

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SEP 26 2014
SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Honorable R. Markley Dennis, Jr.
Circuit Court Judge

C.A. No. 2013-CP-10-00090
Ct. App. No. 2013-001682

Arthur Peter Rowe,

Appellant,

v.

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.

RESPONDENTS' RETURN TO APPELLANT'S MOTION TO REMAND

In this action, Arthur Rowe attempts to assert a loss of consortium claim against various healthcare providers based on their alleged medical malpractice in treating his Wife Beverly. The Wife filed a Notice of Intent to File Suit asserting her own separate

medical malpractice action. These actions were not officially consolidated below, and the Trial Court issued separate orders dismissing both actions for failures to comply with S.C. Code Ann. § §15-79-125(A) and 15-36-100. Husband and Wife have filed separate appeals, which have not been consolidated; however, the relevant procedural history overlaps to a large degree, and their filings in this Court are coordinated and repetitious. They have both filed motions asking the Court to summarily reverse the dismissals and remand the cases to the Trial Court based on the Supreme Court's recent decisions in Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), rev'd, 2012-211188, 2014 WL 3610956 (S.C. July 23, 2014), and Wilkinson v. East Cooper Community Hospital, et. al, Appellate Case No. 2012-213464, Opinion No. 27423 (S.C. Sup. Ct. filed July 23, 2014).

In Ranucci, the Court holds that §15-79-125 incorporates §15-36-100 in its entirety, including a 45-day-grace period in §15-36-100(C)(1), which extends the time for filing the requisite expert witness affidavit and tolls the applicable statute of limitations under §15-79-125(A) upon the filing of a NOI even without an affidavit. In Wilkinson, the Court holds that under Ranucci, the plaintiff was allowed the 45-day extension of time under §15-36-100(C)(1), for filing her expert witness affidavit with her NOI, and that she was not required to file a second expert witness affidavit with her complaint.

As a threshold matter, the Respondents would point out that there are Petitions for Rehearing pending in both Ranucci and Wilkinson, and to that extent, the motion is premature. Moreover, the Respondents would submit that while the opinions issued by the Supreme Court in Ranucci and Wilkinson do include rulings on questions of

application of §§15-79-125 and 15-36-100 in medical malpractice cases, those rulings do not apply to the issues presented in this appeal.

More details and a full discussion of the issues can be found in the Respondents' Initial Brief which already has been submitted to the Court. However, for the purposes of responding to the pending motion, the Respondents would briefly offer this description of the undisputed facts and status of the case. These actions arise out of surgery performed on Beverly Rowe on January 7, 2010, at Bon Secours St. Francis Hospital. Beverly Rowe/Wife filed a notice of intent to file suit on January 7, 2013, without any expert affidavit, asserting that an affidavit was not required because her statute of limitations was expiring and "due to time constraints, an affidavit of an expert could not be prepared," relying on §15-36-100(C)(1). The Trial Court dismissed her NOI on the ground that it was defective because it was not filed contemporaneously with an expert affidavit, and the exceptions under § 15-36-100(C)(1) were not applicable.

Arthur Rowe/Husband never filed a NOI as required by S.C. Code Ann. §15-79-125(A); rather, he filed a summons and complaint on January 7, 2013, asserting loss of consortium, and he did not submit any expert affidavit meeting the requirements of S.C. Code Ann. § 15-36-100. The Trial Court dismissed the Husband's complaint on the grounds: (1) Plaintiff failed to file a Notice of Intent to File Suit and an expert affidavit prior to filing his Complaint as mandated by § 15-79-125; and (2) Plaintiff failed to file an expert affidavit with his Complaint as mandated by § 15-36-100.


Neither Ranucci nor Wilkinson are relevant to the issue of whether the Plaintiff Husband can file a loss of consortium action predicated on allegations of medical malpractice in the treatment of his Wife without first filing a NOI in compliance with §

15-79-125. Further, neither Ranucci nor Wilkinson support any argument that the dismissal was improper because even if that he was entitled to the 45-day-grace period under §15-36-100 to submit an expert affidavit with his complaint, that time period lapsed without him ever submitting an affidavit. The Husband's complaint was filed on January 7, 2013, and as of the hearing date on May 31, 2013, he had not had submitted any expert affidavit. The reality of Plaintiff's situation, as revealed by his Wife who spoke for them both at the hearing, is that she could not get an affidavit because it was too expensive to hire an expert and they could not find an attorney willing to handle their cases.

Conclusion

The Respondents respectfully submit that the Supreme Court's decisions in Ranucci v. Crain and Wilkinson v. East Cooper do not support a summary reversal in this case. To the contrary, the Respondents would argue that §§ 15-79-125 and 15-36-100 together with all the pertinent case law support summary affirmance of the dismissal based on the undisputed facts that the Plaintiff Husband never filed an NOI and he never submitted an expert affidavit. In the alternative, the Respondents would ask this Court to allow supplemental briefing on this point.

Respectfully submitted,



Robert H. Hood/James B. Hood

For All Respondents with Permission as Listed Below

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Roper Hospital, Inc., d/b/a Roper St.
Francis Healthcare

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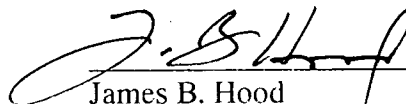
Bon Secours-St. Francis Xavier Hospital, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis Healthcare, Bon Secours St. Francis Health System, Inc., d/b/a Bon Secours St. Francis Xavier Hospital, Bon Secours St. Francis Hospital and Roper St. Francis 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.

CERTIFICATE OF SERVICE

I certify that on this 25th day of September 2014, a copy of the foregoing Return was served on the Appellant by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to him as listed below:

Arthur Peter Rowe, Pro Se Appellant
52 Chadwick Drive
Charleston, SC 29407


James B. Hood

RECEIVED
SEP 26 2014
SC Court of Appeals

1 MS. ROWE: In negligence, *per se*, my
2 understanding was that you could bring a
3 case without ---

4 THE COURT: In negligence *per se*
5 there is a limited exception, or common
6 knowledge perception, maybe. But even then
7 you still can't get by the problem that you
8 have with respect to what the Court has
9 said. You have to file it. In this case,
10 I don't think that it's going to be common
11 knowledge, from what I've read. So ---

12 MS. ROWE: I tried to get an
13 affidavit of merit and I tried to get a
14 medical expert and I was unable to do that.

15 THE COURT: Thank you, ma'am. And,
16 Mr. Rowe, you have don't have an affidavit
17 with yours either, sir?

18 MS. ROWE: He's not going to be able
19 to hear. He's almost totally deaf.

20 THE COURT: Well, he doesn't have an
21 affidavit. Based on the statements and
22 arguments and the memoranda submitted and
23 the affidavits, I am granting the Motion to
24 Dismiss. If you will prepare the
25 appropriate Order, each client, I will be

1 times, Oddly enough in the last six
2 months, I think that I have had two where I
3 have had to dismiss them because the case
4 that he cited says exactly that. There is
5 not -- in fact it was -- I think in that
6 case that they later did obtain an
7 affidavit but the Court said "no." You
8 have to strictly comply with the statute.
9 The Legislature has set forth what had to
10 be done, and it can't be waived.

11 MS. ROWE: Okay. Your Honor, ---

12 THE COURT: That is what we have to
13 address.

14 MS. ROWE: --- the Legislature has
15 established a law that makes it almost
16 impossible for a regular citizen to make a
17 medical malpractice case regardless of
18 their injuries, because of the twenty to
19 thirty thousand dollar payout that has to
20 go to pay an expert witness.

21 THE COURT: Oh, I'm -- Ma'am, I --
22 I practiced law for twenty-one years and I
23 did some medical malpractice. I am well
24 aware of the expense of a plaintiff's case.
25 I am well aware of the difficulty of

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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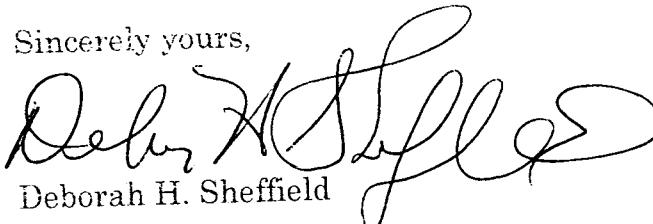
RE: Arthur Peter Rowe v. Bon Secours-St. Francis Xavier Hospital, Inc., et al.;
Appellate Case No. 2013-001682

Dear Madam Clerk:

Enclosed please find the original and 6 copies of the Respondents' Motion to Allow Late Filing of Respondent's Return to the Appellant's Motion to Remand. As stated in the motion, the package was mailed to the Court for filing yesterday, but it was returned for lack of postage. A check for the \$25.00 filing fee is also enclosed. By copy of this letter, we are serving the Appellant with a copy of the Motion.

With appreciation for the Court's understanding and consideration of this request, I am

Sincerely yours,


Deborah H. Sheffield

Enclosure

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Letter to Clerk of Court of Appeals - #2013-001682/Arthur Rowe
September 26, 2014
Page 2

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