THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-28-1170

Patricia Brouwer, ... Appellant,

v.

Sisters of Charity Providence Hospitals;
South Carolina ENT, Allergy and Sleep Medicine, P.A.;
Robert Puchalski, M.D.; Francine K. Moring, M.D.;
Jane Does and John Does, ... Defendants,

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

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This appeal raises issues regarding the construction and application of Section 15-79-125 of the South Carolina Code of Laws. The Appellant Patricia Brouwer filed a Notice of Intent to File Suit on December 29, 2011, together with a Summons and Complaint. On January 4, 2012, she then filed an Amended Notice of Intent to File Suit. (R. 60-74). The Appellant did not file an affidavit of an expert witness contemporaneously with that Amended Notice of Intent to File Suit. The Respondent Francine K. Moring, M.D. was served on January 5, 2012. (R. 75-76). The Respondents South Carolina ENT, Allergy and Sleep Medicine, P.A. and Robert Puchalski, M.D. were served on January 6, 2012. (R. 78, 80). The Appellant also served a Summons and Complaint on the Respondents on these same dates. (R. 77, 79, 81).

The Respondents filed a motion to dismiss on February 1, 2012. (R. 9-10). That motion was heard by Circuit Court Judge Alison Renee Lee on March 6, 2012, and the motion was taken under advisement. By order filed May 31, 2012, Judge Lee denied the Respondents' motion to dismiss the Amended Notice of Intent to File Suit (hereinafter referred to as "Notice of Intent"). Judge Lee did, however, dismiss the Summons and Complaint without prejudice. (R. 1-5).

On June 13, 2012, the Respondents filed a Rule 59(e) motion to alter or amend the order denying the motion to dismiss the Notice of Intent. That motion

was granted by order filed July 6, 2012. In that order, Judge Lee ruled that "[t]he common knowledge exception found in Section 15-36-100 does not apply to the requisite prelitigation procedures set out in Section 15-79-125 and cannot be used to obviate the requirement that there be an expert affidavit filed with the Notice of Intent." (R. 7). Consequently, Judge Lee granted the motion to dismiss the Notice of Intent for failure to file an expert affidavit. (R. 6-7).

On July 23, 2012, the Appellant filed a Rule 59(e) motion to alter or amend. That motion was denied by order filed September 14, 2012. (R. 8). The Appellant thereafter filed a Notice of Appeal.

ARGUMENTS

I. The Circuit Court was correct in dismissing the Appellant's Notice of Intent to File Suit because of her failure to contemporaneously file an expert affidavit with her Notice of Intent to File Suit as required by statute.

In 2005, as part of comprehensive tort reform, the South Carolina General Assembly enacted Section 15-79-125 which requires that a medical malpractice plaintiff must initially file a Notice of Intent to File Suit together with an affidavit of an expert witness. The plaintiff must provide "a short and plain statement of the facts showing that the party filing the notice is entitled to relief" and must provide responses to standard interrogatories. *See*, S.C. Code Ann. § 15-79-125(A). The statute further grants the parties subpoena power to obtain medical records and other relevant records. *See*, S.C. Code Ann. § 15-79-125(B). The purpose of these provisions, in part, is to provide a mechanism for meaningful pre-suit mediation as well as to discourage the filing of frivolous malpractice cases. Section 15-79-125(C) further requires that the parties conduct a mediation conference in accordance with the Circuit Court Alternative Dispute Resolution Rules. *See*, S.C. Code Ann. § 15-79-125(C). The plaintiff is prohibited from filing a civil action until these prerequisites, including pre-suit mediation, are satisfied. The statutory scheme also grants the circuit court with "jurisdiction to enforce the provisions of this section." S.C. Code Ann. § 15-79-125(D).

In the case at bar, the Appellant contends that Circuit Court Judge Alison Renee Lee erred in dismissing her Notice of Intent for failure to file an expert affidavit. It is undisputed that the Appellant filed her Notice of Intent without an accompanying affidavit of an expert witness. The Appellant maintains that the requirement of an expert affidavit is not applicable to her medical malpractice claim because the breach of the standard of care by the Respondents is "within the ambit of common knowledge and experience."[1]

This appeal involves the construction of Section 15-79-125(A), which provides in pertinent part as follows:

> 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). (Emphasis added). In arguing that her medical malpractice claim does not require an expert affidavit, the Appellant relies on Section 15-36-100(C)(2), which provides for an exception to the requirement that

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[1] The Respondents disagree with the Appellant's position that the allegations of medical negligence may be established without expert medical testimony. The Respondents believe that the Appellant would have needed to present expert testimony in order to prove a breach of the standard of care and that the common knowledge exception to the requirement of expert testimony is not applicable to this case. However, that is not an issue to be litigated at this stage of the litigation or as part of this appeal. Section 15-79-125 does not include a mechanism whereby the purported reliance on the common knowledge exception may be challenged, which, as discussed below, is further evidence that the General Assembly did not intend to adopt a common knowledge exception for the expert affidavit requirement.

an expert affidavit be filed with the complaint in professional liability cases. Section 15-36-100(C)(2) states:

> 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. § 15-36-100(C)(2). The Appellant contends that the exception created by Section 15-36-100(C)(2) for the filing of an expert affidavit with a complaint should be read as an exception to the expert affidavit requirement of Section 15-79-125 as well. The rules of statutory construction, the legislative history, and existing precedent do not support the Appellant's position.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Sumter Police Department v. Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894, 896 (Ct. App. 1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Id.* "Courts should ascertain the legislature's intent primarily from the plain language of the statute." *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d 242, 244 (Ct. App. 2012).

This Court has explained that "[t]erms that are clear and unambiguous on their face leave no room for statutory construction, and we must apply the statute

according to its literal meaning." *Ranucci*, 723 S.E.2d at 244. "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." *Id.* The court has "no right to impose another meaning" to the statute. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693, 695 (2012). "[I]t 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." 725 S.E.2d at 695-696.

Section 15-79-125(A) "imposes prelitigation filing requirements upon individuals intending to file suit for medical malpractice." *Ranucci*, 723 S.E.2d at 244. One of those filing requirements is an affidavit of an expert witness. Section 15-79-125 "imposes two requirements on the affidavit, that it be filed at the same time as the Notice of Intent to File Suit and that it comply with the affidavit requirements of section 15-36-100." 723 S.E.2d at 246. There are no exceptions for the affidavit requirement in Section 15-79-125.

The Appellant nonetheless contends that the expert affidavit exception set forth in Section 15-36-100(C)(2) for complaints should be incorporated or read into Section 15-79-125. This Court foreclosed such a result in *Ranucci*. In that case, this Court addressed "which requirements of section 15-36-100 constitute the affidavit requirements referenced by section 15-79-125(A)." *Ranucci*, 723 S.E.2d at 246. As this Court explained,

> Section 15-36-100 sets forth requirements for the qualification of an expert witness-affiant and for the content of an expert witness's affidavit. It also establishes a contemporaneous-filing requirement and exceptions thereto for affidavits filed pursuant to subsection B, rights to challenge or cure affidavits filed pursuant to subsection B and the procedures for doing so, and a limitation on the effects of section 15-36-100 on any applicable statutes of limitation. Further distilled, section 15-36-100 institutes, on the one hand, substantive requirements for the authorship and content of affidavits by expert witnesses and, on the other, procedural requirements relating to such affidavits when filed with a complaint.

Id. This Court then held that "section 15-79-125(A) invokes *only the provisions of section 15-36-100 governing the preparation and content of the affidavit.*" *Id.* (Emphasis added). The Court in *Ranucci* further explained:

> The plain language of section 15-36-100, which ties the filing of affidavits under that statute to a complaint or other initial pleading, prevents the remaining provisions from applying to affidavits filed pursuant to section 15-79-125.

Id. As this Court concluded, "the legislature clearly intended the two statutes to operate independently of one another and in distinct time frames, *with the specific exception that they share the criteria for preparing affidavits of expert witnesses.*" *Id.* (Emphasis added).

Therefore, as *Ranucci* instructs, only the requirements of Section 15-36-100 governing the content of the expert affidavit are incorporated into Section 15-79-125(A). The provisions of Section 15-36-100(C)(2) providing an exception for the

expert affidavit when a complaint for professional negligence is filed are not applicable to the filing of a Notice of Intent. The two statutes are intended to apply independently of one another.

Interestingly, in *Ranucci*, the plaintiff failed to initially file an expert affidavit because of "time constraints." In the Notice of Intent, the plaintiff indicated that she would file an affidavit within 45 days or otherwise she would rely on the common knowledge exception, the latter of which is the same position taken by the Appellant here. The plaintiff later filed an untimely expert affidavit. This Court affirmed the dismissal of the Notice of Intent finding that the failure to file an expert affidavit contemporaneously with the Notice of Intent was improper. Although the plaintiff alternatively relied on a common knowledge exception, this Court in *Ranucci* did not find such an exception to the affidavit requirement, which provides additional support for Judge Lee's ruling in the present case.

Judge Lee's order dismissing the Appellant's Notice of Intent is also supported by the recent decision of the Supreme Court in *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012). In that case, the defendant health care facility filed a motion to dismiss a Notice of Intent because the expert affidavit did not include a competent causation opinion. In reversing the dismissal of the Notice of Intent, the Supreme Court ruled that Section 15-79-125(A) is "unambiguous," and accordingly, the court "is confined to what the statute says, not what it ought to say, for [the court has] no right to modify a statute's application

under the guise of judicial interpretation." 725 S.E.2d at 697-698. The Supreme Court recognized that "[r]ead plainly and strictly, section 15-79-125(A) simply requires the contemporaneous filing of both the notice and the affidavit." 725 S.E.2d at 697. The Supreme Court did not identify any exceptions to this "plain and strict" reading of Section 15-79-125(A).

More importantly, in *Grier*, the Supreme Court explained that "when a statute is clear on its face, it is improvident to judicially engraft extra requirements to legislation just because doing so may further the intent behind the statute." 725 S.E.2d at 698. Because the Court found Section 15-79-125(A) to be unambiguous, the Court declined to read into the statute any additional requirements that were not evident in its plain language. The same is true as to exceptions – because Section 15-79-125(A) is unambiguous, a court may not engraft or read into the statute any exceptions that the General Assembly did not include in the plain language of the statute. The Supreme Court did explain, however, that "[i]t 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." 725 S.E.2d at 695-696. Yet, the Supreme Court in *Grier* found nothing "patently absurd" in Section 15-79-125(A) that could not have been intended by the General Assembly. 725 S.E.2d at 698.

In the present case, the Appellant takes the position that an "absurd result" will occur if Section 15-79-125(A) is construed consistently with its plain language as

requiring an expert affidavit to be filed with *all* Notices of Intent. The Appellant claims that it is absurd to require an expert affidavit with the filing of the Notice of Intent where an expert affidavit is not required with the filing of the complaint once the pre-suit mediation is unsuccessful. That frankly is the extent of the Appellant's argument. It is conclusory and does not explain the alleged "absurdity."[2]

Nonetheless, in response, the Respondents submit that the requirement of an expert affidavit with the Notice of Intent was clearly intended by the General Assembly and for good reason. As the Supreme Court recognized in *Grier*, Section 15-79-125(A) was adopted as part of tort reform legislation which included several major changes in the law specifically applying to medical malpractice cases. The Court explained that "one of the major goals behind these requirements [of Section 15-79-125(A)] is to curtail frivolous litigation by ensuring plaintiffs only present colorable claims." *Grier*, 725 S.E.2d at 697-698. Without an expert affidavit, a medical malpractice plaintiff is less likely to have presented a colorable claim. If the pre-filing procedures adopted and codified in Section 15-79-125 are allowed to proceed on a plaintiff's mere assertion that his/her claim falls within the common knowledge exception, that would arguably undermine the chances of having an effective, meaningful pre-suit mediation. As discussed in a footnote above, a

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[2] It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

plaintiff's assertion of the common knowledge exception would not be challengeable at the pre-suit stage. Any plaintiff who fails to obtain an expert witness – whether for lack of effort, inability to find a favorable witness, or unwillingness to expend the funds necessary – could nonetheless file a Notice of Intent and compel pre-suit discovery and mediation simply by asserting the common knowledge exception, whether valid or not. Such an opportunity for abuse was likely evident to the General Assembly in drawing the distinction between the requirements for filing a Notice of Intent versus filing a complaint. Moreover, such abuse would render the pre-suit mediation process ineffective and fruitless and would likewise negate the purpose of curtailing frivolous litigation.

Furthermore, the General Assembly likely recognized that reliance on the common knowledge exception once suit is filed is, contrary to the pre-suit stage, subject to immediate review by the courts. Section 15-36-100 creates a mechanism whereby the defendant may raise "the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading" and, in essence, have the plaintiff's reliance on the common knowledge exception immediately adjudicated. *See*, S.C. Code Ann. § 15-36-100(F). That mechanism is not available at the pre-suit stage, which is a critical distinction.

Finally, it is important to recognize that the General Assembly did not inadvertently enact two statutes that are inconsistent, as the Appellant seems to suggest in proffering this notion that the plain reading of these statutes results in an

"absurd result." Sections 15-79-125 and 15-36-100 were adopted by the General Assembly on the same day *as part of the same legislation. See*, 2005 Act No. 32. Section 15-79-125(A) even references Section 15-36-100, although only for the purpose of "shar[ing] the criteria for preparing affidavit of expert witnesses." *Ranucci*, 723 S.E.2d at 247. Therefore, there are no unintended inconsistencies between the two statutes. Instead, as this Court explained in *Ranucci*, "the legislature clearly intended the two statutes to operate independently of one another and in distinct time frames." *Id.*

In sum, as the Supreme Court addressed within the specific context of Section 15-79-125(A), courts cannot modify a statute's application "under the guise of judicial interpretation." *Grier*, 725 S.E.2d at 698. Courts likewise cannot substitute their judgment for that of the legislature on policy matters. *See*, *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 428 S.E.2d 889, 893 (Ct. App. 1993) ("[w]hen the Legislature has enacted a rule embodying a particular policy choice, the courts have no power to annul the Legislature's judgment by substituting their own views of sound public policy"). Courts cannot by judicial fiat alter statutory requirements or create statutory exceptions where they are not provided in the statute's plain language. The Appellant, nonetheless, is asking this Court to violate these very rules of statutory construction and the basic premise of separation of powers. *See*, *Holmon*, 428 S.E.2d at 893 ("[i]t is not the province of the courts to perform legislative functions"). The Appellant insists – on the basis of better

judgment or public policy – that the expert affidavit requirement of Section 15-79-125(A) should include a common knowledge exception that the General Assembly did not provide. Judge Lee, in the court below, was correct in ultimately denying the Appellant's request to read into the statute a common knowledge exception. Her ruling is in accordance with the rules of statutory construction, the legislative history and the *Ranucci* and *Grier* cases. That ruling should be affirmed.

II. The fact that the parties participated in pre-suit mediation as required under Section 15-79-125, while the Respondents' motion to dismiss was pending, does not render moot the Appellant's failure to contemporaneously file an expert affidavit with her Notice of Intent to File Suit.

The Appellant also takes the position that her failure to file an expert affidavit is now "moot" because the pre-suit mediation was held. She offers no analysis, citations or other authority for that position. Presented only as "a short, conclusory statement without supporting authority," the issue should be deemed abandoned. *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993).

Nonetheless, there is no support for the suggestion that the failure to meet the pleading requirements of Section 15-79-125(A) becomes moot if the parties proceed with the pre-suit mediation. There is no question that the Respondents timely raised the defect in the filing of the Notice of Intent. By proceeding with

mediation in compliance with the time requirements set by Section 15-79-125(C), the Respondents expressly did not waive their motion to dismiss filed February 1, 2012 and argued on March 6, 2012. If the Respondents had not participated in mediation within the required time deadline, while their motion to dismiss was pending and under advisement by Judge Lee, they could have faced potential enforcement sanctions under Section 15-79-125(D). There is no waiver by the Respondents under such circumstances, and certainly there is no evidence to support a mootness defense.

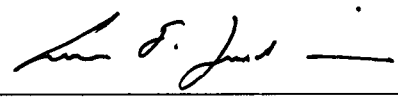
Regardless of whether mediation occurred, the fact remains that the Appellant failed to comply with the requirement to file an expert affidavit with her Notice of Intent. That failure is not somehow obviated by the fact that a mediation was held. In short, the Appellant's reliance on a mootness defense for her failure to comply with Section 15-79-125(A) is meritless.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the order of Circuit Court Judge Alison Renee Lee dated July 6, 2012, which dismisses the Notice of Intent to File Suit for failure to file an expert affidavit.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents that the Final Brief of Respondents complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 8th day of April 2013:

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