RECEIVED
OCT 22 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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 Corp. of SC; 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 & Thoracic, PA; James M. Benner, MD; Mark J. Epler, MD; Palmetto Primary Care Physicians, LLC; and Trident Emergency Physicians, LLC, are.....Respondents.

FINAL RESPONDENTS' BRIEF OF PALMETTO PRIMARY CARE PHYSICIANS, LLC, AND TRIDENT EMERGENCY PHYSICIANS, LLC

Thomas C. Salane
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC

Stephen L. Brown
D. Jay Davis
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
(843) 577-4000

Attorneys for Respondent Trident Emergency Physicians, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

(A) Statutes

(B) Cases

(C) Rule

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court properly follow binding authority in its decision to dismiss the Appellants' Notice of Intent to File Suit, where the Appellants did not contemporaneously file a supporting affidavit with that Notice?

II. Did the trial court properly conclude the untimely affidavit failed to comply with the statutory requirements as to Palmetto Emergency Care Physicians and Trident Emergency Physicians, where the doctor who supplied that affidavit is not a specialist in the specific areas of medicine relating to those Respondents?

STATEMENT OF THE CASE

This appeal arises from the Appellants' attempt to pursue a medical malpractice claim against numerous defendants, including the Respondents. The Appellants filed a Notice of Intent to File Suit, but did not contemporaneously file a supporting expert affidavit. The defendants all moved to dismiss the Notice of Intent pursuant to this Court's decision in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012). Applying the holding in *Ranucci*, the trial court granted the motions to dismiss. The Appellants now challenge that decision in what is essentially a collateral attack on *Ranucci*.

The events purportedly giving rise to the Appellants' medical malpractice claims occurred in July and August of 2009. Some three years later, on August 15, 2012, the Appellants filed a Notice of Intent to File Suit (Medical Malpractice) in the Court of Common Pleas for Charleston County. [R. pp. 8-11.] The Appellants also filed their Answers to Standard Interrogatories as Exhibit A to the Notice of Intent. [R. pp. 13-15.] Those interrogatory answers did not name or specifically identify an expert witness, and

the Appellants did not file an expert affidavit with the Notice of Intent. [R. pp. 11-15.] On August 17, 2012, the Appellants filed Supplemental Answers to Standard Interrogatories, which listed Dr. Paul A. Skudder as an expert witness. [R. pp. 16-17.] The Appellants also filed an affidavit from Dr. Skudder on August 17, 2012. [R. pp. 18-19.]

The Respondents Palmetto Primary Care Physicians, LLC ("PPC") and Trident Emergency Physicians, LLC ("Trident") were two of the defendants listed in the Notice of Intent to File Suit. The Appellants served copies of the Notice of Intent and related materials on PPC and Trident on December 12, 2012, nearly four months after filing. PPC and Trident filed a motion to dismiss the Notice of Intent to File Suit on or about April 10, 2013.[1] [R. pp. 31-33.] The other defendants whom the Appellants had named and served with the Notice of Intent filed similar dismissal motions around the same time.

The Honorable Kristi Lea Harrington conducted a hearing on all the dismissal motions on July 18, 2013, and she granted the motions in an Order filed on August 16, 2013. [R. pp. 1-6.] Judge Harrington noted that the Appellants had not contemporaneously filed an expert affidavit with the Notice of Intent, as S.C. Code §15-79-125 requires, and therefore the Notice of Intent was subject to dismissal. Judge Harrington also rejected the Appellants' attempt to rely on a provision in S.C. Code §15-36-100 that allows for an additional 45 days to file an expert affidavit after the filing of a Summons and Complaint. [R. pp. 1-6.] Citing *Ranucci v. Crain*, Judge Harrington

[1] The motion to dismiss was also filed on behalf of Dr. Patricia Campbell and Dr. Matthew Wallen. Later, however, the Appellants' counsel represented to the trial court that the Appellants would not name Dr. Campbell or Dr. Wallen as defendants in any potential Summons and Complaint. [R. p. 1 at n.1 and n.2.]

concluded that the "45 days" provision from §15-36-100 did not apply to affidavits filed in support of Notices of Intent. [R. pp. 1-6.] This ruling by Judge Harrington applied to all the moving defendants.

In addition, Judge Harrington concluded the supporting affidavit did not satisfy the substantive requirements of §15-36-100 with regard to Dr. Patricia Campbell or Dr. Matthew Wallen.[2] Specifically, the judge found that the affidavit "[did] not indicate [the expert] has 'actual professional knowledge and experience' in the practice areas of Dr. Campbell and Dr. Wallen." [R. p. 6.] Further, the affidavit "fail[ed] to provide the proper qualifications, required by Section 15-36-100, that would permit Dr. Skudder to present an expert opinion about Dr. Campbell and Dr. Wallen." [R. p. 6.] These findings by Judge Harrington served as an additional basis for dismissal as to Drs. Campbell and Wallen and, through them, PPC and Trident.

The Appellants apparently received written notice of the Order in September 2013 and filed and served a Notice of Appeal on or around October 7, 2013. The Appellants later filed and served an Amended Notice of Appeal on October 16, 2013.

STANDARD OF REVIEW

The rulings on appeal are matters of statutory interpretation. An issue regarding statutory interpretation presents a legal question. *South Carolina Coastal Conservation League v. South Carolina DHEC*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors of law." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005).

---

[2] The alleged acts of malpractice by those doctors were the basis for the vicarious liability claims asserted against PPC and Trident.

ARGUMENT

I. The trial court properly dismissed the Notice of Intent due to the Appellants' failure to file a supporting expert affidavit contemporaneously with the Notice.

The basic and dispositive fact in this appeal is uncontested: The Appellants did not file a supporting expert affidavit when they filed their Notice of Intent. The filing of the affidavit did not occur until two days later. This fact was the basis for the trial court's decision to dismiss the Notice of Intent, and that decision was correct under the current and controlling law. Therefore, this Court should affirm the result below.

The Appellants appear to raise three arguments against the trial court's decision. First, the Appellants claim their expert affidavit was timely because §15-79-125 incorporated the "45-day extension" provision of S.C. Code §15-36-100(C). Second, the Appellants contend §15-79-125 did not require them to file the expert affidavit at the same time as the Notice of Intent. Third, the Appellants argue the circuit court should have simply excused the late filing. All of those arguments must fail, as these Respondents will demonstrate below.

(A) Section 15-79-125 did not incorporate the part of §15-36-100 upon which the Appellants attempt to rely.

The Appellants claim that §15-79-125(A) incorporates §15-36-100 in its entirety, including the "45-day extension" of subsection (C). This Court has previously considered that exact position and rejected it. *See Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012). *Ranucci* is directly on-point, and it constitutes binding authority that supports the trial court's decision in this case.

Before turning to the Court's holding in *Ranucci*, it is helpful to consider the language of the two statutory provisions involved in both that case and the one at bar. The clearly applicable statute is S.C. Code §15-79-125(A), which states:

> 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 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. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served in accordance with the rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.

S.C. Code Ann. §15-79-125(A) (emphasis added). As the underlined language plainly states, the section requires a plaintiff to file a Notice of Intent along with a supporting expert affidavit as a prerequisite to filing a medical malpractice action. It logically follows that failure to comply with §15-79-125(A) prevents the commencement of any such lawsuit.

The other statute, referenced in the passage quoted above, is S.C. Code §15-36-100. As relevant to the issues in this appeal, that section states:

> (B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) ...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 and the factual basis for each

> claim based on the available evidence at the time of the filing of the affidavit.
>
> (C)(1) 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. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. ...

S.C. Code Ann. §15-36-100. This statute requires that plaintiffs in all professional malpractice cases (not just medical malpractice cases) file a supporting expert affidavit as part of their complaints, subject to a narrow exception. More importantly for present purposes, §15-36-100 also establishes the content requirements for those expert affidavits.

The interplay of those two statutes was the central issue in *Ranucci v. Crain*, *supra*. There, the plaintiff filed a Notice of Intent to File Suit, which included Responses to Standard Interrogatories that identified an expert witness by name. However, the plaintiff did not file an affidavit from that witness until 45 days after the filing of the Notice of Intent. The defendant physician moved to dismiss the Notice of Intent on that basis, and the circuit court granted the motion. The judge concluded §15-79-125 required the Notice of Intent and supporting affidavit to be filed at the same time, and the plaintiff had failed to comply with the statute. The plaintiff appealed, claiming the statute's reference to §15-36-100 incorporated that section in its entirety, including the "45 days" provision of §15-36-100(C)(1).

After considering the portions of the two statutes quoted above, this Court rejected the plaintiff's argument. The Court concluded that the two statutes operated

independently of one another, with each governing a different stage of a medical malpractice action, and that the parts of §15-36-100 referenced by §15-79-125 did not include the "45 days" provision. Explaining its reasoning, the Court stated:

> This appeal turns upon the proper application of two statutes that treat related situations and reference one another. Here, section 15-36-100 establishes the procedure for commencing suits for professional negligence against professionals in twenty-two different areas, including medical doctors. ... By contrast, section 15-79-125 deals specifically with prelitigation requirements for medical malpractice actions. ... Despite the apparent confusion generated by their internal cross-references, these statutes do not conflict. Each statute governs a distinct time period during the litigation process, and those time periods are consecutive. Section 15-79-125 controls the portion of the process that commences with the filing of a Notice of Intent to File Suit and ends with prelitigation mediation. If the parties are unable to resolve their dispute through mediation, section 15-36-100 guides them through the preparation of initial pleadings and provides mechanisms for challenging and curing defects in the required affidavit.
>
> Section 15-79-125(A) mandates that, prior to filing suit, a 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." This provision imposes two requirements on the affidavit, that it be filed at the same time as the Notice of Intent to File Suit and that it comply with the affidavit requirements of section 15-36-100.
>
> The narrow question in this matter is precisely which requirements of section 15-36-100 constitute the affidavit requirements referenced by section 15-79-125(A). ... [S]ection 15-36-100 institutes, on the one hand, substantive requirements for the authorship and content of affidavits by expert witnesses and, on the other, procedural requirements relating to such affidavits when filed with a complaint.
>
> We find section 15-79-125(a) invokes only the provisions of section 15-36-100 governing the preparation and content of the affidavit. In particular, section 15-79-125(A) implicates the scheme for qualifying an expert witness as

> an affiant and the instruction that the affidavit "must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." ... The plain language of section 15-36-100, which ties the filing of affidavits under that statute to a complaint or other initial pleading, prevents the remaining provisions from applying to affidavits filed pursuant to section 15-79-125. Provisions concerning affidavits filed pursuant to subsection B or the contemporaneous filing provision of subsection B do not apply to affidavits filed under the authority of section 15-79-125. ...
>
> ... [T]he legislature clearly intended the two statutes to operate independently of one another and in distinct time frames, with the specific exception that they share the criteria for preparing affidavits of expert witnesses.

397 S.C. at 175-177, 723 S.E.2d at 246-248 (emphasis added).

The Court's reasoning in *Ranucci* applies with equal force to the present case. Pursuant to §15-79-125, the Appellants were required to file an expert affidavit at the same time they filed their Notice of Intent. The supporting affidavit had to comply with the form and content requirements of §15-36-100, but the "45 days" provision of that statute did not apply. Thus, the Appellants could not rely on §15-36-100 to excuse the late filing of the expert affidavit, and dismissal of the Notice of Intent was the only possible result under *Ranucci*.

The Appellants tacitly concede *Ranucci* is controlling authority that the trial court was bound to follow. The Appellants make no attempt to distinguish this case from *Ranucci* in their Appellants' Brief, and they do not provide any reason why the analysis of *Ranucci* is inapplicable. Instead, the Appellants argue this Court erred in deciding *Ranucci* the way it did, and they devote a separate section of their brief to that assertion.

The Appellants' reliance on that position is misplaced, however, and it does not establish any basis for reversal.

As a threshold matter, these Respondents assert that this Court correctly decided *Ranucci*. In two recent decisions, the Supreme Court has construed the relevant statutes in a manner consistent with the reasoning of *Ranucci*. *See Ross v. Waccamaw Comm. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013), *Grier v. AMISUB of S. Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012). Although it did not address the specific issue before this Court in *Ranucci*, the Supreme Court's analysis in *Grier* is particularly instructive. In *Grier*, the Supreme Court concluded both statutes (*i.e.* §15-79-125 and §15-36-100) are unambiguous. 397 S.C. at 538, 725 S.E.2d at 697. The Court further concluded that §15-79-125 "requires the contemporaneous filing of both the notice and the affidavit" and that §15-79-125 adopts the form and content requirements of §15-36-100 for the affidavit. *Id.* at 538-539, 725 S.E.2d at 696-697. The Court also refused to "judicially engraft" extra requirements or provisions that were not included in those statutes "under the guise of judicial interpretation." *Id.* at 540, 725 S.E.2d at 698.

This Court's decision in *Ranucci* is in accord with all of those conclusions. The Court followed the established principles of statutory interpretation and harmonized §15-79-125 and §15-36-100 in way that honors the legislative language and intent. Consequently, there is no reason for this Court to change its reasoning on the relationship between the two statutes. *Ranucci* was correctly decided, and it should continue to stand as the applicable and controlling law.

Moreover, the Appellants' argument that this Court decided *Ranucci* in error is not preserved for appellate review, because it was not ruled upon by the trial court.

While the Order followed *Ranucci* (properly, these Respondents submit), it did not at all question or otherwise address the correctness of *Ranucci*. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (explaining that, where the trial court does not rule upon an issue, a ruling must be sought via motion under Rule 59(e), SCRCP, to preserve the issue for appellate review).

Yet, even if there were some reason to question the Court's decision in *Ranucci*, and this argument was technically preserved for review, this appeal still would not be the proper forum for that challenge. When the trial court ruled on the dismissal motions, *Ranucci* was the controlling law, and it maintains that status as of the date of this brief.[3] Thus, this Court should continue to follow and apply *Ranucci*. Any change in *Ranucci*'s status should only come as the result of a decision in that case by the Supreme Court or amendments to the relevant statutes by the General Assembly.[4] Unless and until either of those things occur, however, *Ranucci* is binding authority that the Court should apply to this case.

Ranucci is squarely on-point with the case at bar, and it fully supports the trial court's decision to dismiss the Notice of Intent. Although the Appellants disagree with the result in *Ranucci*, they have neither claimed nor demonstrated that *Ranucci* is distinguishable from the present case. The Appellants are seemingly asking this Court to

---

[3] These Respondents are informed that the Supreme Court issued a writ of certiorari to review this Court's decision in *Ranucci* and that oral arguments in the Supreme Court are currently scheduled for May 20, 2014.

[4] It is telling that this Court issued the *Ranucci* decision more than two years ago, and yet the legislature has not amended §15-79-125 to include a "safe harbor" provision for expert affidavits filed after the Notice of Intent.

act as if *Ranucci* does not exist and reverse course on this issue. The Court should decline that invitation and affirm the result below based on the reasoning set forth in *Ranucci*.

(B) Section 15-79-125 requires the Notice of Intent and expert affidavit to be filed at the same time.

The Appellants contend the governing statute does not require the Notice of Intent and the supporting affidavit to be filed together. Essentially, the Appellants claim the word "contemporaneously" as used in the statute does not mean the Notice of Intent and affidavit have to be filed at precisely the same time. This argument fails, however, because it rests upon a tortured and erroneous reading of a single word from the statute.[5]

The Appellants argue the word "contemporaneously" means something different than "simultaneously." This assertion attempts to draw too fine a distinction between two words that are synonymous in both definition and common usage. It is well settled that in statutory interpretation, words must be given their plain and ordinary meaning. *Centex Int'l v. South Carolina Dept. of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). Here, there is no credible basis for the Appellants' suggestion that the plain and ordinary meaning of "contemporaneously" differs from that of "simultaneously." Both words are commonly used and understood to mean "at the same time." In addition, a reading of the entire statute makes it clear the General Assembly intended to require that plaintiffs file both the notice of intent and the affidavit together. Thus, the Court must reject any attempt to create a different meaning based on a single word. *See Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 129, 750 S.E.2d 61, 63 (2013) ("the Court may not, in

[5] In addition, this argument is not preserved for appellate review, because this question of semantics was not actually ruled upon by the trial court *Herron*, 395 S.C. at 465, 719 S.E.2d at 642; *see Elam*, 361 S.C. at 24, 602 S.E.2d at 780.

order to give effect to particular words, virtually destroy the meaning of the entire context").

The Appellants' argument also overlooks the fact that the legislature uses the word "contemporaneous" to mean "at the same time" in a related statute. As previously discussed, subsection (B) of §15-36-100 requires a plaintiff in a professional negligence action to file an expert affidavit "as part of the complaint." This language cannot be construed as anything other than a rule that the affidavit and the complaint be filed together.

The significance of that requirement to this discussion becomes apparent when one considers the language of subsection (C) of §15-36-100. That subsection begins with the following clause: "The contemporaneous filing requirement of subsection (B) ... ." S.C. Code Ann. §15-36-100(C)(1) (emphasis added). As noted above, the "contemporaneous filing requirement of subsection (B)" is the rule that a plaintiff must file the complaint and supporting affidavit at the same time. Thus, in §15-36-100, the General Assembly used the word "contemporaneous" as a synonym for "simultaneous" or "together." Having given "contemporaneous" that meaning in one statute, the legislature could not have intended to give it a different meaning in a related statute. *See Sparks*, 406 S.C. at 129, 750 S.E.2d at 63 ("within a single statutory scheme, the same word should be given consistent meaning").

There can be no doubt that §15-79-125 creates a "contemporaneous filing standard," just like §15-36-100(B). This phrase has a plain and ordinary meaning, and that is precisely how the legislature used it. A potential medical malpractice plaintiff must file a Notice of Intent to File Suit and a supporting expert affidavit at the same time.

No other reasonable interpretation of the statutory language is possible. Therefore, the Appellants' argument on this issue must fail, and the Court should affirm the result below.

(C) The trial court did not have the discretion to excuse the late filing of the expert affidavit.

The Appellants also suggest the trial court erred by not exercising its "discretion" to allow the late filing of the expert affidavit. Essentially, the Appellants claim the trial court should have excused the two-day delay in filing based on notions of "fairness" and the absence of any prejudice to the defendants. While this argument might have some emotional appeal, it fails for one basic, but crucial reason: The General Assembly did not grant trial judges any discretion to excuse late filings of supporting affidavits for the Notice of Intent or require a showing of prejudice by the defendants.

At the outset, it is important to note that these arguments do not appear to be preserved for appellate review. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron*, 395 S.C. at 465, 719 S.E.2d at 642. Here, even if the Appellants made these arguments in the lower court, the trial judge never ruled on them. The Order contains a discussion of *Ranucci v. Crain*, and it bases its primary conclusion on that precedent. However, the Order does not mention any arguments about the judge's discretion or the absence of prejudice, and it certainly never rules on those issues. Given the absence of such rulings in the Order, the Appellants were required to file a timely Rule 59(e) motion to preserve those arguments for appellate review. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780. The Appellants never made a Rule 59(e) motion, which means the arguments regarding judicial discretion and absence of prejudice are not properly before the Court.

Yet, even if these arguments were preserved for appellate review, they would not provide any basis for reversal. As discussed above, the legislature plainly intended to require medical malpractice plaintiffs to file their Notice of Intent to File Suit and their supporting expert affidavit at the same time. Section 15-79-125 does not provide any exceptions to that contemporaneous filing requirement. Nor does it set forth circumstances under which the courts can allow a later filing of the affidavit. The absence of that type of provision indicates the General Assembly did not intend for the courts to excuse untimely filings of expert affidavits for purposes of compliance with §15-79-125.[6]

In light of the General Assembly's decision not to include "discretionary exceptions" to the contemporaneous filing requirement of §15-79-125, this Court cannot grant the Appellants the relief they seek. As the Supreme Court has recently reiterated, courts should not "judicially engraft" extra requirements or provisions into a statute "under the guise of judicial interpretation." *Grier v. AMISUB of S. Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012). Here, §15-79-125 features no provision giving courts discretion to extend the time for filing the expert affidavit. The statute contains only a bright-line rule requiring the Notice of Intent and expert affidavit to be filed at the same time. To insert an element of judicial discretion in the application of that rule would be to rewrite the statute. This is something the Court should not do. *See*

---

[6] Clearly the legislature knew how to make allowances for judicial discretion when it chose to do so. Subsection (C) of §15-79-125, which deals with the pre-lawsuit mediation requirement, states in relevant part: "the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based on a finding of good cause." S.C. Code Ann. §15-79-125(C). No such language appears in subsection (A), which establishes the contemporaneous filing requirement for the notice of intent and expert affidavit.

Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 386 S.C. 137, 144, 628 S.E.2d 38, 42 (2006) (courts cannot rewrite statutes, and any changes to those statutes must come from the legislature).

The same reasoning applies to the Appellants' argument that the late filing of the expert affidavit did not result in any prejudice to the defendants. It is irrelevant whether or not any prejudice existed because §15-79-125 does not require a showing of prejudice. Section 15-79-125 obligates a medical malpractice plaintiff to file the Notice of Intent and expert affidavit at the same time. This is a clear-cut rule that a plaintiff either satisfies or does not. If the plaintiff does not file the affidavit with the Notice of Intent, the plaintiff fails to comply with the statute. What effect, if any, the late filing has on the named defendants is of no consequence. The only proper inquiry is whether the plaintiff complied with the contemporaneous filing requirement of §15-79-125. Here, the Appellants plainly did not. The trial court was not compelled – or even permitted – to examine the issue any further than that. As soon as the trial judge determined the Appellants filed their expert affidavit after the Notice of Intent, dismissal of that Notice of Intent was warranted.

Any reliance the Appellants attempt to place on *Ross v. Waccamaw Comm. Hosp.*[7] is misplaced. In *Ross*, the issue was whether the trial court erred in dismissing the plaintiff's Notice of Intent for failing to complete pre-lawsuit mediation within the time permitted by §15-79-125(C). The defendant's theory, which the trial court accepted, was that the plaintiff's failure to comply with the mediation requirement of §15-79-125(C) divested the court of subject matter jurisdiction. This assertion served as the basis for the

[7] 404 S.C. 56, 744 S.E.2d 547 (2013)

trial court's decision to dismiss the Notice of Intent. The Supreme Court reversed that decision, concluding the trial court retained jurisdiction and had "discretion to permit the mediation process to continue beyond the 120-day time period and [could] consider principles of estoppel and waiver to excuse noncompliance." 404 S.C. at 64, 744 S.E.2d at 551.

The Appellants appear to rely on *Ross* for the proposition that noncompliance with the requirements of §15-79-125 should never result in dismissal, but that is not what the Supreme Court held. The Court addressed only one specific part of the statute, and its conclusion applied to that subsection alone. Indeed, if *Ross* were as sweeping in its scope as the Appellants want it to be, the Supreme Court would have had to overrule this Court's decision in *Ranucci*, which upheld a dismissal based on failure to comply with a different part of the statute. Thus, the absence of any discussion or criticism of *Ranucci* in the *Ross* opinion is telling.

Ross is also distinguishable from the present case for several other reasons. First, *Ross* addressed a subsection of §15-79-125 that specifically grants discretion to the courts for its application. In relevant part, subsection (C) states:

> Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.

S.C. Code Ann. §15-79-125(C) (emphasis added). This language expresses a clear legislative intent that the courts have some leeway in excusing a party's failure to complete the mediation within the 120-day timeframe. Consequently, the Supreme Court

in *Ross* did not have to create or "engraft" a grant of discretion to the lower court; it was already there.

The present case, on the other hand, deals with a subsection that does not include any element of discretion. Subsection (A) states the following with regard to the filing requirement: "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 ...." S.C. Code Ann. §15-79-125(A) (emphasis added). The phrase "shall contemporaneously file" creates a bright-line rule, and the remainder of subsection (A) does nothing to soften or alter it. There is no language allowing courts to excuse untimely affidavits, either for "good cause" or for any other reason. The absence of any such language is significant, especially when compared with its inclusion in subsection (C).

A second distinguishing factor lies in one of the Supreme Court's motivating concerns in *Ross*. The Court noted that automatic dismissals for failure to complete mediation within 120 days would be "ripe for mischief, as defendants could easily thwart timely completion of the mediation conference, and then seek dismissal of the Notice of Intent and reinstatement of the statute of limitations." 404 S.C. at 63, 744 S.E.2d at 550-551. In other words, the Court acknowledged that mediation requires the participation of the defendants, and it is not something the plaintiff can completely control on his or her own. This fact clearly influenced the Court's decision.

The filing of the Notice of Intent and supporting affidavit are different, however, because they are not things the defendants can "easily thwart." The plaintiff controls the preparation and filing of those materials, and there is nothing the defendants can do to

stop or delay that process. Indeed, in most situations, the defendants would not even know that the process was taking place. It is completely within the plaintiff's power to file the Notice of Intent and supporting affidavit together as the statute requires.[8] In fact, this is likely why the General Assembly included a "discretion provision" in subsection (C), but not subsection (A). Such a provision was unnecessary for protecting plaintiffs' interests with regard to the initial filing requirements. Plaintiffs are able to protect their own interests at that stage, and the General Assembly expected them to do just that.

A third difference between *Ross* and the present case arises from *Ross*' focus on the argument that failing to complete mediation on time caused courts to lose subject matter jurisdiction. Subsection (C) presupposes the timely, contemporaneous filing of a Notice of Intent and a supporting affidavit, which gives the court jurisdiction over the matter. The existence of that jurisdiction, coupled with the "discretion provision" in subsection (C), led the Supreme Court to conclude a trial court does not lose jurisdiction simply because the mediation does not occur within 120 days.

Noncompliance with subsection (A) is fundamentally different, however, because it deals with commencing the action in the first place. In order to comply with that subsection, a plaintiff must contemporaneously file a Notice of Intent and a supporting affidavit. The failure to do that is a fatal defect that prevents the pre-lawsuit procedures from ever truly beginning. In other words, the contemporaneous filing requirement is a threshold rule. It is not a requirement that takes hold only after the pre-lawsuit

---

[8] This is true even in situations when an expert does not deliver the affidavit to the plaintiff or his attorney at the agreed-upon time. The plaintiff has three years from the time a potential cause of action arises to obtain the necessary materials for filing the Notice of Intent and supporting affidavit. The plaintiff also controls the selection of a suitable and reliable expert. Thus, obtaining an affidavit in a timely manner is not "out of the plaintiff's control" for purposes of complying with the statute.

procedures have properly commenced. Thus, much of the Supreme Court's analysis in *Ross* is not applicable here.

As noted above, the Appellants did not properly preserve their arguments based on "judicial discretion" and "lack of prejudice." Regardless of whether or not the Appellants asserted those arguments below, it is clear the trial court never ruled on them. Yet, even if the arguments were preserved, they would not aid the Appellants' cause. Section 15-79-125(A) does not provide or allow for any discretion to excuse the untimely filing of the expert affidavit, and it does not require any showing of prejudice by the named defendants. Similar types of provisions appear in other parts of §15-79-125, but not in subsection (A). Therefore, the Appellants' arguments on those issues do not establish any basis for reversal.

II. The trial court properly dismissed the Notice of Intent based on a finding that the expert affidavit did not come from a doctor who specializes in the areas of medicine practiced by these Respondents.

As an additional ground for dismissal as to Dr. Patricia Campbell and Dr. Matthew Wallen, the trial court concluded the expert affidavit did not satisfy the substantive requirements of S.C. Code §15-36-100. Specifically, the trial court found the affidavit did not indicate that the expert (Dr. Paul Skudder) has "'actual professional knowledge and experience" in the practice areas of Dr. Campbell and Dr. Wallen." [R. p. 6.] This decision was correct and should be affirmed.

At the outset, it is debatable at best whether the Appellants have actually appealed the trial court's ruling on this issue. Neither the Amended Notice of Appeal nor the caption of the Appellants' Brief listed Dr. Campbell or Dr. Wallen as respondents. The Appellants' Brief suggests this omission was due to the fact that the Appellants never

served Drs. Campbell and Wallen with the Notice of Intent. In other words, the Appellants appear to claim those doctors were never actually parties and, therefore, could not really have moved to dismiss the Notice of Intent.

There are two problems with the Appellants' argument, however. First, Drs. Campbell and Waller clearly were parties at the outset of this action. They were both listed as defendants in the caption of the Notice of Intent, and they both filed a motion to dismiss that Notice of Intent. [R. pp. 31-33.] Second, the trial court expressly and specifically granted the motion as to Drs. Campbell and Wallen. The Appellants did not file a Rule 59(e) motion seeking to correct or challenge that decision. As a result, the trial court's ruling in favor of Drs. Campbell and Wallen remains in place. The Appellants' failure to appeal the ruling as to those defendants prevents the Appellants from appealing the dismissal in favor of their employers. *Cf. Cherry v. Singer Sewing Mach. Co.*, 165 S.C. 451, 455, 164 S.E. 126, 128 (1932) ("In an action against master and servant jointly, based solely upon the negligence of the servant, a verdict against the master alone will not be allowed to stand."); *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001) (release or discharge of a servant in a tort action operates as a release or discharge of the master as a matter of law), *rev'd on other grounds*, 356 S.C. 238, 588 S.E.2d 588 (2003).[9]

Moreover, a review of the Appellants' argument on this issue reveals no citation to legal authority. Respectfully, these Respondents submit that the Appellants' argument here is conclusory, and may rightfully be deemed abandoned. *R & G Constr., Inc. v.*

---

[9] Dr. Campbell was an agent of the Respondent Palmetto Primary Care Physicians, LLC, and Dr. Wallen was an agent of the Respondent Trident Emergency Physicians, LLC.

Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); *see also McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error).

Even if the Appellants have actually appealed the trial court's ruling on this issue, and it has not been abandoned, their arguments fail. The Appellants focus on Dr. Skudder's qualifications and experience in dealing with conditions similar to those suffered by Johnny Eades. Those arguments are irrelevant, however, because the real issue is whether the affidavit demonstrated Dr. Skudder had "actual professional knowledge and experience" in the specific practice areas of Dr. Campbell and Dr. Wallen. The trial court concluded the affidavit did not satisfy those standards, and that (if anything) is the only relevant issue for this portion of the appeal.

At all times relating to this case, Dr. Campbell practiced in the area of primary care, and Dr. Wallen practiced in the area of emergency care. As the trial court noted in its Order, Dr. Skudder's affidavit does not indicate he has professional knowledge or experience in either of those areas of practice. The affidavit contains the following statements addressing Dr. Skudder's knowledge and experience:

> 1. I, Paul Skudder, am a medical doctor licensed, without restriction and in good standing, in the states of Vermont, Massachusetts, and New York, and in the District of Columbia. I currently practice medicine, and I have been actively engaged in the practice of medicine for more than the past five years, and this practice has included the evaluation and treatment of patients with issues including occluded arteries, aneurysms, and related medical issues, which include issues similar to those of Johnny Eades in July and August, 2009. I have the following board

> certifications: 1986, American Board of Surgery (Recertified 2006); and ABS Surgical Critical Care (Recertified 2001).
>
> 2. I am familiar with the applicable medical standards for the evaluation and treatment of patients under the same or similar circumstances as Johnny Eades, including particularly, but not restricted to, occlusion of the left iliac artery, aneurysm of the same artery, and related issues. I am aware of the degree of care and skill ordinarily exercised by members of the medical profession under the same or similar circumstances as it relates to the care and treatment of patients such as Johnny Eades in July and August of 2009. This knowledge is based upon my education, training, and experience.
>
> * * *
>
> 6. I am a board certified Vascular Surgeon in active clinical practice from 1984 to the present, devoting over 90% of my time to direct patient care.

[R. pp. 18-19.] The rest of the affidavit focuses on allegations of breaches of the applicable standard of care, which are not pertinent to the present issue.

The quoted passages from the affidavit make it clear that Dr. Skudder is a surgeon with an apparent specialty in vascular surgery. Dr. Skudder never claims that he has training or experience relating to primary care or emergency care. Nor does he state that he has knowledge of the standards of care for those specific areas of medicine. Rather, he simply identifies himself as a board certified surgeon who has treated patients with conditions like those Johnny Eades experienced. He then proceeds to describe why he believes the treatment Johnny Eades received violated the standard of care. While that

approach might arguably satisfy the statute as to the defendants who performed surgery on Eades, it fails with regard to Drs. Campbell and Wallen (and their employers).[10]

The controlling statute for this issue is S.C. Code §15-36-100. Subsection (B) of that statute requires a supporting "affidavit of an expert witness which must specify at least one negligent act or omission ...." S.C. Code Ann. §15-36-100(B). Subsection (A) defines an "expert witness" as:

> ... an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:
>
> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written or oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area or specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

[10] Once again, the issue is not whether Dr. Skudder has treated patients like Eades. The issue is whether Dr. Skudder has "actual professional knowledge and experience" in the specific practice areas of the defendants against whom he offers opinions. Dr. Skudder might have sufficient credentials to say how a vascular surgeon should have treated Eades, but he is not qualified to offer similar opinions as to what primary care or emergency care providers should have done.

> (iv) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion ...

S.C. Code Ann. §15-36-100(A) (emphasis added).

As the emphasized language demonstrates, the statute requires an "expert witness" to have experience, training and knowledge (*i.e.* expertise) in the specific "area of practice or specialty" of the defendant professional. It is not sufficient that the person giving the affidavit be a member of the same general profession as the defendant. Rather, the affiant must be qualified to give opinions as to that defendant's particular practice area. Had the legislature intended otherwise, it would not have included so many references to "area of practice" and "specialty" in the definition of "expert witness." Clearly the legislature meant to require opinions from specialists in like areas of practice. General statements from "one size fits all" affiants are not sufficient.

Again, none of this is to say that Dr. Skudder is not qualified (under the statute or otherwise) to give an expert opinion as to practitioners within his own area of expertise (*i.e.* vascular surgery). These Respondents take no position on that question because it is not relevant to them. For present purposes, it matters only that Dr. Skudder is not qualified to give opinions regarding primary care or emergency care. As far as his affidavit reveals, he has no training, experience or specialized knowledge in those areas of practice. Therefore, Dr. Skudder is not an "expert witness" as to Drs. Campbell and Waller (or their employers) for purposes of compliance with the affidavit requirements of §15-36-100. The trial court's conclusion to that effect was correct, and this Court should affirm.

In addition, the trial court's conclusion should apply with equal force to Palmetto Primary Care Physicians, LLC ("PPC") and Trident Emergency Physicians, LLC ("Trident"). Drs. Campbell and Wallen are the agents through whom PPC and Trident, respectively, acted with regard to Johnny Eades. It logically follows that if the Appellants' expert affidavit was insufficient as to those doctors, it was also insufficient as to their employers. Indeed, the Appellants acknowledge this connection when they state in their Appellants' Brief:

> 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.

[Appellant's Brief, pp. 13-14.] Thus, even though Drs. Campbell and Wallen are not listed as respondents in this appeal, the Court should affirm on this issue in favor of PPC and Trident. Indeed, this would be true even if a connection did not exist between Drs. Campbell and Wallen and PPC and Trident because the record demonstrates the insufficiency of the affidavit as to these Respondents. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")

CONCLUSION

The Appellants did not file a supporting expert affidavit with their Notice of Intent to File Suit, which means they failed to comply with the requirements of S.C. Code §15-79-125. As a result, the trial court correctly dismissed the Notice of Intent under the controlling and applicable law. In addition, the Appellants' untimely expert affidavit did

not satisfy the requirements of S.C. Code §15-36-100 as to these Respondents because the affiant does not have the requisite "actual professional knowledge and experience" in the practice areas of these Respondents' agents, Dr. Campbell and Dr. Wallen. Therefore, this Court should affirm the dismissal of the Appellants' Notice of Intent in favor of the Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC.[11]

These Respondents also incorporate by reference and rely upon any additional arguments for affirmance by the other Respondents to the extent those arguments are not inconsistent with the ones asserted in this brief.

Respectfully submitted,

R. Hawthorne Barrett

Thomas C. Salane
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for the Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC

Stephen L. Brown
D. Jay Davis
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
(843) 577-4000

[11] To any extent Dr. Patricia Campbell and/or Dr. Matthew Wallen could be construed as respondents in this action (although they are not listed as such in the Notice of Appeal or the appellate caption), this Court should also affirm the rulings below in those doctors' favor.

Attorneys for Respondent Trident
Emergency Physicians, LLC

RULE 211(b), SCACR, CERTIFICATION

The undersigned, an attorney in this matter for the Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC, certifies that this Final Respondents' Brief complies with the provisions of Rule 211(b), SCACR.

R. Hawthorne Barrett

Thomas C. Salane
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for the Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC