THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Kristi Lea Harrington, Circuit Court Judge

Case No. 2012-CP-10-5366 (NOI)
Case No. 2013-CP-10-4475

Johnny Eades and Barbara Eades, ... Appellants,

v.

Palmetto Cardiovascular and Thoracic, PA; James M. Benner, M.D.;
Mark J. Epler, M.D.; 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, M.D.;
Patricia Campbell, M.D.; Christine E. McNeal, M.D.;
Matthew Wallen, M.D.; Charleston Radiologists, PA;
Joseph M. Mullane, M.D.; Tri-County Radiology Associates, PA;
andTroy Marlon, M.D. ..... Defendants,

Of whom, Palmetto Cardiovascular and Thoracic, PA; James
M. Benner, M.D.; Mark J. Epler, M.D.; Palmetto Primary Care
Physicians, LLC; and Trident Emergency Physicians, LLC are, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The Appellant Johnny Eades and Barbara Eades attempted to pursue a medical malpractice action with the filing of a Notice of Intent to File Suit on August 15, 2012. The Appellants, however, did not file an affidavit of an expert witness contemporaneously with that Notice of Intent. (R. 8-11). Rather, an expert affidavit of Paul A. Skudder, M.D. was filed two days later on August 17, 2012. (R. 16-19).

The named defendants included the Respondents Mark J. Epler, M.D., James M. Benner, M.D., and Palmetto Cardiovascular and Thoracic, P.A. These Respondents filed motions to dismiss the Notice of Intent on the basis that the Appellants failed to contemporaneously file an expert affidavit with the Notice of Intent which is in violation of Section 15-79-125(A). (R. 27-30). The other Respondents filed similar motions to dismiss.

Those motions to dismiss were heard by Circuit Court Judge Krista Lea Harrington on July 18, 2013, and the motions were taken under advisement. By order filed August 16, 2013, Judge Harrington granted the motions to dismiss. Citing this Court's decision in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), Judge Harrington concluded that "the failure to file the expert affidavit at the same time as the Notice of Intent to File Suit requires dismissal of this matter because

the affidavit was not filed contemporaneously with the Notice of Intent to File Suit." (R. 4).

The Appellants did not file a Rule 59(e) motion. Instead, the Appellants thereafter filed the present appeal to this Court.

ARGUMENTS

I. The Appellants' issues on appeal are not concise nor direct and fail to apprise this Court and the litigants of any specific error committed by the lower court.

As their principal issue on appeal directed at the Respondents, the Appellants simply state as follows: "Did the Circuit Court err in dismissing the Appellants' Notice of Intent to File Suit?" They also offer an additional issue that asks simply, "Was the case of *Ranucci v. Crain* correctly decided?" Rule 208(b)(1)(B), SCACR, requires the statement of issues on appeal to be "concise and direct." In *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010), the Supreme Court explained that "broad general statements of issues may be disregarded by this Court." 692 S.E.2d at 903. The Supreme Court reaffirmed the well-established rule of appellate law that "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *Id.* Likewise, the Court reiterated that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.*

The statement of the issues on appeal proffered by the Appellants here are precisely the type of general statement that the appellate courts typically disregard and refuse to address. The Appellants have merely stated that the lower court erred

in dismissing the Notice of Intent without providing any basis for the error.[1] As set out below, the Respondents have done their best to address what appears to be argued in the Appellants' opening brief. Yet, given the non-specific and clearly improper statement of issues on appeal, the Court is urged to dismiss the appeal on the authority of *Jones v. Lott* and numerous other cases, or at a minimum, the Court should strictly construe the issues as briefed.

II. The Circuit Court was correct in dismissing the Appellants' Notice of Intent to File Suit because of their failure to contemporaneously file an expert affidavit with their Notice of Intent to File Suit as required by statute.

In 2005, as part of comprehensive tort reform, the South Carolina General Assembly enacted Section 15-79-125 which requires that a medical malpractice plaintiff must initially file a Notice of Intent to File Suit together with an affidavit of an expert witness. The plaintiff must provide "a short and plain statement of the

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[1] The Supreme Court as well as this Court have addressed this very preservation problem in many cases and have approved the dismissal of the appeal as the appropriate remedy. In *Smith v. South Carolina Department of Social Services*, 284 S.C. 469, 327 S.E.2d 348 (1985), the Supreme Court recognized that a broad and unspecific statement of the issue on appeal where the appellant simply expresses a general dissatisfaction with the decision below warrants dismissal. The Court explained that "[s]uch a predicament has often been deplored by our State's highest court and used by that tribunal as a basis for the dismissal of an appeal." 327 S.E.2d at 349. Similarly, in *Larry's Wheel and Rim, Inc. v. Citizens & Southern National Bank*, 271 S.C. 198, 246 S.E.2d 860 (1978), the Supreme Court dismissed an appeal on this same basis. *See also*, *Odom v. County of Florence*, 258 S.C. 480, 189 S.E.2d 293 (1972) (appeal dismissed); *Forest Dunes Associates v. Club Carib, Inc.*, 301 S.C. 87, 390 S.E.2d 368 (Ct. App. 1990) (appeal dismissed); *State v. Richardson*, 278 S.C. 262, 294 S.E.2d 422 (1982) (appeal dismissed).

facts showing that the party filing the notice is entitled to relief" and must provide responses to standard interrogatories. *See*, S.C. Code Ann. § 15-79-125(A). The statute grants the parties subpoena power to obtain medical records and other relevant records. *See*, S.C. Code Ann. § 15-79-125(B). Section 15-79-125(C) further requires that the parties conduct a mediation conference. *See*, S.C. Code Ann. § 15-79-125(C). The purpose of these provisions is to provide a mechanism for meaningful pre-suit mediation as well as to discourage the filing of frivolous malpractice cases.

In the case at bar, the Appellants filed a Notice of Intent but did not contemporaneously file an expert affidavit as required by Section 15-79-125(A). The Respondents all moved to dismiss the Notice of Intent based on this Court's decision in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), which involved a substantially similar factual scenario and the same legal issues. Relying on the *Ranucci* decision, Circuit Court Judge Krista Lea Harrington granted those motions and dismissed the Notice of Intent.

On appeal, the Appellants assert that Judge Harrington erred in dismissing their Notice of Intent for their failure to contemporaneously file an expert affidavit with the Notice of Intent. However, it is *undisputed* that the Appellants filed their Notice of Intent without an accompanying affidavit of an expert witness. Nonetheless, despite the admitted failure to comply with the contemporaneous filing requirement of an expert witness, the Appellants seem to argue that there

should be a 45-day "safe harbor" provision that allows for the late filing of the expert affidavit based upon Section 15-36-100(C)(1). The Appellants also question the meaning of the term "contemporaneous" and seem to make the curious argument that the "contemporaneous filing" requirement for the expert affidavit is satisfied by a filing *made two days later*. These issues are discussed below.

This appeal involves the construction of Section 15-79-125(A), which provides in pertinent part as follows:

> 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, 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.

S.C. Code Ann. § 15-79-125(A). (Emphasis added). In arguing that their Notice of Intent is not fatally defective by the late filing of an expert affidavit, the Appellants rely on Section 15-36-100(C)(1), which provides a 45-day "safe harbor" as allowed under certain circumstances for the filing of an expert affidavit *with the complaint* in professional negligence cases. Section 15-36-100(C)(1) states in pertinent part:

> 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(C)(1). The Appellants contend that the "safe harbor" created by Section 15-36-100(C)(1) allowing the late filing of an expert affidavit after a complaint is filed should be read as applying to the expert affidavit requirement of Section 15-79-125 as well. The rules of statutory construction, the legislative history, and existing precedent do not support the Appellants' position.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Sumter Police Department v. Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894, 896 (Ct. App. 1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Id.* "Courts should ascertain the legislature's intent primarily from the plain language of the statute." *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242, 244 (Ct. App. 2012).

This Court has explained that "[t]erms that are clear and unambiguous on their face leave no room for statutory construction, and we must apply the statute according to its literal meaning." *Ranucci*, 723 S.E.2d at 244. "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." *Id.* The court has "no right to impose another meaning" to the statute. *Grier v. AMISUB of*

South Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693, 695 (2012).

Section 15-79-125(A) "imposes prelitigation filing requirements upon individuals intending to file suit for medical malpractice." *Ranucci*, 723 S.E.2d at 244. One of those filing requirements is an affidavit of an expert witness. Section 15-79-125 "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." 723 S.E.2d at 246. There are no exceptions or exemptions for the affidavit requirement in Section 15-79-125.

The Appellants nonetheless contend that the 45-day "safe harbor" provision in Section 15-36-100(C)(1) should be incorporated or read into Section 15-79-125. This Court rejected that argument in *Ranucci*. The Appellants appear to concede that *Ranucci* is controlling. The Appellants, in fact, maintain that *Ranucci* was incorrectly decided.

In *Ranucci*, this Court addressed "which requirements of section 15-36-100 constitute the affidavit requirements referenced by section 15-79-125(A)." *Ranucci*, 723 S.E.2d at 246. As this Court explained,

> Section 15-36-100 sets forth requirements for the qualification of an expert witness-affiant and for the content of an expert witness's affidavit. It also establishes a contemporaneous-filing requirement and exceptions thereto for affidavits filed pursuant to subsection B, rights to challenge or cure affidavits filed pursuant to subsection B and the procedures for doing so, and a limitation on the effects of section 15-36-100 on any applicable statutes of limitation. Further distilled,

> section 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.

Id. This Court then held that "section 15-79-125(A) invokes *only the provisions of section 15-36-100 governing the preparation and content of the affidavit.*" *Id.* (Emphasis added). This Court further explained:

> 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.

Id. As this Court concluded, "the 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.*" *Id.* (Emphasis added).

Therefore, as *Ranucci* instructs, only the requirements of Section 15-36-100 governing the content of the expert affidavit are incorporated into Section 15-79-125(A). Thus, the provisions of Section 15-36-100(C)(1) allowing for the late filing of an expert affidavit are not incorporated into Section 15-79-125(A). The two statutes are intended to apply independently of one another.

In *Ranucci*, the plaintiff failed to initially file an expert affidavit because of "time constraints." In the Notice of Intent, the plaintiff indicated that she would file an affidavit within 45 days, which is substantially similar to what the

Appellants stated in their Notice of Intent. The plaintiff in *Ranucci* later filed an expert affidavit. Yet, this Court affirmed the dismissal of the Notice of Intent finding that the failure to file an expert affidavit contemporaneously with the Notice of Intent was improper.

In the present case, Judge Harrington was correct in relying on this Court's decision in *Ranucci*, which is binding precedent. The Appellants generally argue that *Ranucci* was incorrectly decided. The Appellants insist that the General Assembly intended to provide protection to medical malpractice plaintiffs who experience time constraints with the preparation of an expert affidavit, but they fail to substantiate that argument. As this Court has previously determined, the provisions of Section 15-36-100(C)(1) expressly address the filing of an expert affidavit *with the complaint* and not the Notice of Intent. Section 15-79-125 creates a pre-litigation process exclusively for medical malpractice actions with very specific time limitations that must be satisfied.

The dismissal of the Appellants' Notice of Intent is also supported by the post-*Ranucci* decision of the Supreme Court in *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012). In that case, the defendant health care facility filed a motion to dismiss a Notice of Intent because the expert affidavit did not include a competent causation opinion. In reversing the dismissal of the Notice of Intent, the Supreme Court ruled that Section 15-79-125(A) is "unambiguous," and accordingly, the court "is confined to what the statute says, not what it ought to say,

for [the court has] no right to modify a statute's application under the guise of judicial interpretation." 725 S.E.2d at 697-698. The Supreme Court recognized that "[r]ead plainly and strictly, section 15-79-125(A) simply requires the contemporaneous filing of both the notice and the affidavit." 725 S.E.2d at 697. The Supreme Court did not identify any exceptions to this "plain and strict" reading of Section 15-79-125(A). Moreover, the Supreme Court stated no disagreement with or criticism of the *Ranucci* decision.

More importantly, in *Grier*, the Supreme Court explained that "when a statute is clear on its face, it is improvident to judicially engraft extra requirements to legislation just because doing so may further the intent behind the statute." 725 S.E.2d at 698. Because the Court found Section 15-79-125(A) to be unambiguous, the Court declined to read into the statute any additional requirements that were not evident in its plain language. The same is true as to exceptions – because Section 15-79-125(A) is unambiguous, a court may not engraft or read into the statute any exceptions including the 45-day "safe harbor" provision that the General Assembly did not expressly include in the plain language of the statute.

In an attempt to justify their late filing of the Notice of Intent, the Appellant also make the curious argument that the "contemporaneous filing" requirement of Section 15-79-125(A) is ambiguous and that the filing of the expert affidavit two days late was nonetheless "contemporaneous." The term "contemporaneous" as used in statutory and case law has a well established meaning. It means "at the same

time." For instance, when courts require a "contemporaneous objection" to the admission of evidence to preserve an evidentiary issue for review, the court do not find that an objection made two days later is contemporaneous. Instead, the objection must be made at the time of the admission of the evidence. Frankly, this Court need not look beyond existing precedent to reject the Appellants' argument. In *Ranucci*, this Court has already explained that Section 15-79-125(A) requires the expert affidavit "be filed *at the same time* as the Notice of Intent to File Suit." *Ranucci*, 723 S.E.2d at 246. (Emphasis added). The clear intent of the "contemporaneous filing" requirement is for the Notice of Intent and the expert affidavit to be filed *together* and not days apart. The term "contemporaneous" is not ambiguous and should be construed consistently with its common usage in statutory and case law.

In sum, the parties are in apparent agreement that this case is controlled by this Court's decision in *Ranucci*. The Appellants are in the same position as the plaintiff in *Ranucci*. Alleged time constraints prevented the filing of an expert affidavit with the Notice of Intent; yet it is clear that the affidavit was filed separately from the Notice of Intent and in fact two days later. As this Court clearly and succinctly held in *Ranucci*, Section 15-79-125 "do[es] not permit a potential plaintiff to file her expert witness's affidavit after she files her Notice of Intent to File Suit." *Ranucci*, 723 S.E.2d at 247. This Court affirmed the dismissal of the Notice of Intent in *Ranucci* for the failure to comply with the contemporaneous affidavit filing

requirement, and the same result should occur in the present case. The dismissal of the Appellant's Notice of Intent should be affirmed.[2]

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents Mark J. Epler, M.D., James M. Benner, M.D., and Palmetto Cardiovascular and Thoracic, P.A. respectfully request that this Court affirm the order of Circuit Court Judge Krista Lea Harrington filed August 16, 2014, which dismisses the Appellants' Notice of Intent to File Suit for failure to timely file an expert affidavit.

Respectfully submitted,

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[2] In accordance with Rule 208(b)(6), SCACR, the Respondents Epler, Benner, and Palmetto Cardiovascular adopt and incorporate herein the arguments made by the other Respondents to the extent not inconsistent herewith.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents Mark J. Epler, M.D., James M. Benner, M.D., and Palmetto Cardiovascular and Thoracic, P.A. certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents Mark J. Epler, M.D., James M. Benner, M.D., and Palmetto Cardiovascular and Thoracic, P.A. certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents Mark J. Epler, M.D., James M. Benner, M.D., and Palmetto Cardiovascular and Thoracic, P.A., does hereby certify that service of the **Final Brief of Respondents** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 22nd day of October 2014:

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