

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM KERSHAW COUNTY  
Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-28-1170

**RECEIVED**  
AUG 21 2014  
S.C. Supreme Court

Patricia Brouwer, .....

Appellant,

v.

Sisters of Charity Providence Hospitals;  
South Carolina ENT, Allergy and Sleep Medicine, P.A.;  
Robert Puchalski, M.D.; Francine K. Moring, M.D.;  
Jane Does and John Does, .....

Defendants,

Of Whom, South Carolina ENT, Allergy and  
Sleep Medicine, P.A.; Robert Puchalski, M.D.;  
and Francine K. Moring, M.D. are .....

Respondents.

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**PETITION FOR REHEARING**

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The Respondents petition the South Carolina Supreme Court for a rehearing of the Court's recent decision in *Brouwer v. Sisters of Charity Providence Hospitals*, Op. No. 27427 (S.C. S.Ct. filed August 6, 2014).

The grounds for the Respondents' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondents' petition for rehearing is based on the Court's decision in *Brouwer v. Sisters of Charity Providence Hospitals*, Op. No. 27427 (S.C. S.Ct. filed August 6, 2014); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON & LINDEMANN, P.A.

BY:  \_\_\_\_\_

ANDREW F. LINDEMANN  
WILLIAM H. DAVIDSON, II  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

William O. Sweeny, III  
SWEENY WINGATE & BARROW, P.A.  
1515 Lady Street  
Post Office Box 12129  
Columbia, South Carolina 29211  
(803) 256-2233

*Counsel for Respondents*

Columbia, South Carolina

August 21, 2014

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**MEMORANDUM IN SUPPORT OF  
PETITION FOR REHEARING**

The Respondents have petitioned this Court for a rehearing of its recent decision in *Brouwer v. Sisters of Charity Providence Hospitals*, Op. No. 27427 (S.C.

S.Ct. filed August 6, 2014). The Respondents respectfully submit that the following points were overlooked or misapprehended by this Court:

**I.**

In reversing the Circuit Court's dismissal of this action, this Court recognized that the Circuit Court relied exclusively on the Court of Appeals' decision in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012) (identified as *Ranucci I*). On July 23, 2014, this Court overruled the Court of Appeals' decision in *Ranucci I* and specifically held that Section 15-79-125 incorporates Section 15-36-100 in its entirety. *See, Ranucci v. Crain*, Op. No. 27422 (S.C. S.Ct. filed July 23, 2014) (identified as *Ranucci II*). Based upon *Ranucci II*, this Court has now ruled that "the common-knowledge exception of section 15-36-100(C)(2) may operate to eliminate the need to file an expert witness affidavit with the NOI under section 15-79-125(A)." Slip Op. at 5.

The Respondents are advised that this Court's decision in *Ranucci II* is not final. There is currently pending a petition for rehearing in *Ranucci v. Crain*, which was filed by the Respondent Corey K. Crain, M.D. on August 18, 2014. The Court has not yet acted on the petition for rehearing in *Ranucci*.

The Respondents herein submit that this Court's reliance on *Ranucci II* as binding precedent was premature given that that case has not reached final judgment. Rule 220(a), SCACR, provides that a published opinion of this Court

will not be released for publication in the official reporter until "the time for rehearing has expired or, if a petition for rehearing has been filed, when the petition has been finally decided by the appellate court." Rule 220(a), SCACR. Until that occurs, an opinion remains subject to revision or withdrawal. The potential thus remains that this Court may grant Dr. Crain's petition for rehearing in whole or in part, or may otherwise withdraw and issue a substituted opinion. Until that process is complete and the decision in *Ranucci* becomes final, the Respondents herein submit that the Court's decision in the present appeal cannot become final, which precipitates in part the filing of the Respondents' petition for rehearing.

In the event that this Court grants Dr. Crain's petition for rehearing in whole or in part, or otherwise withdraws and issues a substituted opinion in *Ranucci*, the Respondents herein preserve their rights to seek a rehearing in this litigation. Moreover, the Respondents herein adopt and incorporate the bases asserted by Dr. Crain for rehearing in *Ranucci* as additional bases for affirming the decision of the Circuit Court in the present case.

## II.

In addition, the Respondents herein urge this Court to adopt the dissent of Justice Costa Pleicones in *Ranucci II* as the proper construction of Section 15-79-125(A) and its expert affidavit requirement. As Justice Pleicones writes,

The medical malpractice pre-litigation statute and the professional negligence complaint statute reference each other and thus we must interpret them in tandem. The medical malpractice pre-litigation statute provides the expert affidavit accompanying the NOI is "subject to the affidavit requirements established in Section 15-36-100," the professional negligence complaint statute. I would hold this reference in § 15-79-125(A) incorporates only the provisions of § 15-36-100(A) which define "expert" for purposes of the professional negligence complaint affidavit requirement. My conclusion that only subsection (A) of § 15-36-100 is relevant to § 15-79-125's medical malpractice pre-litigation affidavit requirement is confirmed by § 15-36-100(B). Subsection (B), which requires that a professional negligence complaint be accompanied by an expert affidavit, begins "Except as provided in Section 15-79-125(A) ...." In my opinion, this exception of the medical malpractice pre-litigation statute from § 15-36-100(B)'s contemporaneous complaint/affidavit requirement must be read to mean that medical malpractice complaints in cases that have been processed in accordance with § 15-79-125 are not subject to the expert witness affidavit requirements of the professional negligence complaint statute. I would find the legislature exempted these medical malpractice complaints from the expert witness affidavit requirement in § 15-36-100(B) because such an affidavit has already been provided at the NOI stage, and because the parties have already narrowed the issues through the pre-litigation process required by § 15-79-125.

*Ranucci*, 2014 WL 3610956, \*10. Justice Pleicones thus concludes that in accordance with a proper reading of Section 15-36-100(B), "there is no requirement that medical malpractice complaints be accompanied by an expert affidavit." *Id.* He continues: "It follows, then, that the grace period found in § 15-

36-100(C)(1) and the common knowledge exception of § 15-36-100(C)(2), which by their own terms apply only to 'the contemporaneous [complaint and expert affidavit] filing requirements of § 15-36-100(B),' are irrelevant in a medical malpractice case." *Id.* (Emphasis added). As Justice Pleicones writes, the common knowledge exception of Section 15-36-100(C)(2) has no application to a medical malpractice action."

The Respondents herein reiterate Justice Pleicones' salient point that the majority in *Ranucci* fails "to explain its understanding of the 'Except as provided in § 15-79-125' language that begins § 15-36-100(B)." *Ranucci*, 2014 WL 3610956, \*10. Moreover, Justice Pleicones' additional analysis of the common-knowledge exception of Section 15-36-100(C)(2) is likewise correct and should be controlling in the present appeal. As Justice Pleicones writes,

The majority next expresses concern that unless we hold that § 15-36-100(C)(2) is incorporated into § 15-79-125, a medical malpractice plaintiff need always produce an expert witness affidavit at the NOI stage, even if her claim otherwise falls within the common knowledge exception. I do not understand why the requirement that an expert affidavit accompany every medical malpractice NOI, even where the subject matter is within a layperson's common knowledge, leads to the conclusion that the pre-litigation statute must be read to include the same exception as found in the complaint affidavit statute. I am not aware of any rule that prohibits the legislature from imposing an expert affidavit requirement as a threshold matter in a medical malpractice situation even if at trial no expert testimony will be required. Moreover, the majority does not explain how § 15-36-

100(C)(2), which allows a plaintiff to invoke the common knowledge exception if her "pleaded specification of negligence" meets the criteria, can be applied where there is only a NOI, but no pleading.

*Ranucci*, 2014 WL 3610956, \*11.

The Respondents herein would further add that there is good reason that the General Assembly has required the filing of an expert affidavit with the NOI in a medical malpractice case. As this Court previously recognized in *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012), Section 15-79-125(A) was adopted as part of tort reform legislation which included several major changes in the law specifically applying to medical malpractice cases. This Court in *Grier* explained that "one of the major goals behind these requirements [of Section 15-79-125(A)] is to curtail frivolous litigation by ensuring plaintiffs only present colorable claims." 725 S.E.2d at 697-698. However, without an expert affidavit, a medical malpractice plaintiff is less likely to have presented a colorable claim. If the pre-filing procedures adopted and codified in Section 15-79-125 are allowed to proceed on a plaintiff's mere assertion that his/her claim falls within the common knowledge exception, that would arguably undermine the chances of having an effective, meaningful pre-suit mediation.

This Court has clearly overlooked the fact that Section 15-79-125 does not include a mechanism whereby a plaintiff's purported reliance on the common knowledge exception may be challenged. As discussed in more detail below, this

Court, in fact, has erred in addressing *sua sponte* whether the common knowledge exception to the requirement of expert testimony is even applicable to this case. In actuality, that determination cannot be made at the NOI stage – there is no statutory provision for a court to make that determination, which in itself is further evidence that the General Assembly did not intend to adopt a common knowledge exception for the expert affidavit requirement of Section 15-79-125(A).

To reiterate, this Court has overlooked that a plaintiff's assertion of the common knowledge exception would not be challengeable at the pre-suit stage. Any plaintiff who fails to obtain an expert witness – whether for lack of effort, inability to find a favorable witness, or unwillingness to expend the funds necessary – could nonetheless file a NOI and compel pre-suit discovery and mediation simply by asserting the common knowledge exception, whether valid or not. Such an opportunity for abuse was likely evident to the General Assembly in drawing the distinction between the requirements for filing a NOI versus filing a complaint. Moreover, such abuse would render the pre-suit mediation process ineffective and fruitless and would likewise negate the purpose of curtailing frivolous litigation.

Furthermore, the General Assembly likely recognized that reliance on the common knowledge exception once suit is filed is, contrary to the NOI stage, subject to immediate review by the courts. Section 15-36-100 does include a mechanism whereby the defendant may raise "the failure to file an affidavit by motion to

dismiss filed contemporaneously with its initial responsive pleading" and, in essence, have the plaintiff's reliance on the common knowledge exception immediately adjudicated. *See*, S.C. Code Ann. § 15-36-100(F). That mechanism, however, is not available at the NOI stage. Section 15-36-100(F), by its very language, allows for a defendant to judicially challenge a plaintiff's reliance on the common knowledge exception only upon the filing of the defendant's "initial responsive pleading." The NOI process, however, does not require or allow for a defendant to file an "initial responsive pleading" in response to the NOI, and hence, there is no mechanism available for the defendant to oppose a plaintiff's reliance on the common knowledge exception at the NOI stage. The net result will be that a plaintiff who lacks an expert affidavit will simply take the position – whether justified or not – that an expert affidavit is not needed which will allow that plaintiff to proceed past the NOI stage of the litigation with no consequence. Clearly, that is not a logical, reasonable or proper construction of Section 15-79-125.

### III.

Importantly, this Court did not end its analysis in its decision in the present case by simply holding that the common knowledge exception of Section 15-36-100(C)(2) may operate to eliminate the need for an expert affidavit in the NOI process. Instead, this Court explained that "[t]his decision ... does not end our

analysis as we must consider whether Brouwer's case fell within [the common-knowledge] exception." Slip Op. at 5. In engaging in this analysis, however, the Court has erred in several respects.

First, this is not an issue that is properly before this Court on appeal. The Court should not have decided this issue *sua sponte* or based upon the record from the court below. The parties did not litigate in the Circuit Court whether the Appellant's claim properly falls within the common knowledge exception or whether the Appellant will need to present expert testimony in order to prove the standard of care for each separate defendant and a breach of that standard of care. No record was properly submitted on that issue, and there was no ruling by the Circuit Court on that issue. This is not an issue that should be decided for the first time by the appellate court – especially without giving the parties a full opportunity to be heard as required by basic notions of due process.

Second, as discussed above, the Court has engaged in an analysis that is not allowed by any fair reading of Section 15-79-125 or Section 15-36-100. The statutory scheme does not create a mechanism whereby a court may make a judicial determination *at the NOI stage* whether a plaintiff may rely on the common knowledge exception. In effect, this Court – without even discussing the procedural basis for such a review – has created a process by which a circuit court may determine at the NOI stage that no expert affidavit is required. Certainly, by

failing to address the procedural basis for such an analysis and then simply engaging in that analysis, this Court has left open the question of whether a defendant when served with a NOI and no expert affidavit can file a motion challenging the absence of an expert affidavit. Such a procedure allowing a motion to dismiss is provided in Section 15-36-100(F), but only in instances where a defendant is required to also file an "initial responsive pleading," but that is not required as part of the NOI process. Therefore, if the Court is judicially creating a procedure for a defendant to challenge a plaintiff's reliance on the common-knowledge exception or otherwise making Section 15-36-100(F) applicable at the NOI stage, then the Court should make that clear to the bar and bench for future cases. The Court should further require that a party that relies on the common-knowledge exception at the NOI stage waives the right to utilize or rely on expert testimony at any later stage of the litigation.

Finally, the Respondents submit that this Court erred in concluding that this is an appropriate case for the common knowledge exception. This Court viewed Brouwer's allegations on a very superficial or basic level without giving any consideration to the difference between the various defendants and their medical specialties, the different standards of care required of the different health care providers under the specific factual circumstances, or even what information was known to or provided to the physicians. The Court relied on the Appellant's

allegations alone and gave no consideration to the medical records, which at a minimum, would be relevant to determining the applicability of the common knowledge exception.<sup>1</sup>

At the very least, if this Court intends to adopt a process for a defendant at the NOI stage to challenge a plaintiff's reliance on the common-knowledge exception, this Court should allow the Respondents herein to go through that process. The Court should not have proceeded to determine that the Appellant is entitled to rely on the common knowledge exception where that was not litigated or decided in the court below. At the very least, that issue should have been remanded for further proceedings. Due process requires such a result.

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<sup>1</sup> Certainly, an expert witness in a medical malpractice case cannot render an opinion without review of the medical records. It would logically follow that a court should not determine that the common knowledge exception is applicable without at least reviewing the pertinent medical records.

CONCLUSION

Based on the foregoing discussion, the Respondents respectfully request that the Court rehear its decision and affirm the order of Circuit Court Judge Alison Renee Lee dated July 6, 2012, which dismisses the Notice of Intent to File Suit for failure to file an expert affidavit.

Respectfully requested,

DAVIDSON & LINDEMANN, P.A.

BY:  \_\_\_\_\_

ANDREW F. LINDEMANN  
WILLIAM H. DAVIDSON, II  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

William O. Sweeny, III  
SWEENY WINGATE & BARROW, P.A.  
1515 Lady Street  
Post Office Box 12129  
Columbia, South Carolina 29211  
(803) 256-2233

*Counsel for Respondents*

Columbia, South Carolina

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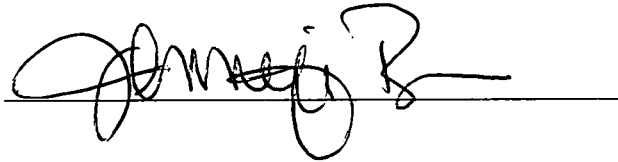
**CERTIFICATE OF SERVICE**

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 21st day of August 2014:

Daryl G. Hawkins, Esquire  
Law Office of Daryl G. Harkins, LLC  
Post Office Box 11906  
Columbia, South Carolina 29211-1906

William O. Sweeny, III, Esquire  
Sweeny Wingate & Barrow, P.A.  
Post Office Box 12129  
Columbia, South Carolina 29211

Weldon R. Johnson, Esquire  
Barnes Alford Stork & Johnson, LLP  
1613 Main Street  
Columbia, South Carolina 29202

A handwritten signature in black ink, appearing to read "Weldon R. Johnson", is written over a horizontal line. The signature is stylized and cursive.