

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

HONORABLE R. MARKLEY DENNIS, JR.
CIRCUIT COURT JUDGE

ORIGINAL

C.A. NO. 2013-CP10-00090
CT. APP. NO.: 2013-001682

ARTHUR PETER ROWE.....Appellant

vs.

BON SECOURS-ST. FRANCIS XAVIER HOSPITAL, INC., D/B/A BON SECOURS ST. FRANCIS XAVIER HOSPITAL, BON SECOURS ST. FRANCIS HOSPITAL AND ROPER ST. FRANCIS HEALTHCARE; BON SECOURS ST. FRANCIS HEALTH SYSTEM, INC., D/B/A BON SECOURS ST. FRANCIS XAVIER HOSPITAL, BON SECOURS ST. FRANCIS HOSPITAL AND ROPER ST. FRANCIS HEALTHCARE; BON SECOURS HEALTH SYSTEM, INC., D/B/A BON SECOURS ST. FRANCIS HOSPITAL AND ROPER ST. FRANCIS HEALTHCARE; ROPER ST. FRANCIS FOUNDATION, D/B/A ROPER ST. FRANCIS HEALTHCARE; BON SECOURS-ST. FRANCIS HEALTH SYSTEM FOUNDATION, INC., D/B/A ROPER ST. FRANCIS HEALTHCARE; ROPER HOSPITAL, INC., D/B/A ROPER ST. FRANCIS HEALTHCARE; BYRON N. BAILEY, M.D.; CHRISTINE C. THOMPSON, M.D., A/K/A CHRISTINE THOMPSON, M.D.; CHARLESTON NEUROSURGICAL ASSOCIATES, LLC; MT. PLEASANT ANESTHESIA ASSOCIATES, PA; CHARLESTON SURGERY CENTER LIMITED PARTNERSHIP, D/B/A CHARLESTON SURGERY CENTER; TAMMY MCGRAW, CRNA, ALSO KNOWN AS TAMMY MCGRAW SPEICHER, CRNA; NURSE ANESTHESIA OF SOUTH CAROLINA, LLC; JEFFERY S. WAGER, CRNA; TRICOASTAL HEALTHCARE BILLING AND MANAGEMENT, INC.; AND STEVEN HEATH COBB,.....Respondents

FINAL BRIEF OF APPELLANT

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The Appellant

JAN 16 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
ARGUMENTS.....	4
CONCLUSION	16
CERTIFICATE OF PRO SE APPELLANT.....	17
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITY

CASES

Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242, 2012 (Ct. App. 2012),..... 13,14

STATUTES

S.C. Code Ann. § 15-36-100 (1976)4,5,6,7,9,10, 11,12,13,14
S.C. Code Ann. § 15-36-100(A) (1976)5,8,12
S.C. Code Ann. § 15-36-100(B) (1976)5,6,8,10,11,12,13,14,16
S.C. Code Ann. § 15-36-100(C) (1976)5,6,8,9,12
S.C. Code Ann. § 15-36-100(C)(1) (1976)3,7,8,9, 10, 11,12,13,14,16,17
S.C. Code Ann. § 15-36-100(C)(2) (1976)2,3,4,5,6,7,8,9, 10, 11
S.C. Code Ann. § 15-79-125 (1976)3,4,6,7,8,9,10,11,13,14
S.C. Code Ann. § 15-79-125(A) (1976) 5,7,8,9,10,11,12,13,14,16

STATEMENT OF ISSUES ON APPEAL

- A. The Trial Court Erred In Granting Defendants' Motions To Dismiss The Appellant's Complaint and the Appellant's Wife's Notice Of Intent To File Suit On Basis That Plaintiff Failed To Contemporaneously File An Affidavit Of An Expert Witness, And The Dismissal Of The Appellant's Action For Loss Of Consortium.
- B. The Trial Court Erred In In Granting Defendants' Motions To Dismiss The Appellant's Complaint And The Appellant's Wife's Notice Of Intent To File Suit Due To The Failure To Apply The Exception To Contemporaneous Filing Of The Affidavit Of An Expert Witness Under Section 15-36-100(C)(1) Of The South Carolina Code Of Laws Of 1976, As Amended.
- C. The Trial Court Erred In That The Honorable Judge Markley Dennis Failed To Recuse Himself After His Law Clerk Received A Letter Dated May 22, 2013 From The Wife Of The Plaintiff/Appellant Disclosing Her Fears Of Receiving A Fair And Impartial Determination Due To A Prior Proceeding Before The Same Judge.

STATEMENT OF THE CASE

On January 7, 2013, the Appellant's wife, Beverly C. Moore Rowe, timely filed and served the Notice of Intent to File Suit at Case Number 2013-CP-10-00088, naming Defendants involved in a medical procedure performed on her as their patient, during her hospital stay that began with her hospital admission on January 7, 2010. As an Exhibit to the Notice of Intent to File Suit, the Plaintiff attached her Summons and Complaint in this action. [ROA, 9, Motion To Dismiss By Defendant, Charleston Surgery Center, Pages 80-100.]

On January 7, 2013, the Appellant timely filed and served the Summons and Complaint for loss of consortium based on the action filed by the Appellant's wife, Beverly C. Moore Rowe, at Case Number 2013-CP-10-00088, the Notice of Intent to File Suit, naming Defendants involved in a medical procedure performed on Appellant's wife as their patient, during her hospital stay that began with her hospital admission on January 7, 2010. As an Exhibit to the Notice of Intent to File Suit, the Appellant's wife attached her Summons and Complaint in this action. [ROA 3, Summons & Complaint. Pages 17-35.]

Due to the statutory deadline to commence her action in the Court of Common Pleas within the applicable three (3) years statute of limitations, which arguably would have expired on January 7, 2013, the Appellant's wife filed and served the Notice Of Intent to File Suit without filing contemporaneously therewith, an affidavit of an expert, due to the inability to obtain an Affidavit of an expert qualified to render an opinion in her Lawsuit within the applicable three (3) years statute of limitations. The Appellant's Wife relied upon the exception to filing a contemporaneous Affidavit set forth in S.C.

Code Ann § 15-36-100(C)(1) (1976). The Notice Of Intent To File Suit included the following paragraph:

“The Affidavit of the Expert Witness required under S.C. Code Section 15-79-125 is not being provided at this time pursuant to S.C. Code Section 15-36-100(C)(1). The Plaintiff is informed and believes that the applicable statute of limitations on one or more claims alleged in the Complaint, which is attached to this Notice Of Intent to File Suit as Exhibit A, will expire within ten (10) days of the date of the filing of the Complaint, and that due to time constraints, an affidavit of an expert could not be prepared. The Plaintiff is informed and believes that S.C. Code Section 15-36-100(C)(1) is applicable to enable the Plaintiff to supplement the pleadings with the required affidavit. [ROA, 9, Motion To Dismiss By Defendant, Charleston Surgery Center, Page 88.]

The Defendants filed Motions to Dismiss on the basis that the Appellant’s Wife failure to attach an expert’s affidavit to her Notice Of Intent to File Suit, warranting dismissal of her claim and the Appellant’s claims, despite the dismissal resulting in their actions being barred by the applicable statute of limitations.

On May 25, 2013, and prior to the Hearing on the Motions to Dismiss, the Appellant’s Wife mailed a letter to the Law Clerk of the Honorable Judge Markley Dennis expressing the Appellant’s Wife’s concerns that he was hearing the Motions in this matter, due to information given to her in an earlier legal proceeding, of which the Plaintiff in that action was also the Appellant’s Wife in the earlier action. The Appellant’s Wife expressed to the Honorable Judge Markley Dennis her concerns as to receiving a fair and impartial hearing, and anticipated that the Honorable Judge Markley Dennis would recuse himself. To the Appellant’s surprise, Judge Markley Dennis heard the Motions with no comment from the bench as to the Appellant’s Wife’s correspondence.

On May 31, 2013, the Honorable Judge Markley Dennis heard the arguments on the Motions to Dismiss in the Charleston County Courthouse. Upon motions made, the Honorable Judge Markley Dennis granted the Defendant’s Motion to Dismiss and the

Appellant has filed this Appeal. [ROA, 2 Order, Pages 5-16; ROA 16, Notice of Appeal, Pages 115-128.]

ARGUMENTS

A. The Trial Court Erred In Granting Defendants' Motions To Dismiss The Appellant's Complaint And The Wife's Notice Of Intent To File Suit On Basis That Respondent's Wife Failed To Contemporaneously File An Affidavit Of An Expert Witness, And The Dismissal Of The Appellant's Action For Loss Of Consortium.

The Appellant respectfully asserts that the trial court erred in granting the Motions to Dismiss filed by the Defendants on the basis that the Appellant's Wife failed to attach an experts' affidavit to the Notice Of Intent to File Suit.

The Appellant's was admitted to the Hospital on January 7, 2010, and it was this hospitalization in which the medical procedures that are the subject of the Appellant's lawsuit occurred. One of the Appellant's wife's symptoms resulting from her medical procedure is a loss of her cognitive and memory brain activity which further delayed the Appellant's wife's own ability to become aware of her injuries from the medical procedure. Nevertheless, and despite diligent effort, the Appellant's wife and Appellant were not able to retain competent legal counsel to undertake representation in this matter.

The Appellant's Wife filed the Notice of Intent to File Suit pursuant to Section 15-79-125 of the South Carolina Code of Laws of 1976, as amended (hereinafter referred to herein as the "Code"). Code Section 15-79-125 provides as follows:

"(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. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the

notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.”¹

S.C. Code Ann § 15-79-125(A) (1976) specifically provides that “...*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,..*”² The language in S.C. Code Ann § 15-79-125(A) (1976) specifically states that the affidavit is subject to the “affidavit requirements established in Code Section 15-36-100”, which indicates that S.C. Code Ann § 15-36-100 (1976) governs the affidavit requirements for the affidavit provided for under S.C. Code Ann § 15-79-125(A) (1976). A careful reading of S.C. Code Ann § 15-79-125(A) (1976) will reveal that it is silent as to any requirements as to the affidavit of an expert witness, including any definition of the phrase, “expert witness”. Accordingly one must rely exclusively upon S.C. Code Ann § 15-36-100 (1976) in order to comply in any way with the requirement of an Affidavit of an expert witness contained in S.C. Code Ann § 15-79-125(A) (1976).

S.C. Code Ann § 15-36-100(A) (1976) provides the definition of who constitutes the definition of “expert witness”³. Paragraphs (B) and (C) of S.C. Code Ann § 15-36-

¹ S.C. Code Ann § 15-79-125(A) (1976).

² S.C. Code Ann § 15-79-125(A) (1976).

³ (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

100 (1976) address the actual affidavit requirements. S.C. Code Ann § 15-36-100(B)

(1976) provides as follows:

“(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.”⁴

Although S.C. Code Ann § 15-36-100(B) (1976) begins, “Except as provided in Section 15-79-125”, S.C. Code Ann § 15-79-125 (1976) provides nothing inconsistent to S.C. Code Ann § 15-36-100(B) (1976). Accordingly, one must conclude that S.C. Code

certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

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

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual’s study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert’s credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert’s credentials pursuant to sub-section (E).

⁴ S.C. Code Ann § 15-36-100(B) (1976).

Ann § 15-36-100(B) (1976) controls as to the “Affidavit of an expert witness required in S.C. Code Ann § 15-79-125(A) (1976).

S.C. Code Ann § 15-36-100(C)(1) (1976) provides as follows:

“(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. 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 Carolina Rules of Civil Procedure.”⁵

S.C. Code Ann § 15-36-100(C)(1) (1976) specifically provides an exception to the “contemporaneous filing requirement of subsection (B) for the good faith belief that the applicable statute of limitations will expire within ten (1) days of the date of filing”⁶. Significantly, S.C. Code Ann § 15-36-100(C)(1) (1976) provides the exception to the “contemporaneous filing requirement”, and uses the same choice of word (contemporaneously”) which is not found elsewhere in S.C. Code Ann § 15-36-100(B) (1976), but is found in S.C. Code Ann § 15-79-125(A) (1976). Accordingly, by its specific language and terms, S.C. Code Ann § 15-36-100 (1976) provides the details not provided in S.C. Code Ann § 15-79-125(A) (1976). One must read S.C. Code Ann § 15-79-125 (1976) and S.C. Code Ann § 15-36-100 (1976) together to determine the person

⁵ S.C. Code Ann § 15-36-100(C)(1) (1976)

⁶ S.C. Code Ann § 15-36-100(C)(1) (1976)

qualified to provide the affidavit and the contents of the affidavit itself.⁷ The exception by specific reference to contemporaneous filing requirement provides must be a specific reference to the contemporaneous filing requirement set forth in S.C. Code Ann § 15-79-125(A) (1976).

The exception to the contemporaneous filing requirement of an affidavit of an expert witness set forth in S.C. Code Ann § 15-36-100(C)(1) (1976) must be intended to alleviate the hardship in the interests of justice when a party injured by professional negligence is not able to obtain the required Affidavit before the expiration of the applicable statute of limitations as is the case at hand.

A determination that S.C. Code Ann § 15-36-100(C)(1) (1976) does not apply to the contemporaneous Affidavit requirement under S.C. Code Ann § 15-79-125(A) (1976) is not a reasonable interpretation when one recognizes that the Notice of The Intent to File Suit requirement of S.C. Code Ann § 15-79-125(A) (1976) is a prerequisite to the filing of the underlying lawsuit.

S.C. Code Ann § 15-79-125(A) (1976) provides prerequisites before a Plaintiff can file a lawsuit for professional medical malpractice in the Courts of South Carolina. If the applicable statute of limitations is about to expire in a medical malpractice claim, the Plaintiff must file the Notice of Intent to File Suit first which will toll the running of the statute of limitations during the time of complying with the requirements of S.C. Code Ann § 15-79-125 (1976). A Plaintiff needs an Affidavit of an expert witness for the Notice of Right To File Suit before the Plaintiff files the underlying Lawsuit which also requires the expert witness affidavit⁸. The Plaintiff whose statute of limitations was

⁷ S.C. Code Ann § 15-36-100(A), (B) and (C) (1976).

⁸ Section 15-36-100(B) of the S.C. Code of Laws of 1976 as amended

about to expire would not require the protection of the exception provided at S.C. Code Ann § 15-36-100(C)(1) (1976) for the underlying lawsuit if the Plaintiff had no such protection when the Plaintiff previously filed the Notice of the Right to File Suit with an Affidavit of the expert witness. The South Carolina Legislature must have intended for the Affidavit requirements of S.C. Code Ann § 15-36-100 (1976) to apply to S.C. Code Ann § 15-79-125 (1976), or that language would not have been stated in S.C. Code Ann § 15-79-125(A) (1976). A determination that S.C. Code Ann § 15-36-100(C)(1) (1976) does not apply to the contemporaneous affidavit requirement of S.C. Code Ann § 15-79-125 (1976), completely negates the benefit to the Plaintiff that that S.C. Code Ann § 15-36-100(C) (1976) was intended to provide.

B. The Trial Court Erred In In Granting Defendants' Motions To Dismiss The Appellant's Complaint And The Appellant's Wife's Notice Of Intent To File Suit Due To The Failure To Apply The Exception To Contemporaneous Filing Of The Affidavit Of An Expert Witness Under S.C. Code Ann § 15-36-100(C)(1) (1976).

The Appellant respectfully directs the Court to the argument set forth at Paragraph A above. S.C. Code Ann § 15-79-125(A) (1976) specifically provides that “...*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,..*”⁹ The language in S.C. Code Ann § 15-79-125(A) (1976) specifically states that the affidavit is subject to the “affidavit requirements established in S.C. Code Ann § 15-36-100 (1976)”, which indicates that S.C. Code Ann § 15-36-100 (1976) governs the

⁹ Section 15-79-125(A) of the S.C. Code of Laws of 1976, as amended.

affidavit requirements for the affidavit provided for under S.C. Code Ann § 15-79-125(A) (1976). A careful reading of S.C. Code Ann § 15-79-125 (1976) reveals that it is silent as to any requirements as to the affidavit of an expert witness, including any definition of the phrase, “expert witness”. Accordingly one must rely exclusively upon S.C. Code Ann § 15-36-100 (1976) in order to discern the affidavit requirements and to comply in any way with the requirement of an Affidavit of an expert witness contained in S.C. Code Ann § 15-79-125(A) (1976).

Paragraphs (B) and (C) of S.C. Code Ann § 15-36-100 (1976) address the actual affidavit requirements. S.C. Code Ann § 15-36-100 (1976) provides as follows:

“(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.”¹⁰

Although S.C. Code Ann § 15-36-100(B) (1976) begins, “Except as provided in Section 15-79-125”, S.C. Code Ann § 15-79-125 (1976) provides nothing inconsistent to S.C. Code Ann § 15-36-100(B) (1976). Accordingly, S.C. Code Ann § 15-36-100(B) (1976) controls as to the Affidavit of an expert witness required in S.C. Code Ann § 15-79-125(A) (1976).

S.C. Code Ann § 15-36-100(C)(1) (1976) provides as follows:

“(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that

¹⁰ Section 15-36-100(B) of the S.C. Code of Laws of 1976, as amended.

an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. 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 Carolina Rules of Civil Procedure.”¹¹

The use of the language, “contemporaneous filing requirement” contained in S.C. Code Ann § 15-36-100(C)(1) (1976) is significant and must be applicable to S.C. Code Ann § 15-79-125(A) (1976) , because the only reference to a contemporaneous filing requirement is found in S.C. Code Ann § 15-36-100(C)(1) (1976). S.C. Code Ann § 15-36-100(B) (1976) makes no reference to a requirement of a contemporaneous filing requirement.

S.C. Code Ann § 15-36-100(C)(1) (1976) specifically provides an exception to the “contemporaneous filing requirement of subsection (B) for the good faith belief that the applicable statute of limitations will expire within ten (1) days of the date of filing”¹². Significantly, S.C. Code Ann § 15-36-100(C)(1) (1976) provides the exception to the “contemporaneous filing requirement”, and uses the same choice of word (“contemporaneously”) which is not used in S.C. Code Ann § 15-36-100(B) (1976), but is only found in S.C. Code Ann § 15-79-125(A) (1976). Accordingly, by its specific language and terms, S.C. Code Ann § 15-36-100 (1976) provides the details not provided in S.C. Code Ann § 15-79-125(A) (1976). One must read S.C. Code Ann § 15-79-125

¹¹ Section 15-36-100(C)(1) of the S.C. Code of Laws of 1976, as amended

¹² S.C. Code Ann § 15-36-100(C)(1) (1976)

(1976) and S.C. Code Ann § 15-36-100 (1976) together to determine the person qualified to provide the affidavit and the contents of the affidavit itself.¹³ The exception by specific reference to contemporaneous filing requirement provides must be a specific reference to the contemporaneous filing requirement set forth in S.C. Code Ann § 15-79-125(A) (1976).

The exception to the contemporaneous filing requirement of an affidavit of an expert witness set forth in S.C. Code Ann § 15-36-100(C)(1) (1976) must have been included at S.C. Code Ann § 15-36-100(C)(1)(1976) to alleviate the hardship, in the interests of justice, when a party injured by the professional negligence of others is not able to obtain the required Affidavit which professionals in the same profession are often reluctant to provide, before the expiration of the applicable statute of limitations, as is the case at hand.

A determination that S.C. Code Ann § 15-36-100(C)(1) (1976) does not apply to the contemporaneous Affidavit requirement under S.C. Code Ann § 15-79-125(A) (1976) is not a reasonable interpretation when one recognizes that the Notice of The Intent to File Suit requirement of S.C. Code Ann § 15-79-125(A) (1976) is a prerequisite to the filing of the underlying medical malpractice lawsuit.

S.C. Code Ann § 15-79-125(A) (1976) provides prerequisites before a Plaintiff can file a lawsuit for professional medical malpractice in the Courts of South Carolina. If the applicable statute of limitations is about to expire in a medical malpractice claim, the Plaintiff must file the Notice of Intent to File Suit first which will toll the running of the statute of limitations during the time of complying with the requirements of S.C. Code

¹³ S.C. Code Ann § 15-36-100(A), (B) and (C) (1976).

Ann § 15-79-125 (1976). A Plaintiff needs an Affidavit of an expert witness for the Notice of Right To File Suit before the Plaintiff files the underlying Lawsuit which also requires the expert witness affidavit¹⁴. The Plaintiff whose statute of limitations was about to expire would not require the protection of the exception provided at S.C. Code Ann § 15-36-100(C)(1) (1976) for the underlying lawsuit if the Plaintiff had no such protection when the Plaintiff previously filed the Notice of the Right to File Suit with an Affidavit of the expert witness. The South Carolina Legislature must have intended for the Affidavit requirements of S.C. Code Ann § 15-36-100 (1976) to apply to S.C. Code Ann § 15-79-125 (1976), or that language would not have been stated in S.C. Code Ann § 15-79-125(A) (1976). A determination that S.C. Code Ann § 15-36-100(C)(1) (1976) does not apply to the contemporaneous affidavit requirement of S.C. Code Ann § 15-79-125 (1976), completely negates the benefit to the Plaintiff that S.C. Code Ann § 15-36-100(C)(1) (1976) was intended to provide.

The dismissal of a Plaintiff's claim for medical malpractice on the basis of the failure to file contemporaneously an Affidavit of an expert witness with the Notice of the Right To File Suit is not consistent with the purpose and effect of the exception stated in S.C. Code Ann § 15-36-100(C)(1) (1976), and appears to reward the most prominent medical professionals with immunity from lawsuits by their patients due to the inability to obtain the affidavit from a qualified expert witness.

The Appellant acknowledges that this Court's opinion in *Rancussi v. Crain*, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012) is contrary to the position being submitted to this Court in this Appeal. The Appellant respectfully dissents the opinion of *Rancussi v.*

¹⁴ S.C. Code Ann § 15-36-100(B) (1976)

Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), and would request that this Court reconsider its opinion that S.C. Code Ann § 15-36-100(C)(1) (1976) is not applicable to the contemporaneous filing requirement of S.C. Code Ann § 15-79-125(A) (1976). In Ranucci, this Court states that S.C. Code Ann § 15-79-125(A) (1976) invokes only the provisions of S.C. Code Ann § 15-36-100 (1976) governing the preparation and content of the affidavit. The only affidavit requirements are set forth at S.C. Code Ann § 15-36-100(B) (1976). If the contemporaneous filing requirement of an Affidavit applies solely to the Complaint filed under S.C. Code Ann § 15-36-100(B) (1976) and not to the filing of the Notice of the Intent to File Suit under S.C. Code Ann § 15-79-125 (1976), then the plaintiff of a professional medical malpractice action will never be entitled to the benefit of S.C. Code Ann § 15-36-100(C)(1) (1976) due to the prerequisite to filing the lawsuit of filing the Notice of Intent To File Suit required at S.C. Code Ann § 15-79-125 (1976)¹⁵

C. The Trial Court Erred In That The Honorable Judge Markley Dennis Failed To Recuse Himself After His Law Clerk Received A Letter Mailed May 25, 2013 By The Wife Of The Appellant Disclosing Her Fears Of Receiving A Fair And Impartial Determination Due To A Prior Proceeding Before The Same Judge.

The Appellant submits to this Court that the Honorable Judge Markley Dennis should have recused himself upon receipt by his Law Clerk of the letter from the Appellant's Wife. The Appellant was faced with the dilemma of not making an Ex Parte

¹⁵ S.C. Code Ann § 15-79-125(A) (1976).

communication but to raise this concern without causing any embarrassment to the Judge in open Court.

The Appellant's Wife learned that the Honorable Judge Markley Dennis would be hearing the Motions in this matter on May 31, 2013. The Appellant was concerned because she had been the Plaintiff in an earlier case that Judge Markley Dennis was the presiding judge, entitled: "Beverly Christine Moore v. Holy Trinity Church, The Protestant Episcopal Church in the Diocese of South Carolina, The Protestant Episcopal Church, AKA The Episcopal Church USA and The Foreign And Domestic Missionary Society, Charleston County Ninth Circuit Court of Common Pleas 2007-CP-10-243".

The Appellant's Wife mailed the Appellant's letter on May 25, 2013 addressed to the Law Clerk for the Honorable Judge Dennis expressing her concerns due to the prior litigation. [ROA, 17, Letters, Pages 151-154.] The Appellant's letter informed the Honorable Judge Dennis of concerns from what she had been informed by the Attorneys who represented her in the earlier proceedings. The Appellant's Wife had been informed by her Attorneys that she was not allowed to remove any of the files' contents from their offices, because "*Judge Dennis had sealed the Church's discovery records under a "Protective Order" made under his own volition*". [ROA, 17, Letters, Page 153.] The Appellant's Wife was extremely upset about the Order sealing the records because of her desire that the publicity would prevent the perpetrators from relocating to another church and performing the same illegal and unconscionable actions. The belief that Judge Dennis had sealed the record on his own, caused the Appellant's Wife to have a lack of confidence in the Honorable Judge Dennis and to fear that the Judge had demonstrated bias in favor of the Defendants in the prior legal action of which she was the Plaintiff.

The Appellant and his Wife are informed and believe that based on the prior proceedings and the information from the lawyers representing her in the earlier proceedings, Judge Dennis should have recused himself.

CONCLUSION

The Appellant respectfully requests that this Court reverse the Opinion of the trial Court granting the Defendant's Motion to Dismiss Appellant's Action by determining that the exception to the contemporaneous filing of the affidavit provided at S.C. Code Ann § 15-36-100(C)(1) (1976) applies to the contemporaneous filing of the affidavit requirement of S.C. Code Ann § 15-79-125(A) (1976). A determination otherwise is inconsistent to the intent in the interests of justice. If the exception to the contemporaneous filing of the affidavit provided at S.C. Code Ann § 15-36-100(C)(1) (1976) is not applicable to the contemporaneous filing of the affidavit requirement of S.C. Code Ann § 15-79-125(A) (1976), then no plaintiff of a medical malpractice matter could file without an affidavit of an expert witness and prevent the lapsing of the applicable statute of limitations.

The filing of the Notice of the Intent To File Suit at S.C. Code Ann § 15-79-125(A) (1976) is a prerequisite to the filing of the Lawsuit in a medical malpractice action referenced at S.C. Code Ann § 15-36-100(B) (1976). The exception of S.C. Code Ann § 15-36-100(C)(1) (1976) to the contemporaneous filing of the affidavit of the expert witness as to the lawsuit in a medical malpractice action is of no effect if the Plaintiff in the medical malpractice matter does not have that protection at the time of the initial filing requirement, the Notice of Right to File Suit. The specific use of the words, "contemporaneous affidavit filing" in both S.C. Code Ann § 15-79-125(A) (1976) and

The filing of the Notice of the Intent To File Suit at S.C. Code Ann § 15-79-125(A) (1976) is a prerequisite to the filing of the Lawsuit in a medical malpractice action referenced at S.C. Code Ann § 15-36-100(B) (1976). The exception of S.C. Code Ann § 15-36-100(C)(1) (1976) to the contemporaneous filing of the affidavit of the expert witness as to the lawsuit in a medical malpractice action is of no effect if the Plaintiff in the medical malpractice matter does not have that protection at the time of the initial filing requirement, the Notice of Right to File Suit. The specific use of the words, “contemporaneous affidavit filing” in both S.C. Code Ann § 15-79-125(A) (1976) and S.C. Code Ann § 15-36-100(C)(1) (1976) is no coincidence and must have been intentional.

Lastly, the Appellant requests that this Court reverse the Opinion of the trial court granting the Defendants’ Motions to Dismiss on the basis that the trial judge should have recused himself upon learning of the concerns of the impartiality of the trial judge from his Wife’s prior experience with him as trial judge and her as the Plaintiff.

The Appellant further requests such further relief as may be determined by this Court.

Respectfully submitted by:



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November 13, 2014

CERTIFICATE OF PRO SE APPELLANT

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

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November 13, 2014

CERTIFICATE OF SERVICE

I certify that on this Fourteenth (14th) day of November, 2014, a copy of the foregoing Final Brief was served on the Respondents by depositing a copy in the United States Mail, with sufficient first class postage prepaid, and addressed each of the Respondents at the addresses listed below:

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