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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. MARKLEY DENNIS, Jr., Circuit Court Judge

Case No. 2015-CP-10-5000
Appellate Case No. 2016-000495

Jim Washington,.....Appellant,

V.

Trident Medical Center,.....Respondent.

APPELLANT FINAL BRIEF

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Appellant / Pro Se

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STATEMENT OF THE CASE

On September 23, 2012 appellant had right-side weakness at home. He was Taken to Trident for diagnosis and treatment for his right-side weaknesses. He was Admitted at the emergency room. Trident voluntarily undertaken to diagnose and treat Appellant for his right-side weaknesses. Various test was perform to diagnose to source Of these symptoms. On work-up Trident evidence showed a small stoke and MRI showed Multi foci restrictive diffusion in the left parietal lobe but no evidence of a cardiac source Shown then. Appellant was treated with aspirin 325mg for secondary stroke prevent and Discharge on 9/26/12. On 9/30/12 appellant had a second symptoms with right-side Weaknesses. HE was admitted at TRMC on 9/30/12 and on 10/1/12 MRI results showed Evidence of a cardio embolic source for his stroke. The evidence showed Trident's Negligence in diagnosis and treatment.

Appellant filed a Notice of Intent with supporting expert affidavits and complaint on 9/11/15 under S.C. Code Statutes 15-79-125(A), 15-36-100, and 15-79-125(E)(2).

FACT

I. Respondent's counsel, William H. Harkins, Jr., moved the court with a SCRCP Rule 12(b)(6) to dismiss the complaint. Respondent basis for dismissal was that appellant Had not complied with **S.C. Code Statutes 15-79-125(A) pre-suit Notice of Intent and 15-36-100 Expert Witness Affidavit requirements prior to filing the Medical Malpr-ractice action on 9/11/15**. The other ground for dismissal was that the claim of negligent Treatment of anticoagulation therapy was not a common knowledge factual issue but Required specialized expert witness affidavit. Judge, Dennis agreed with respondent and dismiss on all of the above grounds. Tr., p. 3-8 and Rpp. 56-61. Appellant, had ask The court's permission to speak. Objecting to respondent's grounds for dismissal and the Court's ruling because the statutes pleadings as a whole signed on 10/25/12 complied . with S.C. Code Statutes 15-79-125(A) and that it can be inferred breach standard of care **using the Verified Complaint Treated As An Affidavit of An Expert Witness under 15-36-100 by citing both statues on the complaint and on the affidavit. Judge Dennis ruled that appellant filed the pleadings just as appellant said, but did not Follow the procedures. Judge Dennis, ruled appellant could not use the Doctors' Opinions as Expert Witness Affidavit to meet the statute compliance, and that it was Questionable whether or not to dismiss. Respondent's counsel had <u>conceded in his Memorandum of Law</u> that appellant did filed pleadings under S.C. Code Statutes 15-79-125(A) Notice of Intent and 15-36-100 Expert Witness Affidavit, but conclude It was defective for pleadings presuit Notice of Intent and Expert Witness Affidavit. Rp. 1, line1-14; Rpp. 7-9 caption, Rp. 9 section 1, lines 1-p. 11, line2; Rp.11, Stand-Ard of Care, lines 1-7, lines 13-26; Rp. 12, lines 9-24, lines 32-p. 13, line2; Rpp. 56-**

61; Rp. 62, line 1-p. 63, line 13; Rpp. 72-88 signed 10/25/12 pleadings; Rp. 91-96 Signed 10/25/12 presuit pleadings and Rpp. 9-14 signed complaint pleadings under S.C. Code Statutes 15-79-125 (A) Notice of Intent and 15-36-100 Expert Witness Affidavit; Rpp. 114-120 pleadings under S.C. Code Statute 15-79-125 (A) NOI.

II. The Expert Witness Affidavits met the requirements to specify at least one negligent act or omission. The affidavits specified by noting "we receive documents From Trident which showed a small acute stroke , but no evidence of a cardio embolic Source on MRI then or during work-up". Trident's MRI showed multi-foci and TRMC MRI showed multi-foci which specifically noted " given the multifocality suggest a cardio embolic source". { Rpp.79-83 }. The TRMC, expert witness affidavit Specifically noted that " because embolism is a **possibility** I ordered a Heparin Drip, Neurology has been consulted to be treated per Neurology Protocol and noted to see Patient history. The history notes indicated patient **had MRI at Trident was treated and discharged with a prescription for aspirin ".** Rpp.79-83. Since the standard of care **.showed the same mutifocal as Trident MRI, this affidavit evident infer embolism of Cardiac source was a possibility at Trident and negligent diagnose and treatment.** Therefore, the trial Judge err this was not admissible nor a common knowledge issue.

App. Final Br., pp. 18-22, 25-28; Rp. 62, Line 1-p. 63 Med. Bkgd., line 6;

Rp. 1, line 1-14, p. 5 ; Rp. 9 section 1, lines 1-p. 11, line2; Rp. 11 section 2, lines 1-25; Rp. 63 (Med. Backgd.), line 1-6; Rp. 30, line 1-p. 33, line 3; Rpp. 39-40; Rp. 45, lines 1-end; Rpp. 51-52;Rpp. 70-88; Rpp. 89-96; Tr., pp. 3-8 and Rpp.56-61; Rp. 99 section-b, Lines 1-p. 100, line 42; Rpp. 103-104; Rp. 110 section-b, line 1-p. 111, line 8.

The affidavit also met the statute requirement meaning and qualification of an expert Witness under **S.C. Code Statute 15-36-100(A) and subsections (1) and (2)(a) or (b).** Subsection(A) states: **As used in this section , "expert witness" means an expert who 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 and 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.** Dr. M. K. Greene, as a Hospitalist has actual professional knowledge and Experience and regularly engages in making decision on the acceptable standard of care Treatment based on a Radiologist diagnosis of possible embolism of a cardiac source. Dr M.K. Greene opinion is that " when embolism is a possibility the standard of care is to Order a Heparin Drip, consult Neurology, to treat per Neurology Protocol" . Rpp.79-83. Dr. Greene, was familiar with the history of the case from the initial admission, diagnosis And treatment evidence findings based on the MRI and work-up documents received From Trident. As a Hospitalist, Dr. Greene, has experience and knowledge review MRI Results to determine the proper treatment. And knowledge and experience in reviewing The radiologist evidence finding that specifically suggest prior hemorrhage chronic and multi focal suggest a cardiac source of embolism, and Trident MRI multifoci showed no Evidence of a cardiac source on MRI then or on work-up, **is a negligent act or omission.**

Therefore, there is no **defect** in the expert qualification under S.C. Statute 15-36-100.

Dr. Sarah Anne Ludington, as a, Hospitalist at TRMC was authorized by TRMC on October 8, 2012 on the date of patient's discharge to investigate the reason for admission, History of case, assessment and plan and discharge summary. Dr. Ludington, as an expert And based on both Trident and TRMC medical records verified that the patient was Admitted and discharged from Trident prior to admission to TRMC with a diagnose on Work-up which showed a small stroke CVA and was treated with and discharged on Aspirin 325 mg., statin, and hypertension medication. Dr. Ludington, affidavit state upon Admission at TRMC patient had an MRI of the brain which was diagnosed as cardioemb-Olic stroke, that intra-atrial thrombus was detected on TEE, was placed on heparin to Transition to coumadin. Dr. Ludington discharge plan was condition stable, follow-up, INR in 2 days with adjustments made by primary care physician; needs follow up with Primary care physician in 1-2 weeks. Discharge medications are amlodipine, ASA 81mg, Pravastatin and wafarin. Thus Dr. Ludington was qualified as a Hospitalist expert to give An opinion on issue of standard of care **upon discharging** a patient with possible cardio-Embolism which is treatment of coumadin with follow-up INR in 2 days with PCP Primary care physician in 1-2 weeks adjustments made by PCP and condition stable Prior to discharge. {Rpp. 89-96 }. Dr. Ludington's affidavit specifically stated " The Next day I reviewed the MRI results which showed multiple small foci of restricted Diffusion in the high left parietal lobe and evidence of hemosiderin deposition suggesting **Prior cortical hemorrhage of uncertain chronicity.** It was noted that **given the Multifocality the appearance was suggestive of an embolic phenomenon.** In addition,

There were area of chronic ischemic changes in the left occipital lobe" .

Verified Complaint Treated As An Affidavit of An Expert Witness of Dr. Sarah Anne Ludington, History Present Illness. Rpp. 89-96; Discharge Plan, Rpp. 89-96; Discharge Medications, Rpp. 89-96; Rp. 9 -p. 11, line 2; Rp. 11, part 2, Line 1-25 Standard of Care. Thus, under S.C. Code Statute 15-36-100 (A) And subsections (1), (2)(a) and (b), Appellant's Verified Complaint Treated As An Affidavit of An Expert Witness of, Dr. Sarah Anne Ludington, satisfied the statute Requirements as an expert witness qualified as a Hospitalist to give an opinion on the Generally recognize and accepted treatment for cardio embolism and Trident's **Negligence discharge.** Therefore, there is no defective affidavit under S.C. Statutes **15-36-100 as part of the complaint 15-79-125 (E)(2), nor a defective 15-79-125 (A) Notice of Intent and Expert Witness Affidavit.** Rpp.56-61; Rp. 62, Line 1-p. 63 (Med. Backgd.), line 6; Rp. 1, lines 1-14, p. 5 lines 1-8; Rp. 9 part 1, line 1-p. 11, line 2; Rp. 11 part 2, lines 1-25; Rp. 63(Med. Backgd.), lines 1-6; Rp. 30, line 1-p. 33, line 3; Rpp. 39-40; Rp. 45, lines 1-end; Rpp. 51-52; Rpp. 79-83; Rpp. 89-96; Rp.99 (b), lines 1-p. 100, line 42; Rpp. 103104; Rp. 110(b), line 1-p. 111, line 8.

III. At the January 7, 2016 hearing, appellant sought amendment of the complaint to Conform to the evidence and cure any alleged defect in the affidavit requirements under S.C. Code Statute 15-36-100(B). S.C. CODE Statute 15-36-100(B) states: **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 of filing of the affidavit. Id.

S.C. Code Statute 15-36-100(E) states: If a plaintiff files an affidavit which is Allegedly defective, and the defendant to whom it pertains alleges, with specificity, By motion to dismiss filed contemporaneously with it's initial responsive pleading, That the affidavit is defective, the plaintiff's complaint is subject to dismissal for Failure to state a claim, except that the plaintiff may cure the alleged defect by Amendment within thirty days of service of the motion alleging that the affidavit is Defective. The trial court may, in the exercise of it's discretion, extend the time for Filing an amendment or response to the motion, or both, as the trial court Determines justice requires. The filing of a motion to dismiss pursuant to this Section shall alter the period for filing an answer to the complaint in accordance With rule 12(a), South Caroline Rules of Civil Procedure. Id.

Appellant, had initially amended the pleadings on November 12, 2015 which was Styled as Opposition To Motion To Dismiss, which was within 30 (thirty) days of Respondent's October 14, 2015 Motion To Dismiss the complaint. Appellant had amend The pleading to state a second theory of recovery which cured any alleged defects in the Pleadings of complaint and affidavit under S.C. Rule of Civil Procedure, Rule 15 (a) Amendments, and 15 (b) Amendments To Conform To The Evidence and under S.C. Code Statute 15-36-100 (E). Id. Appellant, second theory of recovery was **" that**

Trident knowingly, recklessly intent to initially start plaintiff on the treatment of Aspirin but delayed this treatment until it decided what his allergic reaction to Aspirin. Then recklessly changed from Plavix to Aspirin 325mg on or about 9/24/12 Until 9/26/12 upon discharge and afterwards with reckless intent to harm plaintiff By using this treatment in an excessive doses, not Heparin and Coumadin with no Follow-up care instruction for this needed treatment upon discharge, knowing his Condition had become critical worsen, fell below the standard of care" . Appellant, Also raised this second theory of recovery in his Memorandum of Law In Support Of Opposition To Motion To Dismiss; Appellant Opposition To Dismiss.

Rp. 100, lines 10-41; Rp. 111, lines 8-29; Rpp. 25-55; Rp. 9 Facts / Breach, lines 1-p. 11 part 2, line 25.

The facts and evidence in the affidavits as it conforms to evidence to the amended Second theory of recovery is **Trident Medical Center-Medical Records, Rpp. 20-55, Which is incorporated by reference in the complaint shows:** On 9/23/12 patient was Admitted to Trident, with right-side weakness with stroke like symptoms where Trident Voluntary undertaken to diagnose patient to determine the cause of symptoms and to Treat the condition with due care. On 9/23/12 Trident perform various diagnostic test.for A work-up. An EKG of the heart showed abnormalities. A CT scan of the head allegedly Showed no abnormality and no hemorrhage and no acute process and the clinical Impression was a new Cerebrovascular accident which was allege to be a small stroke Of the brain. The test results were reviewed and determine a need for additional work-up Which was discussed with on call health provider, Dr. T. Botelho. They agreed on a Treatment plan. Dr. Botelho, Assessment / Plan, stated: **CVA right hemi paresis**

Incomplete. The patient will be place on Plavix as he has an allergy to aspirin. We Will need to determine what his allergy actually is. Blood pressure control per Stroke protocol. Ultrasound carotid repeat CT 24 to 48 hours verses MRI / MRA Of the brain and Neurology to be consulted. Elevated CK-MB with abnormal EKG. Cardiology is consulted, start statin therapy. Check lipids in the morning, telemetry And continue serial CIPs. The patient will be started on Plavix and beta blocker.

On or about 9/24/12, Dr. Julio Rentas-Reyes allegedly determined patient was Probably not allergic to aspirin so he changed patient treatment from Plavix to aspirin 325 mg for treatment for secondary stroke prevention. Dr. Reyes-Rentas, who was a **Part of the decision making process to determine the treatment plan for the patient Condition, knew or should have known Plavix is a blood thinner and prescribed as a Blood thinner for the patient care and that aspirin 325 mg as shown by the package Insert from the manufacturer warn that aspirin 325 mg is not the recommended as a Blood thinner and physician may want to prescribe a lower doses of aspirin to Prevent blood clots which reduces the risk of a stroke.** Therefore, the above evident Shows Trident was reckless in treatment to prevent embolism, clots or second stroke.

On 9/24/12 Trident performed an Echocardiogram of patient heart which allegedly Was normal and showed no evidence of embolism of a cardiac source. A few hours later Trident performed an MRI of the patient's brain. The results showed: **Multi focal patchy Restricted diffusion is present within the right parietal lobe and posterior left Frontal lobe which appears to involve the cortex and subcortical white matter. This extends into the left centrum semiovale. There is minimal associated edema**

With this abnormality. No significant mass effect is present. There is no associated Intracranial hemorrhage. Postcontrast imaging demonstrates serpentine Enhancement within the abnormality.

Impression: Acute infarct within the posterior left frontal lobe, left parietal lobe, And left centrum semiovale as detailed above.

On 9/25/12 Trident perform another EKG on patient. The results stated **Marked Sinus bradycardia. Minimal voltage criteria for LVH, may be a normal variant. ST And T wave abnormality, consider anterolateral ischemia. Abnormal EKG when Compared with EKG of 9/23/12. Nonspecific T wave abnormality now evident in Inferior leads.** Trident **9/26/12 discharged summary and instruction-No anticoagula-Tion.** Appellant, second theory of recovery is that evidence from the MRI and the above EKG showed his condition had become abnormally worsen in the brain and heart since Admission on 9/23/12. And that above evidence showed Trident knowledge and aware That the aspirin 325 mg treatment was not adequate to thin the blood to maintain blood Flow to the heart and brain. And that Trident, knowingly, recklessly with intent to Harm patient, continue to treat him with the excessive doses of aspirin 325mg until Discharge and gave upon discharge a prescription for aspirin 325 mg without treatment or instruction for a need for anticoagulation treatment with PCP. Trident voluntarily Undertaken to treat to prevent a second stroke, embolism, allergic treatment of aspirin.

. Therefore, the above evidence shows Trident knowing, recklessly with intent to Cause harm, which did cause harm of a second stroke, cardiac embolism, hemorrhage, .and severe brain impairments. Therefore, the trial Judge rulings were error. There. Is no defect in the amended pleading to conform to evidence requirements under S.C.

Rule of Civil Procedure-Rule 15(a) and(b) and cured any defective affidavit requirement Allowed under S.C. Code Statute 15-36-100(B) and 15-36-100(E). The trial Judge Denied the amendment and rule that appellant Memorandum of Law in Opposition was Irrelevant, immaterial and inadmissible. Therefore, based upon the above factual Evidence, S.C. Rule of Civil Procedure and S.C. Code Statute 15-36-100(B) and (E) there Is no factual or legal grounds in the record to support for the trial Judge ruling denial of Amendment of the pleading in complaint and deny admission of the affidavit. Complaint, Rp. 9, line1-p. 11 Standard of Care, lines 1-25; Tr., p. 7, line 13-p. 8, line 4 And Rp. 60, line 13-p. 61, line 4; Respondent Memorandum of Law, Rpp. 62, Procedu-Ral Background, line 1-p. 63, para. 2, lines 1-8; Verified Complaint Treated As An Expert Witness of , Dr. Sarah Anne Ludington. Rpp., 89-96; History of Present Illness; Rpp. 89-96, Discharge Medications; Appellant Memo-Random of Law In Opposition To Motion To Dismiss, Rp. 101, lines 10-41; Opposition To Motion To Dismiss, Rp. 111(2), lines 8-29. S.C. Rule Civil Procedure-Rule 15(a) Amendments states: **A party may amend his pleading once as a matter of course at Any time before or within 30 days after a responsive pleading is served or, if the Pleading is one to which no responsive pleading is required and the action has not Been placed upon the trial roster, he may so amend it at any time within 30 days After it is served. Otherwise a party may amend his pleading only by leave of the Court or by written consent of the adverse party; and leave shall be freely given When justice so requires and does not prejudice any other party. Id.**

S.C. Rule of Civil Procedure-Rule 15(b) Amendments To Conform To The

Evidence, states: **When issues not raised by pleadings are tried by express or implied Consent of the parties, they shall be treated in all respects as if they had been raised In the pleadings. Such amendment of the pleadings as may be necessary to cause Them to conform to the evidence and to raise these issues may be made upon motion Of any party at any time, even after judgment; but failure to so amend does not Affect the result of the trial of these issues. If evidence is objected to at the trial on The ground that it is not within the issues made by the pleadings, the court may Allow the pleadings to be amended and shall do so freely when presentation of the Merits of the action subserved thereby and the objecting party fail to satisfy the Court that admission of such evidence would prejudice him in maintaining his Action or defense upon the merits. Id.**

ARGUMENTS

I. DID APPELLANT COMPLY AND MEET THE STATUTORY REQUIREMENTS IN FILING THE NOTICE OF INTENT AND COMPLAINT AT THE SAME TIME BY FILING UNDER S.C. CODE STATUTES 15-79-125(A)AND 15-79-125(E)(2)?

STANDARD OF REVIEW

"On appeal from dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies The same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646,675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a

Light most favorable to the nonmovant and determine if the facts alleged and the infer-Ences reasonably deducible from the pleadings would entitle the plaintiff to relief on any Theory of the case." Id. The motion will not be sustained if the facts alleged and the Inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on Any theory of the case. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). The question to Be considered is whether, in light most favorable to the plaintiff, the pleadings articulate Any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987. The Complaint should not be dismissed merely because the court doubts the plaintiff will Prevail in the action. Id.

DISCUSSION

On September 23-26, 2012 appellant was diagnose and treated by respondent Trident For stroke like symptoms. On September 30, 2012 appellant had second episode of stroke Like symptoms at home after discharge from Trident on Semptember 26, 2012. Appellant Was admitted to TRMC on Semtember 30, 2012. On October 1, 2012 TRMC's MRI Results showed appellant injury was cardio embolism. It was also determined that Appel-lant injury was likely cause by Trident negligent diagnosis and treatment. Rpp. 70-96. On September 11, 2015 appellant refiled a presuit Notice of Intent and a Complaint against Respondent 12 days prior to the 3 (three) years limitation. Rpp.9, 21-22, 57-59, 63,70-96.

Appellant, specifically invoked S.C. Code Statute 15-79-79(E)(2) because the 3(three) Years statute of limitation was to expire in 12(twelve) days and under S.C. Code Statute

15-3-545(A) which is mandatory states "in any action to recover damages for injury to The person arising out of any medical treament must be commenced within three years From the date of treatment or omission." S.C. Code Statute 15-79-125 States: **Notice of Intent to File Suit as prerequisite to filing action; subpoena of medical records; Depositions; mandatory prelitigation mediation;initiating action;ADR participation.** Under S.C. Code Statute 15-79-125(C) it 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 based upon a finding of good cause. S.C. Code Statute 15-79-125 section(E) States: **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. The action must be filed:**

(1) within sixty days after the mediator determines that the mediation is not viable, That an impasse exists, or that the mediation should end; or

(2) prior to expiration of the statute of limitation, whichever is later.

I. With all of the above statutory schemes in mind and applicable to appellant Circumstances in the presuit pleadings to initiate both S.C. Statutes 15-79-125(A) Notice Of Intent /Affidavits and 15-79-125(E)(2) filing the Complaint prior to the expiration of The statute of limitation, **whichever is later, conditions were met to invoke** the above 2 (two) statutes and file the Notice of Intent/Affidavits and Complaint together as one. For all of the above statutes to be in compliance, appellant had to file the Notice of Intent As a prerequisite to filing an action and must participate in mediation conference within Ninty days but no later than one hundred twenty days with an extension of sixty

Days as a prerequisite to filing the presuit. However, he then had to wait sixty days after It was determine an impasse exist, that mediation not viable or mediation should end; Or file the Notice of Intent and properly invoke S.C. Code Statute 15-79-125(E)(2) and File the Summons and Complaint all together as one because of the later condition prior To the expiration of the 3(three) years statute of limitation had been met and to conduct Mediation after filing the complaint (F). Clearly on it's face S.C. Code 15-79-125(E)(2) Was applicable to appellant, but the 2(two) statutes must be read together to give effect To legislative intent when a presuit Notice of Intent is prerequisite and Mediation has not Yet begun but the statute of limitation is about to expire which is the later circumstance. Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189(2014)(quoting Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459(2007) "The cardinal rule of statutory interpretation is to Ascertain and effectuate the intention of the Legislature." "When a statute's terms are Clear and unambiguous on their face, there is no room for statutory construction and a Court must apply the statute according to it's literal meaning." Id. In interpreting a statute , "[w]ords must be given their plain and ordinary meaning without resort to subtle or Forced construction to limit or expand the statute's operation." Id. At 499, 640 S.E.2d at 459. Futher, "the statute must be read as a whole and sections which are a part of the Same general statutory law must be construed together and each one given effect." S.C. State Ports Auth. V. Jasper Cnty., 368 S.C. 388, 629 S.E.2d 624, 629(2009)(citing TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471(1998) ; Grazia v. S.C. State Plastering, 390 S.C. 562, 703 S.E.2d 197(2010)(Harmonization of The Right To Cure Act's Stay Provision and Notice Requirements "It is clear to this court

That these two provisions are at odds, as the language used in section 40-59-840 appears To require mandatory compliance with the Act's notice provisions prior to filing an Action, while section 40-59-830 provides a contractor / subcontractor with a means of Staying an action that is filed without first complying with the same notice provision").

Grazia, also cites Trimble V. Itz, 898 S.W.2d 370, 373-74(Tex. App. 1995(considering Similar notice provisions included in statutes requiring pre-litigation notice and Concluding that the purpose of the statute is better served by abeyance than dismissal). Trimble v. Itz, actually considered similar notice provision in medical malpractice action. See also Kukral v. Mekras, 679 So. 2d 278-Fla: Supreme Court (1996)(citing Hospital Corp. v. Lindberg, 571 So.2d 446(Fla. 1990)(Pre-Suit Notice of Intent and Complaint Filed at the same time prior to the expiration of the statute of limitation). Therefore, under S.C. Code Statutes 15-79-125(A) Notice of Intent and 15-79-125(E)(2) Complaint prior To expiration of the statute of limitation must be read together to give effect to the Legislative intent. Futhermore, to not do so would create and absurb result because the Statute of limitation would still expire and appellant would be forever barred from filing A complaint with his attached 10/25/12 pleadings to render it meaningless, yet appellant complied with presuit requirements and timely initiated this action. Rpp.9, 21-22,70-96. Wilkinson v. East Cooper Community Hospital, 410 S.C. 163, 763 S.E.2d 426(2014) (citing Ross v. Waccamaw and Grier, for the proposition that the Notice of Intent and Complaint were timely initiated). Therefore, appellant request this court for an extension Of Wilkinson in it's application of S.C. Code Statutes 15-79-125(A) to 15-79-125((E)(2).

II. Finally, appellant was in compliance with S.C. CODE Statute 15-79-125(A) Notice of Intent requirements, 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 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 his attorney, and must include any Standard interoggatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filling the Notice of Intent tolls all applicable statute Of limitations.

On September 11, 2015 appellant filed under S.C. Code Statutes 15-79-125(A), 15-79-125(E)(2) and 15-36-100 Common Knowledge on the face of the complaint citing These statutes for pleadings Notice of Intent, complaint filed prior to the expiration of the Statute of limitation and expert witness affidavit. Appellant also cited S.C. Code Statutes 15-79-125(A) and 15-36-100 on the face of the Notice/Claim/Disclosure authorized from disability claim, pleading for initiating the Notice of Intent and the Expert Affidavit. The Notice provision of Notice of Intent and Affidavit on page 4(four) states **the information In the documents could be used in any related civil proceedings**. Therefore, appellant Was using this Notice of Intent and Affidavit as part of the related medical issues for Pleading S.C. Code Statutes 15-79-125(A) presuit Notice of Intent and 15-36-100 as the Affidavits of Expert Witnesses specifying two acts or omissions claiming to exist and the Factual basis for each claim base on the available evidence on **10/25/12** time of filing the

Affidavit. Appellant signed the Notice on page 3(three) on **10/25/12** and cited S.C. Code Statutes !5-79-125(A) and 15-36-100 on the face of the Notice of Intent and Expert Witnesses Affidavit on **9/11/15**. Rpp.70-96. Appellant on September 11, 2015 included The required standard Interrogatories filing under S.C. Rules of Civil Procedures Rule 33 And 34 Request for Production. Respondent, Trident was Name as adverse party, contain The plain and short statement showing appellant entitled to relief by incorporating by Reference the affidavit factual basis for claim into the complaint pleadings for damages Relief and signed the request for damages relief. Finally, appellant attached the presuit Notice of Intent and Affidavits pleadings together with the litigation pleadings captioned Filed under these statutes on the face of the complaint but the clerk of court erroneously Filed Notice of Intent and Affidavits separately as an exhibit from disability proceeding. Rp. 1, caption filed under S.C. Code Statutes 15-79-125(A), 15-79-125(E)(2) And 15-36-100; Rp. 63, lines 6-13; Rpp. 70-88 Caption citing S.C. Code Statutes 15-79-125(A) and 15-36-100-Caption styled as Verified Complaint Treated As An Expert Witness Affidavit; Rpp. 89-96; Rp. 9 Statutes pleading - p. 11, part 2, Lines 1-25; Rp. 108, lines 1-p. 109, line 34; App. Fi. Reply Br., p. 8-15.

Therefore, based on all of the above pleadings filed under S.C. Code Statute 15-79-125(A) Notice of Intent, appellant complied with statutory requirement even if the Clerk of court filed the presuit Notice of Intent / Affidavit documents separately from the Complaint caption filed pleadings under S.C. Code Statutes 15-79-125(A) and 15-36-100 As separate documents from a different proceeding with different case number. This Does not convert appellant prelitigation Notice of Intent claim and litigation claim filed Under S.C. Code Statute 15-79-125(E)(2) into two cases requiring two Notice of Intent

And two Expert Affidavits. The assignment of prelitigation pleadings and litigation Pleadings filed separately as if from a different proceeding is of no consequence Because they both comprise a single medical malpractice claim. Wilkinson v. East Cooper Community Hospital,Inc., 410 S.C. 163, 763 S. E.2d 426 (2014)(quoting Fisher v. Perlstring, 817 F. Supp.2d 791, 807 n. 8 (D.S.C. 2011)(analyzing procedures for initiating medical malpractice claims and stating "[s]ection 15-79-125 Also does not include any language indicating that the case number under which a Notice of Intent is served on a defendant must be the same as the case number assigned To the complaint served on that defendant if a civil action is ultimately initiated").Rp.98.

Therefore, the trial judge ruling was error of law that appellant did not follow the Procedure under S.C. Code Statute 15-79-125(A) prior to filing his medical malpractice Action. Wilkinson v. East Cooper Community Hospital, Inc., 410 S.C. 163, 763 S.E.2d 426 (2014)(Based on the foregoing , we hold the circuit court erred in granting Respondents' motions to dismiss as Wilkinson's Complaint was timely and sufficient to Properly initiate a civil action for medical malpractice). S.C. Code Statutes 15-79-125(A), 15-79-125 (E)(2); Baird v. City of Charleston, 333 S.C. 519, 511 S.E.2d 69(1999)(same).

ARGUMENTS

II. DID THE TRIAL JUDGE ERR TO DISMISS BECAUSE APPELLANT FAIL TO FILE AN ADMISSIBLE QUALIFIED EXPERT WITNESS AFFIDAVIT WHEN IT IS QUESTIONABLE APPELLANT WILL PREVAIL?

DISCUSSION

S.C. Code Statute 15-36-100 states: Complaint in actions for damages alleging Professional negligence; contemporaneous affidavit of expert specifying negligent act or Omission.

(A) **As used in this section, "expert witness" means 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 and 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 a result of having been regularly engaged in:

(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 claim to exist and the factual basis for each claim based on the available Evidence at the time of filing of the affidavit.

Appellant, on September 11, 2015 filed in the court of common pleas, filed under S.C. Code Statutes 15-79-125(A) Notice of Intent, 15-79-125(E)(2)Complaint prior to the Expiration of the statute of limitation, and 15-36-100 Affidavits of Expert Witnesses, Claims for damage relief for medical malpractice based on respondent negligence in

Diagnosis and treament of him for cardio embolism. Respondent, Trident filed motion Seeking dismissal of medical malpractice action and dismissal of affidavits on the ground The affidavit pleadings were defective not meeting S.C. Code Statutes 15-79-125(A) And 15-36-100 requirements for a presuit expert witness affidavits. Respondent, also Stated the affidavits did not contain an opinion on the standard of care which was Breached by Trident, therefore was not admissible as evidence and subject to dismissal. Respondent, also stated that the type, amount and doses of anticoagulation treatment Required specialized professional knowledge from an expert witness and not a common Knowledge issue. { Respondent's Memo. Of Law, Rp. 63 Proc. Back., para. 2, lines 1-8; Complaint, Rp. 9 Fact. Basis for Claim, lines 1-Rp. 11, Standard of Care, lines 1-25 }.

On January 7, 2016, the hearing on the motion for dismissal was held. Respondent, Trident raised the same above grounds for dismissal. The trial Judge, agreed With respondent on all of the grounds for dismissal. Appellant, raised objection to all of Respondent's grounds for dismissal and to the trial Judge conclusion that the affidavits Were not qualified as presuit affidavits of expert witnesses, inadmissible as evident And not a common knowledge issue. The trial Judge ruled that it was questionable Whether or not to dismiss the action and that appellant could not use the doctors opinion As an affidavit, that treatment of anticoagulation was not a common knowledge issue and Appellant, Memorandum of Law was irrelevant, immaterial and inadmissible evidence. The trial Judge, granted respondent motion to dismiss the action and affidavits and notice Of intent. Tr., p. 3, Line 1-p. 8, Lines 1-4 and Rpp.56-61.; Appellant's Memo. of Law, Rp. 99 (b), Lines 1-Rp. 100, Lines 1-41; Order, Rpp. 1-5; Rp. 110 b, line 1-p. 111,line29.

The expert witness affidavit of, Hospitalist, M.K. Greene, met the requirements

Of an affidavit under S.C. Code Statutes 15-79-125(A) and 15-36-100(B) by specifying At least one negligent act or omission claim to exist and the factual basis for the claim based on the available evidence at the time of filing the affidavit. Rpp.70, 79-83. The Affidavit specified by noting "We receive documentation from Trident which showed a Small acute stroke, but no evidence of a cardio embolic source on MRI then or on Work-up". Trident's MRI showed multi-foci and TRMC showed muli-foci which Specifically noted " Given the multi focality suggest a cardio embolic phenomenon". TRMC, expert witness affidavit specifically noted " because embolism is a possibility I Ordered a Heparin Drip, Neurology has been consulted to be treated per Neurology Protocol " and noted to see patient history. The history notes indicates **patient had a MRI at Trident and was treated with aspirin 325 mg, hypertension medication and Statin and given a prescription for refill of the same medication.** Appellant, claim for Relief is that given the affidavit shows that the diagnostic standard of care of a radiologist On MRI is a diagnosis of " multi focality suggest a cardia source of embolism" and Since both Trident MRI and TRMC MRI showed the same multi foci results. Therefore a reasonable deducible inference embolism of a cardiac source was possible at Trident. { Rpp. 79-83}. Therefore, the affidavit specified one act or omission claim to exist And the factual basis for the claim of negligent in not diagnosing embolism on MRI. Likewise, since embolism was a possibility at Trident and a, Hospitalist standard of care Is to " Order a Heparin Drip, consult Neurology, and treat per Neurology Protocol". And Since, embolism of a cardiac source was a possibility at Trident and affidavit specifically Noted " see patient history for detail reason for admission" and the history note specified

" patient treated with Plavix and discharge on aspirin and given a prescription for A refill of the same medication. Therefore, the affidavit met the requirements under S.C. Code Statutes 15-79-125(A) and 15-36-100(B) specifying at least two negligent Act or omission and factual basis for each claim based on the available evidence at the Time of filing, of negligent not to suggest embolism of a cardiac source " given the multi Foci" and inferred negligent treatment of aspirin.{ Order, Rpp. 1-5; Rp. 70; Rp. 79 PCP; Rp. 79 History of Present Illness; Rpp. 79-80 Hosp. Course; Rpp. 80-83 Assessment and Plans and Final Discharge Diagnosis; Rpp. App. Fi. Reply Br., P. 8-15; Rp. 31-32; Rp.40.

The Affidavit of Dr. M.K. Greene, also met the meaning and qualification Requirements under S.C. Code Statute 15-36-100(A) and subsections(1) and(2)(a) or(b) For an expert witness. Dr. M.K. Greene, as a Hospitalist has actual professional Knowledge, experience and regularly engages in making decisions on the standard Of care for treatment on a Radiologist diagnosis of possible embolism of a cardiac source. Dr. M.K. Greene, opinion is that when " embolism is a possibility the standard of care is To order a Heparin Drip, consult Neurology, treat per Neurology Protocol". Dr. Greene, Was familiar with the history of the case from Trident MRI which showed " acute CVA Stroke with multi foci brain infraction, did not show evidence of a source".{ Rpp.79-83}. Therefore, the affidavit show, Dr. Greene, had experience and knowledge to review MRI Results to determine the proper treatment. And knowledge and experience in reviewing A radiologist acts or omission to form an opinion on the standard of care of a prudent Radiologist under the same condition. Dr. Greene, specifically stated "of note we did Received documenation from Trident which showed a small acute stroke but no evidence Of a cardio embolic source on MRI then or on work-up" "Acute CVA with brain infarct

Likely cardio embolic source". Rpp.31-32,40; Rp.70; Rpp.79-83 . Therefore, the affidavit Met the statute's meaning and qualification as an affidavit of a qualified expert witness. .

The affidavit of, Dr. Sarah Anne Ludington, met the requirements under S.C. Code Statutes 15-79-125(A) and 15-36-100(B) which require 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 filing. { Rpp. 80; Rpp. 89-96 }.

Dr. Sarah Anne Ludington, as a Hospitalist, affidavit specifically stated " The patient Actually presented to Trident about a week and a half ago with similar symptoms where He was admitted. He had a work-up which showed a small stroke. The Echo was normal. Past medical history of CVA .{Rpp.89-96}. On 10/1/12 before the patient got his MRI of The brain he wanted to leave. As I got a call by the patient's nurse, I convinced the Patient to stay for the MRI". " The next day I reviewed the MRI results which Showed multiple small foci of restricted diffusion in the high left parietal lobe and Evidence of hemosiderin deposition suggesting prior cortical hemorrhage of uncertain Chronicity". It was **noted** "given the multi focality the appearance was suggestive of an Embolic phenomenon". "In addition, there were areas of chronic ischemic changes in left Occipital lobe". **" Because of these findings, I called the patient at home yesterday Requesting him to come back to the hospital regarding the need for possible Anticoagulation given the possibility of embolic stroke"**. Dr. Ludington's, affidavit Specifically noted TRMC, Hospital Course was "Patient admitted and atrial thrombus Detected on TEE. Was placed on heparin gtt to transition to coumadin" and Discharge Plan, standard of care, required " Follow Up INR in 2 days with adjustments made

By Primary Care Physician, needs follow up with PCP in 1-2 weeks" with Discharge Medication of Warfarin 5mg, with adjustments made by PCP in 2 days for INR according Neurology Protocol. Rpp. 89-96. Therefore, Dr. Ludington affidavit met the requirement Under S.C. Code Statutes 15-79-125(A) and 15-36-100 specifying at least one negligent Act or omission claimed to exist and the factual basis for each claim based on Dr. Greene Hospital course records at time of filing on 10/8/12 of Trident's neligent in diagnosis to Show a source of embolism of cardiac source on MRI of the CVA stroke. And negligence As a Hospitalist under similar circumstances upon discharge and on follow- up to treat With anticoagulation the generally recognized and accepted practice. Rp. 83; Rpp. 89-96.

Likewise, Dr. Ludington, affidavit also met the meaning and qualifications as an Expert Witness Affidavit under S.C. Code Statutes 15-36-100(A)(1) and (2)(a)or (b). Dr. Ludington, as a Hospitalist was authorized by TRMC to investigate the patient's Reasons for admission, history of present illness, hospital course of action in respond and To make assessments and plans for needed folow up care after discharge from TRMC. Dr. Ludington, has knowledge and experience making assessments and plans for a patient Follow up care after discharge as an active part of her practice that she regularly engages In at TRMC for stroke patients to give an opinion on the standard of care after discharge. Dr. Ludington, as a Hospitalist at TRMC, has experience and knowledge of type needed For anticoagulion treatment of coumadin and INR effect, the timing needed to make adjustments and the amount needed on discharge to prevent future clots and stroke.{ Rp. 95}.

Therefore, Dr. Greene and Dr. Ludington's, affidavits in combination established The standard of care and the negligent acts and omissions of Trident in the diagnosis and Treatment on MRI then and work-up and upon discharge on the issue of standard of care.

The trial court ruled TRMC doctors statements could not be used as qualifying Experts under 15-36-100. And also ruled anticoagulation treatment is not a common Knowledge issue. { Order, Rpp.1-5; Tr., p. 3, Line 1-p. 8, Line 4 and Rpp. 56-61 }.

The qualification of a witness as an expert and admissibility of his Testimony are matters largely within discretion of the trial judge. Creed v. City of Columbia, 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993). Similarly, the admission or Exclusion of evidence in general is within the trial court's decision will not be disturbed On appeal absent an abuse of discretion. Pike v. S.C. Dept of Transp.,343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596,598 (1987); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921, 923(Ct. App. 2001). An abuse of discretion occurs when the ruling is based on an error of law or a Factual conclusion that is without evidentiary support. Carlyle v. Tuomey Hosp., 305 S.C. 187, 193 ,407 S.E.2d 630, 633 (1991); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E. 565, 566 (1987). To warrant reversal based on the admission or exclusion of evidence , The appellant must prove both error of the ruling and the resulting prejudice, that is, that There is is a reasonable probability the jury's verdict was influenced by the challenged Evidence or lack thereof. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997); Timmons v, S.C. Tricentennial Comm., 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); Powell v. Temple, 250 S.C. 149, 160, 156 S.E.2d 759, 764(1967).

I. The evidence in, Dr. Greene's affidavit established "embolism of a cardiac source was a possibility" at Trident but documents Rpp.39-40 "did not show evidence of cardio Embolic source on MRI then or on work up, but showed a small stroke".Rpp.79-83. Thus

Trident was negligent in diagnosis "given the multi focality" radiologist standard of care Is suggestive of cardio embolic source. Bowie v. Hearn, 294 S.C. 344, 345, 364 S.E.2d 469, 470(1988)(Petitioner expert testified that a caesarean section requires a series of Incisions through various layers of the mother's abdomen. He stated the proper procedure Is to make a tiny initial incision in each layer and then lift the edges of that incision and Make it larger and deeper. According to the testimony, use of this standard technique Will not result in injury to the baby. Respondent testified that when he reach the uterus, He made three or four "swipes" with a scalpel in order to reach the uterine wall. Petitioner's expert testimony was evidence that respondent's action deviated from the Recognized and generally accepted caesarean procedure); Gooding v. St. Francis Xavier, 326 S.C. 248, 487 S.E.2d 596 (1997)(Sorenson never testified that Dr. Hood used Gooding's teeth as a fulcrum during intubation. Because Gooding presented no evidence That Dr. Hood did not conform to the accepted standard of care , he failed to establish That Dr. Hood was negligent); King v. Williams, 276 S.C. 478, 279 S.E.2d 618 (1981).

The evidence in Dr. Greene's affidavit also establishes that Trident was Negligent in treatment. Since the standard of care of a radiologist diagnosis is "given The multi focality is suggestive of a cardio embolic source" and requires a Hospitalist To "consult Neurology, order a Heparin Drip and treat per Neurology Protocol when Embolism is a possibility". Dr. Greene's affidavit noted " after reviewing the MRI results I called the patient at home and told him the likely source of his CVA is cardio embolic. And that he needed to come back to the hospital to be admitted for possible anticoagulat-ion treatment". Rpp. 79-83. Dr. Greene, further noted "patient admitted to Telemetry. I Did order a Heparin Drip given embolism is a possibility. Neurology has been consulted

To treat per Neurology Protocol" which is a Hospitalist standard of care treatment when Embolism is a possibility. Therefore, since Dr. Greene's affidavit established embolism Was a "possibility" and " hemorrhage" while still admitted and under Trident's medical care it also established Trident negligent discharge treatment of aspirin by stating " see history which states, Trident treated and discharged on aspirin with prescription for refill For follow up care of the CVA with brain infarction likely cardio embolic source with old Hemorrhage".{ Rpp.30-45;Rpp.70-83; App. Fi. Reply. Br. P. 8-15}. King v. Williams, Supra(Based upon his reading of the x-rays, as well as the report of the radiologist, Dr. Williams diagnosed and treated the injury as a severe ankle sprain. King was released In early March and allowed to walk on the foot using a walking cast. When it was Removed in late March, the foot remained swollen and blue. Dr. Williams considered This condition to be normal and continued the same treatment. On appeal, Dr. Williams Challenges the admission into evidence of (1) the testimony of Dr. Rein, and (2) Purported X-rays of King's foot, and contends that without this evidence there was Insufficient competent evidence from which a jury could find any negligence on his part. Affirmance of the verdict is not dependent upon expert testimony. Even without Dr. Rein's testimony, the jury reasonably could have inferred that King's injury was Proximately cause by negligence of Dr. Williams. King suffered a foot injury. Dr. Williams X-rayed the ankle region only, and diagnosed a "severe sprain." While the Initial examination and diagnosis was arguably not negligent, the subsequent events Clearly infers a failure to use proper skills. Despite persistent pain and swelling, he failed To X-ray areas of the foot other than the ankle for almost eight months. Furthermore, he

Failed to consult a specialist until almost a year later in spite of abnormal developments, Such as, failure to timely heal, fallen arch and demineralization. Dr. Williams fail to Consult the specialist either before or after the appointment. Dr. Williams admitted that King followed the prescribed medication. The law is well-established that expert Testimony is not required where the **common knowledge** or experience of a laymen is Capable of **inferring lack of proper care** and also the required casual link. We think the Jury was justified under these circumstances in finding actionable negligence by Dr. Williams even absent expert testimony).{App. Fi. Reply Br., p.8-15 ; App. Fi. Br., p. 20-28 }.

Therefore, based on the above evidence in Dr. Greene's affidavit,15-36-100 and case Laws cited which shows error of the trial court's rulings. And requires reversal of its order to dismiss the affidavits of, Drs. Greene and Ludington. Since Dr. Ludington's affidavit verified Dr. Greene's of Trident's negligent discharge and follow up care. This was evidence showed merit to the issues breach the standard of care and common knowledge. App. Fi. Rep. Br. P. 8-15. Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189(2014))(As to Dr. Crain's assertions regarding defects in the authorship and content of Dr. Boortz -Marx affidavit, we find this not an appropriate ground to affirm the circuit court's order Because the affidavit is facially sufficient given it is sworn and identifies a potentially Meritorious medical malpractice claim. Moreover, there is no factual basis in the record To challenge either the expert's qualifications or content of the affidavit); Cf. Poch v. Bayshore Concrete Prods., Inc., 405 S.C. 359, 378 n. 13 , 747 S.E.2d 757, 767 n. 13 (2013)(declining to reject affidavit presented as proof of worker's compensation Insurance as there was "no basis for which to reject the affidavit as it is by its very nature a sworn statement intended as documentary evidence in a legal proceeding"). **Id.**

II. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 n. 9(2005) (quoting Elledge v. Richland / Lexington School Dist. Five, 352 S.C. 179, 185-89, 573 S.E.2d 789, 792-95 (2002)(finding prejudicial error in exclusion of industry safety Standards for playground equipment because such standards would have helped establish The necessary standard of care, would have provided important support and enhancement Of opinion testimony of expert witnesses, and would not have been cumulative to experts Testimony) also quoting Seen v. J.S. Weeks Co., 255 S.C. 585, 591, 180 S.E.2d 336, 338 (1971)(finding prejudicial error) and also quoting Sellers v. Public Sav. Life Ins. Co., 255 S.C. 251, 256, 178 S.E.2d 241, 243(1970)(finding prejudicial error); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921(Ct. App.)(2001)(finding exclusion of the evidence was not Harmless error as there was no equivalent testimony presented to this effect).

ARGUMENTS

III. DID THE TRIAL COURT ERR IN DENYING LEAVE TO AMENDMENT OF THE COMPLAINT TO STATE A SECOND THEORY OF RECOVERY?

DISCUSSION

Dismissal of a case "without prejudice" means a plaintiff may reassert her complaint By curing defects that led to the dismissal. In contrast, a dismissal of a complaint "with Prejudice" is intended to bar relitigation of the same claim. Collins v. Sigmon, 299 S.C. 464,467, 385 S. E.2d 835, 837 (1989).

Dismissal of a complaint does not bar a subsequent action brought before the expiration Of the statute of limitations if the dismissal is based merely on insufficiency of the

Complaint. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Hennegan v. Atlantic Coast Line R. Co., 211 S.C. 357, 45 S.E.2d 331 (1947). Dismissal of a case precludes Relitigation only on matters actually decided in the dismissal. Sealy, 289 S.C. at 544, 347 S.E.2d at 505(dismissal for improper joiner and lack of capacity to sue precludes only Those issues).

When a complaint is dismissed under Rule 12 (b)(6) for failure to state facts sufficient to Constitute a cause of action, the dismissal is generally is without prejudice. The plaintiff In most cases should be given an opportunity to file and serve an amended complaint. See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962)(rules of civil Procedure should be liberally construed to do substantial justice and lower court erred in Denying motion to amend complaint where amendment would have stated alternative Theory of recovery).

When a plaintiff is not given the opportunity to file an serve an amended complaint, but is Left with no choice but appeal after dismissal of her case with prejudice, an appellate Court which affirms the dismissal may modify the lower court's order to find the Dismissal is without prejudice. When the statute of limitations has expired, the appellate Court may in its discretion impose a reasonable period of time in which to amend the Complaint. An appellant court should follow this procedure when the plaintiff presents Additional factual allegations or a different theory of recovery which, taken as true in a Well-pleaded complaint, may state a claim upon with relief may be granted. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).

Applying these principles in the present case the appellant has presented additional

Factual allegations or a different theory of recovery in his opposition to motion to Dismiss and in his Memorandum of Law in opposition to respondent's motion to dismiss Which may give rise to a cause of action which relief maybe granted against Trident. Therefore, the lower court order was in error and should not be affirmed. The trial judge Denied appellant motion for leave to amendment of the complaint to state a second theory With supporting factual allegations that Trident "**knowingly, recklessly intent to Initially start plaintiff on the treatment of aspirin but delayed this Treatment until it decided what his allergic reaction to aspirin. Then recklessly Changed from Plavix to Aspirin 325mg on or about 9/24/12 until discharge and Afterwards with reckless intent to harm plaintiff by using this treatment in an Excessive dosages, but not treating him with the generally recognized and accepted Treatment of Heparin and Coumadin with discharge instruction for follow up with Plaintiff primary care physician for this needed treatment upon discharge, knowing His condition had become critical worsen with possible embolism of a cardic source Took no correct action ".** Tr., p.3, Line 1-p. 8, Line 4 and Rpp. 54-61. Wilkinson v. East Cooper Community Hospital,Inc.. 410 S.C. 163, 763 S.E.2d 426 (2014)(In view of Our decision, it is unnecessary to address Wilkinson's remaining argument that she Should be permitted to supplement her complaint with an expert affidavit based on Spence); Cf. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006)(However owner 2 Has failed to present any additional factual allegations or a different thory of recovery Which may give rise to a cause of action upon which relief may be granted). App. Memo. Of Law, Rp.99 (b), line 1-p. 100, line 41; Rp. 60, line 13-p. 61, line 4.

The error of the lower court was not harmless but critical evidence on the issues

Duty of care that Trident voluntarily undertook. Therefore the allegation in amendment Complaint were relevant to the issues of standard of care and duty of care which involved Different element of a negligent claim of action and therefore not cumulative which was Prejudicial requires reversal of the trial court order. Elledge v. Richland/Lexington School District Five, 352 S.C. 179, 573 S.E.2d 789 (2002)(In addition, we note that the Bulk of the experts' testimony went to the element of breach of duty whereas the specific Evidence of industry standards was intended to establish the applicable duty of care. Since the evidence at issue went to a different element on the the negligent cause of Action--duty verses breach--clearly the evidence cannot be cumulative. Accordingly we Hold the trial court's error in excluding this evidence prejudiced respondents' case).

The court must determine, as a matter of law, whether the law recognizes a Particular duty. If there is no duty, then the defendant is entitled to judgment as a matter Of law. Madison Ex Rel. Bryant v. Babcock Center, 370 S.C. 42, 634 S.E.2d 275(2006).

Under South Carolina common law , there is no general duty to control the conduct of Another or to warn a third person or potential victim of danger. There are five exceptions To this rule: (1) where the defendant has a special relationship with the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant Voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates The risk; and (5) where a statute imposes a duty on the defendant. Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)(listing cases and Authority supporting each proposition). An affirmative legal duty may be created by Statute , a contractual relationship, status, property interest, or some special circumstan-

Ces. Jensen v. Anderson County Dept. of Social Services, 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). Moreover, it has long been the law that one who assumes to act, even Though under no obligation to do so, thereby becomes obligated to act with due care. Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986).

"One who undertakes, gratuitously or for consideration, to render services to another Which he should recognize as necessary for the protection of the other's person or thing, Is subject to liability to the other for physical harm resulting from his failure to exercise Reasonable care to perform his undertaking, if(a) his failure to exercise such care Increases the risk of such, or (b) the harm is suffered because of the other 's reliance Upon the undertaking." Restatement of Torts statute 323(1965). In addition, "[o]ne who, Being under no duty to do so, takes charge of another who is helpless adequately to aid or Protect himself is subject to liability to the other for any bodily harm caused to him by (a) The failure of the actor to exercise reasonable care to secure the safety of the other while Within the actor's charge , or (b) the actor's discontinuing his aid or protection, if by so Doing leaves he leaves the other in a worse position than when the actor took charge of Him." Restatement of (Second) of Torts statute 324.

The present case falls within all of the exceptions specified in Faile, as well as within the Circumstances outlined in Restatement(Second) of Torts statute 323-324.

The evidence in affidavit shows "embolism of a cardiac source was a possibility" while Appellant was still at Trident but Trident "did not show a source on MRI then or on work Up" and that Trident had voluntarily undertaken to diagnose and treat him to prevent

Embolism of a cardiac source or a second stroke using the Echocardiogram on 9/24/12, But found no source of embolism of a cardiac source. That following the Echocardiogram An MRI was performed a few hour later which showed "multi foci restrictive in the left Parietal lobe". Based on a radiologist standard of care "given the multi focality" suggest Appearance of a cardiac embolic phenomenon. Trident radiologist was negligent and "did not show a source of cardio embolism then on MRI or on work up". However, Trident did "specifically noted Neurology to be consulted". This is a Hospitalist Standard of care when " embolism is a possibility" to treat with anticoagulation Heparin And do further testing to rule out a cardiac source for a CVA stroke, and to transition a Patient to coumadin with follow up instruction on discharge to patient Primary Care Physician for adjustment for INR. The evidence in Trident medical record which is Incorporated into the complaint shows Trident Hospitalist on 9/23/12 did voluntarily Undertaken to determine "what patient allergic reaction to aspirin actually is, start Treatment with Plavix, consult Cardiology to do routine customary echocardiogram to Rule out embolism of a cardiac source, the results allegedly were normal, Trident Change patient treatment from Plavix to Aspirin 325mg for secondary stroke prevention On or about 9/24/12. MRI on 9/24/12 showed multi foci restricted diffusion but did not Show a source of cardio embolism then. On 9/25/12 a second EKG showed that EKG was Abnormal compared to 9/23/12 EKG with recommendation to consider ante lateral Ischemia and marked bradycardia, Trident took no recommended corrective action to rule Out ante lateral ischemia or further testing to rule out cardio embolism,nor change Treatment from aspirin to Heparin, nor give instruction or discharge with coumadin". Com.,R p. 9 Fact. Bas. For Cl., Line 1-p. 11 Std.of Care, Line 1-25; Rp. 31-33,40-41,45;

App. Memo. of Law, Rp. 99(b), Line 1-p. 100, Line 42; Rp. 60, line 13-p. 61, line 4.

Therefore, based upon five exceptions specified under Faile as well as within The circumstances outlined in Restatement (Second) of Torts statutes 323-324, and the Factual circumstances of this case, Trident clearly had duty on 9/24/12 to "show a source Of cardio embolism on MRI so that Neurology could be consulted to treat with Heparin because embolism was possible" and on 9/25/12 based on the second EKG results also Had a duty to follow up the recommended testing by taking corrective action prior to Discharge to rule out a cardiac source and consult Neurology, order a Heparin Drip and Transition to coumadin with discharge instruction to patient Primary Care Physician as a Reasonable prudent Hospitalist under similar circumstances and like condition, all of Which Trident voluntarily undertaken to use due care to prevent embolism and stroke. {Rpp. 20-55;Rpp.70-96}. Russell v. City of Columbia, 305 S.C. 86, 406 S.E. 338 (1991); Bryant v. Babcock Center, 370 S.C. 42, 634 S.E.2d 275 (2006)(We reverse the circuit Court and hold that Babcock Center and its employee have a common law duty to Exercise reasonable care in supervising and providing care and treament to appellant, a Mentally retarded client with disabilities and special needs. Department also owes a Common law duty to Appellant and statutory exceptions to waiver of immunity which Department asserts are inapplicable. We decline to identifiy particular sources or Standards of care which may be relevant in defining the nature and extent of Respondents' duty under common law or statutes, as well as whether they breached their Duty. Such issues may be explored by the parties and court on remand of this case. We Hold that whether the breach of duty proximately cause Appellant's injuries is a question

Of fact for the jury. Finally, we hold that allegations relating to Department's alleged Negligence in connection with Appellant's initial evaluation and admission are not Time-barred); Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

Therefore, based on the above statutes and citations of authority, the trial court's order should be reversed.

CONCLUSION

Based on holdings of Wilkinson and S.C. Code Statutes 15-79-125(A) and 15-79-125(E)(2), appellant timely and sufficient filed his NOI and Complaint to comply With the statutory requirement. Therefore, the NOI tolls all applicable statutes of Limitations. The affidavits met the statutory requirements under S.C. Code 15-36-100 Meaning and qualifications to qualify as expert witness affidavits. And the content and Authorship are not appropriate grounds to affirm the circuit court ruling nor respondent Challenges. Finally, deny amendment of complaint was prejudicial requiring reversal. Furthermore, the circuit court's order denying amendment of complaint is erroneous and Should be reversed and also modified with a reasonable time allowed to amend the Complaint.

Respectfully submitted,

November 28, 2016

s/ Jim Washington

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. MARKLEY DENNIS, Jr., Circuit Court Judge

Case No. 2015-CP-10-5000
Appellate Case No. 2016-000495

Jim Washington,.....Appellant,

V.

Trident Medical Center, LLC.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211 (b), SCACR.

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December 5, 2016