THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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S.C. Supreme Court

Opinion No. 4935 (S.C. Ct. App. filed Jan. 25, 2012)

Shannon Ranucci,.....Petitioner

v.

Corey K. Crain, M.D.,.....Respondent

PETITION FOR A WRIT OF CERTIORARI

Eric C. Davis, Esquire
ATWATER & DAVIS, L.L.C.
528 12th Street
West Columbia, South Carolina 29169
(803) 939-1340
Attorney for Petitioner

Other Counsel of Record:

D. Gary Lovell, Jr., Esquire
Lee Cannon Weatherly, Esquire
CARLOCK COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 266-8202
Attorney for Respondent

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner, Shannon Ranucci, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 15, 2012.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that the reference in § 15-79-125 (A) to an expert witness affidavit does not permit a Plaintiff to file the affidavit at any time after the filing of a Notice of Intent to File suit?

II. Did the Court of Appeals err in finding that Petitioner/Appellant Shannon Ranucci did not timely file an affidavit of a medical expert?

STATEMENT OF ISSUES

I. THE COURT OF APPEALS ERRED IN CONSTRUING §15-79-125(A) IN A MANNER THAT CREATES AN ABSURD RESULT: THAT THE ADDITIONAL 45 DAYS PROVIDED BY §15-36-100 APPLIES ONLY TO THE SECOND STEP OF A TWO-STEP PROCESS, RENDERING THE ADDITIONAL 45 DAYS A LEGAL NULLITY.

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE REFERENCE IN §15-79-125(A) TO AN EXPERT WITNESS AFFIDAVIT DOES NOT INCLUDE PORTIONS OF §15-36-100 PERMITTING A PLAINTIFF TO FILE THE AFFIDAVIT AFTER THE FILING OF A NOTICE OF INTENT TO FILE SUIT?

III. DID THE COURT OF APPEALS ERR IN FINDING THAT PETITIONER/ APPELLANT SHANNON RANUCCI DID NOT TIMELY FILE AN AFFIDAVIT OF A MEDICAL EXPERT?

STATEMENT OF THE CASE

This medical malpractice case was initiated with the filing of a Notice of Intent to File Suit pursuant to S.C. Code of Laws (Ann.) § 15-79-125 on June 8, 2009. Paragraph D of the Notice of Intent to File Suit included a notice pursuant to S.C. Code of Laws (Ann.) § 15-36-100(C)(1) stating that the pleading was being filed within 10 days of the applicable Statute of Limitations and that due to time constraints an affidavit of the expert could not be prepared. Further reference was made to the statutory provisions of S.C. Code of Laws (Ann.) § 15-36-100(B) stating that an affidavit of the expert would be filed within 45 days.

On July 23, 2009, the Plaintiff (Ranucci) filed the expert Affidavit of Richard L. Boortz-Marx, M.D. within 45 days of filing the Notice of Intent to File Suit.

On July 16, 2009, prior to Ranucci's filing of her expert's affidavit, the Defendant (Dr. Crain) filed an Answer to the Notice of Intent to File Suit along with a Motion to Dismiss. The Defendant's Answer alleged that the Plaintiff failed to comply with the mandatory requirements of S.C. Code of Laws (Ann.) §§ 15-79-120, 15-79-125, and 15-36-100 by failing to file an expert affidavit contemporaneously with the Notice of Intent to File Suit. The Defendant specifically pled and asserted that the tolling provisions of Section 15-36-100 are inapplicable. The Defendant's Motion to Dismiss was predicated upon the non-contemporaneous filing of the expert affidavit and alleged defects in the affidavit itself.

The motion to dismiss was heard by the Honorable S. Jackson Kimball on August 13, 2009 and he issued an order dated September 21, 2009 finding that "an

affidavit was not timely filed, and that Plaintiff has not met the requirement of the statute."

On October 5, 2009, the Plaintiff filed a Notice of Motion and Motion to Alter or Amend Judgment seeking clarification of the prior order. In this motion, the Plaintiff specifically requested a declaration as to whether or not Judge Kimball had ruled that the provisions of S.C. Code of Laws (Ann). § 15-36-100 are applicable in part, or in its entirety, to the filing of an expert affidavit as referenced in S.C. Code of Laws (Ann.) § 15-79-125.

A hearing on the Plaintiff's motion was convened by the Honorable S. Jackson Kimball on November 12, 2009.

Judge Kimball entered an Order on November 13, 2009 stating that "S.C. Code Ann. §15-79-125 and 15-36-100 operate independently of each other, and that §15-36-100 does not offer a procedural alternative to §15-79-125."

The Plaintiff filed its appeal on November 19, 2009. The South Carolina Court of Appeals issued its Opinion on January 25, 2012 as Opinion No. 4935. The Plaintiff filed a Petition for Rehearing on February 9, 2012 and that Petition was denied on March 15, 2012. The Supreme Court issued an extension for serving and filing the Writ of Certiorari and Appendix until May 16, 2012.

STATEMENT OF FACTS

The Appellant (Ranucci) was a patient of the Respondent (Dr. Crain) who had been referred for a needle biopsy of her breast. As a result of Dr. Crain's negligent performance of the procedure, Ranucci discovered that her lung had been punctured and collapsed causing her serious pain and loss of ability to breathe along with the need for additional medical treatment and expense, prolonged administration of potent medications, emotional and physical suffering, physical disability of a temporary and permanent nature, and impairment of income earning capacity.

On June 8, 2009, which was less than ten days from the expiration of the Statute of Limitations, Ranucci filed and served a Notice of Intent to File Suit against Dr. Crain which complied with the mandates of S.C. Code of Laws (Ann.) §§ 15-79-125(A) and 15-36-100(B), (C)(1), (G). Within 45 days of such filing, Ranucci filed an affidavit of expert Richard L. Boortz-Marx, M.D. which detailed the opinion to a legal degree of medical certainty that Dr. Crain had violated the standard of medical care and practice by not having documented evidence of duly informed consent.

Dr. Crain filed a Motion to Dismiss claiming that the tolling provisions of § 15-36-100(B), (C)(1), (G) were inapplicable to medical malpractice actions against medical doctors.

Ranucci responded citing as authority that § 15-79-125(A) explicitly incorporates the entirety of § 15-36-100 regarding the pre-suit mandates for a professional malpractice action. Ranucci further cited as authority that § 15-36-

100(B) explicitly includes medical doctors by reference to § 15-79-125 and by reference to § 15-36-100(G) which lists medical doctors in subsection (G)(7) as a profession which is included within the mandates of the statute.

After a hearing on Dr. Crain's motion and a subsequent Motion filed by Ranucci pursuant to Rule 59(e), SCRCivP; the lower court ruled in error in favor of Dr. Crain.

The lower court was affirmed by the SC Court of Appeals and this petition follows.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN FINDING THAT A MEDICAL EXPERT AFFIDAVIT WAS NOT TIMELY FILED WHEN PLAINTIFF HAD FILED SAME WITHIN 45 DAYS OF THE FILING OF A NOTICE OF INTENT TO FILE SUIT WHICH WAS FILED WITHIN 10 DAYS OF THE STATUTE OF LIMITATIONS AS ALLOWED BY §15-36-100

This dispute centers on the proper interpretation of Sections 15-79-125(A) and 15-36-100. These two sections establish a two step process in medical negligence/medical malpractice cases. Step one requires the filing of a Notice of Intent to File Suit, and if that fails to resolve the dispute, then step two is the filing of a Complaint. The Court of Appeals erred in construing §15-79-125(A) in a manner that creates an absurd result: that the additional 45 days provided by §15-36-100(C)(1) applies only to the second step of a two-step process, rendering the additional 45 days a legal nullity.

Section 15-79-125(A) clearly and unequivocally states that the contemporaneous filing of a Notice of Intent to File Suit and an affidavit of an expert are "...subject to the affidavit requirements established in Section 15-36-100...".

There is no limiting language in this section as to what parts of § 15-36-100 apply to the use, or non-use, of an expert affidavit and, therefore, the lower court judge and Court of Appeals committed reversible error by finding the expert medical affidavit must have been filed at the same time as the Notice of Intent to File Suit as described in Section 15-79-125(A). The proper interpretation of the statutes mandates that a potential Plaintiff be able to initially file a Notice and

subsequently add an expert affidavit as circumstances may require. Pursuant to §15-36-100(C)(1), whenever the Notice of Intent to File Suit is filed within ten days of the expiration of the applicable Statute of Limitations, and the plaintiff alleges in the Notice of Intent that because of time constraints an affidavit of an expert could not be prepared, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Any other interpretation creates the absurd result that the only way (C)(1) has any meaning is where a plaintiff would file a Notice of Intent action with an appropriate affidavit, have the mediation of the Notice fail, and then somehow not have the affidavit they just filed to attach to the Complaint to initiate the civil suit. The interpretation by the lower court and the Court of Appeals assumes the legislature intended such an absurd set of circumstances to likely come to exist and that outlined in footnote 1, *supra*.

In the lower court, Dr. Crain argued in both his Motion to Dismiss (R. pp. 15-17) and at the hearings on the motion (R. p. 49 line 14-p. 52 lines 21-23) that the tolling language of Section 15-36-100(C)(1) was inapplicable to a medical malpractice action and that the affidavit of the medical expert must be filed contemporaneously[1] with the Notice of Intent to File Suit to be timely.

Ranucci has consistently argued that Sections 15-36-100 and 15-76-125

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1 We note that neither Court has addressed the plain meaning of the word "contemporaneously". Webster's New World Dictionary distinguishes "contemporaneously" from "simultaneously" as the former meaning "in the same period of time" and the latter meaning "occurring, done, existing, etc. together, or at the same time." *See*, *Webster's New World Dictionary* (2d College Ed. 1970), at p. 306 (contemporaneously); *Id.* at p. 1328 (simultaneously). Accordingly, filing an expert affidavit while the Notice of Intent matter is still pending meets the file "contemporaneously" notion of requirement.

must be read and construed together to give them their statutory meaning and intent. *See*, Transcript of Record of Hearing dated August 13, 2009 (R. 42-46) (R. p.56, lines 3-7; p. 56 lines 23-25 - p. 57, lines 1-4; p. 59, lines 24-25 - p.60, lines 1-16 - p.61, lines 16-25 - p. 62, lines 1-3), and Transcript of Record of Hearing dated November 12, 2009 (R. p. 78, lines 22-25 - p.79, lines 1-12; p.79, lines 16-25 - p.80, lines 1-25 - p.81, lines 1-9 - p. 85, lines 7-19 - p.86, lines 22-25 - p. 87, lines 1-10 - p. 88, lines 2-7). Ranucci argued that a correct reading of both sections requires that the tolling provisions in Section 15-36-100(C)(1) are applicable to the filing of an expert affidavit in a medical malpractice action initiated pursuant to Section 15-79-125(A) when (1) the Notice of Intent to File Suit is filed within ten days of the applicable Statute of Limitations and the Plaintiff alleges that there was not sufficient time to prepare an affidavit of the expert, and (2) an affidavit comporting with the requirements of 15-36-100(B) is subsequently filed within forty-five days of the filing of the Notice of Intent.

The resolution of this dispute lies within the ambit of two primary issues: (1) statutory interpretation of Sections 15-36-100 and 15-79-125; and (2) notice and compliance with filing deadlines in regard to the medical malpractice action.

A. Interpretation of Sections 15-36-100 and 15-79-125

i. Rules of Statutory Construction

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. Coastal Conservation v. Dept. of Health, 380 S.C. 349, 365 (Ct.App. 2008).

In South Carolina, the court's foremost duty is to determine the intent of the General Assembly. Coastal, 380 S.C. at 365.

All rules of statutory constructions are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. Coastal, 380 S.C. at 365.

The first inquiry in deciphering the legislature's intent should begin by determining whether the statute's meaning is clear on its face. Coastal, 380 S.C. at 366.

The legislative intent should be derived primarily from the plain language of the statute. Coastal, 380 S.C. at 365. *See also,* Peake v. S.C. Dept. of Motor Vehicles, 375 S.C. 589, 597-598, ("With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.")

The statute's text is the best evidence of legislative intent or will. Peake, 375 S.C. at 598.

Clear and unambiguous statutes require no statutory construction and should be applied by the court according to their literal meaning. Coastal, 380 S.C. at 366.

The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Coastal, 380 S.C. at 366,367.

Under the "plain meaning rule," it is not the court's place to change the

meaning of a clear and unambiguous statute. Coastal, 380 S.C. at 367.

"The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. Coastal, 380 S.C. at 367.

When reasonably possible, statutes in apparent conflict should be interpreted to allow both to stand. Coastal, 380 S.C. at 368.

Courts will reject statutory interpretations that lead to absurd results clearly unintended by the legislature or that defeat the plain legislative intent. Peake, 375 S.C. at 599. *See also*, Grier v. Amisub, Opinion No. 27118 (S.C. Supreme Court filed May 2, 2012) and Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

While the Court of Appeals suggests in its opinion that it was following these rules of interpretation, the result is "absurd" that one set of rules would apply to actual complaints and some more stringent rule to Notices.

ii. Applying the Rules to the Statute

The process of initiation of a Medical Malpractice Action is spelled out in two different statutes which refer to one another in their language. Both of these statutes were passed within one single act of the legislature, being Act No. 32 of 2005.

S.C. Code Ann. § 15-79-125(A) reads: ***(emphasis added)***

"*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. 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 upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure."*

The language in Section 15-79-125(A) is clear and unambiguous, yielding only one possible interpretation. Under the phrasing of the statute, the plaintiff must file a Notice of Intent to File Suit and serve it upon the defendant. Further, this statute directs that the plaintiff must refer to Section 15-36-100 in order to comply with the expert affidavit requirements. There is no language whatsoever in Section 15-79-125(A) which limits what portions of Section 15-36-100 related to affidavits would apply. Nonetheless, the Court of Appeals chose to "read in" limiting language so as to exclude the savings clause related to the 10 day rule and subsequent filing of an affidavit when the Statute of Limitations is about to

run. Therefore, our rules of statutory construction mandate that these two statutes must be read in conjunction with one another and given their plain meaning.

S.C. Code Ann. § 15-36-100(B) reads: ***(emphasis added)***

(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) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by 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.*

This subsection of Section 15-36-100 mandates that an expert affidavit must be filed in order to initiate a legal proceeding alleging professional negligence.[2] It also outlines the specific information and requirements of the expert affidavit which must be filed pursuant to Sections 15-79-125 and 15-36-100.

Specific reference is made in this subsection to the professionals to whom

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2 Under the interpretation given by the Court of Appeals, subsection (c)(2) which allows the filing of a complaint without any affidavit at all would not apply to Notices producing the ridiculous notion that the Legislature would have intended that a Plaintiff could file suit and proceed to trial without an expert witness but would be required to hire an expert to file a Notice.

this subsection applies regarding the submission of an expert affidavit as a prerequisite to the initiation of legal proceedings for damages arising as a result of professional negligence. This subsection directs that it is applicable to "***a professional licensed by or registered with the State of South Carolina and listed in subsection (G)***".

S.C. Code Ann. § 15-36-100(G) reads: ***(emphasis added)***

(G) This section applies to the following professions:

(7) medical doctors

It is without argument that the legislature intended to include medical doctors as a group of professionals to which Section 15-36-100 is applicable. Not only by specific inclusion of the profession in the language of this section, but also by its unambiguous reference of Section 15-36-100 in subsection (A) of Section 15-79-125.

Sections 15-36-100(B) and Section 15-79-125(A) both have language which requires that the expert affidavit be filed at the same time as the pleadings which initiate the legal proceedings.

S.C. Code Ann. § 15-36-100(B) reads in part: ***(emphasis added)***

"*...the plaintiff* ***must file as part of the complaint*** *an affidavit of an expert witness...."*

S.C. Code Ann. § 15-79-125(A) reads in part: ***(emphasis added)***

"...the plaintiff ***shall contemporaneously file a Notice of Intent to File Suit and*** *an affidavit of an expert witness..."*

However, there is a tolling provision in S. C. Code Ann. § 15-36-100(C)(1) which is applicable to both of the aforementioned sections.

S.C. Code Ann. § 15-36-100(C)(1) reads in part: ***(emphasis added)***

"***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.....***".

Reading all of the sections together as required by our rules of statutory construction, it becomes abundantly clear that the tolling provision of Section 15-36-100(C)(1) is equally applicable to the initial filing requirements of both sections 15-79-125 and 15-36-100.

There is no rational reason why a "savings clause" would apply to complaints, but not to Notices. This is especially true when one considers that the Notice tolls the Statute of Limitations and allows suit 60 days after the mediation has failed. If the affidavit had been filed with the Notice as the Court of Appeals holds, there would never be an occasion where the "savings clause" would come into play because the Plaintiff would already have their expert affidavit.

It is not possible to read Section 15-79-125 by itself and ascertain all of the requirements mandated by the legislature for filing a medical malpractice action. It is for this reason that 15-79-125 explicitly incorporates Section 15-36-100 in its entirety.

iii. Ranucci's Compliance with Statutory Filing Deadlines

Applying the apropos interpretation of Sections 15-36-100 and 15-79-125, an examination of the record shows that Ranucci correctly and timely met the statutory filing deadlines.

(a) Ranucci filed the Notice of Intent to File Suit within ten days of the applicable Statute of Limitations as required by Section 15-79-125(A). *See*, Notice of Intent to File Suit dated June 8, 2009 (R. p. 3-4).

(b) Ranucci filed the affidavit of an expert within forty-five days of the filing of the Notice of Intent to file Suit as required by Sections 15-79-125(A), 15-79-125(B), and 15-79-125(C)(1). *See*, Affidavit of Richard L. Boortz-Marx, M.D. dated July 23, 2009 (R. p. 18).

II. THE COURT OF APPEALS ERRED IN FINDING THAT S.C. CODE ANN. §15-79-125 AND §15-36-100 OPERATE INDEPENDENTLY OF EACH OTHER

It is not possible to read Section 15-79-125 by itself and ascertain all of the requirements mandated by the legislature for filing a medical malpractice action. It is for this reason that 15-79-125 explicitly incorporates Section 15-36-100 in its entirety.

Statutes are to be read together and given their plain meaning. Any conflicting rule goes to inclusion not to exclusion. These statutes are both part of the same Act and all statutes in an act are required to be read together to give the Act its proper purpose.

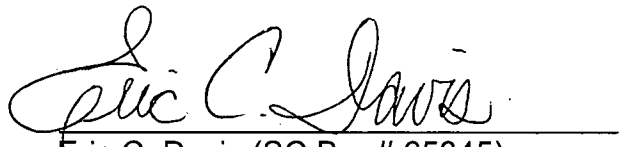
It defies common sense and logic to reach what can only be described as an absurd result that in Sections 15-79-125 and 15-36-100 the Legislature intended to create a "savings clause" ((c)(1)) to apply to post-Notice mediations only.[3]

3 Further, filing an expert affidavit in the pending Notice claim meets the generally accepted definition of "contemporaneously" because it is filed "in the same time period" of the pending Notices claim. No Defendant can claim any prejudice from this filing of an affidavit shortly after filing of the Notice and prior to mediation.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,



Eric C. Davis (SC Bar # 65345)
Atwater and Davis, LLC
528 12th Street
West Columbia, South Carolina 29169
(803) 939-1340
Attorney for the Petitioner

May 16, 2012

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Corey K. Crain, M.D.,.....Respondent

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari on Corey K. Crain, M.D. by depositing a copy of it in the United States Mail, postage prepaid, on May 16, 2012, addressed to his attorney of record Lee Cannon Weatherly, Esquire of Carlock Copeland & Stair, LLP, 40 Calhoun Street, Suite 400 Charleston, SC 29401. I also certify that I have filed the Petition for a Writ of Certiorari with the Clerk of the Court of Appeals by hand delivery the office of The Honorable Jenny Abbott Kitchings, Clerk of Court of the South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201.

May 16, 2012

Eric C. Davis (SC Bar # 65345)
Atwater and Davis, LLC
528 12th Street
West Columbia, South Carolina 29169
(803) 939-1340 Office
(803) 939-1339 Fax
Attorney for the Petitioner

A ACCIDENT AND INJURY LAW PRACTICE OF
ATWATER AND DAVIS, L.L.C.
528 12TH STREET
WEST COLUMBIA, SOUTH CAROLINA 29169

MICHAEL E. ATWATER, ESQ.
ERIC C. DAVIS, ESQ.

TELEPHONE 1-803-939-1340
FACSIMILE 1-803-939-1339

May 16, 2012

The Honorable Daniel E. Shearouse
Clerk of Court for the Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: Shannon Ranucci, Appellant v. Corey K. Crain, M.D., Respondent
Opinion No. 4935 (S.C. Ct. App. Filed January 25, 2012)

Dear Mr. Shearouse:

Enclosed for filing are the original and six copies of the Petition for a Writ of Certiorari, Proof of Service and one bound and one unbound copy of the Appendix. Along with a copy of this letter, I am mailing respondent by way of his attorney, Lee Weatherly, Esquire, a copy of the Petition for a Writ of Certiorari and Proof of Service of same.

With kindest personal regards,

Eric C. Davis (SC Bar # 65345)
Atwater and Davis, LLC
528 12th Street
West Columbia, SC 29169
(803) 939-1340

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MAY 16 2012
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$100.00

Enclosures

cc: Lee Weatherly, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 266-8202

The Supreme Court of South Carolina

ATWATER AND DAVIS, LLC

05/16/2012

RECEIPT #64241

Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Check
Reference No:	7214
Check/Money Order Date:	05/16/2012
Comments:	SHANNON RANNUCCI V. COREY K. CRAIN, MD