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 REPLY BRIEF OF APPELLANT

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I. THE COURT ERRED IN GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

The Circuit Court in Richland County recently considered the very same issue raised in this Appeal. Appellant would adopt the reasoning set forth by the Circuit Court as additional support for their position in this matter. The opinion in that case is set forth in full below:

James Lamont Melvin v. Richland County Alvin S. Glenn Detention Center

Case Number: 2012-CP-40-03608

This case came before me on August 17, 2012 on the Motion to Dismiss of Defendants Richland County and Alvin S. Glenn Detention Center. Having reviewed the documents of record and the pleadings, S.C. Code Ann. § 15-79-125 (1976) of the Medical Malpractice Actions Act (MMA) applies to the Defendants and this medical malpractice action was appropriately commenced pursuant to S.C. Code. Ann. §§ 15-78-110 and 15-79-125. Accordingly, the Defendants' Motion to Dismiss is DENIED.

Plaintiff James Lamont Melvin commenced this medical malpractice action on May 23, 2012 against Defendants Richland County, Alvin S. Glenn Detention Center, and Correct Care Solutions, LLC, by filing a Notice of Intent (Civil Action No.: 2012-CP-40-3608) and an expert affidavit pursuant to Section 15-79-125. A Summons and Complaint were also filed on May 23, 2012 (Civil Action No.: 2012-CP-40-3610). In its Notice of Intent, Plaintiff noted that because it had not been established whether the pre-litigation requirements of the MMA are applicable to cases involving governmental entities, Plaintiff was filing both a Summons and Complaint against the Defendants, while also complying with pre-lawsuit procedural requirements provided for by the MMA. In addition, the Plaintiff stated that if the Defendants conceded that the MMA does not apply to governmental entities, Plaintiff would agree to dismiss the Notice of Intent as to the Defendants and proceed with the action under the Summons and Complaint.

Defendants Richland County and Alvin S. Glenn Detention Center argue that the South Carolina Tort Claims Act (SCTCA), rather than Section 15-79-125 applies in this case, and therefore Defendants are not required to participate in any of the malpractice portions of Section 15-79-125. Although neither the S.C. Court of Appeals nor the S.C. Supreme Court have addressed the applicability of Section 15-79-125 to governmental entities, the reasoning set forth in Judge G. Thomas Cooper's 2009 Trial Court Order in *Terry* v. *University of South Carolina,* 2009 WL 8509019 (S.C.Com.Pl.) is persuasive. Upon a review of the MMA, Section 15-32-240, Section 15-78-220, and the SCTCA, it is clear that the MMA's requirements for filing a medical malpractice action as stated in Section 15-79-125 apply to governmental entities such as the Defendants.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Bayle v. S.C. Dept. of Transp.,* 344 S.C. 115, 122, 542 S.E.2d 736, 739 (Ct.App. 2001). When enacting Section 15-79-125, the General Assembly is presumed to have had

knowledge of the SCTCA and thus knowledge that Section 15-78-110 does not specify how an action is commenced. The S.C. Supreme Court has held that "[a] basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed *or-* -> related subject." *Kerr v. Richland Memorial Hospital.,* 383 S.C. 146, 148, 678 S.E.2d 809, 811 (20O9)(citing *Berkebile v. Outen,* 311 S.C. 50, 53, 426 S.E.2d 760, 761, 762 (1993)). If the General Assembly intended for a summons and complaint to be the only way in which a Plaintiff could commence a medical malpractice action against a governmental entity, then the General Assembly would have amended Section 15-78-110 or the SCTCA to specifically state that fact.

Additionally, the SCTCA does not specify how an action is commenced; applying the MMA's requirements for commencing a medical malpractice action to governmental entities does not affect any right, privilege, or provision of the SCTCA. *See* S.C. Code Ann. §§ 15-32-240, 15-78-220. The MMA's requirements for commencing a medical malpractice lawsuit constitute only a procedural change. Because a procedural change does not affect any right, provision, or privilege of the SCTCA, there is no bar to the application of Section 15-79-125 to governmental entities.

Accordingly, this Court finds that the Defendant's Motion to Dismiss must be denied because the MMA's requirements for filing a medical malpractice lawsuit apply to governmental entities and because Plaintiff properly commenced this action pursuant to the MMA by filing a Notice of Intent and expert affidavit on May 23, 2012.

Based upon the foregoing reasoning, in addition to the arguments previously asserted by Appellant the Court should reverse the lower Court and remand this matter for trial.

II. THE LOWER COURT ERRED IN CONCLUDING THAT THE TOLLLING PROVISIONS SET FORTH IN SOUTH CAROLINA CODE SECTION 15-79-125 EXPIRED.

Respondent contends that even if the tolling provisions of S.C. Code Section 15-79-125 were applicable they expired after the time for mediation ended. It is conceded by Respondent that they made no Motion to Compel Mediation or made any affirmative request for the Appellant to participate in Mediation. In response to Appellant's contention that Respondent is collaterally stopped from raising the expiration of the tolling provision Respondent asserts that Appellant has raised the argument for the first time on appeal. Respondent had a duty to at least inform the lower Court of the fact that Respondent had entered into a Consent Order agreeing that both discovery and mediation should be delayed until the resolution of the issue of whether or not the action should be dismissed because S.C. Code Section 15-79-125 did not apply to a

governmental entity. There is ample evidence that the parties had mutually consented to delaying discovery and mediation until the matter was heard by the Court. See: Letter dated August 13, 2010 from Respondent to Judge James (R. p. 81); E-mail dated August 16, 2010 from Judge James (R. p. 82); Letter dated October 21, 2010 from Appellant to Respondent (R. pp. 88-90); Letter dated October 21, 2010 from Appellant to Judge James (R. pp. 83-87); Letter from Appellant to Respondent dated February 3, 2011 (R. pp. 91-93); Letter dated February 18, 2011 from Appellant to Judge James (R. pp. 94-100); E-mail dated February 18, 2011 from Judge James (R. p. 101).

The Consent Order is also further evidence of the fact that Appellant was not unilaterally ignoring the mediation requirement. Further, Respondent does not accurately represent to the Court the date the parties consented to delay any mediation or discovery. See: Letter dated August 13, 2010 from Respondent to Judge James (R. p. 81); Letter dated October 21, 2010 from Appellant to Judge James (R. pp. 83-87); Letter from Appellant to Respondent dated February 3, 2011 (R. pp. 91-93); Letter dated February 18, 2011 from Appellant to Judge James (R. pp. 94-100); E-mail dated February 18, 2011 from Judge James (R. p. 101).

The Respondent and Appellant had agreed to submit this Consent Order much earlier than the Order was actually issued. See: Letter dated August 13, 2010 from Respondent to Judge James (R. p. 81); E-mail dated August 16, 2010 from Judge James (R. p. 82); Letter dated October 21, 2010 from Appellant to Judge James (R. pp. 83-87); Letter from Appellant to Respondent dated February 3, 2011 (R. pp. 91-93); Letter dated February 18, 2011 from Appellant to Judge James (R. pp. 94-100); E-mail dated February 18, 2011 from Judge James (R. p. 101).

Further, Appellant would assert that the Consent Order is evidence that was in the record at the time the Court issued its ruling. It is not an additional argument as the issue of the delay in mediation was presented to the lower Court and argued by both Appellant and Respondent. Further the lower Court never indicated that it considered the argument propounded by Respondent was considered. The Court affirmatively stated that "I think what it's going to boil down to quite frankly is whether or not I interpret the statute, the language that Mr. Carrigg interpreted as Notice of Intent to file suit tolls all applicable statutes of limitations. I have to determine whether or not this [is] applicable. I think that's what it boils down to." (R. p. 69). Further, Appellant had objected to Respondents argument as the same was not pled in his Motion. (R. p. 64). Further, the Judge who heard the motion was well aware of the Consent Order entered by the parties. See: Letter dated August 13, 2010 from Respondent to Judge James (R. p. 81); E-mail dated August 16, 2010 from Judge James (R. p. 82); Letter dated October 21, 2010 from Appellant to Judge James (R. pp. 83-87); Letter from Appellant to Respondent dated February 3, 2011 (R. pp. 91-93); Letter dated February 18, 2011 from Appellant to Judge James (R. pp. 94-100); E-mail dated February 18, 2011 from Judge James (R. p. 101).

CONCLUSION

For the forgoing reasons the Order of the lower Court should be reversed and this matter should be remanded for trial on the merits.

Respectfully submitted,

February 12, 2013

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CERTIFICATE OF COUNSEL

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

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Dated: March 5, 2013

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PROOF OF SERVICE

I certify that I have served the Certificate of Counsel for the Final Brief of the Appellant and Final Reply Brief of the Appellant on the above-listed Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 5, 2013, addressed to Respondent's attorney of record as detailed below.

March 5, 2013

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of the Appellant 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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