THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2016-000784
Civil Action Nos. 2015-CP-21-01699, 2015-CP-21-01701,
2015-NI-21-00007, and 2015-NI-21-00008

Frances Brown as Personal Representative
of the Estate of Alice Queen Ester Wallace, ... Appellant,

v.

Carolinas Hospital System and
Regency Hospital/Hospice of Florence, ... Respondents.

FINAL BRIEF OF RESPONDENT QHG OF SOUTH CAROLINA, INC. d/b/a CAROLINAS HOSPITAL SYSTEM

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d/b/a Carolinas Hospital System

November 10, 2016

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STATEMENT OF THE CASE

On June 15, 2015, Appellant filed a wrongful death Complaint (Civil Action No. 2015-CP-21-01699) (the "Wrongful Death Complaint") and a survival Complaint (Civil Action No. 2015-CP-21-01701) (the "Survival Complaint")[1] in the Florence County Court of Common Pleas against Respondents Carolinas Hospital System (correctly identified as QHG of South Carolina, Inc. d/b/a Carolinas Hospital System and referred to herein as "Carolinas") and Regency Hospital/Hospice of Florence ("Regency").[2] (R. pp. 22-24 & 33-35). In the Complaints, Appellant alleged Alice Queen Ester Wallace (the "Decedent") was admitted to Carolinas "where deficient nursing care . . . resulted in the [Decedent] getting bed sores which contributed to the decline in her health and contributed to her death." (R. pp. 22-23, ¶¶ 4-6; R. pp. 33-34, ¶¶ 4-6). Contemporaneously with the Complaints, Appellant submitted affidavits stating that the statute of limitations to bring the actions would expire on June 16, 2015, and that "[b]ecause of the time constraints the affidavit of an expert cannot be prepared in time to avoid the expiration of the statute of limitations[.]" (R. pp. 19-20 & 30-31).

On June 18, 2015, Appellant filed a wrongful death Notice of Intent to File Suit (Civil Action No. 2015-NI-21-00007) (the "Wrongful Death NOI") and a survival Notice of Intent to File Suit (Civil Action No. 2015-NI-21-00008) (the "Survival NOI")[3] against Carolinas and Regency. (R. pp. 39-40 & 44-45). The Notices of Intent alleged that the

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[1] The Wrongful Death Complaint and the Survival Complaint are referred to herein collectively as the "Complaints."

[2] The undersigned attorneys represent Carolinas only. They do not represent Regency, which has never appeared in this case. Upon information and belief, Appellant has not served Regency.

[3] The Wrongful Death NOI and the Survival NOI are referred to herein collectively as the "Notices of Intent."

Decedent was admitted to Carolinas "where deficient nursing care left her with gross bed sores[.]" (R. pp. 39 & 44). The Notices of Intent further alleged that the Decedent was transferred to a facility run by Regency "where she was not given possible lifesaving resuscitation as was her living will and she was given the wrong medication or the correct medication in the wrong form which was the proximate cause of her death." (R. pp. 39 & 44). The Notices of Intent were not accompanied by contemporaneously filed affidavits of an expert witness as required by S.C. Code Ann. § 15-79-125(A), nor did they allege that the affidavits required by Section 15-79-125(A) could not be timely prepared pursuant to S.C. Code Ann. § 15-36-100(C)(1).

On August 17, 2015, 63 days after the Complaints were filed and 60 days after the Notices of Intent were filed, Appellant filed a Motion to Extend Time to File Affidavit of Expert Witness pertaining to the Complaints. (R. p. 60). She did not request such an extension with respect to the Notices of Intent. The motion as it pertained to the Survival Complaint was heard on September 29, 2015, and the motion as it pertained to the Wrongful Death Complaint was heard on September 30, 2015. Appellant's counsel did not appear for either hearing, nor did Appellant request a continuance for either hearing or otherwise advise the Circuit Court that her counsel would not be appearing. The Circuit Court subsequently entered Orders dismissing the motion for failure to prosecute on October 2, 2015 and October 8, 2015. (R. pp. 2 & 3).

On October 6, 2015, the Complaints and the Notices of Intent were delivered to Debbie Brace, a human resources specialist with Carolinas. On November 5, 2015, Carolinas served a Rule 12 Motion or Motion to Dismiss with respect to each of the Complaints and Notices of Intent (the "Rule 12 Motions") asserting that the Complaints and Notices of Intent should be dismissed on the grounds of insufficiency of process and

insufficiency of service of process and because Appellant had failed to follow the requirements for bringing a medical malpractice action set forth in Section 15-79-125(A). (R. pp. 67-69 & 71, 73-76, 79-81, & 84-86). The Rule 12 Motions were filed on November 9, 2015.

A hearing on the Rule 12 Motions was held on December 18, 2015 before The Honorable Michael G. Nettles. At the hearing, Judge Nettles requested that the parties submit memoranda in support of their respective positions, which they subsequently did. (R. pp. 106-115 & 116-128). After carefully reviewing the pleadings and considering the arguments of counsel and the applicable law, Judge Nettles granted the motions and signed an Order to that effect dated March 6, 2016 (the "Rule 12 Order"), which was subsequently entered in all four actions. (R. pp. 6-15). Appellant timely filed and served a Notice of Appeal of the Rule 12 Order on April 15, 2016.

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY DISMISSED THE COMPLAINTS AND NOTICES OF INTENT BECAUSE APPELLANT FAILED TO FOLLOW THE PROCEDURE FOR FILING MEDICAL MALPRACTICE CLAIMS SET FORTH IN SECTION 15-79-125.

When the General Assembly enacted the Tort Reform Act of 2005 Relating to Medical Malpractice, 2005 Act No. 32, it established "a unique two-step procedure that filters frivolous claims but permits the filing of potentially meritorious claims." Ranucci v. Crain, 409 S.C. 493, 506, 763 S.E.2d 189, 196 (2014). That procedure is set forth in Section 15-79-125, which is quoted in pertinent part below.

> (A) ***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. . . .
>
> * * *
>
> (C) 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.
>
> * * *
>
> (E) ***If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action*** by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure.

S.C. Code Ann. § 15-79-125 (emphasis added).

Therefore, before filing a medical malpractice action in South Carolina, a plaintiff must: (1) contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness pursuant to Section 15-36-100; (2) serve the Notice of Intent to File Suit

upon all named defendants; and (3) mediate the dispute with the defendant(s). ***The plaintiff may not file a summons and complaint until after all of these requirements have been met and mediation has failed.*** In this case, however, Appellant failed to comply with the requirements imposed by Section 15-79-125.

A. Appellant improperly filed the Complaints before any of the prerequisites of Section 15-79-125 had been satisfied.

Appellant filed the Complaints on June 15, 2015. On that date, no Notice of Intent to File Suit or affidavit of an expert witness had been filed—much less served on Carolinas—and the dispute had not been unsuccessfully mediated. Accordingly, the Complaints were not proper pursuant to Section 15-79-125. ***Because the statutory prerequisites had not been met, the Complaints were nullities from the moment they were filed.*** Indeed, they may as well have not been filed at all. See, e.g., Gaither v. United States, 5:13-cv-00108-RMG-KDW, 2014 WL 2155085, at *5 (D.S.C. May 22, 2014) ("[I]t is undisputed that Plaintiff has failed to file a Notice of Intent to File Suit or an expert affidavit with his Complaint, and therefore he cannot proceed with a state law claim of medical malpractice."); Jones v. Correct Care Sols., 0:11-cv-02890-RBH-PJG, 2013 WL 6145263, at *5 (D.S.C. Nov. 20, 2013) (finding that the plaintiff's medical negligence claim should be dismissed due to his failure to comply with the pre-suit requirement to file a Notice of Intent to File Suit and an expert affidavit); Straws v. Roach, 5:11-cv-00132-TMC-KDW, 2012 WL 3157001, at *7 (D.S.C. July 13, 2012) ("It is undisputed that Plaintiff has failed to file a Notice of Intent to File Suit or an expert affidavit with his Complaint, and therefore he cannot proceed with a state law claim of negligence or medical malpractice[.]"), report and recommendation adopted, 5:11-cv-00132-TMC-KDW, 2012 WL 3202951 (D.S.C. Aug. 2, 2012). See also Washoe Med.

Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe, 148 P.3d 790, 794 (Nev. 2006) (finding that a medical malpractice complaint that did not comply with the statutory requirements was void ab initio and of no force and effect); Scarsella v. Pollak, 607 N.W.2d 711, 713 (Mich. 2000) (affirming the trial court's determination that a medical malpractice complaint that did not comply with the statutory requirements was a nullity). Cf. Doe v. City of Duncan, 417 S.C. 277, 286, 789 S.E.2d 602, 607 (Ct. App. 2016) (finding that service of an amended complaint was a nullity where the initial complaint had never been served and, therefore, could not be amended pursuant to Rule 15(a), SCRCP). ***Appellant concedes this point in her brief, even going so far as to "respectfully withdraw" the Complaints.*** Appellant's Initial Brief at 11.

B. The Notices of Intent were not accompanied by an affidavit of an expert witness pursuant to Section 15-36-100.

Appellant admits that she "did not contemporaneously file an affidavit of an expert witness with the Notices of Intent to File Suit as required by S.C. Code Ann. 15-79-125(A)" and that she "did not allege that an affidavit of an expert witness could not be prepared because of time constraints as required by S.C. Code Ann. 15-36-100(C)[.]" Appellant's Initial Brief at 5. Accordingly, like the Complaints, ***the Notices of Intent were defective from the moment they were filed.***

C. Appellant did not supplement the Notices of Intent with an expert affidavit or move to extend the time to file such an affidavit within 45 days after filing the Notices of Intent.

Section 15-36-100(C)(1), which is incorporated into Section 15-79-125(A),[4] provides that the requirement to contemporaneously file an expert affidavit "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." Appellant submitted affidavits with the Complaints asserting that the applicable statute of limitations would expire on June 16, 2015, and that "[b]ecause of the time constraints the affidavit of expert cannot be prepared in time to avoid the expiration of the statute of limitations[.]" (R. pp. 19-20 & 30-31). She did not submit such affidavits with the Notices of Intent.

Even assuming the "time constraint" affidavits Appellant submitted with the Complaints can be deemed incorporated into the Notices of Intent, she failed to comply with the remainder of Section 15-36-100(C)(1), which gave her "forty-five days after the filing of the [Notice of Intent to File Suit] to supplement the pleadings with the [requisite expert] affidavit." ***She has never supplemented the Complaints or Notices of Intent with an expert affidavit.*** Nor did she move for an extension of the 45-day deadline—which Section 15-36-100(C)(1) permits the trial court to grant upon good cause shown—until August 17, 2015, ***after the deadline had already expired.*** And even then, she failed

[4] The Supreme Court has held that all provisions of Section 15-36-100 are incorporated into Section 15-79-125(A). See Ranucci, 409 S.C. at 504, 763 S.E.2d at 194 (holding that Section 15-79-125(A)'s reference to "the affidavit requirements established in Section 15-36-100" constitutes an adoption of all provisions of Section 15-36-100, not just the parts that relate to the preparation and contents of an expert's affidavit).

to appear for the hearings on her motion for extension, which was dismissed for failure to prosecute. She justifies her failure to appear on the ground that her counsel had ethical concerns about the motion being heard without the presence of counsel for Carolinas and asserts she planned to re-file the motion after Carolinas was served and its counsel identified. Notably, however, counsel for Carolinas appeared on November 5, 2015 when it served the Rule 12 Motions. Nevertheless, ***Appellant has never re-filed her motion for extension.***

Because no expert affidavit was filed within 45 days after the filing of either the Complaints or the Notices of Intent, because the deadline to submit an expert affidavit was never extended by the trial court, and because Carolinas alleged in the Rule 12 Motions that Appellant failed to file the requisite affidavit, ***the Complaints and Notices of Intent were "subject to dismissal for failure to state a claim."*** S.C. Code Ann. § 15-36-100(C)(1). Such dismissal was required, as the General Assembly plainly intended to make the contemporaneous filing of an expert affidavit mandatory in medical malpractice cases. See S.C. Code Ann. § 15-36-100(B) ("[I]n an action for damages alleging professional negligence against . . .any licensed health care facility . . . the plaintiff ***must*** file as part of the complaint an affidavit of an expert witness[.]") (emphasis added); S.C. Code Ann. § 15-79-125(A) ("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[.]") (emphasis added). Courts do not have discretion to ignore this requirement, for otherwise the General Assembly will have done a futile act in passing tort reform legislation, something it is never presumed to do. See, e.g., State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645,

651 (Ct. App. 2008) ("When interpreting a statute, courts must presume the legislature did not intend to do a futile act. The legislature is presumed to intend that its statutes accomplish something.").

D. The allegations of the Complaints and Notices of Intent are not within the ambit of common knowledge and experience.

Though she did not allege as much in either the Complaints or the Notices of Intent, Appellant began arguing at the hearing on the Rule 12 Motions that she was not required to contemporaneously file an expert affidavit with the Notices of Intent pursuant to Section 15-36-100(C)(2), which provides that an expert affidavit "is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." However, this argument does not withstand scrutiny.

To begin with, if Appellant believed an expert affidavit was not required pursuant to Section 15-36-100(C)(2), then it was not necessary for her to invoke, via the affidavits she submitted with the Complaints, the "time constraints" exception of Section 15-36-100(C)(1).

Furthermore, in order to prevail on her medical malpractice claims, Appellant would be required to prove at trial that Carolinas negligently deviated from "generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances[.]" Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014) (citation omitted). She would need expert testimony to do so, as ***the allegations of the Complaints and Notices of Intent are plainly not "within the ambit of common***

knowledge and experience." Id. ("A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct.") (citation and quotation marks omitted).[5]

The gist of Appellant's pleadings is that, as a result of the alleged negligence of Carolinas, the Decedent developed bed sores which caused or contributed to her death. "Bed sore" is the common name for a medical condition known as a decubitus ulcer. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 111, 687 S.E.2d 29, 30 n.2 (2009). Often referred to as "pressure sores" or "pressure ulcers," bed sores "are injuries to skin and underlying tissue resulting from prolonged pressure on the skin." Bedsores (Pressure sores) (Definition), Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/bedsores/basics/definition/CON-20030848. They are caused "by pressure against the skin that limits blood flow to the skin and nearby tissues." Bedsores (Pressure sores) (Causes), Mayo Clinic, http://www.mayoclinic.org/diseases-

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[5] Examples of cases where the common knowledge exception has been applied in South Carolina include: Brouwer (finding the fact that negligent exposure to latex of a patient with a known latex allergy could result in an allergic reaction in that patient fell within the common knowledge exception); Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978) (finding the fact that a tubal ligation renders an IUD or any other birth control device useless to be a matter of common knowledge); Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (finding the fact that a malfunctioning and overheated surgical drill could burn a patient's skin on contact fell within the common knowledge exception); and Hickman v. Sexton Dental Clinic, P.A., 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (finding the fact that an injury could be caused by the ramming of a sharp object into a patient's mouth by an unsupervised dental assistant fell within the common knowledge exception). See also Wade v. Methodist Hosp., No. 01-02-01272-CV, 2004 WL 2749565, at *3 (Tex. App. Dec. 2, 2004) ("The type of injury suffered at the hands of a medical provider for which no expert report is required usually involves the misuse of mechanical instruments, operating on the wrong part of the body, or leaving surgical instruments or sponges in the body.").

conditions/bedsores/basics/causes/con-20030848. Based on their severity, they are classified in one of four different stages—defined by the National Pressure Ulcer Advisory Panel—ranging from stage I (least severe) to stage IV (most severe). Bedsores (Pressure sores) (Symptoms), Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/bedsores/basics/symptoms/con-20030848. See also Robinson v. Baptist Health Sys., Inc., 24 So. 3d 1119, 1123 (Ala. Civ. App. 2009) ("The medical profession categorizes bedsores using a four-stage continuum. A reddening or blanching of the skin without an open wound is categorized as a stage-one bedsore. An open wound in the skin that is not deep enough to reveal the subcutaneous fat is categorized as a stage-two bedsore. An open wound that is deep enough to reveal the subcutaneous fat but is not deep enough to reveal the muscle, ligaments, tendons, or bones underneath the subcutaneous fat is categorized as a stage-three bedsore. An open wound that is deep enough to reveal the muscle, ligaments, tendons, or bones underneath the subcutaneous fat is categorized as a stage-four bedsore.").

The common knowledge and experience of laypersons is simply not sufficient to evaluate whether a patient's development of bed sores was the result of a healthcare provider's deviation from the applicable standard of care. Courts throughout the country have so held. See, e.g., Jackson v. Oktibbeha Cty. Hosp., 1:10-cv-00088-SA-DAS, 2012 WL 39399, at *3 (N.D. Miss. Jan. 9, 2012) ("[N]either this Court, nor the average layperson knows, as a matter of common sense and practical experience, whether bedsores of the type developed by the decedent would ordinarily not occur in the absence of negligence.") (quotation marks omitted); Ryan v. San Francisco Peaks Trucking Co., 262 P.3d 863, 870 (Ariz. Ct. App. 2011) (finding allegations that nurses failed to

adequately clean a wound, thus resulting in infected pressures sores, "did not lend themselves to a causal relationship that would have been readily apparent to the trier of fact") (citation and quotation marks omitted); Robinson, 24 So. 3d at 1126 (rejecting the plaintiff's argument that the cause of the development and worsening of bedsores is within the common knowledge of jurors and, therefore, did not require expert testimony); Wade v. Methodist Hosp., No. 01-02-01272-CV, 2004 WL 2749565, at *3 (Tex. App. Dec. 2, 2004) ("Contrary to [the plaintiff's] assertion, several courts have held that the standard of care for preventing and treating ulcers is properly established by expert testimony.") (citing cases); Fluary ex rel. Estate of Fluary v. St. John Hosp. & Med. Ctr., No. 195029, 1998 WL 1992816, at *2 (Mich. Ct. App. May 8, 1998) (rejecting plaintiff's argument that the jury could determine for itself, without the necessity of expert testimony, whether the defendants breached the applicable standard of care by allegedly allowing the development of decubitus ulcers). Therefore, the "common knowledge" exception of Section 15-36-100(C)(2) did not relieve Appellant of her statutory obligation to contemporaneously file an expert affidavit along with the Notices of Intent.

II. THE CIRCUIT COURT CORRECTLY DISMISSED THE COMPLAINTS AND NOTICES OF INTENT IN LIGHT OF APPELLANT'S FAILURE TO PROPERLY SERVE CAROLINAS.

Carolinas is a South Carolina corporation. Rule 4(d)(3), SCRCP, provides that service upon a corporation shall be made "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process[.]" "Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily

mean that the person has authority to receive process." Moore v. Simpson, 322 S.C 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). "[T]here must be evidence the defendant intended to confer such authority." Id. "Without specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary." Id. at 523-24, 473 S.E.2d at 67.

Debbie Brace, the individual to whom the Plaintiff delivered copies of the Complaints and Notices of Intent on October 6, 2015, is a human resources specialist with Carolinas. She is not an officer, a managing or general agent, or an agent authorized by appointment or by law to receive service of process. There is no evidence in the record of her "actual appointment for the specific purpose of receiving process" or that Carolinas "intended to confer such authority" upon her. Id. at 523, 473 S.E.2d at 67. "[T]here is no indication that . . . [Carolinas] knowingly permitted [Ms. Brace] to accept service on [its] behalf." Lail v. U.S., 3:11-cv-00977-TLW-TER, 2012 WL 3779386, at *7 (D.S.C. Aug. 10, 2012), report and recommendation adopted, 3:11-cv-00977-TLW, 2012 WL 3839338 (D.S.C. Aug. 30, 2012). Accordingly, ***Appellant cannot carry her burden of establishing that Carolinas was properly served with the Complaints and Notices of Intent.*** See, e.g., Moore, 322 S.C. at 523, 473 S.E.2d at 66 ("The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant.").

III. ADDITIONAL GROUNDS EXISTS FOR SUSTAINING THE CIRCUIT COURT'S ORDER.

Though the Rule 12 Order can and should be affirmed for the reasons set forth above, additional sustaining grounds exist. See Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)."); 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."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding that "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling").

A. The Notices of Intent were not "commenced" within the applicable statute of limitations.

The statute of limitations for medical malpractice actions against non-governmental entities is three years. S.C. Code Ann. § 15-3-545(A). According to Appellant, the limitations period expired on June 16, 2015. (R. p. 19, ¶ 3) ("The statute of limitations to bring this action will expire on [sic] tomorrow, June 16, 2015."); (R. p. 30, ¶ 3) ("The statute of limitations to bring this action will expire on [sic] tomorrow, June 16, 2015."). See also Appellant's Initial Brief at 10 ("[T]he statute of limitations ran out on June 16, 2015[.]"). However, ***the Notices of Intent were not "commenced"—as defined by the South Carolina Rules of Civil Procedure—until two days later on June 18, 2015.***

Pursuant to Rule 3(a), SCRCP, "[a] civil action is commenced when the summons and complaint are filed with the clerk of court[.]" See also Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer."). Thus, even though Appellant may have placed the Notices of Intent in the mail on June 15, 2015, they were not actually "filed" by the Florence County Clerk of Court until June 18, 2015. (R. pp. 39 & 44). Appellant acknowledges this in her brief. Appellant's Initial Brief at 5 ("On June

18, 2015, the clerk of court filed the Plaintiff's wrongful death Notice of Intent to File Suit and a survival Notice of Intent to File Suit against the Defendants[.]").

The only action Appellant took prior to the expiration of the statute of limitations was to prematurely file the Complaints—which she has now withdrawn—without statutory authorization. Even if she could have cured her unauthorized filing of the Complaints by subsequently filing Notices of Intent to File Suit as required by Section 15-79-125(A), she had to do so prior to the expiration of the statute of limitations in order to protect the viability of her claims. Indeed, she could have ensured the Notices of Intent were filed on time by hand delivering them as she did with the Complaints. But instead, she mailed them and took the risk that they would not be filed on time. See, e.g., Gary, 347 S.C. at 629, 557 S.E.2d at 663 ("It is clear under South Carolina law that mailing does not constitute filing."). Accordingly, ***the Notices of Intent were not "commenced" until June 18, 2015, two days after the statute of limitations expired by Appellant's own admission, and would have been time-barred even if Appellant had contemporaneously (or supplementally) filed an expert affidavit.*** They are, therefore, not subject to renewal pursuant to Section 15-36-100(F) because there is no evidence in the record that Appellant had the requisite expert affidavit in her possession within the time required by Section 15-36-100 but mistakenly failed to file it.

B. The Complaints and Notices of Intent do not contain a short and plain statement of the facts showing that Appellant is entitled to relief.

A viable complaint must contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(a)(2), SCRCP. The same is true of a viable Notice of Intent to File Suit. See S.C. Code Ann. § 15-79-125(A) (providing that a Notice of Intent to File Suit "must contain a short and plain statement of the facts showing that

the party filing the notice is entitled to relief"). A plaintiff must allege "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).[6] "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." Id. (citation and quotation marks omitted).

The Complaints and Notices of Intent allege that Carolinas rendered "deficient nursing care," but they do not specify who, what, when, where, or how. (R. p. 22, ¶ 4; R. p. 33, ¶ 4; R. pp. 39 & 44). They do not specify a negligent act or omission by Carolinas. Thus, the allegations are factually deficient. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Id. at 679. The conclusory allegations of the Complaints and Notices of Intent fail to give Carolinas "fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (ellipsis in original) (citation and quotation marks omitted). The absence of any factual support for these allegations subjects them to dismissal. See, e.g., Iqbal, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter[.]"). Accordingly, ***the Complaints and Notices of Intent would have been subject to dismissal under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action even if Appellant had contemporaneously (or supplementally) filed an expert affidavit.***

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[6] Since the South Carolina Rules of Civil Procedure are based on the Federal Rules of Civil Procedure, our courts may look to the construction given to the federal rules. See Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

CONCLUSION

For the reasons set forth herein, the Circuit Court committed no error in issuing the Rule 12 Order. Accordingly, Respondent Carolinas Hospital System (correctly identified as QHG of South Carolina, Inc. d/b/a Carolinas Hospital System) respectfully requests that this Court affirm the Rule 12 Order.

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November 10, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2016-000784
Civil Action Nos. 2015-CP-21-01699, 2015-CP-21-01701,
2015-NI-21-00007, and 2015-NI-21-00008

Frances Brown as Personal Representative
of the Estate of Alice Queen Ester Wallace, ... Appellant,

v.

Carolinas Hospital System and
Regency Hospital/Hospice of Florence, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the enclosed **FINAL BRIEF OF RESPONDENT QHG OF SOUTH CAROLINA, INC. d/b/a CAROLINAS HOSPITAL SYSTEM** complies with Rule 211(b), SCACR.

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