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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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..... Petitioner,

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.

Petition for Rehearing by East Cooper Community Hospital, Inc. d/b/a East Cooper Regional Medical Center

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Pursuant to Rule 221(a), SCACR, East Cooper Community Hospital, Inc. d/b/a East Cooper Regional Medical Center ("ECCH") hereby petitions for rehearing of the Court's opinion reversing the circuit court's order dismissing medical malpractice claims asserted by Vicki L. Wilkinson against ECCH, Carolina Aesthetic Plastic Surgery Institute, PA, and Thomas X. Hahm, M.D. See Wilkinson v. East Cooper Community Hosp., Inc., Op. No. 27423 (Sup. Ct. filed July 23, 2014).

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

Rehearing in the present case is supported by the following alternative grounds:

I. This Court's majority respectfully erred in addressing the clerk's assignment of separate case numbers to the NOI filing and, later, the summons and complaint.

This Court's majority opinion ascribes error to the Clerk of Court for assigning separate case numbers to Wilkinson's NOI and the subsequent civil action. Consequently, this Court's majority directs clerks to assign the same case number to an NOI and the subsequent civil action as part of the "same medical malpractice claim."

This portion of the Court's majority opinion was not briefed by the parties and, therefore, warrants rehearing. Further, the Court's majority respectfully should not have ascribed error to the Clerk where, as here, the Clerk's office applied the plain language of section 15-79-125(A) of the South Carolina Code and where, as here, the Clerk's office followed the administrative procedures previously adopted by this Court for NOI filings, which provide, in pertinent part, as follows:

> Should the parties file a summons and complaint, this action should be considered a new Common Pleas action and should receive a new case number. The Summons and Complaint should not receive the same case number as the previous Notice of Intent action.

Re: Clerk of Court Manual Revision, 2014-OR-05-21-01 (S.C. Sup. Ct. filed May 21, 2014), §6.2.10 (emphasis in original).

A. Rehearing should be granted because this Court addressed the issue *sua sponte*.

A petition for rehearing should be granted when the appellate court grants relief not requested or rules on an issue not previously raised by the parties to the appeal. The situation is analogous to when a trial court grants relief not requested or rules on an issue not raised at trial. Cf. Fryer v. S. Carolina Law Enforcement Div., 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct.

App. 2006) ("A post-trial motion must be made when the trial court either grants relief not requested or rules on an issue not raised at trial.").

Moreover, when an appellate court raises an issue of its own volition without notice to the parties or an opportunity to be heard on the issue, a rehearing obviates any procedural due process concerns. See Lawson v. Dixon, 25 F.3d 1040 (4th Cir. 1994) (appellate courts must provide parties with notice and opportunity to be heard on merits, but failure to do so may be addressed if rehearing granted); Wooley v. Lucksinger, 61 So. 3d 507, 564 (La. 2011) ("Even had there been justification for the court of appeal's re-determination of the choice of law decision, the appellate court committed error in failing to give the litigants notice of its *sua sponte* determination or to provide the litigants with an opportunity to be heard on the issue during the approximately 30 months the court of appeal reviewed the case.").[1]

Wilkinson never raised an alleged error on the part of the Clerk in assigning separate case numbers to Wilkinson's NOI and complaint. Accordingly, this Court's majority respectfully should not have raised the issue *sua sponte* as an alternative ground for *reversing* the circuit court's decision. See 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. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle

[1] In at least one jurisdiction, an appellate court is statutorily required to grant rehearing when an appellate court renders a decision based upon an issue which was not raised by the parties. See Cal. Gov't Code § 68081 ("Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.").

underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.").

B. This Court's majority mistakenly concludes that the Clerk erred in using separate case numbers.

This Court's majority opinion mistakenly concludes that the Clerk erred by using separate case numbers or by treating pre-litigation mediation separately from a civil action for medical malpractice. This conclusion respectfully flies in the face of both the plain language of the applicable statute *and* this Court's previously-adopted instructions to Clerks of Courts.

Section 15-79-125(A) of the South Carolina Code provides, in pertinent part: "**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." (Emphasis added). Section 15-79-125(E), in turn, states: "If the matter cannot be resolved through mediation, the plaintiff may **initiate the civil action by filing a summons and complaint** pursuant to the South Carolina Rules of Civil Procedure." (Emphasis added). Finally, section 15-79-125(F) explains: "Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution **after the civil action is initiated**." (Emphasis added).

Based on the emphasized language, section 15-79-125 of the South Carolina Code clearly contemplates that **pre-litigation** mediation will occur **before** a civil action is **initiated** through the filing of a summons and complaint. Thus, pre-litigation mediation and any subsequent

medical malpractice action are *not* part of the same civil action.[2]

Additionally, the Clerk of Court in the instance case handled the filing of the NOI and subsequent civil action exactly as instructed by this Court. The Clerk of Court Manual adopted by this Court expressly provides, in pertinent part: "**Prior to filing a civil action alleging medical malpractice** in which the cause of action occurred after July 1, 2005, the plaintiff must file a Notice of Intent to File Suit and an Affidavit from an expert witness in the county where venue is proper." Re: Clerk of Court Manual Revision, 2014-OR-05-21-01 (S.C. Sup. Ct. filed May 21, 2014), §6.2.10 (emphasis added). "The case will proceed to mediation." Id. "If the matter cannot be resolved through mediation, **the plaintiff may *initiate* a civil action by filing a summons and complaint**." Id. (emphasis and double-emphasis added).

The Manual likewise instructs clerks of court that, with respect to an NOI, the clerk should, among other things, "[a]ssign a Common Pleas (CP) case number." Id. Further, the Manual explains: "Upon receipt of the Proof of ADR, you should dispose the Notice of Intent to File Suit action." Id. Finally, this Court directs clerks of court as follows: "**Should the parties file a summons and complaint, this action should be considered a new Common Pleas action and should receive a new case number**." Id. (emphasis added). "The Summons and Complaint should not receive the same case number as the previous Notice of Intent action." Id. (emphasis in original).

Thus, as Justice Pleicones explains through his dissenting opinion in the related case of

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[2] An interpretation of the applicable statutes to conclude that a civil action has been commenced by the mere filing and service of a Notice of Intent to File Suit would also raise due process concerns. See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant."). As such, ECCH contends that this Court should respectfully refrain from instructing clerks of court to assign the same civil action number to pre-litigation mediation filings and to any subsequent medical malpractice lawsuit.

Ranucci v. Crain, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014):

> As the Court of Appeals correctly stated, the medical malpractice pre-litigation statute, § 15–79–125, and the professional negligence complaint statute, § 15–36–100, operate "in distinct time frames" *Ranucci v. Crain,* 397 S.C. 168, 176, 723 S.E.2d 242, 247 (Ct.App.2012). The medical malpractice statute requires the contemporaneous filing of a pre-complaint pre-litigation expert witness affidavit along with the NOI. § 15–79–125(A). The filing and service of these two documents, along with limited discovery and mandatory mediation, are **prerequisites** to "filing or initiating a civil action [alleging] medical malpractice...." § 15–79–125.

(Emphasis added).

Based on the foregoing, this Court's majority opinion respectfully erred in finding that the filing of an NOI initiates a civil action which is simply continued by the filing of a summons and complaint upon the termination of pre-litigation mediation. As a result, this Court also erred in ruling, *sua sponte*, that the Clerk of Court in the present action should have assigned separate case numbers to the NOI and subsequent civil action. Rehearing should therefore be GRANTED.

II. This Court's majority opinion respectfully overlooks or misapprehends ECCH's argument that section 15-79-125(A), by its express terms, only incorporates "the affidavit *requirements* established in Section 15-36-100."

As a preliminary matter, in reversing the circuit court in the present case, this Court's majority partially relies on its companion decision in Ranucci v. Crain, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) ("Ranucci II"). As such, many of the issues raised by ECCH on appeal remain unaddressed in this Court's majority opinion in the present case.

In Ranucci II, this Court's majority opinion explains:

> Pursuant to section 15–79–125 a plaintiff is required, prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, to "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." S.C.Code Ann. § 15–79–125(A) (Supp.2013)

> (emphasis added). **Because there are no words of limitation surrounding the reference to section 15–36–100, we find it is incorporated into section 15–79–125 in its entirety.**

(Emphasis in bold added). This Court's majority in Ranucci II thus concluded that a forty-five day "safe harbor" provision for expert affidavits in section 15-36-100(C)(1) of the South Carolina Code should apply equally to expert affidavits filed under section 15-79-125(A).

This ruling overlooks ECCH's previous argument in the present case that section 15-79-125(A) plainly incorporates only the affidavit *requirements* established in section 15-36-100. This conclusion likewise overlooks ECCH's argument that nothing in either section 15-79-125 or section 15-36-100 suggests that any "safe harbor" applies to the contemporaneous filing requirement in section 15-79-125(A).

A statute may adopt the procedural provisions of another statute by specific and descriptive reference thereto. See Univ. of S. Carolina v. Mehlman, 245 S.C. 180, 187, 139 S.E.2d 771, 775 (1964) ("A statute conferring the power of eminent domain may adopt the procedural provisions of another statute by specific and descriptive reference thereto, in which case the effect is the same as though the procedure prescribed by the adopted statute had been written into the adopting statute."). "Where, however, the adopted statute is referred to merely by words describing its general character, only those parts of it which are of a general nature will be considered as incorporated into the adopting statute." Id.

"Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." Greene v. S.C. Election Comm'n, 314 S.C. 449, 452, 445 S.E.2d 451, 453 (1994). "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."

Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010). When the language of a statute is clear and explicit, "the courts cannot rewrite the statute and inject matters into the statute which are not in the legislature's language." Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970); see also City of Columbia v. Am. Civil Liberties Union of S. Carolina, Inc., 323 S.C. 384, 388, 475 S.E.2d 747, 749 (1996) ("This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.").

Section 15-79-125(A), applicable to medical malpractice claims specifically, requires an expert affidavit and *NOI* to be filed contemporaneously. On the other hand, section 15-36-100(B) of the South Carolina Code, applicable to all professional negligence claims, requires an expert affidavit and a *complaint* to be filed contemporaneously. By its express terms, the so-called "safe harbor" provision in section 15-36-100(C)(1) provides relief only from the contemporaneous filing requirement in section 15-36-100(B) and only under certain enumerated circumstances: "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." (emphasis added) "In such a case, the plaintiff has forty-five days **after the filing of the complaint** to supplement **the pleadings** with the affidavit." § 15-36-100(C)(1) (emphasis added).

Section 15-36-100(C)(1) says nothing about the contemporaneous filing requirement in section 15-79-125(A) and, in the absence of such express language, these differently-worded statutes should be interpreted differently. See 73 Am. Jur. 2d Statutes § 122 ("[T]he use of

differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended.").

While this Court's majority points to a clause in section 15-79-125(A) stating that the expert affidavit filed with the NOI is "subject to the affidavit **requirements** established in Section 15-36-100," the forty-five day safe harbor is, simply put, not a *requirement* for expert affidavits. The generally accepted definition of the word "requirement" is something which is required, necessary, or essential to the existence or occurrence of something else.[3] The procedures articulated in section 15-36-100 for initiating a civil action alleging professional negligence are, simply put, not "affidavit requirements." See Sloan v. Hardee, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007) ("Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.").

These procedures are not required, necessary, or essential to the existence or occurrence of the expert affidavit in section 15-79-125(A). On the other hand, the substantive mandates for the preparation and content of expert affidavits in several remaining provisions of section 15-36-100, especially section 15-36-100(A), are required, necessary, or essential to the existence or occurrence of the affidavit.

Further, while the majority opinion in Ranucci II looks to the definition of "medical doctors" in section 15-36-100(G)(7), the issue in the present case is *not* whether section 15-36-100 applies to medical professionals, but instead whether the procedures set forth for initiating a civil action alleging professional negligence apply to the NOI process. As ECCH has consistently maintained, *both* section 15-36-100 *and* section 15-79-125 apply to medical

[3] See http://www.merriam-webster.com/dictionary/requirement (defining "requirement" as "something wanted or needed" or "something essential to the existence or occurrence of something else."

malpractice claims. However, as ECCH has also consistently maintained, they are two distinct parts of the process.

Moreover, while this Court's majority in Ranucci II purports to rely on the legislative history of section 15-36-100 and 15-79-125 to conclude that the General Assembly intended that "section 15-36-100 to establish the general construct regarding expert witnesses for all professional negligence cases," nothing in the legislative history supports such a conclusion and, in any event, the plain language of section 15-79-125(A) controls. See Milner v. Dep't of Navy, (2011) ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it . . . . When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language."). Here, the legislative history reveals, at most, that 15-36-100 and 15-79-125 should be read together. However, it does not establish any intent that section 15-36-100 be wholly incorporated into section 15-79-125(A).

Finally, this Court looks to the purported absence of specific provisions in section 15-79-125 to conclude that section 15-36-100 was entirely incorporated into section 15-79-125. As previously discussed, this interpretation respectfully ignores the limited incorporation of only the affidavit *requirements* established in section 15-36-100. Nonetheless, it is also worth mentioning that this Court overlooks that section 15-79-125(A) incorporates the service requirements in the South Carolina Rules of Civil Procedure and that section 15-79-125(C) incorporates the procedures in the South Carolina Alternative Dispute Resolution Rules ("SCADRR"). See, e.g. Rule 4(c), SCADRR (explaining that the filing requirements for an NOI should accord with the procedures for filing a lis pendens).[4]

[4] The majority opinion in Ranucci II also suggests that the common knowledge exception would be written out of section 15-79-125(A) if section 15-36-100 were not incorporated in its entirety. However, "statutes in derogation of the common law are to be strictly construed." Grier v.

This Court's majority opinion respectfully overlooks or misapprehends these arguments by failing to address them. Rehearing should therefore be granted.

III. This Court's majority opinion respectfully misapprehends or overlooks ECCH's argument that section 15-79-125(A) of the South Carolina Code unambiguously requires Wilkinson to file an expert affidavit contemporaneously with her NOI to toll the statute of limitations.

Section 15-79-125(A) of the South Carolina unambiguously states that a plaintiff must file an expert affidavit contemporaneously with the plaintiff's NOI and that such filing tolls the applicable statute of limitations. Thus, there is no reason to look to the separate tolling provisions applicable to expert affidavits filed under section 15-36-100. ECCH previously raised this argument, and this Court's majority opinion overlooks it by failing to address it.

As Justice Pleicones explains in his dissenting opinion in Ranucci II:

> The majority first asserts that without the wholesale incorporation of the professional negligence complaint statute into the medical malpractice pre-litigation statute, a medical malpractice plaintiff is deprived of the forty-five day grace period found in § 15–36–100(C)(1). The purpose of this grace period is to toll the statute of limitations when a professional negligence plaintiff files her complaint within ten days of the running of the statute in order to

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AMISUB of S. Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Furthermore, as Justice Pleicones points out in his dissenting opinion, nothing prevents the General Assembly from requiring an expert affidavit to be contemporaneously filed with the NOI even in the absence of a requirement for expert testimony in the subsequent civil action.

Additionally, as Justice Pleicones also recognized in his dissenting opinion in Ranucci II, section 15-79-125 provides for the circuit court's jurisdiction to enforce issues arising under section 15-79-125. Thus, despite the majority opinion's concern in Ranucci II that section 15-79-125 does not create a specific remedy, the circuit court has inherent power to ensure that just results are obtained in any given situation. See Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."). Further, the issue in this case, as argued by ECCH, is whether Wilkinson properly tolled the statute of limitations. If she did not, one remedy available to ECCH is to move to dismiss Wilkinson's complaint due to the expiration of the statute. This is the remedy of which ECCH took advantage.

> allow her time to procure an expert affidavit. **The majority *fails to acknowledge* that in a medical malpractice case the statute is tolled much earlier, that is, when the NOI and expert witness affidavit are filed under the medical malpractice pre-litigation statute which states the contemporaneous filing of these two documents "tolls all applicable statutes of limitations."** § 15–79–125(A). Moreover, under § 15–36–100(C)(1), the forty-five day grace period does not commence until "the filing of the complaint," an event which cannot occur in a medical malpractice action until after the NOI and its affidavit have been filed, discovery materials exchanged, and mediation attempted. *See* § 15–79–125(E). I do not agree that the lack of a "grace period" in the medical malpractice pre-litigation statute, which contains its own tolling provision, mandates that we implant this separate, more limited tolling provision from the professional negligence complaint statute.

(Emphasis and double-emphasis added).

Section 15-79-125(A) of the South Carolina Code provides, in pertinent part: "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." (emphasis added). "Read plainly and strictly, section 15–79–125(A) simply requires **the contemporaneous filing of both the notice and the affidavit**." Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 539, 725 S.E.2d 693, 697 (2012) (emphasis added).

Notwithstanding this Court's majority opinion in Ranucci II, ECCH argued that an interpretation of section 15-79-125(A) which divorces the expert affidavit requirement from the filing of the NOI places form over substance, reads one sentence of section 15-79-125(A) in isolation, and ignores the remaining provisions of the same section of the same statute. This Court's majority opinion respectfully does not address these contentions, instead focusing on a single reference to section 15-36-100 of the South Carolina Code.

When the provisions of section 15-79-125(A) are read as a whole, it is clear that section 15-79-125(A) expressly tolls the statute of limitations *only* when a plaintiff files an NOI *with* the required expert affidavit. In fact, as ECCH previously argued, the majority's interpretation effectively and improperly renders much of the provisions in section 15-79-125(A), including the contemporaneous filing requirement for an expert affidavit, meaningless or absurd. See Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.").

It is clear from a reading of section 15-79-125 in its entirety that, after mandating that an expert affidavit be filed contemporaneously with the NOI, the remaining provisions therein treat the expert affidavit as part of the NOI. In short, nothing in section 15-79-125(A) purports to divorce the NOI from the expert affidavit required to initiate mandatory pre-litigation mediation in a medical malpractice action. To do so would improperly turn a mandatory requirement into an option or suggestion. The express and mandatory nature of the contemporaneous affidavit requirement in section 15-79-125(A) also distinguishes the present case from Grier, 397 S.C. at 540, 725 S.E.2d at 698, in which this Court declined to judicially impose a requirement that the affidavit also address causation:

> We do not doubt that requiring the affidavit to contain an opinion regarding causation furthers these important goals. Nevertheless, the statute is unambiguous and we 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."

Because this Court's majority overlooked ECCH's argument in this respect, rehearing should be granted.

IV. This Court's majority respectfully misapprehends ECCH's reference to case law from other jurisdictions and overlooks the policy considerations behind ECCH's interpretation

of section 15-79-125(A). ECCH contends that the "contemporaneous filing requirement" in section 15-79-125(A) protects the integrity of pre-litigation mediation.

This Court's majority states, in a footnote, that ECCH "references decisions from other jurisdictions to support the contention that a second affidavit is required . . . ." ECCH never did anything of the sort.[5]

To the contrary, ECCH cited to these decisions as supporting ECCH's contention that the expert witness affidavit is a *substantive* requirement; integral to the materiality of *pre-litigation mediation*; and a requirement that should be included as early as possible in the process, as the General Assembly must have intended: "In the context of a medical malpractice case, the contemporaneous filing requirement for expert affidavits in section 15-79-125(A) helps not only protect medical professionals against frivolous claims, **but also ensures, from the get-go, the effectiveness of and full participation in the pre-litigation mediation process, with a look to avoiding litigation entirely.**" (ECCH Final Br., p.15). As briefed by ECCH:

> In fact, the expert affidavit is *the driving force behind* the pre-litigation mediation process articulated in section 15-79-125. It ensures that both parties will "come to the table" understanding not only the plaintiff's allegations, **but also that these allegations have some arguably legitimate basis**. [The Court of Appeals] observed in Ranucci that filing an NOI without an expert affidavit would have no *legal* effect. Similarly, **if the parties were required to participate in pre-litigation mediation based on an NOI without an expert affidavit, the NOI would also have no *practical* effect**.

(ECCH Final Brief, p.16) (emphasis in bold added). "[T]he expert affidavit impacts **the substance of the mediation, not just its timing**." (ECCH Final Br., pp.16-17) (emphasis

[5] These citations were included in the portion of ECCH's brief dealing with whether an expert witness affidavit must be filed contemporaneously with an NOI to toll the statute of limitations as set forth in section 15-79-125(A). They were *not*, as suggested by this Court, included as part of ECCH's argument that an updated affidavit is required under section 15-36-100.

added).[6]

In this respect, ECCH included a footnote referencing cases from other jurisdictions, stating: "Other courts addressing the import of expert affidavits in similar contexts likewise conclude that the **filing of an expert affidavit as a precondition to or requirement of a lawsuit alleging medical malpractice is substantive, not procedural or formalistic.**" (ECCH Br., p.17 note 4) (emphasis added).

This Court's majority opinion clearly misapprehends ECCH's argument in this respect, since it incorrectly stated ECCH's argument and the reason for inclusion of the referenced case law. This misapprehension supports rehearing.

V. This Court's majority also misapprehends ECCH's argument that the circuit court properly dismissed Wilkinson's complaint for her failure to file an expert affidavit contemporaneously with her complaint as mandated by section 15-36-100(B) of the South Carolina Code.

It is undisputed that Wilkinson failed to file an expert witness affidavit with her complaint or at any time thereafter. As previously discussed in Section I, *supra*, this Court erred in finding that the filing of an NOI initiates a civil action for medical malpractice which is merely continued when a summons and complaint are filed. Moreover, this Court's majority did not address ECCH's contention that, since section 15-79-125 permits the parties to subpoena documents and depose witnesses as part of pre-litigation mediation, the factual basis and available evidence relating to a plaintiff's claims may change between the time the expert

[6] These policy considerations are even more important where, as here, this Court concluded that an updated expert affidavit need not be filed with the subsequent summons and complaint, as argued by ECCH. If an expert affidavit is required *only* as part of pre-litigation mediation in a medical malpractice action, it should be "injected into the earliest stages of a dispute," as argued in Ranucci II. The earliest stage of the dispute is the filing of the NOI, and imposing a "grace period" on the contemporaneous filing requirement in section 15-79-125(A) disserves such purpose—an assertion which ECCH previously raised and which this Court's majority opinion overlooks by failing to address.

affidavit in section 15-79-125(A) is filed and the time the expert affidavit in section 15-36-100(B) is filed. The separate expert witness affidavit requirement in section 15-36-100(B) is therefore not superfluous or absurd; instead, it recognizes that the expert may have amended his opinions, solidified his opinions, or changed his mind entirely between the filing of the NOI and filing of a lawsuit.

The Court's interpretation of the phrase "Except as provided in Section 15-79-125," in section 15-36-100(B) also misapprehends ECCH's argument on this issue. This phrase clearly calls attention to the separate affidavit requirement in section 15-79-125(A) and clarifies that, with respect to medical malpractice actions, something more is required before suit may be filed.

Conclusion

This Court respectfully should not have raised, *sua sponte*, a new ground for overturning the circuit court's decision. Nevertheless, to the extent this Court relies on a new ground, this reliance is misplaced because both section 15-79-125 and this Court's administrative procedures manual for clerks of court unambiguously recognize that an NOI and a subsequent civil action should receive separate case numbers. They are not one civil lawsuit.

Moreover, this Court respectfully overlooks or misapprehends many of the grounds which ECCH raised in support of its arguments. In particular, this Court did not address ECCH's contention that section 15-79-125(A) should be read as a whole; misapprehended ECCH's reliance on case law from other jurisdictions; overlooked the policy considerations supporting ECCH's interpretation of section 15-79-125(A); and did not address ECCH's plain language interpretation of section 15-26-100(B).

For each of the foregoing reasons, this Court should GRANT rehearing, withdraw its opinion, and substitute a re-filed opinion affirming the circuit court.

Respectfully Submitted,

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August 15, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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..... Petitioner,

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.

PROOF OF SERVICE

I certify that I have served the **Petition for Rehearing by East Cooper Community Hospital, Inc., d/b/a East Cooper Regional Medical Center** on Vicki L. Wilkinson; Carolina Aesthetic Plastic Surgery Institute, PA; Thomas X. Hahm, M.D.; and Amicus Curiae South Carolina Hospital Association by depositing a copy of it in the United States Mail, postage prepaid, on August 15, 2014, addressed to their respective attorneys of record, as follows:

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