THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case Number: 2009-CP-14-439

Ronald Grubb as PR of the Estate of Joyce Grubb..... Appellant

v.

Clarendon Memorial Hospital..... Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This action arose due to alleged medical negligence on the part of Respondent that resulted in the death of Appellant's wife on September 14, 2006. This case is one that purely involves an issue of statutory construction.

Appellant initially brought an action against Respondent, Clarendon Memorial Hospital, and co-defendant, D. Maxwell Egbonin, MD, through the filing of a Notice of Intent to File Suit on or about September 12, 2008 (R. pp. 1-30). The Respondent took the position that S.C. Code Ann. § 15-79-125, did not apply to a governmental hospital and therefore the Appellant had allowed the statute of limitations contained within the South Carolina Tort Claims Act to run. (R. pp. 71-77). In the same correspondence Respondent asserts "[o]f course, the Insurance Reserve Fund is not objectionable to an evaluation of your supported claims and has no objection to participating in a mediation conference should you propose this." No mediation was scheduled as it appeared to Appellant that the same would be futile. Appellant filed a Summons and Complaint against Respondent and Dr. D. Egbonin on August 7, 2009 (R. pp. 31-36). Respondent filed an Answer along with its Motion to Dismiss on September 22, 2009. During

the time period that followed the filing of the Notice of Intent to File Suit, Appellant was involved with discussions with Counsel for Dr. Egbonin. He was ultimately dismissed from the action by Stipulation of Dismissal dated October 22, 2010. On March 8, 2011 a Consent Scheduling Order was entered by the Court. That Order stated " [t]his matter comes before me on the consent of the parties for scheduling order in the above captioned matter. The parties need to conduct additional discovery and a mediation in the case. In addition, 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 guidelines are established in this matter..." (R. pp. 45-47).

STATEMENT OF FACTS

As this is a case that hinges on statutory construction the actual facts of the case are not at issue. From a factual standpoint the only issues the Court needs to concern itself with are that Appellant's wife Mrs. Grubb died on September 14, 2006. An action alleging medical malpractice was brought against Respondent on or about September 12, 2008 in the form of a Notice of Intent to File Suit pursuant to S.C. Code § 15-79-125. Subsequent to that, Respondent corresponded with Appellant informing them that it was Respondents position Appellant had allowed the statute of limitations under the South Carolina Tort Claims Act to run. Appellant filed a Summons and Complaint alleging the same medical malpractice as alleged in the original Notice of Intent to File Suit on August 7, 2009. Respondent filed an Answer and Motion to Dismiss on September 22, 2009. A scheduling order was entered by the Court on March 8, 2011 addressing the need to dispose of Respondents motion prior to discovery and mediation taking place.

ARGUMENT

I. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE PROVISIONS OF S.C. CODE SECTION 15-79-125 DO NOT APPLY TO A CASE AGAINST A HOSPITAL WHICH IS A "GOVERNMENTAL ENTITY"?

Questions of statutory interpretation are questions of law, which the Appellate Court is free to decide without any deference to the lower Court below." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011). It is well-established that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). "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." *Id.* Thus, the Appellate Court should follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* 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 the Appellate Court should look beyond the statute's plain language. *Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011).

The statute of limitations as set forth in the Tort Claims Act at South Carolina Code Ann. §15-78-110 states that an action is forever barred unless it is brought within two years after the date of the loss or its discovery. The stature limitations can be extended by the filing of a verified claim for an additional year however it is undisputed in this case that no verified claim was filed by Appellant. South Carolina Code Ann. §15-79-125 sets forth the procedure required when an individual is filing a medical malpractice action in the state of South Carolina. This provision was enacted as part of the South Carolina Non-economic Damages Award Act of 2005. The bulk of the act as its title states, deals with the issue of non-economic damages awards in a

medical malpractice action. The act itself specifically sets damage awards that exceed the caps as set in the South Carolina Tort Claims Act. The Lower Court initially relies on the assumption that S.C. Code Ann. §15-78-125 simply does not apply to an action against a governmental entity and finds that the action of Appellant should be dismissed. (R. pp. 73-74). Appellant contends that since S.C. Code Ann. §15-79-125 does not specifically exclude itself from the provisions of the Tort Claims Act it does apply. And Appellant by filing a proper Notice of Intent to File Suit tolled the Statute of Limitations.

Further, it is a cardinal rule of statutory construction that a specific statute governs of a general statute. 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. *Wilder v. South Carolina Hwy. Dep't,* 228 S.C. 448, 90 S.E.2d 635 (1955); *see also Wooten ex rel. Wooten v. S.C. Dep't of Transp.,* 333 S.C. 464, 511 S.E.2d 355, 357 (1999) (a specific statutory provision prevails over a more general one). *Spectre, LLC v. South Carolina Dept. of Health and Environmental Control*, 386 S.C. 357, 688 S.E.2d 844 (S.C. 2010*), Florence County Democratic Party v. Florence County Republican Party*, Op. No. 27128 (S.C. 2012). Here we have the South Carolina Tort Claims Act which generally deals with all lawsuits against all types of governmental entities. In contrast S.C. Code Ann. §15-79-125, deals specifically with medical malpractice lawsuits. Effectively you have one Act, the Tort Claims Act that deals in a general manner as to what is required to bring a suit against a governmental entity, you also have a second Act, the Non-economic Damages Award Act of 2005 that provides for very specific requirements to be followed before a plaintiff can bring a medical malpractice action. Clearly nothing in the Non-economic Damages Award Act of 2005 could be construed to apply to any

type of cause of action with the exception of a professional negligence action. Appellant would submit that as a general rule of statutory construction, S.C. Code Ann. §15-79-125 should be applied in medical malpractice action brought against governmental entities. Therefore, the Court erred in granting Summary Judgment to Respondent.

II. DID THE CIRCUIT COURT ERR IN CONCUDING THAT THE DEFENDANT WAS ENTITLED TO SUMMARY JUDGMENT BASED UPON THE DEFENSE OF STATUTE OF LIMITATIONS UNDER THE TORT CLAIMS ACT?

After its initial finding the Court goes on to conclude that S.C. Code Ann. §15-79-125 is specifically excluded from actions against governmental entities. (R. pp. 74-75) In support of that conclusion the Court relies on two statutes that we enacted as part of the South Carolina Non-economic Damages Award Act of 2005. Those are S.C. Code Ann. §15-32-240, and §15-78-220.

In *Anderson v. South Carolina Election Commission*, Op. No. 27120 (S.C. 2012), our Supreme Court stated, "The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 718 S.E.2d 432 (2011). In construing statutory language, the statute must be read as a whole, and sections which are a part of the same general statutory law must be construed together and each one given effect. *Id.*; *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *MidState Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Id.*"

First it is of paramount importance to note that S.C. Code Ann §15-79-125 does not contain a provision which excludes its application to governmental entities. However to the contrary S.C. Code Ann. §15-32-240 includes a specific provision which exempts governmental and charitable entities. It states:

> The provisions of this article 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. (Emphasis Added)

This statute is found in Article 3 Chapter 32 of Title 15. Clearly the intent of the legislature was to exclude the increased caps allowed by the South Carolina Non-economic Damages Act from affecting the caps in place under the South Carolina Tort Claims Act.

It is true that there is a sister provision contained in the S.C. Tort Claims act that mirrors the language at S.C. Code Ann. §15-32-240. S.C. Code Ann. §15-78-220 states:

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.

The question becomes did the legislature in enacting more stringent requirements for a Plaintiff to bring a medical malpractice action intended to exclude those more stringent requirements from a case brought against a governmental entity. Title 15 Chapter 79 deals specifically with medical malpractice actions. It requires that several steps be taken as a prerequisite to filing a medical malpractice action against a hospital or other medical provider. Those prerequisites include that the Plaintiff must obtain an affidavit from a medical professional setting forth at least one instance of a breach of the duty owed to the Plaintiff. Further, the Plaintiff is required to serve a Notice of Intent to File Suit prior to being allowed to file suit in the case and must file along with his Notice of Intent, the affidavit and complete answers to standard interrogatories. It is inconceivable that the legislature would enact stricter rules for

every Plaintiff in South Carolina to bring an action against any medical provider in South Carolina but would intend to exclude state owned and governmental owned hospitals, doctors and medical providers from those protections and additional burdens placed on the Plaintiff. "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." *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578, (2000). Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id.* 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. *Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011).

Further, one can look to S.C. Code Ann. §15-79-110 which includes the definitions of among other entities a hospital. That definition does not exclude hospitals owned and operated by a governmental entity. If the Legislature had intended to exclude governmental entities from the provisions of S.C. Code Ann. §15-79-125 it certainly would have made sense that their definitions would have set forth the exclusion.

In this case the Plaintiff followed the procedure as set forth in S.C. Code Ann. §15-79-125. That provision specifically states that by following that procedure "Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations." (emphasis added). It is the Appellants position that the Court erred in disregarding the provisions of S.C. Code Ann. §15-79-125 and granting summary judgment to Respondent.

Our Appellate Courts have long recognized that provisions of the S.C. Tort Claims Act must be read in light of the purpose of the Act. Clearly the Tort Claims Act was established to create more stringent rules on individuals bringing claims for instance limitations on recovery and

exclusion of punitive damages. In *Gardner v. Biggert*, 308 S.C. 331, 717 S.E.2d 858 (S.C. 1992), the Court dealt with construction of the Tort Claims Act. In *Gardner* the Supreme Court stated, "Clearly, to accept Department's contention and view §15-78-60(25) in an "unrestricted sense" would absolve schools, state hospitals, and prisons from liability for virtually all acts relating to students, patients, prisoners, etc., absent gross negligence. Such an interpretation of the statute is contrary to the purpose and policy of the Tort Claims Act, which abrogates sovereign immunity." *Gardner v. Biggert*, 308, S.C. 331, 717 S.E.2d 858 (S.C. 1992).

Further, nothing in S.C. Code Ann. §15-79-125, in any way infringes on any right created by the South Carolina Tort Claims Act. If anything S.C. Code Ann. §15-79-125 provides additional rights over and above those provided by the South Carolina Tort Claims Act to governmental entities in medical malpractice action.

III. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT IF S.C. CODE SECTION 15-79-125 DID APPLY THE DEFENDAT WAS STILL ENTITLED TO SUMMARY JUDGMENT BASED UPON THE DEFENSE OF STATUTE OF LIMITATIONS, BECAUSE MEDIATION HAD NOT BEEN HELD WITHIN 180 DAYS OF THE FILING?

Finally the lower Court concludes that if S.C. Code Ann. §15-79-125 does apply Appellant did not comply with the requirements of the statute and therefore the tolling provision of the statute ceased 180 days from the date of filing. The Courts conclusion that the tolling provision is temporary is without statutory support. First, the S.C. Code Ann. § 15-79-125 does not say the statute of limitations is tolled "only if the provisions of the mediation section are followed.' It says "Filing . . .tolls all applicable statutes of limitations." There are no modifying or limiting words following this statement. Clearly the legislature has established a pre-suit procedure for medical malpractice actions and expects the same to be followed. Further, the

statute goes on to state, "the circuit court has jurisdiction to enforce the provisions of this section.' Clearly the Legislature intended to allow a party to go to court to require the opposing party to mediate if the opposing party was not acting in accordance with their wishes. Here Respondent filed no motion to compel mediation. In fact, contrary to their position before the lower court, Respondent had no intention of mediating in any meaningful fashion. According to the letter which was sent shortly after the filing of the Notice of Intent Respondent made it abundantly clear that they were relying on the defense of statute of limitations. (R. pp. 71-77). In the letter the Respondent states, "[o]f course, the Insurance Reserve Fund is not objectionable to an evaluation of your supported claims and has no objection to participating in a mediation conference should you propose this." It is of import to note that the letter does not say, 'this matter is required to be mediated," it effectively states that Respondent is willing to mediate if Appellant proposes it. Later Respondent uses this veiled offer to mediate as a cornerstone to insist that the Appellant did not comply with the required procedure and has run afoul of the requirements of the statue thus ending the tolling provision. It was clearly Respondents position that the issue of whether or not S.C. Code Ann. §15-79-125 applied needed to be decided BEFORE either party went to the expense of discovery or mediation. On March 8, 2011, both Appellant and Respondent agreed to a Consent Scheduling Order which was entered by the Court. That Order stated " [t]his matter comes before me on the consent of the parties for scheduling order in the above captioned matter. The parties need to conduct additional discovery and a mediation in case. In addition, 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 guidelines are established in this matter..." (R, p. 45). Clearly, based on the

earlier position taken by Respondent they should be estopped from asserting a contrary position now. A Defendant will be estopped to assert the statute of limitations in bar of a . . . claim when the delay that otherwise would give operation to the statute has been *induced by the defendant's conduct*. The doctrine is of course, most clearly applicable where the aggrieved party's delay in bringing suit was caused by his opponent's *intentional* misrepresentation; *but deceit is not an essential element of estoppel*. It is sufficient that the aggrieved party *reasonably relied* on the words and conduct of the person to be estopped in allowing the limitations period to expire. *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc.*, Op. No. 4943 (Ct. App. 2012).

Further the Order dated March 8, 2011, either was or should have been considered by the lower court before granting summary judgment. Here, the Court had entered an order stating that the issues raised in Respondents Motion needed to be decided PRIOR to a mediation taking place. It would be Appellants position that even if the tolling provisions of S.C. Code Ann. §15-79-125 are somehow considered to be temporary, they were extended by Order of the lower court.

Finally, it should be noted that Respondent in their motion made no mention of the ground upon which Respondent sought relief at the hearing. The motion merely references that S.C. Code Ann. § 15-79-125, does not apply. It is further worthy of note that the Court entertained a motion to dismiss. The Court granted Judgment in Favor of Defendant. This Appeal should be treated as an appeal from summary judgment.

CONCLUSION

The Circuit Court erred in granting Respondents Motion to Dismiss/Motion for Summary Judgment. The Court clearly misinterpreted the statutes in issue and applied the law in an erroneous manner. The Order granting Judgment in favor of Respondent should be reversed and this matter should be remanded for Discovery, Mediation and Trial.

Respectfully submitted,

February 12, 2013

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PROOF OF SERVICE

I certify that I have served the Final Brief of the Appellant and Record on Appeal on the above-listed Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 15, 2013, addressed to Respondent's attorney of record as detailed below.

February 15, 2013

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CERTIFICATE OF COUNSEL

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

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Dated: March 5, 2013