THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County
Court of Common Pleas

The Honorable George C. James, Jr.
Circuit Court Judge

Case No. 2009-CP-14-439

Ronald Grubb as PR of the Estate of Joyce Grubb,

Appellant,

v.

Clarendon Memorial Hospital,

Respondent.

Final Brief of Respondent Clarendon Memorial Hospital

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Trial Court properly dismiss the action against Clarendon Memorial Hospital where the Plaintiff failed to commence her medical malpractice action within the applicable two-year statute of limitations of S.C. Code Ann. §15-78-110 of the S.C. Tort Claims Act?

II. Did the filing of a Notice of Intent to File Suit pursuant to S.C. Code Ann. § 15-79-125 toll the statute of limitations where the enabling act, Act 32 of 2005 as codified at § 15-78-220, explicitly states that the provisions of the Act do not affect any right, privilege, or provision of the South Carolina Tort Claims Act?

III. Is the Plaintiff's claim barred, notwithstanding the filing of a Notice of Intent to File Suit, where the Plaintiff did not timely comply with the provisions of § 15-79-125(C) & (E)?

A. The Plaintiff did not participate in mediation as required by § 15-79-125(C).

B. The Plaintiff did not timely file his summons and complaint within the period allowed/required by § 15-79-125(E).

STATEMENT OF THE CASE[1]

This medical malpractice action arises from the death of Joyce Grubb on September 14, 2006. Her husband, as the personal representative of her estate, filed a Notice of Intent to File Suit pursuant to § 15-79-125, on September 12, 2008, naming as defendants, D. Maxwell Egbonim, M.D.[2] and Clarendon Memorial Hospital. [ROA 3; Notice of Intent, C/A No. 08-CP-14-472.]

Counsel for Clarendon Memorial sent a letter to Plaintiff's Counsel on October 13, 2008, taking the position that the provisions of § 15-79-125 do not apply to governmental entities such as Clarendon Memorial.[3] However, Defense Counsel expressed willingness to participate in mediation and pre-filing discovery, subject to the proviso that such participation was not a waiver of any provisions of the Tort Claims Act. [ROA 79; Ex. 1 – Letter.]

No mediation was held.[4] Instead, the Plaintiff filed a summons and complaint almost a year later on August 7, 2009. [ROA 33; Summons and Complaint.]

Defendant Clarendon Memorial filed an answer denying the allegations of negligence and also filed a motion to dismiss on the ground that any claims are barred by the applicable two-year statute of limitations, S.C. Code Ann. §15-78-110. [ROA 37, 43; Answer, Motion, filed September 22, 2009.]

On March 18, 2011, the trial court entered a Consent Scheduling Order:

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[1] The issues on appeal involve only procedural facts and thus, the underlying facts of the medical treatment are not relevant and no separate Statement of the Facts is necessary.

[2] Claims against Dr. Egbonim have been dismissed.

[3] Counsel for Plaintiff admits that he received the letter. [ROA 66; Tr. 19:21-23.]

[4] As stated by the Plaintiff in his Statement of the Case. [Appellant's Brief, p. 1.]

> This matter comes before me on the consent of the parties for a scheduling order in the above-captioned matter. The parties need to conduct additional discovery and mediation in the case. In addition, the Counsel for Defendant Clarendon Memorial Hospital filed a dispositive motion that needs to be heard and decided on prior to the parties moving further in discovery and mediation. Accordingly, I find that good cause exists for this order, and therefore, the following deadlines are established in this matter:
>
> > Trial in this matter shall not be before six months after the disposition of the current Motion to Dismiss on file with this Court. Nothing in this deadline shall prevent a party from moving to amend this deadline upon extenuating or exceptional circumstances.

[ROA 45; Consent Scheduling Order.]

Thereafter, the motion came for hearing on July 27, 2011. [ROA 48; Transcript.] Subsequently, the Trial Court issued its order granting the motion and dismissing the action. [ROA 72; Order, filed August 31, 2011.] The Plaintiff filed and served a notice of appeal without making any motion for reconsideration.

SUMMARY OF ARGUMENT

It is shown on the face of the summons and complaint that this action is barred by the applicable statute of limitations in the S.C. Tort Claims Act, S.C Code Ann. § 15-78-110, because it was not filed within two years of the Patient's death. Plaintiff does not argue that he is entitled to the optional three-year period because it is undisputed that he did not file a verified claim to extend the statute of limitations to three years. Rather, the Plaintiff argues that the two-year period was tolled when he filed a Notice of Intent to File Suit under the provisions of S.C. Code Ann. §15-79-125.

Defendant maintains, as the Trial Court correctly found, that pursuant to § 15-78-220, the provisions of § 15-79-125 do not apply to circumvent the specific statute of limitations and verified claim provisions of the S.C. Tort Claims Act. In the alternative,

if the provisions of § 15-79-125 were to apply, any tolling was rendered ineffective and/or expired when the Plaintiff did not fully and/or timely comply with the mandatory mediation requirements.

Applicable Statutory Provisions

S.C. Tort Claims Act, S.C. Code Ann. § 15-78-110:

> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

Section 5, 2005 S.C. Acts 32, as codified at S.C. Code Ann. § 15-79-125:

> (A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action. The notice must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure. Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure.
>
> (B) After the Notice of Intent to File Suit is filed and served, all named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.
>
> (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.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(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.

(F) Participation in the prelitigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution after the civil action is initiated. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

S.C. Tort Claims Act, S.C. Code Ann. § 15-78-220:

> The provisions of Act 32 of 2005 do not affect any right, privilege, or provision of the South Carolina Tort Claims Act as contained in Chapter 78, Title 15 of the 1976 Code or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56 of Title 33.

S.C. Noneconomic Damages Awards Act of 2005, S.C. Code Ann. § 15-32-240:

> The provisions of this article [art. 3, ch. 32, title 15] [5]do not affect any right, privilege, or provision of the South Carolina Tort Claims Act pursuant to Chapter 78, Title 15 or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56, Title 33.

[5] "This article [art. 3, ch. 32] may be cited as the 'South Carolina Noneconomic Damage Awards Act of 2005'." S.C. Code Ann. § 15-32-200.

Applicable Law – Burden of Proof & Standard of Review

Statute of limitations is an affirmative defense and the burden of establishing the bar rests upon the Defendant. Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). However, the Plaintiff who claims the statute of limitations should be tolled bears the burden of proving sufficient facts to establish the timeliness of his claim. Hooper v. Ebenezer Sr. Services & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29, 32 (2009); Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359, 361 (Ct. App. 2011).

Issues of statutory interpretation are questions of law, which we are subject to de novo review by the appellate court. Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693, 695-96 (2012).

ARGUMENT

I. Any claim against Clarendon Memorial Hospital is barred by the applicable statute of limitations under the S.C. Tort Claims Act, S.C. Code Ann. §15-78-110, because this action was not commenced within two years of the date of death.

Since Clarendon Memorial is a governmental entity[6], the S.C. Tort Claims Act governs this case. Section 15-78-110 generally provides a two-year statute of limitations, but a three-year statute of limitations is available to a party who files a "verified claim" within one year of the loss or injury as provided in § 15-78-80. As the Plaintiff has acknowledged, it is undisputed that the Plaintiff did not file a verified claim.[7] [Appellant's Brief, p. 3.] Thus, the two-year statute of limitations is applicable.

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[6] "Mr. Carrigg: ... No question this hospital is a governmental entity." [ROA 57; Tr. 10:10-11.]

[7] Strict compliance with the verified claim provisions of § 15-78-80 is required. Vines v. Self Mem'l Hosp., 314 S.C. 305, 443 S.E.2d 909, 910 (1994)

The patient died on September 16, 2006 and the summons and complaint were not filed until more than two years later on August 7, 2009. Accordingly, the Plaintiff's claims are barred and the Trial Court properly dismissed this action.

II. Under the explicit provisions of § 15-78-220, the filing of a Notice of Intent to File Suit pursuant to § 15-79-125 did not toll the statute of limitations provisions of the S.C. Tort Claims Act.

Section 15-79-125 was enacted by the S.C. Legislature along with the S.C. Noneconomic Damages Awards Act of 2005. 2005 S.C. Acts 32 (S.B. 83) ("...BY ADDING CHAPTER 79 TO TITLE 15 SO AS TO DEFINE KEY TERMS, PROVIDE FOR MANDATORY MEDIATION, AND TO PERMIT BINDING ARBITRATION IN MEDICAL MALPRACTICE ACTIONS....") Section 15-79-125(A) requires that a plaintiff file a Notice of Intent to File Suit along with an affidavit of an expert witness prior to filing any civil medical malpractice action and provides that the filing of such notice tolls all applicable statutes of limitations. Sections 15-79-125(B) and (C) also provide for prefiling discovery and mandate mediation. As further provided in §15-79-125(E), if mediation is not successful in resolving the matter, the plaintiff then may pursue a civil action by filing a summons and complaint; however, the action must be filed within sixty days after the mediator makes a determination; or prior to the expiration of the statute of limitations, whichever is later.

The Plaintiff took the position "that we filed the notice of intent within the two year statute of limitations. Under 15-79-125, it tolls the statute of limitations." [ROA 60; Hearing Tr. 13:16-19.] The Trial Court held that, under the terms of § 15-78-220,[8] the Plaintiff cannot rely upon the tolling provision of § 15-79-125(A) to circumvent the

[8] The Trial Court also considered the comparable provisions of § 15-32-240, codified as part of the S.C. Noneconomic Damages Awards Act of 2005, which deals with monetary caps.

statute of limitations and verified claim provisions of the S.C. Tort Claims Act. The Trial Court also held, in the alternative, that if the Notice of Intent to File Suit did toll the period of limitations, the Plaintiff's claim is barred because he did not participate in mediation or otherwise timely file his summons and complaint within the time limits set forth in § 15-79-125(E).

Compliance with mediation and the application of § 15-79-125(E) are addressed below. However, to as the threshold question of whether the tolling provision of § 15-79-125(A) can even be applied to toll the statute of limitations provision of the S.C. Tort Claims Act, the Plaintiff contends that § 15-79-125 does apply since it does not specifically exclude itself from the provisions of the Tort Claims Act. Defendant maintains that the explicit provisions of the enabling Act, as codified in §15-78-220, evidences the clear legislative intent that the S.C. Tort Claims stands paramount to the tolling provision of § 15-79-125(A).

There is no disagreement that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature:"

> 'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.' Thus, we must follow the plain and unambiguous language in a statute and have 'no right to impose another meaning.'

Grier v. AMISUB, 725 S.E.2d at 695, *quoting from* Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000).[9] "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language

[9]In Grier, the Court considered the interplay of § 15-79-125 with §15-36-100 as to the necessary specifics for the required expert affidavit, and held that: "The expert affidavit required by sections 15–36–100 and 15–79–125 does not need to contain an opinion as to proximate cause."

used, and that language must be construed in the light of the intended purpose of the statute." Singletary v. S. Carolina Dept. of Educ., 316 S.C. 153, 447 S.E.2d 231, 235 (Ct. App. 1994) (citations omitted).

Another well-settled rule of statutory construction is that a specific statutory provision prevails over a more general one. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 511 S.E.2d 355, 357 (1999); Atlas Food Systems & Serv., Inc. v. Crane, 319 S.C. 556, 462 S.E.2d 858 (1995).

> Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.

Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 628 S.E.2d 38, 41 (2006) (citations omitted).

The Plaintiff argues that §15-79-125 is a specific statute dealing with medical malpractice actions which prevails over the statute of limitations in the Tort Claims because it is a general statute dealing with all lawsuits against all types of governmental entities. [Appellant's Brief, p. 4.] On the other hand, the same rule supports the argument that the Tort Claims Act is the specific statute to the extent that it is a limited waiver of sovereign immunity. However, this rule of construction simply need not be applied at all in view of the express provisions of the enabling Act, 2005 S.C. Acts 32:

> **Rights pursuant to the Tort Claims Act**
>
> SECTION 18. The provisions of this act do not affect any right, privilege, or provision of the South Carolina Tort Claims Act as contained in Chapter 78, Title 15 of the 1976 Code or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56 of Title 33.

Compare City of Rock Hill v. S. Carolina Dept. of Health & Envtl. Control, 302 S.C.

161, 168, 394 S.E.2d 327, 331 (1990) ("there is no language in the Tort Claims Act which either expressly or implicitly negates any of the provisions of the Pollution Control Act").

The fact that this provision is codified in the Tort Claims Act as § 15-78-220, rather than in §15-79-125, does not diminish or obscure the clear intent of the Legislature. The statute of limitations provisions of the S.C. Tort Claims Act, §15-78-110, cannot be affected by the provisions of Act 32 as codified in § 15-79-125. Thus, the filing of the Notice of Intent to File Suit did not toll the two-year statute, the Plaintiff's claim is barred, and the Trial Court's order of dismissal should be affirmed.

III. The Plaintiff's claim is barred, notwithstanding the filing of a Notice of Intent to File Suit, because the Plaintiff did not timely comply with the provisions of § 15-79-125(C) and (E).

A. The Plaintiff did not participate in mediation as required by § 15-79-125(C).

As noted above, §15-79-125(C) mandates mediation:

> (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. ....

And, §15-79-125(D) gives the circuit court jurisdiction to enforce the provisions of this section. The Court addressed the policy behind § 15-79-125 in Grier v. AMISUB of S. Carolina, Inc., supra:

> Piedmont turns to the policies behind tort reform legislation such as section 15–79–125. It correctly notes that one of the major goals behind these requirements is to curtail frivolous litigation by ensuring plaintiffs only present colorable claims. Moreover, section 15–79–125(C) requires that parties to a medical malpractice claim engage in mandatory pre-suit mediation. It is only if this mediation fails that a civil action officially is initiated in the circuit court. S.C. Code Ann. § 15–79–125(E).

725 S.E.2d at 697-98. Defendant submits that compliance with this provision is necessary to effectively trigger the tolling. *Compare* Vines v. Self Mem'l Hosp., 314 S.C. 305, 443 S.E.2d 909 (1994) (requiring strict compliance with verified claim to trigger extended three-year period).

The Notice of Intent was served on September 16, 2008, and thus, a mediation conference should have been held no later than January 16, 2009. While the Plaintiff does not dispute that there was no mediation, he argued that it would have been futile:

> The fact of the matter is we filed the Notice of Intent within the two year statute of limitations and we served it. Now, yes, there were things we should have done after that [filing the Notice of Intent] with respect to scheduling mediation and the like, but at that point in time Mr. Buyck's position was this doesn't apply and you've let the statute run. So, I really didn't see quite honestly and then I did ultimately file a Summons and Complaint so that we could get the thing moving, he just basically took the position that he wasn't going to pay attention to the notice. [ROA 59; Tr. 12:3-13.]
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> Well, maybe I read or took the letter the wrong impression. My impression was their position was the statute had run. I honestly did not anticipate at that juncture it would have been fruitful to try, I mean, when I'm faced with the fact that, you know, no response comes from the Notice of Intent to file suit. And then when I get with him he says we take the position that the statute has run and yeah that letter does come and I'll grant you that." [ROA 66; Tr. 19:9-17.]

However, the Plaintiff cannot avoid the consequence of his failure to request an extension as permitted under subsection (C) or to seek enforcement of the mandatory mediation provisions under subsection (D).

It is no excuse that Defense Counsel had written a letter taking the position that § 15-79-125 did not apply. Defense Counsel affirmatively expressed the willingness to participate, and in any event, the Plaintiff could have moved to compel mediation under the provisions of § 15-79-125(D). Plaintiff argues, to the contrary, that the Defendant

should have demanded mediation in the letter and/or filed a motion to compel mediation. However, the Plaintiff seeks the protections of the tolling and it is his burden to prove the facts to avoid the statute of limitations bar. Hooper v. Ebenezer Sr. Services & Rehab. Ctr., supra.

On appeal, the Plaintiff argues for the first time that his failure to mediate is excused by the Consent Scheduling Order entered in this action on March 8, 2011, which states that:

> The parties need to conduct additional discovery and a mediation in the case. In addition, the Counsel for Defendant Clarendon Memorial Hospital filed a dispositive motion that needs to be heard and decided on prior to the parties moving further in discovery and mediation.

[ROA 45; Consent Scheduling Order.] Plaintiff contends that Defendant's consent to this order constitutes equitable estoppel to assert the Plaintiff's failure to mediate in the earlier proceeding under § 15-79-125, or in the alternative, that this order extended the tolling and mediation provisions of § 15-79-125. Defendant submits that this argument cannot be raised for the first time on appeal. Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505, 510 (2006)("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

Moreover, the Consent Order simply cannot meet the elements of equitable estoppel, which are:

> (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts.' *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). Estoppel may apply against a government agency, but 'the party asserting estoppel against the

> government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position.' *Am. Legion Post 15 v. Horry County,* 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct.App.2009).

Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 698 S.E.2d 879, 883 (Ct. App. 2010). Plaintiff cites to Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112, 125 (Ct. App. 2012), for the propositions that a defendant will be estopped to assert a statute of limitations bar if the delay was induced by the defendant's conduct; and that deceit is not an essential element, rather, it is sufficient that the plaintiff reasonably relied on the words and conduct of the defendant in allowing the limitations period to expire.

Defendant submits that the Plaintiff's estoppel argument lacks any logical foundation given that the Consent Scheduling Order was not entered until more than 18 months after this action was filed, and thus, nothing contained therein could have induced the Plaintiff not to seek enforcement of the mediation under §15-79-125(D) or his delay in filing the summons and complaint in this action. The parties entered into the scheduling order specifically to bring the motion to dismiss for hearing because the parties were having considerable difficulties in getting a hearing scheduled, and while Defense Counsel specifically wanted to preserve the issues raised in the motion without waiving any arguments for the appeal, the order included delaying discovery until the issue was resolved for the benefit of Plaintiff's Counsel so that they would not have to unnecessarily incur the time and cost of conducting discovery if the motion were granted. In addition, any assertion that the letter of October 13, 2008 might support an estoppel fails because Defense Counsel did not make a false representation or conceal any

material fact; rather, he only asserted a legal position and affirmatively expressed a willingness to participate in mediation subject to the limitations of the Tort Claims Act and Act 32.

Finally, the Plaintiff complains that the Defendant's motion to dismiss made no mention of the fact that he had not complied with the mediation requirements.[10] To the extent that the Defendant did move to dismiss on the stated ground that the claim is barred by the statute of limitations, the Plaintiff cannot deny that the undisputed facts on the face of the complaint establish that the summons and complaint was filed more than two years after the Patient died; thus, the Defendant proved the ground of its motion. However, inasmuch as the Plaintiff sought to avoid the statute of limitations bar by arguing that the statute was tolled by his filing the Notice of Intent to File Suit under § 15-79-125,[11] the burden shifted to him and required him to prove full compliance with all the provisions of § 15-79-125:

> The burden of proving facts in avoidance of the statute of limitations rests on the party relying on such facts. The party who relies on facts in avoidance of the statute of limitations has the burden of proving such facts. Similarly, the party seeking to avoid the bar of limitations bears the

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[10] "Mr. Carrigg: And you Honor with respect, the scope of this motion is whether or not we filed the motion in time." [ROA 56; Tr. 9:12-14.] "The motion is we failed to file the, we failed to file a complaint in time." [ROA 60; Tr. 13:5-7.] "The motion is merely the complaint was not filed within the two year statute of limitations. And I think you have to file a motion saying, you know, or at least raise in your motion that you didn't comply with 15-79-125." [ROA 64; Tr. 17:15-19.] "My point is that under 15-79-125(a) if the statute is toll, absent him filing a motion under that section saying we did not comply with it or to compel us to comply with it then I do not believe that it is proper to dismiss the case." [ROA 66-67; Tr. 19:25 – 20:4.]

[11] "Mr. Carrigg: My position is that we filed the notice of intent within the two year statute of limitations. Under 15-79-125, it tolls the statute of limitations. We filed suit. I mean, suit was not filed until August 7. However, I would submit to you, if the statute is tolled, it's tolled." [ROA 60; Tr. 13:16-21.]

> burden of proving a provision that would toll the statute or proving that he or she strictly comes within a claimed exemption to avoid the statute.

54 C.J.S. Limitations of Actions § 428; Hooper v. Ebenezer Sr. Services & Rehab. Ctr., supra.

When the Plaintiff went beyond the complaint to prove up his filing of a Notice of Intent to File Suit, it was he who arguably converted the motion to one for summary judgment. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994) ("If on a motion under 12(b)(6) matters outside the pleadings are presented and not excluded, the motion shall be treated as one for summary judgment.") Apart from the Notice of Intent, all other matters beyond the complaint are undisputed -- namely, Plaintiff's Counsel admitted that he received the letter and that he did not make any effort to compel mediation. Without mediation, any tolling from the filing of the Notice of Intent was rendered null and void.

B. The Plaintiff did not timely file his summons and complaint within the tolling period allowed/required by § 15-79-125(E).

Apart from the issue of whether the Plaintiff can assert the tolling of §15-79-125(A) when he does not comply with the mediation requirement, the Plaintiff completely ignores the fact that the tolling is not indefinite because §15-79-125(E) sets a limit on the tolling period. The plaintiff may pursue a civil action by filing a summons and complaint if mediation is unsuccessful; however, the action must be filed within sixty days after the mediator makes a determination; or prior to the expiration of the statute of limitations, whichever is later:

> (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.

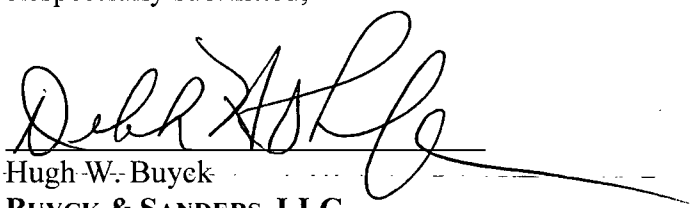
There was no determination by a mediator so option (1) does not apply, and under option (2), the two-year statute of limitations expired on September 14, 2008. Plaintiff repeatedly asserts that he tolled the statute of limitations by filing his Notice of Intent; however, he has no argument for how his summons and complaint is timely under the provisions of § 15-79-125(E).

CONCLUSION

On the face of the complaint, this action is barred by the applicable statute of limitations in the S.C. Tort Claims Act, S.C Code Ann. § 15-78-110, because it was not filed within two years of the Patient's death. Contrary to the Plaintiff's contention that the filing of his Notice of Intent to File Suit tolled the statute of limitations, the Trial Court correctly found that pursuant to § 15-78-220, the provisions of § 15-79-125 do not apply to circumvent the specific statute of limitations and verified claim provisions of the S.C. Tort Claims Act. In the alternative, if the provisions of § 15-79-125 were to apply, the two-year statute of limitations still was not tolled because the Plaintiff did not fully and/or timely comply with the mediation requirements of § 15-79-125(C) and (E).

WHEREFORE, based on the foregoing, the Defendant Clarendon Memorial Hospital respectfully requests that the Court affirm the order of dismissal.

Respectfully submitted,



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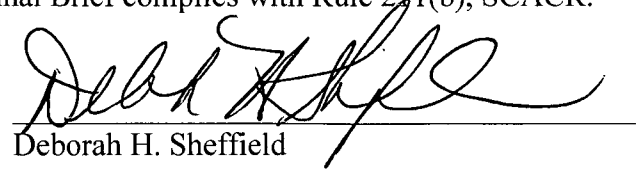
Certification of Counsel

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



March 4, 2013 Deborah H. Sheffield

Certificate of Service

I certify that on this 4th day of March 7, 2013, a copy of the foregoing Final Brief was served on Appellant by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to his Counsel of Record of as listed below:

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