing of the affidavit provided at Code Section Code Section 15-36-100(C)(1) applies to the contemporaneous filing of the affidavit requirement of Code Section 15-79-125(A). A determination otherwise is inconsistent to the intent in the interests of justice. If the exception to the contemporaneous filing of the affidavit provided at Code Section 15-36-100(C)(1) is not applicable to the contemporaneous filing of the affidavit requirement of Code Section 15-79-125(A), then no plaintiff of a medical malpractice matter could file without an affidavit of an expert witness and prevent the lapsing of the applicable statute of limitations.

The filing of the Notice of the Intent To File Suit at Code section 15-79-125(A) is a prerequisite to the filing of the Lawsuit in a medical malpractice action referenced at Code Section 15-36-100(B). The exception of Code Section 15-36-100(C)(1) to the contemporaneous filing of the affidavit of the expert witness as to the lawsuit in a medical malpractice action is of no effect if the Plaintiff in the medical malpractice matter does not have that protection at the time of the initial filing requirement, the Notice of Right to File Suit. The specific use of the words, "contemporaneous affidavit filing" in both Code section 15-79-125(A) and Code Section 15-36-100(C)(1) is no coincidence and must have been intentional.

The Appellant requests that this Court reverse the Opinion of the trial court granting the Defendants' Motions to Dismiss on the basis that the trial judge should have recused himself upon learning of the concerns of the impartiality of the trial judge from his Wife's prior experience with him as trial judge and her as the Plaintiff.

The Appellant further requests that this Court deny Respondents' argument that if the forty-five (45) days grace period provided in Code Section 15-36-100(C)(1) applied to relieve the Appellants in their matters before you from the contemporaneous filing requirement in Code Section 15-79-125(a), then the Appellant should be determined to have failed to comply. This argument is not consistent with the discretionary authority granted to the Court in that Code Section to further extend the Forty-five (45) days grace period in the interests of justice.

The Appellant respectfully requests that this Court determine that the forty-five (45) days grace period provided in Code Section 15-36-100(C)(1) applied to relieve the Appellants in their actions in the Trial Court from the contemporaneous filing requirement in Code Section 15-79-125(a).

The Appellant further respectfully requests that this Court exercise the discretion granted in Code Section 15-36-100(C)(1) in the interests of justice, and remand the Appellant's case to the Trial Court with a grant to the Appellant of an extension of an additional reasonable period of time pursuant to Code Section 15-36-100(C)(1) for the Appellant to obtain and file an Affidavit from an Expert as required.

The Appellant further requests such further relief as may be determined by this Court.

Respectfully submitted by:

*Arthur Peter Rowe*

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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY  
COURT OF COMMON PLEAS

HONORABLE R. MARKLEY DENNIS  
CIRCUIT COURT JUDGE

C.A. NO. 2013-CP-10-00090  
CT. APP. NO.: 2013-001682

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ARTHUR PETER ROWE..... Appellant,

vs.

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,

\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I certify that I have served a copy of the Reply Brief and the Record On Appeal on the Respondents listed above, with all enclosures referenced therein, by depositing a copy of it in the United States Mail, postage prepaid, on Monday, June 2, 2014, addressed to the Respondents' Attorneys of record, as listed below:

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Dated: June 2, 2014

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South Carolina Court of Appeals  
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RE: Arthur Peter Rowe vs. Bon Secours-St Francis Xavier Hospital, Inc., et al  
Court Of Appeals Case Number: 2013-001682  
Charleston County Civil Action No.: 2013-CP10-00090

Dear Madam or Sir:

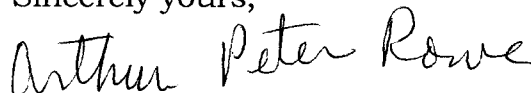
I am sending to you the original copy of my Reply Brief in the above-referenced matter. I am also sending to you 14 bound copies and 1 unbound copy of my Record On Appeal in this matter by separate letter and delivery. I am also enclosing the original copy of the Affidavit of Service.

I have simultaneously served the Respondents by separate letter, a copy of the Reply Brief, Record on Appeal and Affidavit of Service by and through mailing them to their Attorneys of Record.

I have enclosed a copy of the Reply Brief and the Affidavit Of Service. I am respectfully requesting that you please file the above-referenced original documents and return the enclosed copies, marked as filed, in the enclosed self-addressed stamped envelope provided. Thank you for your assistance in this matter.

Thank you for your consideration.

Sincerely yours,



Arthur Peter Rowe

BCM-R  
Enclosures

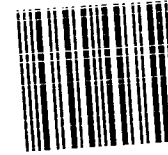
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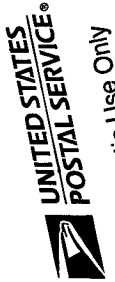
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