THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Civil Action No. 11-CP-46-3984

Ann P. Adams, as Personal Representative of
the Estate of Jacob E. Adams, Deceased .....Appellant,

vs.

Amisub of South Carolina, Inc., d/b/a
Piedmont Medical Center and d/b/a
Piedmont Healthcare System;

Staci L. Versen-Rampey, NP,
Individually and as Agent, Servant or
Employee of South Carolina Emergency
Physicians, LLC, and as Agent, Servant or
Employee of Amicus of South Carolina,
Inc., d/b/a Piedmont Medical Center and
d/b/a Piedmont Healthcare System,

Jason Price, Radiologic Technologist,
Individually and as Agent, Servant or
Employee of Amisub of South Carolina,
Inc., d/b/a Piedmont Medical Center and
d/b/a Piedmont Healthcare System, and

James E. Reinhardt, Jr., M.D.,
Individually and as Agent, Servant or
Employee of Rock Hill Radiology
Associates, PA, and as Agent, Servant
Or Employee of Amisub of South Carolina,
Inc., d/b/a Piedmont Medical Center and
d/b/a Piedmont Healthcare System,

Rock Hill Radiology Associates, P.A.,
South Carolina Emergency Physicians,
LLC, ...Respondents.

INITIAL BRIEF OF RESPONDENTS JAMES E. REINHARDT, JR., M.D., AND ROCK HILL RADIOLOGY ASSOCIATES, P.A.

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Statement of the Case

This is a wrongful death action based upon allegations of medical malpractice. Plaintiff Ann P. Adams, as personal representative of the Estate of Jacob E. Adams, filed a Notice of Intent to File Suit and a Summons and Complaint against several defendants on October 20, 2011. [Notice of Intent; Summons and Complaint.] Neither James E. Reinhardt, Jr., M.D. ("Dr. Reinhardt"), nor his practice, Rock Hill Radiology Associates, P.A. ("Rock Hill Radiology"), was named as a defendant in the Notice of Intent to File Suit or in the Summons and Complaint.

More than three years after the death of Jacob E. Adams (hereafter "Decedent"), the Plaintiff filed an Amended Notice of Intent to File Suit and an Amended Summons and Amended Complaint on December 1, 2011. [Amended Notice of Intent to File Suit; Amended Summons and Amended Complaint.] Dr. Reinhardt and his practice, Rock Hill Radiology, were named as defendants for the first time in Plaintiff's Amended Notice of Intent to File Suit and Amended Summons and Complaint. The Amended Notice of Intent and Amended Summons and Complaint were mailed to Rock Hill Radiology on January 25, 2012, and served personally on Dr. Reinhardt on February 1, 2012. [Proof of Service.] Plaintiff alleges in her Amended Complaint that Dr. Reinhardt was negligent in interpreting a CT scan of the Decedent that was taken on October 20, 2008. [Amended Complaint.] Dr. Reinhardt and Rock Hill Radiology have denied any negligence with respect to the medical services they provided to the Decedent.

Dr. Reinhardt and Rock Hill Radiology thereafter filed (1) a Motion To Dismiss the Amended Notice of Intent To File Suit and (2) a Motion To Dismiss the Amended Summons and Amended Complaint. [Motion To Dismiss the Amended Notice of Intent

To File Suit; Motion To Dismiss the Amended Summons and Amended Complaint.] Following a hearing in York County on June 27, 2012, Judge John C. Hayes, III, issued an Order of Dismissal on July 31, 2012, granting the motions to dismiss. [Order of July 31, 2012.] Judge Hayes concluded dismissal was appropriate due to Plaintiff's failure to comply with the mandatory pre-suit requirements of S.C. Code Ann. § 15-79-125 (Supp. 2011) as well as Plaintiff's failure to file the action prior to the expiration of the three-year statute of limitations. [Order.] Plaintiff did not file a Rule 59(e) motion to alter or amend the judgment.

Plaintiff filed and served a Notice of Appeal on August 2, 2012, and this appeal ensued.

Statement of Facts

The Decedent, an eighty-four year old male, fell and struck his head at home on the afternoon of October 20, 2008. He was taken by ambulance to the emergency room of Piedmont Medical Center in Rock Hill, South Carolina. He was assessed at Piedmont Medical Center by a physician's assistant, Defendant Staci L. Versen-Rampey, NP, an employee of South Carolina Emergency Physicians, LLC, and Amisub of South Carolina, Inc. [Amended Complaint, ¶¶ 6-7.] Ms. Versen-Rampey took the Decedent's vital signs and contacted the hospital's radiology department to perform a CT of the head and cervical spine. [Amended Complaint, ¶ 7.] Plaintiff's Amended Complaint alleges Dr. Reinhardt reviewed the CT scan but failed to diagnose an intracranial hemorrhage. [Amended Complaint, ¶ 8.] Dr. Reinhardt denies that any negligence occurred in his review of the CT scan.

Plaintiff's Amended Complaint also alleges the physician's assistant, Ms. Versen-Rampey, failed to properly evaluate the Decedent and failed to notice the Decedent's elevated lab values. [Amended Complaint.] The Amended Complaint further alleges Ms. Versen-Rampey should have insisted the patient be seen by a physician and admitted for observation. [Id.]

Hours after returning home from Piedmont Medical Center, the Decedent awoke after midnight with a severe headache and was taken to a hospital in Charlotte, North Carolina, where he died on October 28, 2008. Soon thereafter, Plaintiff was advised by a life insurance agent, who was assisting with her husband's estate, that she should consult with an attorney about possibly bringing a medical malpractice claim related to her husband's death. [Affidavit of Anne Adams.] Plaintiff asked the McGowan, Hood, and Felder law firm to review the Decedent's medical records and to render an opinion as to whether she had a medical negligence cause of action. [Affidavit of Diane Berinsky, p. 2] After the McGowan law firm reviewed the records, the firm advised Plaintiff by letter dated April 6, 2009, that "there was no medical negligence committed, she had no case, and the medical records were [being] returned to her." Id. On September 20, 2010, the Plaintiff met with her current counsel, James W. Boyd, to discuss bringing a possible malpractice claim, and the Plaintiff subsequently retained his law firm. [Id.]

Thirteen months later, on October 20, 2011, the Plaintiff filed a Notice of Intent to File Suit and a Summons and Complaint. [Notice of Intent to File Suit; Summons and Complaint.] Neither Dr. Reinhardt nor Rock Hill Radiology was named as a party in the Notice of Intent to File Suit or in the Summons and Complaint.

The three-year statute of limitations subsequently expired on October 28, 2011, three years after the Decedent's death. On December 1, 2011, the Plaintiff filed an Amended Notice of Intent to File Suit and an Amended Summons and Complaint. [Amended Notice of Intent to File Suit; Amended Summons and Complaint.] Rock Hill Radiology and Dr. Reinhardt were named as defendants for the first time in Plaintiff's Amended Notice of Intent to File Suit and Amended Summons and Complaint. The Amended Complaint asserted causes of action for wrongful death and survivorship.

Dr. Reinhardt and Rock Hill Radiology moved for dismissal of both the Amended Notice of Intent to File Suit and of the Amended Summons and Complaint. [Motions to Dismiss.] Dr. Reinhardt argued that Plaintiff failed to comply with the mandatory pre-suit requirements of S.C. Code § 15-79-125. Specifically, he contended Plaintiff failed to satisfy the statutory provision, S.C. Code § 15-79-125(C), which requires mediation and impasse before filing suit against a health care provider. Dr. Reinhardt also asserted the Plaintiff incorrectly filed the Amended Complaint and Amended Notice of Intent to File Suit at the same time, thereby failing to follow the mandatory statutory procedure for giving pre-suit notice. In addition, Dr. Reinhardt moved for dismissal on the grounds that Plaintiff filed the Amended Notice of Intent to File Suit and Amended Summons and Complaint after the expiration of the statute of limitations.

On June 27, 2012, the circuit court heard arguments on the motions to dismiss. [Hearing Transcript of 06/27/12.] In an Order of Dismissal dated July 31, 2012, the circuit court granted Dr. Reinhardt's and Rock Hill Radiology's motions to dismiss. [Order of Dismissal.] The court found that Plaintiff failed to comply with the mandatory pre-suit requirements of S.C. Code Ann. § 15-79-125. The court also found that

Plaintiff's claim against these defendants is barred by the applicable statute of limitations because the Amended Notice of Intent to File Suit and Amended Summons and Complaint were all filed more than three years after the death of the Decedent.

Standard of Review

Pursuant to Rule 12(b)(1), SCRCP, a party may move for dismissal where the court lacks jurisdiction over the subject matter presented. See Rule 12(b)(1), SCRCP. Subject matter jurisdiction is defined as the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Brown v. Evatt, 322 S.C. 189, 193, 470 S.E.2d 848, 850 (1996).

When reviewing a dismissal of a claim for failure to state facts sufficient to constitute a cause of action under Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008). "The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief." Id. at 112-113, 659 S.E.2d at 161. The court will not sustain the motion if the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).[1]

[1] To the extent the trial court considered any matters outside the pleadings in this case, the Rule 12(b)(6) motion may have been converted into a motion for summary judgment. However, it is respectfully submitted that under either standard of review, the result is the same.

Argument

I. Plaintiff's first stated issue on appeal is not preserved for appellate review.

A. Issue Preservation

The first issue listed in the "Statement of the Issues on Appeal" section of the Appellant's Brief is: "Did the Court err in ruling that the South Carolina code of laws § 15-36-100 is not applicable to the filing of an expert affidavit." Along these same lines, in the Argument section of her brief, the heading for Plaintiff's first argument states "The Court erred in holding that South Carolina Code § 15-36-100(C)(1)[2] does not apply to South Carolina Code § 15-79-125." [Initial Brief of Appellant, p. 2.] However, this issue is not preserved for appellate review. The circuit court's July 31, 2012, Order of Dismissal as to Dr. Reinhardt and Rock Hill did not rule on the applicability of § 15-36-100 to the filing of an expert affidavit; nor did the Order address the supposed interplay between § 15-36-100(C)(1) and § 15-79-125.[3] The Brief of Appellant does not make clear whether this issue is being appealed as to all or only some of the respondents. However, if Plaintiff is attempting to assert this as an issue in her appeal against Dr.

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[2] S.C. Code § 15-36-100(C)(1) provides in part:

> The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit.

[3] The only mention of § 15-36-100 in the entire circuit court's order appears on page 4 where there is a block quote taken directly from the text of § 15-79-125(A) that references § 15-36-100; however, as stated above, the court did not address whether § 15-36-100 is applicable to the filing of an expert affidavit as required in medical malpractice cases under § 15-79-125; nor did the court address whether § 15-36-100(C)(1) applies to South Carolina Code § 15-79-125.

Reinhardt and his practice, then the issue should not be considered because it is not preserved for review.

The court did not rule on this issue in its Order of Dismissal of July 31, 2012, and Plaintiff failed to file a Rule 59(e) motion to alter or amend the judgment in order to preserve this issue for review. Therefore, as to Respondents Dr. Reinhardt and Rock Hill Radiology, this issue has not been preserved for review.

In order for an issue to be properly preserved for appellate review, the issue must have been raised to, and ruled upon, by the lower court. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). The Supreme Court has stated: "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." Elam, 361 S.C. at 24, 602 S.E.2d at 780. "A party **must** file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Id. (emphasis in original).

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), the Supreme court discussed the policy underlying this rule:

> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

338 S.C. at 422, 526 S.E.2d at 724.

B. Ranucci decision

In her brief, Plaintiff discusses the case of Ranucci v. Crain, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012), in which the Court of Appeals held that section 15-79-

125(A) invokes only the substantive requirements of section 15-36-100 governing the preparation and contents of an expert affidavit. There, the Court rejected the argument that section 15-79-125(A) also adopted by reference the procedural requirements of section 15-36-100, such as the provision of 15-36-100(C) that allows a plaintiff to file an expert affidavit forty-five days after a complaint is filed in those instances when the statute of limitations is about to expire. Id., 397 S.C. at 176, 723 S.E.2d at 246.

Here, the Plaintiff suggests that if the Court of Appeals' Ranucci decision is reversed by the Supreme Court, this will affect the present appeal. As an initial matter, there is no reason to believe that the decision will be reversed inasmuch as the Court of Appeals' unanimous Ranucci opinion (as well as the concurring opinion of Chief Judge Few) is well thought out, logical, and persuasive.

Furthermore, contrary to Plaintiff's assertion, any ruling by the Supreme Court in Ranucci will have no impact whatsoever on the outcome of Plaintiff's appeal against Dr. Reinhardt and Rock Hill Radiology for several reasons.

First, as stated above, the circuit court's July 31, 2012 order of dismissal as to Dr. Reinhardt and Rock Hill Radiology did not address the issue of whether South Carolina Code § 15-36-100(C)(1) applies to South Carolina Code § 15-79-125. That was not a basis for the court's ruling. Rather, the circuit court dismissed Plaintiff's Amended Summons and Complaint and Amended Notice of Intent to File Suit because the mandatory pre-suit mediation was never held and because Plaintiff attempted to bring a claim after the statute of limitations had run. Therefore, even if the Supreme Court were to reverse the Court of Appeals' holding that section 15-79-125(A) invokes only the substantive requirements of section 15-36-100 governing the preparation and contents of

an expert affidavit, this would have no effect since the circuit court's dismissal of Dr. Reinhardt and Rock Hill Radiology was not based upon this issue.

Secondly, regardless of how the Supreme Court rules in the Ranucci appeal, the Supreme Court's decision will not impact the present matter since Plaintiff failed to preserve for appellate review the issue of whether section 15-79-125(A) invokes only the substantive, rather than procedural, requirements of section 15-36-100. The circuit court's July 31, 2012 order of dismissal did not rule on that issue, and Plaintiff did not file a Rule 59(e) motion to preserve the issue for review.

Finally, a reversal by the Supreme Court in Ranucci will have no impact on the outcome of Plaintiff's appeal against Dr. Reinhardt and Rock Hill Radiology because, as explained in greater detail in Section II below, the Plaintiff's malpractice claim against Dr. Reinhardt and his practice are barred by the statute of limitations.

II. The circuit court properly dismissed the Plaintiff's Notice of Intent against Dr. Reinhardt and Rock Hill Radiology because it was not filed within the three year limitations period.

A. The statute of limitations for Plaintiff's claim against Dr. Reinhardt and his practice began to run on the date of the Decedent's death on October 28, 2008.

A cause of action for wrongful death accrues on the date of death and must be filed within three years of that date. See S.C. Code Ann. § 15-3-530(6) ("within three years ... an action under Sections 15-51-10 to 15-51-60 for death by wrongful act, the period to begin to run upon the death of the person on account of whose death the action is brought").

Here, the alleged negligence of Dr. Reinhardt would have occurred on October 20, 2008, when he reviewed the Decedent's CT scan. The Decedent died eight days later

on October 28, 2008. Therefore, the three year statute of limitations on Plaintiff's wrongful death claim expired on October 28, 2011.

Dr. Reinhardt and Rock Hill Radiology were not named as defendants in this matter until Plaintiff filed an Amended Notice of Intent and Amended Summons and Complaint on December 1, 2011, at which point the three year limitations period had already run.

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). A statute of limitations is "founded on motives of public policy" and "after the lapse of a prescribed time ... the doors of the court are no longer open to him for the enforcement of a claim which he has neglected to assert within the prescribed time." Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (Ct.App.1999).

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). Statutes of limitations relieve courts of the burden of trying stale claims of those who have slept on their rights. See McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct.App.1989). "The purpose of statutes of limitation is to ensure litigation is 'brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation.'" Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 227, 659 S.E.2d 213, 218 (Ct.App.2008).

Because the statute of limitations for Plaintiff's claim against Dr. Reinhardt and his practice began to run on the date of the Decedent's death on October 28, 2008, the circuit court properly dismissed the Plaintiff's Notice of Intent against Dr. Reinhardt and Rock Hill Radiology because it was not filed within the three year limitations period.

B. Plaintiff's argument that her action was timely brought under the discovery rule is not supported by the facts or the applicable law.

Plaintiff argues that due to the "discovery rule" her claim against Dr. Reinhardt and his practice did not accrue until November 3, 2011, when she learned that Dr. Reinhardt was involved in reading the CT scan and x-ray films in question. However, Plaintiff's argument is inconsistent with the unambiguous language of S.C. Code Ann. § 15-3-530(6), which provides that the statute of limitations on a wrongful death claim begins to run "upon the death of the person on account of whose death the action is brought", which in this case is October 28, 2008.

Moreover, even if the discovery rule is applied, Plaintiff's claim against Rock Hill Radiology and Dr. Reinhardt was brought outside of the limitations period. Plaintiff should have reasonably known on October 28, 2008, when the Decedent died after being treated at Piedmont Medical Center and having a CT scan and x-ray, that a claim against these defendants might exist. That is the date when the statute of limitations began to run if the discovery rule were applied.[4]

Further, Plaintiff was in fact aware of the statute of limitations, and filed her original Notice of Intent against Piedmont Medical Center on October 20, 2011, clearly

[4] Additionally, Plaintiff's affidavit establishes that soon after the Decedent's death, her insurance agent told her to seek an attorney's advice about a possible medical negligence claim regarding her husband's death. [Affidavit of Ann Adams, p. 1.] The fact that she was advised to seek legal counsel soon after the Decedent's death completely undercuts Plaintiff's position that the statute of limitations did not begin to run until November 3, 2011.

recognizing the cut-off date of the statute. Whether Plaintiff knew of the precise identity of Dr. Reinhardt at that time is irrelevant. The South Carolina Supreme Court has stated, "the focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer." Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994). "The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer." Wiggins, 314 S.C. at 129 (quoting Tollison v. B & J Machinery Co., Inc., 812 F.Supp. 618, 620 (D.S.C.1993)). "If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." Id.

The date on which discovery of a cause of action should have been made is an objective, rather than subjective, question. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). "In other words, whether the particular plaintiff actually knew he had a claim is not the test." Hackworth v. Greenville County, 371 S.C. 99, 637 S.E.2d 320 (2006), citing Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct.App.1999). "Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." Id.

Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or should have been discovered by the exercise of reasonable diligence. Smith v. Smith, 291 S.C. 420, 426, 354 S.E.2d 36, 40 (1987). Pursuant to this objective test, one is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge

and experience on notice that some claim might exist. Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct.App.1987).

"'[A]n injured party must act with some promptness where the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist.'" Strong v. Univ. of S.C. Sch. of Med., 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994) (quoting Snell v. Columbia Gun Exchange, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). A cause of action accrues when an injury is discovered or "reasonably ought to have been discovered." Id. The "reasonably ought to have been discovered" requirement is a "reasonable diligence" standard. Id.

Plaintiff did not exercise reasonable diligence. In attempting to explain why it took so long to bring a claim against Dr. Reinhardt and his practice, Plaintiff points to several events. She points out that her previous counsel, the McGowan Hood Law Firm, held a copy of the Decedent's medical records for some time and then released them to her on April 6, 2009, after the firm concluded "there was no medical negligence committed" and "she had no case." [Affidavit of Diane Berinsky filed by Plaintiff; see also Brief of Appellant, p. 4.] She then gave these records to her present counsel "about October 2010." [Id.] Plaintiff contends the first time her new attorney learned of the name of the radiologist who read the Decedent's CT scan and x-ray was on November 3, 2011, when her attorney's law firm received from Piedmont Medical Center "a printed copy showing a clear impression and bearing the name of James E. Reinhardt as the Radiologist that interpreted the film." [Id.]

In attempting to further explain the delay in obtaining these CT scan and x ray records from the hospital, Plaintiff filed an affidavit of Diane Berinsky, a legal assistant employed by her attorney. In her affidavit, Ms. Berinsky states she had to "personally" go to Piedmont Medical Center's records department in order to obtain these records and "waited for approximately 2 hours to obtain this necessary information." [See Affidavit of Diane Berinsky, p. 3.] Plaintiff has also made the assertion: "Only after Ms. Berinsky went to Piedmont Medical Center and waited for two (2) hours to obtain the records was the name of James E. Reinhardt shown." [See Plaintiff's Brief in Opposition to Motions to Dismiss, p. 7.] Through Ms. Berinsky's affidavit, Plaintiff has unintentionally proven that the records in question could easily have been obtained by merely spending a couple of hours at the hospital's records department. Yet Plaintiff sat on her rights and did not adequately investigate a possible claim against Dr. Reinhardt and his practice in a timely manner. The CT scan and x ray film, as well as the attendant records with Dr. Reinhardt's name thereon, were produced in October 2008 and were kept at Piedmont Medical Center. There is no evidence that these records were not readily available. However, Plaintiff waited until November 2011 to attain these records. The only conclusion to be drawn is that Plaintiff did not exercise reasonable diligence with respect to her potential claim against Dr. Reinhardt and Rock Hill Radiology.

Furthermore, by asserting that the statute of limitations did not begin to run until her second attorney was provided a copy of a record with Dr. Reinhardt's name on it, Plaintiff is essentially arguing the limitations period did not start until after she had developed a full-blown theory of recovery against all possible defendants. Our courts have repeatedly held that "an injured party must act with some promptness where the

facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." Id.

"[Plaintiff] proposes an interpretation of the discovery rule that would require absolute certainty a cause of action exists before the statute of limitations begins to run." Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 127, 542 S.E.2d 736, 742 (Ct.App. 2001). "However, that is not the law of this state." Id.

Plaintiff asserts that because her attorneys did not learn of Dr. Reinhardt's identity until November 3, 2011, there is "conflicting testimony regarding the time of discovery of facts giving notice of a medical malpractice claim, [and] the date on which discovery should have been made becomes an issue for the jury." [Brief of Appellant, p. 6.] Plaintiff's assertion should be rejected. However, there is no conflicting testimony that would create a jury issue. Pursuant to S.C. Code Ann. § 15-3-530(6), the statute of limitations on a wrongful death claims begins to run "upon the death of the person on account of whose death the action is brought." Therefore, the statute of limitations began to run on October 28, 2008. Even if the discovery rule is applied, the statute still began to run on October 28, 2008, since the Decedent's death on that date would have put a person of common knowledge on notice that a claim against the Decedent's healthcare providers might exist.

B. The cases relied on by Plaintiff are distinguishable.

Plaintiff relies upon Strong v. University of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (1994) and Arrant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997), in making her argument that the limitations period did not begin to run until her attorney received a medical record that included Dr. Reinhardt's name on November 3, 2011. Plaintiff suggests Strong and Arrant stand for the proposition that in an action alleging medical negligence, the statute of limitations does not begin to run until the plaintiff is informed by a medical specialist that his or her injury was caused by the treating physician's negligence. [Brief of Appellant, p. 6 ("In *Strong* and *Kressler*, the Supreme Court of South Carolina held that the statute of limitations began to run when medical specialists informed the plaintiffs of the cause of their injury.")]

Plaintiff has mischaracterized the holdings of these two cases. For example, in Strong the Supreme Court simply stated— without deciding precisely when the statute of limitations began to run— that the statute began to run **at the very latest** when a notation by another physician was made in plaintiff's medical records that placed blame on the initial treating defendant doctor's follow-up care. Strong, 316 S.C. at 191, 447 S.E.2d at 852 ("Plaintiff's blindness was known to Plaintiff in May 1989. The cause of the injury was readily discoverable by a 'person of common knowledge' through reasonable diligence **by at least** June 1989 when Dr. Martin noted in Plaintiff's medical records that Plaintiff's blindness was due to poor follow-up care.") (emphasis added).

In Arrant, the Supreme Court found a patient's medical malpractice claim against an obstetrician arising from delivery of a child was time barred because another physician had told her more than three years before commencement of the action that the reason she

was bleeding was because the obstetrician had not removed all of the placenta. 327 S.C. at 229, 489 S.E.2d at 209. The Court held this information was sufficient to put the patient on notice of a claim against the obstetrician. Id. Again, as in Strong, the Arrant Court did not rule that it was **necessary** for a specialist to inform a plaintiff of a treating physician's negligence in order to trigger the running of the statute of limitations. Rather, the Court merely found that the information given to the plaintiff concerning the obstetrician's failure to remove the placenta "was sufficient to put [plaintiff] on notice of a claim against [the obstetrician]." Arrant, 327 S.C. at 229, 489 S.E.2d at 209.

Here, immediately upon the Decedent's death on October 28, 2008, Plaintiff should have suspected the possibility of negligence on the part of all physicians and medical personnel who were involved in diagnosing and treating Decedent at Piedmont Medical Center. The Decedent's death put Plaintiff on notice that possible claims against diagnosing and treating medical providers might exist. Yet Plaintiff did not timely investigate possible claims and the action against Rock Hill Radiology and Dr. Reinhardt was not filed until December 1, 2011, well past the expiration of the three-year statute of limitations.

III. The circuit court properly dismissed Plaintiff's Amended Summons and Complaint because Plaintiff failed to comply with the mandatory pre-suit requirements set forth in S.C. Code Ann. § 15-79-125.

A. "Two Issue Rule"

In its order dated July 31, 2012, the circuit court ruled that Plaintiff's action against Dr. Reinhardt and Rock Hill Radiology must be dismissed because Plaintiff failed to comply with the mandatory pre-suit requirements of S.C. Code Ann. § 15-79-125. The Plaintiff has not appealed this ruling, and thus, the ruling is now the law of the case.

Where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) (under the "two issue rule", if the appellant does not appeal all grounds for trial court's decision, the appellate court will affirm); Portman v. Garbade, 337 S.C. 186, 522 S.E.2d 830 (Ct. App. 1999) (where trial court listed number of grounds stated in motion to dismiss for failure to state claim and then granted motion, but where nonmovants appealed only one such ground, alternate grounds became law of case and formed basis for affirming trial court's decision). "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." Jean H. Toal, et al, Appellate Practice in South Carolina 80 (1999) (citing Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993)). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. Id.

Because Plaintiff did not appeal the circuit court's ruling that the action must be dismissed for lack of compliance with the mandatory pre-suit requirements of S.C. Code Ann. § 15-79-125, Plaintiff is bound by this ruling under the law of the case doctrine, the circuit court's ruling dismissing Dr. Reinhardt and his practice must be affirmed.

B. Undisputed evidence indicates Plaintiff failed to comply with the mandatory pre-suit requirements set forth in S.C. Code Ann. § 15-79-125.

Furthermore, the circuit court's ruling that Plaintiff failed to comply with the mandatory pre-suit requirements set forth in S.C. Code Ann. § 15-79-125 is supported by undisputed evidence. Plaintiff failed to give the pre-suit notice required by 15-79-125(A), and Plaintiff also failed to have the dispute mediated prior to filing suit as required by S.C. Code § 15-79-125(C).

Code Section 15–79–125, adopted by the General Assembly as part of the "tort reforms" of 2005, deals specifically with pre-litigation requirements for medical malpractice actions. Section 15-79-125 requires, among other things, that prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, a plaintiff must file both a Notice of Intent to File Suit and an affidavit of an expert witness. Subsection A of 15-79-125 provides: "Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action." S.C. Code Ann. § 15-79-125(A). Subsection B of 15-79-125 permits all parties to subpoena documents and take depositions (with leave of court) during the pre-suit phase once the Notice of Intent to File Suit has been filed and served.

Section 15–79–125 also "establishes a timetable for mandatory prelitigation mediation, and, in the event mediation fails, provides for the commencement of a lawsuit via the timely filing of a summons and complaint." Ranucci v. Crain, 397 S.C. 168, 173, 723 S.E.2d 242, 244 (Ct. App. 2012). "Section 15–79–125 controls the portion of the process that commences with the filing of a Notice of Intent to File Suit and ends with prelitigation mediation." Id., 397 S.C. at 176, 723 S.E.2d at 246. "Section 15-79-125 enables potential litigants to identify likely causes of action, gather information, and pursue a resolution of their medical malpractice disputes through mediation ... ." Id., 397 S.C. at 178, 723 S.E.2d at 247. Subsections C and E, which govern the mediation process, state:

(C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to mediation pursuant to this section.

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

See S.C. Code Ann. § 15-79-125(C), (E).

1. Plaintiff failed to provide the mandatory pre-suit notice before filing a lawsuit against Dr. Reinhardt and his practice.

It is undisputed that the Plaintiff simultaneously filed an Amended Notice of Intent to File Suit along with an Amended Summons and Amended Complaint.[5] Dr. Reinhardt and his practice were named as defendants for the first time in Plaintiff's Amended Notice of Intent to File Suit and Amended Summons and Complaint. In filing the Amended Notice of Intent to File Suit and Amended Summons and Complaint at the same time, Plaintiff failed to provide Dr. Reinhardt with the statutorily mandated pre-suit notice as required by subsection A of S.C. Code Ann. § 15-79-125. This was in contravention of the legislature's directive that a prospective plaintiff must provide pre-

[5] Plaintiff's counsel conceded this issue at the Hearing on the motion and advised it was not his intent to file the Summons and Complaint separately, but merely as attachments to the Notice of Intent.

suit notice and must participate in a mandatory mediation conference before a medical malpractice action may be commenced. S.C. Code Ann. § 15-79-125(A), (C).

Plaintiff's simultaneous filing of an Amended Notice of Intent to File Suit and an Amended Summons and Amended Complaint also conflicts with Subsection B of 15-79-125, which gives all named parties the right to engage in limited pre-suit discovery, including the right to subpoena documents and take depositions (with leave of court), before a medical malpractice action may be commenced. S.C. Code Ann. § 15-79-125(B). If South Carolina courts allowed prospective plaintiffs to file medical malpractice lawsuits and Notices of Intent to File Suit at the very same time, this would render Subsection B utterly ineffectual and useless. "When interpreting a statute, courts must presume the legislature did not intend to do a futile act. State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008). "The legislature is presumed to intend that its statutes accomplish something." Id.

There is no legal or factual basis that would excuse Plaintiff from failing to provide the required pre-suit notice. The plain language of the statute mandates that pre-suit notice be given to all medical malpractice defendants. "Statutory conditions precedent must be met before an action for malpractice or negligence may be instituted against a medical practitioner or other health care provider." 70 C.J.S. Physicians and Surgeons § 142 (2012).

Moreover, by failing to comply with the pre-suit notice requirements (as well as with the mandatory pre-litigation mediation requirement), Plaintiff has thwarted the legislative purpose behind S.C. Code § 15-79-125. The legislative purpose in enacting pre-suit notice statutes, such as S.C. Code § 15-79-125, is to allow prospective parties the

opportunity to evaluate claims at an early stage and engage in settlement negotiations prior to the filing of a lawsuit. See, e.g., Labelle v. McKay Dee Hosp. Ctr., 89 P.3d 113, 114 (Utah 2004) ("These mandates, commonly known as 'prelitigation procedures,' are a central feature of the Medical Malpractice Act, enacted to further the Act's goal 'to expedite early evaluation and settlement of claims.' (quoting UTAH CODE ANN. § 78-14-2)); Williams v. Campagnulo, 588 So.2d 982, 983 (Fla. 1991) ("The statute [requiring notice prior to filing action for medical malpractice] was intended to address a legitimate legislative policy decision relating to medical malpractice and established a process intended to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding. A major factor in this process is the provision that tolls the statute of limitations to afford the parties an opportunity to attempt to settle their dispute.").

Inasmuch as the Plaintiff failed to follow the statutory procedure for giving pre-suit notice, the circuit court correctly dismissed the action against Dr. Reinhardt and Rock Hill Radiology.

2. Plaintiff failed to participate in mandatory pre-litigation mediation before filing a lawsuit against Dr. Reinhardt and his practice.

The intent of the legislature to make pre-suit mediation compulsory is evidenced by the legislature's choice of language. Act 32's preamble states in relevant part "An act to amend the Code of Laws of South Carolina, 1976 ... by adding Chapter 79 to Title 15 so as to ... provide for mandatory mediation ... ." 2005 South Carolina Laws Act 32 (S.B. 83). Further, Code section 15-79-125(C), which governs the timeline for

prelitigation mediation provides "... the parties **shall** participate in a mediation conference ..." S.C. Code Ann. § 15-79-125(C) (emphasis added).

In the present matter, the required mediation was never held. The General Assembly has mandated that before a medical malpractice action can be filed, all parties must participate in a pre-litigation mediation conference. See S.C. Code § 15-79-125(C). The mediation conference must occur between 90 and 120 days from the service of the Notice of Intent to File Suit, unless an extension is granted by the trial court. Id. This mediation is compulsory, as evidenced by the unambiguous language employed by the General Assembly. See S.C. Code § 15-79-125(C) ("the parties **shall** participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause." (emphasis added).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Id. Therefore, the courts are bound to give effect to the expressed intent of the legislature. Id.

If the mediation is unsuccessful, **only then** may a plaintiff initiate a medical malpractice action. See S.C. Code § 15-79-125(E) ("If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and

complaint pursuant to the South Carolina Rules of Civil Procedure"). A summons and complaint must be filed prior to the expiration of the statute of limitations or within 60 days of the mediator's determination that the mediation will not be fruitful. S.C. Code § 15-79-125(E).

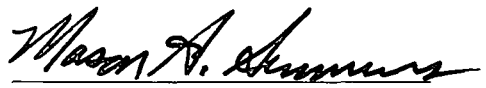
Here, mediation was never held and, therefore, an impasse letter was of course never issued. Plaintiff failed to satisfy this essential prerequisite to commencing a medical malpractice action, and the circuit court was correct in dismissing Plaintiff's action. If courts allowed prospective plaintiffs to file medical malpractice actions without first participating in pre-litigation mediation, this would make Subsection C of S.C. Code § 15-79-125 useless. See State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous....")

The circuit court properly concluded Plaintiff has not met the requirements for commencing a medical malpractice action as a matter of law, and accordingly, the court's dismissal of Plaintiff's action should be affirmed.

Conclusion

Based upon the foregoing, Respondents James E. Reinhardt, Jr., M.D., and Rock Hill Radiology Associates, P.A., respectfully submit that the circuit court's Order of Dismissal of July 31, 2012, should be affirmed in its entirety.

Respectfully submitted,



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