STATE OF SOUTH CAROLINA
In the Court of Appeals

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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-10-00088
Ct. App. No. 2013-001673

Beverly C. Moore-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, Beverly Rowe filed a Notice of Intent to File Suit asserting a medical malpractice claim which the Trial Court dismissed because she did not submit the required expert affidavit contemporaneously with her NOI. She has filed a motion

asking the Court to summarily reverse the dismissal and remand the case 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).[1]

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, the facts were that those plaintiffs actually did file expert affidavits within the 45-day grace period.

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[1] Her husband, Arthur Rowe is also attempting to assert related a loss of consortium claim in a separate action; however, he filed a complaint without first filing a NOI as required by §15-79-125, and he never submitted an expert affidavit as required by §15-36-100. These actions were not officially consolidated below, and the Trial Court issued separate orders dismissing both actions for failures to comply with §§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, including the fact that the Husband has filed virtually the same motion for remand.

Thus, those rulings do not support summary reversal of the Trial Court's dismissal of this Plaintiff's NOI because she has ***never*** submitted the required expert affidavit.

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. This action arises out of surgery performed on Beverly Rowe on January 7, 2010, at Bon Secours St. Francis Hospital. She 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, relying upon the Court of Appeals' decision in Ranucci v. Crain.

With the issuance of the Supreme Court's decision in Ranucci, the Trial Court's ruling can no longer be sustained on the reasoning that the 45-day grace period of §15-36-100(c)(1) does not apply to the NOI requirements in § 15-79-125. However, the dismissal of the NOI still can and should be sustained on the additional ground that the Plaintiff did not submit the requisite expert affidavit within the 45-day grace period, and in fact, it is undisputed that she has never submitted one.

To the extent that the Supreme Court now has declared that §15-36-100(C)(1) applies to the filing of the required expert affidavit with a NOI, it does not grant an indefinite delay for the Plaintiff to find an expert and procure the requisite affidavit. The

claimant/plaintiff has 45 days after the filing of the NOI to supplement the pleadings with the affidavit. Upon motion, the trial court may grant a further extension of time beyond those 45 days, for good cause "as the court determines justice requires."

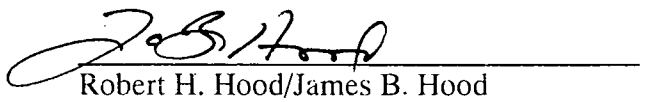
Here, the undisputed facts show that the NOI was filed on January 7, 2013, and as of the hearing date on May 31, 2013, the Plaintiff had not had submitted any expert affidavit. Nor did she ever make a motion for a further extension. The fact is, as the Plaintiff revealed at the hearing in the Trial Court, that she could not get an affidavit because of the cost: "I tried to get an affidavit of merit and I tried to get a medical expert and I was unable to do that." [Tr. 12:12-14.] "[T]he Legislature has established a law that makes it almost impossible for a regular citizen to make a medical malpractice case regardless of their injuries, because of the twenty to thirty thousand dollar payout that has to go to pay an expert witness." [Tr. 10:11-14.] In the course of this appeal, she also has declared that she has contacted over 40 attorneys and she simply cannot find an attorney willing to represent her and her husband. [Brief, p. 6; Motion, filed March 7, 2014.]

Under the Supreme Court's decision in Ranucci, a NOI is not subject to dismissal solely on the ground that an expert affidavit was not submitted contemporaneously with it, but a NOI can and should be dismissed if an expert affidavit is not submitted within the 45-day grace period or such other extension as granted by a trial court on motion and a showing of good cause. Ultimately, there is nothing in the statutory language of § 15-79-125 or 15-36-100, or in the Court's opinions in Ranucci or Wilkinson that allows an indefinite extension of time for the claimant to find an attorney willing to take the case or an exemption from the affidavit requirement based on financial constraints.

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 never submitted the required expert affidavit. In the alternative, the Respondents would ask this Court to allow supplemental briefing on this point as an additional sustaining ground to affirm the dismissal.

Respectfully submitted,



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For All Respondents with Permission as Listed Below

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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 her as listed below:

Beverly C. Moore-Rowe, Pro Se Appellant
52 Chadwick Drive
Charleston, SC 29407

James B. Hood

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

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

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

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

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

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

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

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

THE COURT: That is what we have to address.

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

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

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September 25, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Beverly C. Moore-Rowe v. Bon Secours-St. Francis Xavier Hospital, Inc., et al.
C/A No. 2013-CP-10-00088, Charleston CP
Appellate Case No. 2013-001673
HLF File No. 242.163

Dear Madam Clerk:

Enclosed for filing please find the original and seven (7) copies of the Respondents' Return to the Appellant's Motion to Remand in the above-referenced matter. Please return a clocked-in copy in the envelope provided.

By copy of this letter, I am serving the Pro-Se Appellant and all counsel with a copy of the Return.

Kind regards,

Yours truly,

James B. Hood

JBH/mdh
Enclosures
cc: Beverly C. Moore-Rowe, Pro Se Appellant
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