THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Case Tracking No. 2012-213231

APPEAL FROM KERSHAW COUNTY
Civil Action No. 2011-CP-28-1170
Alison Renee Lee, Circuit Court Judge

Patricia Brouwer ..... Appellant

vs.

Sisters of Charity Providence Hospitals d/b/a Providence Hospital and Providence Hospital Northeast; South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; Francine K. Moring, M.D.; Jane Does (1-5); and John Does (1-5) ..... Defendants

Of Whom Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; and Francine K. Moring, M.D. are ..... Respondents

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FINAL INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS THE NOTICE OF INTENT TO FILE SUIT FOR FAILURE TO FILE AN AFFIDAVIT WHEN THE BASIS OF LIABILITY IS WITHIN THE AMBIT OF COMMON KNOWLEDGE AND EXPERIENCE?

STATEMENT OF THE CASE

This case was initiated with the filing of a Notice of Intent to File Suit in a Medical Malpractice Case (hereafter "NOI") pursuant to S.C. Code Ann. Section 15-79-125 and Summons and Complaint on December 29, 2011. A scrivener's error was discovered, and an amended NOI and Summons and Complaint were filed on January 4, 2012. (R. pp. 60-74). The NOI was filed as case number 2011-CP-28-1169, and the Complaint was filed as case number 2011-CP-28-1170.

On January 31, 2012, Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A., Robert Puchalski, M.D., and Francine K. Moring, M.D. filed their Answer along with a Motion to Dismiss for failing to comply with S.C. Code Ann. Section 15-79-125 in case number 2011-CP-28-1170. (R. pp. 9-11).

The Motion to Dismiss was heard by the Honorable Alison Renee Lee on March 6, 2012. (R. pp. 95-119). Judge Lee issued an order dated May 29, 2012 denying the Defendants' Motion to Dismiss the NOI for failure to file an affidavit. (R. pp. 1-5). The Order granted Defendants' Motion to Dismiss the Summons and Complaint as to Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A., Robert Puchalski, M.D., and Francine K. Moring, M.D., but not as to Defendant Sisters of Charity Providence Hospitals d/b/a Providence Hospital and Providence Hospital Northeast. The second amended Summons and Complaint were filed on June 19, 2012. (R. pp. 83-94). Prior to the filing of the second amended Complaint, the parties engaged in mediation on April 26, 2012, which was unable to settle the case. (R. pp. 82).

On June 12, 2012, Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A., Robert Puchalski, M.D., and Francine K. Moring, M.D. filed a Motion to Alter or Amend the Order Denying the Motion to Dismiss NOI made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (R. pp. 46-51). An order, dated July 3, 2012, by Judge Lee granted Defendants' Motion to Alter or Amend the Court's May 29, 2012 Order and granted Defendants' Motion to Dismiss the NOI for failure to file an affidavit. (R. pp. 6-7). The Motion of the Defendants and the Order by the Judge were both under case number 2011-CP-28-1170, which is the Complaint and not the NOI.

The Plaintiff filed a Motion to Alter or Amend the July 3, 2012 Order of Court pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. Judge Lee denied the Motion on September 12, 2012. (R. pp. 8).

The Plaintiff filed this appeal on October 12, 2012.

STATEMENT OF FACTS

This action arises from Patricia Brouwer, the Appellant, being admitted to Providence Hospital by Dr. Puchalski for a procedure to treat sleep apnea. The Appellant has a latex allergy, a fact the Defendants knew, or would have easily known through the exercise of reasonable diligence. Attached to the Complaint were medical records, including Pre-Anesthesia Evaluation and Consent to Operation, Anesthetic and Other Medical Services, which both specifically included that the Appellant has a latex allergy. (R. pp. 91-93). The Appellant even had a big red bracelet that said 'latex allergy.' During the course of the treatment, the Appellant was exposed to latex, which caused her to suffer an allergic reaction and as a result she had to undergo treatment in the intensive care unit.

On December 29, 2011, Appellant filed a NOI and Summons and Complaint. On January 4, 2012, Appellant filed an Amended NOI and Amended Summons and Complaint stating that a filing of an expert affidavit was not required because the subject matter of this action, exposure of latex to a person allergic to latex, lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the Defendants. (R. pp. 60-74).

A Motion to Dismiss the NOI for failure to file an affidavit was filed, and heard on March 6, 2012. The Court, in the original order denied the Defendants' Motion to Dismiss. However, the Court granted the Defendants' Rule 59 Motion

to Alter or Amend and thereby granted Defendants' Motion to Dismiss. (R. pp. 6-7).

The lower court erred in granting Defendants' Motion to Dismiss the NOI for failure to file an affidavit.

STANDARD OF REVIEW

"Questions of statutory interpretation are questions of law, which [the Court is] free to decide without any deference to the court below." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used." Ranucci v. Crain, 397 S.C. 168, 171, 723 S.E.2d 242, 244 (Ct. App. 2012) (quoting McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)).

All terms that are free of ambiguity on their face must be applied according to their literal meaning. Id. at 172, 723 S.E.2d at 244. "It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute's plain language." Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012) (citing Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)).

Lastly, "statutes in derogation of the common law are to be strictly construed." Id. at 536, 725 S.E.2d at 696 (citing Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). Further, the statutes which this rule is applicable to are those which "limit a claimant's right to bring suit." Id. at 536, 725 S.E.2d at 696 (quoting 82 C.J.S. Statutes § 535).

ARGUMENT

A. The trial court erred in granting Defendants' Motion to Dismiss the NOI for failure to file an affidavit.

The trial court erred in granting Defendants' Motion to Dismiss the NOI for failure to file an affidavit. The trial court based its ruling on Ranucci v. Crain, which stated the requirements set out in Section 15-79-125 are subject only to the provisions of S.C. Code Ann. Section 15-36-100 that govern the preparation of the content of the affidavit. Ranucci, 397 S.C. 168, 723 S.E.2d 242 (Ct. App. 2012). The trial court failed to follow the rules of statutory construction in reading Sections 15-36-100 and 15-79-125, and failed to recognize the absurd result that would occur if a party is required to file an expert affidavit for a NOI, but does not need to file an expert affidavit with the Complaint in the actual litigation.

1. Rules of Statutory Construction demand that Section 15-79-125(A) grant an affidavit exception under Section 15-36-100(C)(2).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent." S.C. Coastal Conservation League v. Dep't. of Health and Envtl. Control, 380 S.C. 349, 365, 669 S.E.2d 899, 907 (Ct. App. 2008). "In South Carolina, the court's foremost duty is to determine the intent of the General Assembly." Id. at 365, 669 S.E.2d at 907. "All rules of statutory constructions are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Id. at 365, 669 S.E.2d at 907.

"The first inquiry in deciphering the legislature's intent should begin by determining whether the statute's meaning is clear on its face." Id. at 366, 669 S.E.2d at 907. "The legislative intent should be derived primarily from the plain language of the statute." Id. at 366, 669 S.E.2d at 907.

The statute's text is the best evidence of legislative intent or will. Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007). "Clear and unambiguous statutes require no statutory construction and should be applied by the court according to their literal meaning." Coastal, 380 S.C. at 366, 669 S.E.2d at 908. "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction." Id. at 366, 669 S.E.2d at 908.

"When reasonably possible, statutes in apparent conflict should be interpreted to allow both to stand." Id. at 367, 669 S.E.2d at 909.

"Courts will reject statutory interpretations that lead to results so plainly absurd they could not have been intended by the legislature." Peake, 375 S.C. at 599, 654 S.E.2d at 289 (citing Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005)). See also, Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693, 695-96 (2012) and Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

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

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

The affidavit requirements in S.C. Code Ann. Section 15-36-100 include the following exception:

> The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

S.C. Code Ann. Section 15-36-100(C)(2).

Subsection (B) of Section 15-36-100 states that a plaintiff must file an expert witness affidavit that specifies at least one negligent act if the action is alleging professional negligence against one of the twenty-two (22) stated professions, which includes physicians.

The language in Section 15-79-125(A) is clear and unambiguous, yielding only one possible interpretation. Under the phrasing of the statute, the plaintiff must file a NOI and serve it upon all defendants. Further, the statute directs that the plaintiff must refer to Section 15-36-100 in order to comply with the expert affidavit requirements. One of the affidavit requirements outlined in Section 15-

[1] The defendant, Sisters of Charity Providence Hospitals d/b/a Providence Hospital and Providence Hospital Northeast contends it is not subject to the NOI statute because it is a charitable organization and asserts that the NOI statute does not apply to charitable organizations.

36-100 states that an affidavit requirement is not applicable if the negligence is "within the ambit of common knowledge and experience." There is no language whatsoever in Section 15-79-125(A) which limits what portions of Section 15-36-100 related to affidavit requirements would apply.

South Carolina courts have long recognized an exception to the general rule that an expert is needed in malpractice cases, "in situations where the common knowledge or experience of laymen is extensive enough to recognize or to infer negligence from the facts." Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978). More recently, the South Carolina Court of Appeals upheld the common knowledge exception in a case that involved a drill malfunctioning during oral surgery. Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008).

In this matter, the Plaintiff disclosed her allergy to latex and yet Defendants then exposed her to latex and the medical records attached to the pleadings establish this fact. (R. pp. 66-68). It is within the ambit of common knowledge that someone who is allergic to latex who is then exposed to latex will be harmed. Stated otherwise, if a person advises that they are allergic to latex on their consent form and pre anesthesia disclosure to the hospital, the anesthesiologist and surgeon have a duty not to expose the patient to latex. It would be of no benefit or purpose to any party to have an expert put in an affidavit that when the medical providers, who have been placed on notice of an allergy, should not then expose the patient to the allergy they are on notice of.

This issue is not presented or addressed in the Ranucci case cited by the lower court and accordingly, Ranucci is not applicable.

Further, the South Carolina Supreme Court recently stated, "[w]e must be mindful that Section 15-79-125(A) is to be strictly construed, and imposing requirements which are not clearly intended to be in it violates this rule." Grier, 397 S.C. 532, 540, 725 S.E.2d 693, 698. Section 15-79-125(A) cannot be construed so as to force a plaintiff to file an affidavit with the NOI when such an affidavit is not required when filing a complaint and when the courts of South Carolina have consistently recognized a common knowledge exception. If such a requirement was clearly intended by Section 15-79-125(A), then Section 15-36-100(C)(2) would serve no obvious purpose because every plaintiff filing a complaint would already have an affidavit of an expert witness from their NOI filing However, Section 15-36-100(C)(2) is still good law in South Carolina, and therefore Section 15-79-125(A) cannot be so construed as to impose requirements which were not clearly intended by the legislature of this state.

2. An absurd result would occur if S.C. Code Ann. Section 15-79-125(A) required an affidavit and S.C. Code Ann. Section 15-36-100 did not.

Statutes should not be interpreted so as to reach an absurd result. Grier, 397 S.C. 532, 725 S.E.2d 693. The lower court has interpreted that there is a requirement to file an affidavit along with the NOI, however, if mediation falls, and a lawsuit is filed, an affidavit is not required if the alleged negligence falls within the ambit of common knowledge and experience.

The present case is a clear example of an absurd result. The lower court has interpreted that the Plaintiff, whose injury was the result of exposure to latex after she had informed the Defendants of her allergy to latex, must nonetheless file an expert witness affidavit along with the NOI, even though if mediation fails and a complaint is filed, an expert witness affidavit would not be required. By the lower court's interpretation, prelitigation requires an expert witness affidavit regardless of whether the subject matter is within the ambit of common knowledge and experience, but actual litigation does not require an expert witness affidavit. Accordingly, this interpretation would also needlessly increase the costs of persons seeking redress for medical malpractice injuries.

The Supreme Court of South Carolina in Grier stated that statutes should not be applied in a manner that would yield results that are patently absurd. Id. at 536, 725 S.E.2d at 695 (citing Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)). If the statutes in controversy in this present appeal are interpreted as the lower court has, the result will be patently absurd.

3. The issue of the affidavit became moot when the parties mediated the case.

The Appellant also argues that the issue of an affidavit became moot when the parties mediated the case, regardless of any reservations of the Defendants to the contrary. Once the mediation has occurred without reaching a settlement, the Defendants cannot then complain that the NOI was inadequate. In the present case, mediation occurred on April 26, 2012 and was unable to settle the case. (R. pp. 82). The purpose of Section 15-79-125 is to alert the

parties of a claim and to participate in mediation. Once the parties have actually participated in the mediation, the issue of the affidavit became moot.

4. Public policy mandates that Section 15-79-125(A) include the affidavit requirement exception of Section 15-36-100(C)(2).

One of the main purposes of the legal system is for parties to redress injuries in front of an impartial decision maker, be that a judge or a jury. A goal of the legislature and the courts is to make the legal system easy and affordable for all members of the public to be able to bring their grievances before the court. By installing an immediate threshold requirement of the necessity of an expert witness affidavit, the court is making access to the legal system more expensive and more difficult. Before the Tort Reform Act of 2005, a plaintiff could successfully prosecute an action without an expert witness affidavit against a professional if, and only if, the subject matter of the suit fell within the ambit of common knowledge and experience. The lower court's holding is that now, before any medical malpractice lawsuit can proceed, an expert witness affidavit is required, regardless of the common knowledge and experience exception, which only adds to the complexity and monetary cost of bringing a suit to redress an injury.

The Court in Ranucci, stated that the "affidavit filed pursuant to [Section 15-79-125(A)] serves as notice to potential defendants of the claim and qualifies potential plaintiffs and defendants to engage in prelitigation discovery." Ranucci, 397 S.C. at 178, 723 S.E.2d at 247[2]. However, the requirement of a "short and plain statement of the facts showing that the party filing notice is entitled to relief," S.C. Code Ann. Section 15-79-125(A) already serves as notice to potential defendants of the claim, and should qualify potential plaintiffs and defendants to engage in prelitigation discovery in a matter such as the case here. The Court also stated that "[s]uch an affidavit is a threshold requirement a medical malpractice claimant must satisfy in order to seek disclosure of sensitive and often highly technical information." Id. at 178, 723 S.E.2d at 247. Again, the requirement of a "short and plain statement of facts," in an allergic reaction case such as this, along with mandatory mediation should remove all meritless claims from proceeding and therefore, the fear of deficient claims is baseless.

The Ranucci Court asserts that an expert witness affidavit is necessary in order to serve notice to potential defendants of the claims and to weed out all meritless claims. However, in a case where no expert witness is needed, such as this one, the requirement only adds time and expense in finding an "expert," which will only increase legal costs for plaintiffs. Therefore, public policy requires that Section 15-79-125(A) include the affidavit requirement exception of Section 15-36-100(C)(2).

[2] The "qualifies potential plaintiffs and defendants" language is subject to much dispute as there is no corollary requirement for defendants to provide any affidavit in opposition nor provide any explanation whatsoever as to why they refuse to settle cases at the mediation stage of an NOI filing.

CONCLUSION

For the foregoing reasons, the Court should overrule the decision of the trial court granting Defendants' Motion to Dismiss the NOI for the failure to file an affidavit.

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March 11, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
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Of Whom Defendants South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; and Francine K. Moring, M.D. are ..... Respondents

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PROOF OF SERVICE

I certify that I have served the Record on Appeal, Certification of Counsel, Final Initial Brief of Appellant and Final Reply Brief of Appellant on South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D. and Francine K. Moring, M.D., by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record, William H. Davidson II, Esquire and Andrew F. Lindemann, Esquire, Davidson & Lindemann, PA , PO Box 8568, Columbia, SC 29202 on March 18, 2013.

I certify that I have served the Record on Appeal, Certification of Counsel, Final Initial Brief of Appellant and Final Reply Brief of Appellant on Francine K. Moring, M.D. by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record, Benson H. Driggers, Esquire, Sweeny Wingate & Barrow, PA, PO Box 12129, Columbia, SC 29211 on March 18, 2013.

I certify that I have provided a courtesy copy of the Record on Appeal, Certification of Counsel, Final Initial Brief of Appellant and Final Reply Brief of Appellant upon Defendant Sisters of Charity Providence Hospitals d/b/a Providence Hospital and Providence Hospital Northeast who is not a Respondent in the appeal by depositing a copy of it in the United States Mail, postage

prepaid, addressed to its attorney of record, Weldon R. Johnson, Esquire, Barnes, Alford, Stork & Johnson, LLP, PO Box 8448, Columbia, SC 29202-8448 on March 18, 2013.

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March 18, 2013

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CERTIFICATION OF COUNSEL FOR APPELLANT REGARDING FINAL INITIAL BRIEF

Counsel for Appellant hereby certifies that the Final Initial Brief complies with Rule 211(b) and has been served upon all parties of record.

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