

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

KRISTI LEA HARRINGTON, Circuit Court Judge

Appellate Case No.: 2013-002177
Case No. 2012-CP-10-5366
(NOI) and 2013-CP-10-4475

JOHNNY EADES AND BARBARA EADES..... Appellants,

v.

PALMETTO CARDIOVASCULAR AND THORACIC, PA; JAMES M. BENNER, MD;
MARK J. EPLER, MD; TRIDENT MEDICAL CENTER, LLC; COLUMBIA/HCA
HEALTHCARE CORPORATION OF SOUTH CAROLINA; HCA HEALTHCARE-SOUTH
CAROLINA; TRIDENT MEDICAL CENTER; TRIDENT HEALTH SYSTEM; PALMETTO
PRIMARY CARE PHYSICIANS, LLC; TRIDENT EMERGENCY PHYSICIANS, LLC;
BRIAN R. WHIRRETH, MD; PATRICIA CAMPBELL, MD; CHRISTINE E. MCNEAL,
MD; MATTHEW WALLEN, MD; CHARLESTON RADIOLOGISTS, PA; JOSEPH M.
MULLANE, MD; TRI-COUNTY RADIOLOGY ASSOCIATES, PA; AND
TROY MARLON, MD,..... Defendants;

OF WHOM

PALMETTO CARDIOVASCULAR AND THORACIC, PA; JAMES M. BENNER, MD;
MARK J. EPLER, MD; PALMETTO PRIMARY CARE PHYSICIANS, LLC; AND,
TRIDENT EMERGENCY PHYSICIANS, LLC, Respondents.

FINAL BRIEF OF APPELLANTS

November 24, 2014

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A. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

Table of Authorities	i
Statement of Issues on Appeal	1
Statement of the Case	2
Argument	3
1. DID THE CIRCUIT COURT ERR IN DISMISSING THE APPELLANTS' NOTICE OF INTENT TO FILE SUIT?	5
2. WAS THE CASE OF <u>RANUCCI v. CRAIN</u> CORRECTLY DECIDED?	11
3. DID THE CIRCUIT COURT ERR IN RULING THAT THE AFFIDAVIT OF DR. SKUDDER WAS INSUFFICIENT AS TO THE RESPONDENTS PALMETTO PRIMARY CARE PHYSICIANS, LLC, AND TRIDENT EMERGENCY PHYSICIANS, LLC?	13
Conclusion	15
Rule 211 (b) Certificate	17

2. TABLE OF AUTHORITIES

a. Cases

<u>Bass v. Isochem</u> , 365 S.C. 454, 617, S.E. 2d 369 (Ct. App. 2005).....	6,11
<u>Brown v. S.C. Dept. of Health & Env'tl. Control</u> , 348 S.C. 507, 560 S.E. 2d 410 (2002).....	6
<u>Grier v. AMISUB, Inc.</u> , 397 S.C. 531, 725 S.E. 2d 693 (2012).....	8
<u>Hitachi Data Sys. Corp. v. Leatherman</u> , 309 S.C. 174, 420 S.E. 2d 843 (1992).....	11
<u>Ranucci v. Crain</u> , 397 S.C. 168, 723 S.E. 2d 242 (Ct. App., 2012).....	7,10,11,15
<u>Ross v. Waccamaw Community Hospital</u> , 404 S.C. 56, 744 S.E. 2d 547 (2013).....	8
<u>Stephen v. Avins Constr. Co.</u> , 324 S.C. 334, 478 S.E. 2d 74.....	11

b. Statutes

S.C. Code Ann. Section 15-36-100.....passim

S.C. Code Ann. Section 15-79-125..... passim

c. Rules

South Carolina Rules of Civil Procedure, Rule 1.....3

South Carolina Alternate Dispute Resolution Rules.....8

B. STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN DISMISSING THE APPELLANTS' NOTICE OF INTENT TO FILE SUIT?
2. WAS THE CASE OF RANUCCI v. CRAIN CORRECTLY DECIDED?
3. DID THE CIRCUIT COURT ERR IN RULING THAT THE AFFIDAVIT OF DR. SKUDDER WAS INSUFFICIENT AS TO THE RESPONDENTS PALMETTO PRIMARY CARE PHYSICIANS, LLC, AND TRIDENT EMERGENCY PHYSICIANS, LLC?

C.

STATEMENT OF THE CASE

1. This matter was commenced by Appellants' Notice of Intent to File Suit on August 15, 2012. The Appellants filed an expert affidavit along with Supplemental Answers to Standard Interrogatories on August 17, 2012. This is a medical malpractice matter. Several months later the Respondents filed Motions to Dismiss at various times. On June 10, 2013 the matter was mediated without success. A substantial amount is in controversy due to serious injuries suffered by the Appellant Johnny Eades. The Motions to Dismiss were heard on July 18, 2013. By Order dated August 9, 2013, the Circuit Court granted the Respondents Motions to Dismiss. The Court's Coversheet, however, indicated that the Order was the Decision of the Court, and that the Order does not end the case. Notice of entry of the Order was received by Counsel for Appellant on September 7, 2013, without a copy of the Order, and a written notice of the entry of the Order with a copy of the Order was received by Counsel for Appellant on September 11, 2013. Notice of Appeal was filed on October 7, 2013.

D.

ARGUMENT

INTRODUCTION

The Appellants are at risk of being denied the right to litigate their case on the merits. The fundamental purpose of a court system is to provide citizens with an opportunity to litigate causes of action on the merits. This is something that should not be forgotten in the interpretation of statutes and in the application of the Rules of Civil Procedure. The foundation is set out in Rule 1 of the South Carolina Rules of Civil Procedure: "These rules govern the procedure in all South Carolina courts in all suits of a civil nature.... They shall be construed to secure the just, speedy, and inexpensive determination of every action. The Appellants respectfully submit that it would be contrary to justice and sound jurisprudence to deny them the right to litigate their case on the merits.

Ultimately, the issue of this case is a simple one. Does the Notice of Intent to File Suit Statute (S.C. Code Annotated, Section 15-79-125) bar the Appellants from litigating their case on the merits? Counsel for the Appellants sent by fax a proposed affidavit to an expert witness on August 14, 2012. Counsel attempted on both August 14, and August 15, 2012, to contact the expert witness to get the proposed affidavit. When the affidavit did not arrive on August 15, 2012, Counsel elected to file the Notice of Intent without it because of concerns about potential defenses regarding the statute of limitations. (One of the Appellants suffered a ruptured aneurysm on August 15, 2009). So the Notice of Intent to File Suit was filed on August 15, 2012. The affidavit (which was signed on August 15) was faxed to Counsel on the afternoon of August 16 and it was filed with the Court on August

17, 2012. See Affidavit of Counsel for the Plaintiffs, R. pp. 33-34.

The Respondents moved to dismiss the Notice of Intent because the affidavit of the expert witness was filed two days after the Notice of Intent to File Suit. (It is the Appellants' position that the Respondents have abandoned and/or withdrawn the statute of limitations portion of their Motions, Transcript of hearing, R. p. 63, lines 15-18 and p. 74, lines 5-16. The Circuit Court dismissed the Notice of Intent to File Suit because the affidavit was filed two days after the Notice of Intent to File Suit.

It is apparently the position of the Respondents that the Notice of Intent to File Suit Statute (Section 15-79-125) can only be satisfied by filing the expert affidavit at the precise moment as the filing of the Notice of Intent to File Suit (simultaneously). While making the argument for all the Respondents, Mr. Sanders stated at the hearing on the Motions to Dismiss, that the Notice of Intent to File Suit and the expert affidavit must be filed "simultaneously" and "there are no exceptions." Transcript of Hearing, R. p. 61 line 25-p. 62, line 16.

Respectfully, it is submitted that the Respondents are mistaken. It would be unjust, unreasonable, and irrational for there to be a requirement of simultaneous filing with no exceptions.

(For two of the Respondents there is another issue regarding the qualifications of the expert witness which shall be addressed below).

1. DID THE CIRCUIT COURT ERR IN DISMISSING THE APPELLANTS' NOTICE OF INTENT TO FILE SUIT?

a. APPLICABLE LAW.

The Appellants complied with both the letter and the spirit of Section 15-79-125. The purpose of this section is to require pre-suit mediation. An affidavit of an expert witness, "subject to the affidavit requirements established in Section 15-36-100" is required.

The statute states that "the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness." The statute also provides that, "Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations." Section 15-79-125 does not make the expert affidavit a part of the Notice of Intent to File Suit. (By contrast, Section 15-36-100 does make the expert affidavit a part of the complaint).

Since the filing of the Notice of Intent to File Suit tolls statutes of limitations without reference to the expert affidavit, it is clear that the wording and structure of this statute contemplates that there will be occasions when the Notice of Intent to File Suit will be filed prior to filing of the expert affidavit. Further, the statute never uses the word "simultaneous" or "at the precise moment." Words should ordinarily be given their plain meaning in statutory construction. The word actually used in this section is "contemporaneously." The plain meaning of the word "simultaneous" is "at the same time." The plain meaning of "contemporaneous" is "in the same period." Thus "simultaneous" is a subset of "contemporaneous."

Plaintiff's Memorandum in Opposition to Motions to Dismiss.

The heading of the statute makes no reference to the expert affidavit as prerequisite to file an action. The precise wording is "Notice of Intent to File Suit as prerequisite to filing action." This again emphasizes that the Notice of Intent to File Suit is a separate document from the affidavit of the expert witness.

Nowhere does Section 15-79-125 state that the expert witness affidavit must be filed at precisely the same time as the Notice of Intent to File Suit. And it certainly does not state that without exception the expert affidavit can never be filed after the Notice of Intent to File Suit.

The statute clearly provides functions for the Notice of Intent to File Suit which are separate from the expert affidavit. This leads to the clear implication that the Circuit Court has discretion in the application of the statute.

Memorandum of Plaintiff in Opposition to Motions to Dismiss.

In interpreting a statute, an appellate court must seek to determine the intent of the legislature. The appellate court should also construe the statute in accord with its plain meaning. See Bass v. Isochem, 365 S.C. 454, 617 S.E. 2d 369 (Ct. App. 2005) and Brown v. S.C. Dept. of Health & Env'tl. Control, 348 S.C. 507, 560 S.E. 2d 410 (2002).

Section 15-79-125 clearly incorporates "the affidavit requirements established in Section 15-36-100." This is not a cross reference. It is a plain and explicit incorporation. Section 15-79-125 explicitly incorporates all of the affidavit requirements of Section 15-36-100 which apply to the expert affidavit. This includes not only Section 15-36-100(A) and (B). This means that subsection (C) is

also incorporated along with the remaining subsections regarding the expert affidavit. Section 15-79-125 clearly intends to incorporate all aspects of Section 15-36-100 which apply to the expert affidavit. The preceding portions of this paragraph are partially contradicted by the case of Ranucci v. Crain, 397 S.C. 168, 723 S.E. 2d 242 (Ct. App., 2012). Rannucci holds that only part of Section 15-36-100 is referred to by Section 15-79-125. The Ranucci case will be addressed further in a separate section below.

All of Section 15-36-100 relates to a civil action involving a Complaint. The heading for Section 15-36-100 clearly says, "Complaint in actions for damages alleging professional negligence.... Section 15-36-100(B) states in part, "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.... The legislature was aware that Section 15-36-100 applied explicitly to a complaint, but it chose to explicitly incorporate all of its aspects regarding the expert affidavit into Section 15-79-125. This includes the moderating portions of the statute as well as the definitional aspects of the statute. To hold otherwise is to contradict the plain and explicit language of Section 15-79-125 which incorporates the entirety of the Section 15-36-100's provisions for the expert affidavit.

Appellants respectfully submit that the correct interpretation of Statute 15-79-100 is that all portions of Section 15-36-100 pertaining to the expert affidavit are applicable. But even if they are not, the provisions of Section 15-36-100 should be applied by analogy as far as possible through the discretion of the Circuit Court. Clearly, the legislature expressed its intent that there be significant leeway for later

filing of an expert affidavit where there is concern about the statute of limitations.

The South Carolina Supreme Court has made it clear that Section 15-79-125 is a statute in derogation of the common law which limits a claimant's right to bring suit, and, therefore, it must not be extended beyond the clear intent of the legislature. Grier v. AMISUB, Inc., 397 S.C. 531, at 536, 725 S.E. 2d 693, (2012).

The South Carolina Supreme Court has recently dealt with another issue arising out of Section 15-79-125. That is the timing of mediation requirement of Section 15-79-125(C). In Ross v. Waccamaw Community Hospital, 404 S.C. 56, 744 S.E. 2d 547 (2013), the Supreme Court overturned a dismissal of a Notice of Intent to File Suit for not having a mediation conference within the time prescribed. The Supreme Court frowned upon construing "section 15-79-125 as a trap for plaintiffs with potentially meritorious claim." Ross, 744 S.E. at 550. The Supreme Court quoted with approval, "In the absence of express language, we are unwilling to read the harsh penalty of dismissal of the lawsuit into the mediation statute. Ross, 744 S.E. 2d at 551.

Finally, the Alternate Dispute Resolution Rules (hereinafter, ADR Rules) have application to Section 15-79-125, unless inconsistent with the terms of the statute.

b. APPLICATION OF LAW TO FACT OF THIS CASE

The legislature made it clear that where there is a concern about a close statute of limitations an expert affidavit may be filed 45 days later. The legislature also provided explicit authority for the court to "extend the time as the court

determines justice requires.” In other words, the legislature’s intention is clear that justice is the primary concern, not a strict time limit with no exceptions. Section 15-36-100(C)(1).

In this case the Appellants were in touch with an expert witness. An affidavit had been prepared. The expert witness signed the affidavit on the same day as the filing of the Notice of Intent to File Suit. But his office neglected to forward it to Counsel for the Appellants until the afternoon of August 16, despite attempts by Counsel to contact him on August 14 and 15. The expert affidavit was filed promptly on August 17, 2012.

There was not and could not have been any prejudice to any of the Respondents since they did not have to be served under the SCRCP until 120 days after August 15, 2012. None of the Defendants filed Motions to Dismiss until between 60+ and 130+ days after service of the Notice of Intent to File Suit. Memorandum In Opposition to Defendants Motions to Dismiss, Respondents Motions to Dismiss.

Both the Notice of Intent to File Suit and the expert affidavit were simultaneously on file with the Clerk of Court on August 17, 2012.

Certainly, there should have been no dismissal. The only conceivable sanction would be to rule that the Statute of Limitations was not tolled until August 17, 2012.

Even if the Court ruled that Section 15-36-100(C) was not directly incorporated into Section 15-79-125, it was an abuse of discretion to not allow that the two day delay was permissible under the circumstances. The Court should have

ruled that the legislature had made it explicit in Section 15-36-100(C) that justice is more important than an arbitrary time limit.

Since all of the provisions of Section 15-36-100 regarding the expert affidavit were incorporated explicitly into Section 15-79-125, the Court should have ruled that the two day delay was permitted under the circumstances with a statute of limitations arguably near. The Court should have ruled that the Appellants complied with the applicable statutes, both the letter and the intent.

Finally, the purpose of Section 15-79-125 is to provide for pre-suit mediation. The Court should have ruled there was no reason to deprive the Appellants of their right to pursue their claims. The expert affidavit was filed within a reasonable time under the circumstances, and there was no possibility that the two day delay in any way prejudiced the rights of the Respondents. The Court should not have dismissed the Notice of Intent because the two day delay in filing the expert affidavit did not in any way interfere with the purpose of Section 15-79-125, which is to provide for pre-suit mediation.

The Appellants were at all times available for mediation, and mediation in fact took place on June 10, 2013, without success. Mediation Results Form, R. p. 104.

Section 15-79-125 is a mediation statute, and our Supreme Court has made it clear that it believes that cases should be decided on the merits and not subject to the "harsh penalty" of dismissal in the absence of express language. See Ross, supra. The Circuit Court should have applied this case along with the language of

the statutes to deny the Motions to Dismiss.

2. WAS THE CASE OF RANUCCI v. CRAIN CORRECTLY DECIDED?

The Appellants respectfully submit that the Court of Appeals was in error in its decision in Ranucci v. Crain, *supra*. As the Ranucci opinion states, the intent of the legislature is the "cardinal rule" for statutory interpretation. Ranucci, *supra*, 723 S.E. 2d at 242, citing Bass v. Isochem, 365 S.C. 454, 617 S.E. 2d 369 (Ct. App. 2005). As Ranucci further states, the legislature's intent is to be determined from the plain language of the statute. Ranucci, citing Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The Ranucci opinion also states that the language must be read in a sense that harmonizes with the subject matter and accords with the general purpose. Ranucci, citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E. 2d 843, 846 (1992).

Section 15-79-100 explicitly states 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. The Court of Appeals in Ranucci ruled that only the provisions of Section 15-36-100 governing the preparation and content of the affidavit are invoked by Section 15-79-100. This is re-writing the statute contrary to the plain language of the statute and contrary to the obvious intent of the legislature. There is nothing in Section 15-79-125 to indicate that it is limited in the way the Ranucci opinion rules. The Ranucci opinion says that outside of Section 15-36-100 (A) and (B), that ties with a "complaint or other initial pleading" prevent those sections from being applied to Section 15-79-125. However, the heading for Section 15-36-100 says "Complaint in

actions for damages alleging professional negligence.... " Also, Section 15-36-100(B) states "the plaintiff must file as part of the complaint and affidavit..."

There was nothing to prevent the legislature from specifying that on Section 15-36-100 (A) and (B) was incorporated into Section 15-79-125. But the statute says that 15-36-100 is incorporated as to the expert affidavit.

It makes no sense that the legislature would provide generous provisions for extra time where a statute of limitations issue arose concerning the filing of a complaint, but to provide zero time for statute of limitations problems for a Notice of Intent to File Suit. Obviously, the real statute of limitations problem can only occur in the Notice of Intent to File Suit. The statute of limitations for the complaint is governed only by the various tolling provisions found within Section 15-79-100 regarding for example timing of the mediation and the 60 day period after the mediation.

In other words, the statute of limitations issue is primarily concerned with the filing of the Notice of Intent to File Suit. By the time the complaint is filed, the statute of limitations has already been tolled by the filing of the Notice of Intent to File Suit. The generous provisions of Section 15-36-100 for 45 days when a statute of limitations issue may be present, and even the explicit authorization of the Court to grant additional time as justice requires, are intended primarily for the Notice of Intent to File Suit.

It would be irrational and even malevolent for the legislature to exclude the moderating provisions of Section 15-36-100 (C) from Section 15-79-125. It is

precisely the Notice of Intent to File Suit which is on the cutting edge of tolling the statute of limitation, and Section 15-79-125 explicitly holds that it is the filing of the Notice of Intent to File Suit, not the filing of the expert witness, that tolls the statute of limitations.

It makes no sense for the legislature to provide generous time moderation for filing of the expert affidavit for the complaint and not for the Notice of Intent to File Suit. By the time the complaint is filed, the statute has already been tolled and the plaintiff already has an expert affidavit. Also, by the time the complaint is filed there has been an opportunity for limited discovery.

It is irrational to suggest that the legislature would intend all of this time protection for the filing of the expert affidavit with the complaint but no protection at the Notice of Intent stage. It is clear that the earlier stage is in need of more protection if there is a potential statute of limitations problem.

It is respectfully submitted that it is not necessary to ascribe irrationality to the legislature. It is also contrary to the explicit wording of the statute.

The Appellants respectfully submit that the Ranucci case is wrongly decided and that it should be overturned. Obviously, if the case is overturned, then the Circuit Court's dismissal of the Appellants' Notice of Intent to File Suit should be reversed.

3. DID THE CIRCUIT COURT ERR IN RULING THAT THE AFFIDAVIT OF DR. SKUDDER WAS INSUFFICIENT AS TO THE RESPONDENTS PALMETTO PRIMARY CARE PHYSICIANS, LLC AND TRIDENT EMERGENCY PHYSICIANS, LLC?

The Order of the Circuit Judge indicates that the Notice of Intent to File Suit

is dismissed as to Dr. Campbell and Dr. Wallen. It is assumed that the intent of the Judge was to dismiss the Notice of Intent to File Suit as to the Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC, since Dr. Campbell and Dr. Wallen were not served with the Notice of Intent to File Suit.

The Court ruled that Dr. Skudder's affidavit does not indicate actual professional knowledge and experience sufficient to form opinions as to the care of the above named respondents. The Court further ruled that Dr. Skudder lacked the proper qualification to render an expert opinion as to the above named Respondents.

Palmetto Primary Care Physicians, LLC, is a group of primary care physicians. Trident Emergency Physicians, LLC, is a group of ER physicians.

Dr. Skudder is a board certified vascular surgeon and he is board certified in surgical critical care. His affidavit indicates that he is a medical doctor licensed in three states and the District of Columbia. His affidavit indicates that he currently practices medicine and has practiced medicine for more than 5 years prior to the affidavit. The affidavit states that his practice has included the evaluation and treatment of patients with issues included occluded arteries, aneurysms, and related medical issues, which include issues similar to those of Johnny Eades in July and August of 2009.

His affidavit indicates that there were several indications of negligence. He indicated that there is evidence that the physicians seeing the patient failed to appreciate the nature of the patient's initial procedure. He indicated that there is

evidence of a failure to properly examine the patient or consult the records of the recent admission. More specifications of negligence are included in the affidavit.

Clearly, Dr. Skudder is a highly qualified medical doctor, with extensive experience treating the very issues concerning the Appellant Johnny Eades. He is qualified to render opinions concerning other medical doctors treating the problems at issue in this case. He is clearly qualified to form an opinion as to the necessity to consult the records of the recent admission, and he is clearly qualified to express an opinion that the patient was not properly examined. Affidavit of Dr. Skudder, R. p. 18.

The affidavit clearly specifies that Dr. Skudder has extensive experience and professional knowledge to determine such basic matters as whether the applicable records were consulted or a proper examination was performed.

It is respectfully submitted that the Circuit Court was in error in ruling that Dr. Skudder lacked the qualifications to render an opinion as to the care of the Appellant Johnny Eades.

CONCLUSION

It is respectfully submitted that the Appellants have complied with the applicable statutes regarding the filing of a Notice of Intent to File Suite and an expert affidavit. It is respectfully submitted that the Circuit Court was in error and abused its discretion in ruling that the Appellants claims are dismissed.

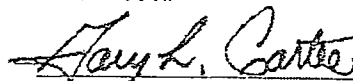
The coversheet of the Circuit Court's ruling indicated that the ruling does not end the claims of the Appellants. The meaning of the coversheet is not understood.

It is respectfully submitted that the Ranucci case was wrongly decided and should be overturned.

Also, it is respectfully submitted that the Dr. Skudder has ample qualifications to render an opinion as to the standard of care of the Respondents Palmetto Primary Care, LLC, and Trident Emergency Physicians, LLC. It is further respectfully submitted that it was error for the Circuit Court to rule that he lacked sufficient professional knowledge, experience, and proper qualifications to render opinions as to the standard of care of the said Respondents.

Finally, it is requested that this Honorable Court rule that the Appellants may move forward with this case, and that there will be no obstacle to the Appellants litigating this claim through the Summons and Complaint. The two day delay in filing the expert affidavit after the filing of the Notice of Intent to file suit has been explained and there was absolutely no possibility of any prejudice to the Respondents. The Appellants respectfully submit that they have complied with the requirements of the applicable statutes.

Respectfully, the Appellants request that the Order of the Circuit Court dismissing the Notice of Intent to File Suit be reversed.

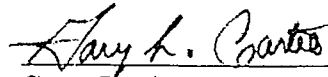


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RULE 211 (B) CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellants, hereby certifies that the Final Brief of Appellants complies with Rule 211 (b) of the SCACR.



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