

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

KRISTI LEA HARRINGTON, Circuit Court Judge

Appellate Case No.: 2013-002177
Case No. 2012-CP-10-5366
(NOI) and 2013-CP-10-4475

JOHNNY EADES AND BARBARA EADES..... Appellants,

v.

PALMETTO CARDIOVASCULAR AND THORACIC, PA; JAMES M. BENNER, MD;
MARK J. EPLER, MD; TRIDENT MEDICAL CENTER, LLC; COLUMBIA/HCA
HEALTHCARE CORPORATION OF SOUTH CAROLINA; HCA HEALTHCARE-SOUTH
CAROLINA; TRIDENT MEDICAL CENTER; TRIDENT HEALTH SYSTEM; PALMETTO
PRIMARY CARE PHYSICIANS, LLC; TRIDENT EMERGENCY PHYSICIANS, LLC;
BRIAN R. WHIRRETH, MD; PATRICIA CAMPBELL, MD; CHRISTINE E. MCNEAL,
MD; MATTHEW WALLEN, MD; CHARLESTON RADIOLOGISTS, PA; JOSEPH M.
MULLANE, MD; TRI-COUNTY RADIOLOGY ASSOCIATES, PA; AND
TROY MARLON, MD,.....Defendants;

OF WHOM

PALMETTO CARDIOVASCULAR AND THORACIC, PA; JAMES M. BENNER, MD;
MARK J. EPLER, MD; PALMETTO PRIMARY CARE PHYSICIANS, LLC; AND,
TRIDENT EMERGENCY PHYSICIANS, LLC, areRespondents.

RETURN TO PETITION FOR REHEARING

August 3, 2015.

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(843) 767-1800

Attorney for Appellants

RETURN TO PETITION FOR REHEARING

The Appellants respectfully submit that this Honorable Court correctly ruled that “the issue of the sufficiency of the expert affidavit as to Respondents is unpreserved.”

The circuit court dismissed the NOI in this case stating that the expert affidavit was not filed contemporaneously with the NOI. This Honorable Court has reversed and remanded as to all Respondents on that issue. All of the Respondents have accepted the ruling of this Honorable Court as to that issue.

However, the Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC, have moved for a rehearing on the issue of the sufficiency of the expert affidavit.

It is respectfully submitted that this issue is unpreserved because there was no specific and separate ruling by the circuit court. The circuit court did not dismiss the NOI as to any Defendant on the ground of an alleged insufficiency of the expert affidavit. Further, the record on appeal does not provide a basis for preserving the issue of the sufficiency of the affidavit as to the Respondents.

Further, even if there were a ruling on the issue in the circuit court, and even if the record on appeal supported raising the issue, the affidavit is clearly sufficient for purposes of Section 15-36-100.

ARGUMENT

I. There was no specific and separate ruling by the circuit court on the issue of the sufficiency of the affidavit.

A. No specific and separate ruling on the issue.

The ruling of the circuit court is set forth in one brief paragraph as follows:

“Defendants’ Motion to Dismiss is GRANTED as to the claims presented by

Plaintiffs. Plaintiff's claims as to the above named Defendants are hereby DISMISSED. IT IS SO ORDERED." R. p. 6.

The Defendants were listed in the first paragraph of the Order. R. pp. 1-2. This included, among others, the surgical Defendants, Palmetto Cardiovascular & Thoracic, PA, James M. Benner, M.D., and Mark J. Epler, M.D. These surgical Defendants moved to dismiss only on the issue of the allegedly non-contemporaneous filing of the NOI and the affidavit. See these Defendants' Motions to Dismiss at R. p. 27-30. At no time did the surgical Defendants challenge the sufficiency of the affidavit.

Therefore, the ruling of dismissal by the circuit court was only as to the allegedly non-contemporaneous filing of the NOI and the expert affidavit. Further, the ruling of the circuit court could not have been for the alleged insufficiency of the affidavit, because the surgical Defendants did not raise that issue.

As will be discussed in section II of this Argument, there is simply no record, either in the circuit court or on appeal to support a ruling beyond that quoted above.

In fact, there is no ruling in the Order that the NOI is dismissed as to any Defendant on the ground of the alleged insufficiency of the affidavit.

B. The Respondents took no action to get a specific and separate ruling on the sufficiency of the affidavit issue.

i. No Rule 59(e) motion was made.

The Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC, could have moved pursuant to Rule 59(e) of the SCRPC for a specific order dismissing the NOI as to them pursuant to the sufficiency of the affidavit issue. They could have requested that the circuit court make an explicit ruling that the NOI be dismissed as to them because the affidavit

was insufficient. However, they failed to do so and the only ruling of the circuit court is the dismissal as to all Defendants, including the surgical Defendants. As pointed out above, that ruling could only have been on the ground of the contemporaneous filing issue.

ii. **The Order of the circuit court is virtually verbatim the same as the proposed order submitted by the Respondents.**

The order of the circuit court is apparently verbatim word for word the same as the proposed order submitted by the Respondents. (The circuit court allowed sufficient time to file proposed orders, and trial counsel for the petitioning Respondents did so). See Proposed Order Submitted to Circuit Court by Defendants. R. pp.89-95.

So, the Respondents who have filed the Petition for Rehearing which is before this Honorable Court could have submitted a proposed order which separately and explicitly dismissed the NOI as to them on the ground of the allegedly insufficient affidavit. But they did not.

II. **There is no record to support a dismissal of the NOI on the ground of alleged insufficiency of the expert affidavit.**

The Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC, failed to file any affidavits, depositions, or other documentation to support their claim that the expert affidavit was insufficient. Therefore, there is no factual basis to support their claims.

In the Petition for Rehearing elaborate arguments are made for the relationships between the Defendants and doctors who are alleged to be their employees. Allegations are made as to the specialty of practice of the petitioning Respondents and their alleged employees. However, there is no factual basis in the

record to support those allegations.

The petitioning Respondents' Motion to Dismiss states only, "Furthermore, this matter should be dismissed because Dr. Skudder is a vascular surgeon and does not practice in the field of either primary care or emergency medicine." R. at p. 31. At the hearing in the circuit court the complete argument on the sufficiency of the affidavit issue was as follows: "If you get an opportunity at some point in time to take a look at the memorandum I handed up, I have three grounds.... The second one was the fact that I have an emergency medicine physician and a primary care physician. Their expert's affidavit is from a vascular surgeon, so it is not in the same area of practice." R. p. 64, llines7-9 and lines 11-14.

All that the petitioning Respondents' Memorandum says about themselves is as follows: "However, Defendant Primary Care Physicians, LLC, specializes in primary care medicine and Defendant Trident Emergency Physicians, LLC, specializes in emergency medicine." R. p. 40, lines 11-13. Nothing at all is even alleged as to Dr. Campbell and Dr. Wallen.

So, before the circuit court and before this Honorable Court, there are only sketchy bare allegations. There are no facts properly in the record before this Honorable Court to support the petitioning Respondents' position regarding the alleged insufficiency of the affidavit.

As stated above, the petitioning Respondents have failed to file any factual affidavits. There are no depositions. There are no documents. There are not even any pleadings in the record.

There are not any arguments or allegations at all in the record regarding Dr. Campbell or Dr. Wallen, much less any record as to their relationship with the

petitioning Respondents.

There is wholly lacking any fact, or any argument as to the actual medical examinations or procedures performed by either petitioning Respondent or by any alleged employee of either petitioning Respondent. There is wholly lacking any attempt at a rational argument as to what they did or failed to do for the Appellant, Mr. Eades.

The petitioning Respondents have provided no factual basis for the assertion that Dr. Skudder's affidavit was insufficient to meet the preliminary requirements for an NOI.

III. Even if there were a ruling dismissing any Defendant for the alleged insufficiency of the affidavit, and even if there were any record to support such an issue, the affidavit of Dr. Skudder is abundantly sufficient under the statute.

The only facts in the Record on Appeal relating to the condition of the Appellant, Mr. Eades, are in the affidavit of Dr. Skudder. His affidavit states that he has been actively engaged for more than five years in the practice of medicine "...which includes issues similar to those of Johnny Eades in July and August, 2009." It also states that "this practice has included evaluation and treatment of patients with issues including occluded arteries, aneurysms, and related medical issues...."

The affidavit further states, "I am familiar with the applicable medical standards for the evaluation and treatment of patients under the same or similar circumstances as Johnny Eades, including particularly, but not restricted to, occlusion of the left iliac artery, aneurysm of the same artery, and related issues. I am aware of the degree of care and skill ordinarily exercised by members of the medical profession under the same or similar circumstances as it relates to the care and treatment of patients such as Johnny Eades in July and August of 2009. This knowledge is based upon my education, training, and experience."

The affidavit also states that, "On several occasions the patient was seen after the initial operation. There is evidence that the physicians seeing the patient during that period of time at the hospital where the initial procedure was performed failed to appreciate the nature of the patient's initial procedure. There is evidence of a failure to properly examine the patient or consult the records of the recent admission. There is evidence of a failure to properly consider complications of the aneurysm as a possible explanation for the patient's signs and symptoms. These failures denied the patient the opportunity to be treated before the progression to hemorrhage and further complications. These failures were deviations from the standard of care." R. pp 18-19.

Dr. Skudder has made it clear that he is qualified to render opinions regarding members of the medical profession when evaluating and treating patients such as the Appellant Mr. Eades. He has made it clear that he is particularly qualified to evaluate and treat medical problems such as those suffered by Mr. Eades.

As pointed out above, the petitioning Respondents have no factual basis in the record to support their arguments that Dr. Skudder is unqualified to render an expert opinion regarding their services.

The petitioning Respondents seek to unduly restrict the term "area of practice" in the statute. They seek to equate "area of practice" and "specialty." The petitioning Respondents allege that they specialize in family practice and emergency medicine. But certainly when they are evaluating and treating patients with occluded arteries, aneurysms of the artery, and related issues, they are engaged in "areas of practice" which overlap each other, and which overlap other specialties which deal with the same medical issues.

Dr. Skudder has stated in his affidavit that he is highly trained, and experienced with the areas of practice necessary to treat the Appellant Mr. Eades, and he is highly knowledgeable of the standards of care of the medical profession in

dealing with such issues. Among other breaches of the standard of care he has noted a failure to consult records and a failure to properly examine the patient. His affidavit indicates that he is licensed and is board certified in Vascular Surgery and Surgical Critical care. Further, his affidavit is explicit that he has vast professional knowledge and experience in the area of practice in which his opinion has been given, and he has been actively practicing for more than three of the last five years. This more than meets the requirements of Section 15-36-100 (A) (1) and (2). His affidavit would also more than meet the requirements of Section 15-36-100 (A) (3). He has vast study, experience, and specialized knowledge which render him qualified to express expert opinions regarding the evaluation and treatment of Mr. Eades, and this is explicitly explained in his affidavit.

The South Carolina Supreme Court has made it clear that Section 15-79-125 is a statute in derogation of the common law which limits a claimant's right to bring suit, and, therefore it must not be extended beyond the clear intent of the legislature. Grier v. AMISUB, Inc., 397 S.C. 531, at 536, 725 S.E. 2d 693 (2012). The same principle would apply to Section 15-36-100 and its affidavit requirements which are appended to Section 15-79-125. A similar principle has been followed in Ross v. Waccamaw Community Hospital, 404 S.C. 56, 744 S.E. 547 (2013). The Supreme Court has been reluctant to allow plaintiffs to suffer the harsh penalty of dismissal under Section 15-79-125 without express language.

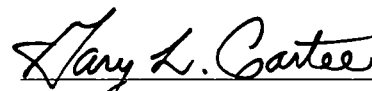
Dr. Skudder's affidavit more than demonstrates his qualifications to render expert opinions regarding the treatment of the Appellant Mr. Eades. There are no opposing or even explanatory facts in the record to support or preserve the petitioning Respondents' position.

CONCLUSION

It is respectfully submitted that this Honorable Court was correct in concluding that the petitioning Respondents have failed to preserve the issue of the alleged insufficiency of the affidavit for appellate review.

There is no ruling in the Order of the circuit court dismissing the NOI which states that any Defendant was dismissed from the case due to the alleged insufficiency of the affidavit. Further, there are no facts in the record to support the preservation of the issue of the alleged insufficiency of the affidavits. There are no pleadings (verified or unverified), there are no affidavits, no depositions, and no documentation supporting the petitioning Respondents' position. Finally, the only argument against the affidavit is that Dr. Skudder is a vascular surgeon. The affidavit on its face clearly states that he has vast specialized knowledge, training, and experience which qualify him to express expert opinions on the care and applicable standards of the medical profession for the evaluation and treatment of the Appellant, Mr. Eades.

The Appellants respectfully request that the Petition for Rehearing before the Court be denied.



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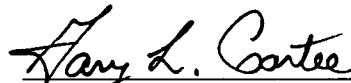
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TRIDENT EMERGENCY PHYSICIANS, LLC, Respondents.

PROOF OF SERVICE

The undersigned counsel for the Appellants hereby certifies that he has served the Appellants' Return to Petition for Rehearing in this matter by depositing copies in the United States Mail, postage prepaid, on August 3, 2015, addressed to the Respondents' attorneys of record as follows: Thomas C. Salane, Esq., R. Hawthorne Barrett, Esq., Turner Padgett Graham & Laney P.A., PO Box 1473, Columbia, SC

29202; Andrew F. Lindemann, Esq., Davidson & Lindemann, P.A., PO Box 8568, Columbia, SC 29202; Darren K. Sanders, Esq., Buyck & Sanders Law Firm, LLC, PO Box 2424, Mt. Pleasant, SC 29465-2424; William C. McDow, Esq., Richardson Plowden & Robinson, PA, PO Drawer 7788, Columbia, SC 29202; D. Jay Davis, Jr., Esq., Stephen L. Brown, Esq., Russell G. Hines, Esq., Young Clement Rivers, LLP, PO Box 993, Charleston, SC 29402; and Hutson S. Davis, Jr., Esq., Jason W. Ward, Esq., Johnson Davis Ward, PA, 10 Pinckney Colony Road, Victoria Bldg., Suite 200, Bluffton, SC 29909.



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August 3, 2015

The Honorable Jenny Abbott Kitchings
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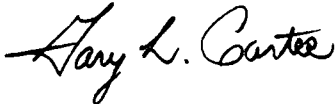
SC Court of Appeals

RE: Johnny Eades v. Palmetto Cardiovascular
Appellate Case No.: 2013-002177

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the Appellants' Return to Petition for Rehearing in the above referenced matter together with an original Proof of Service.

Respectfully submitted,



Gary L. Cartee

cc:

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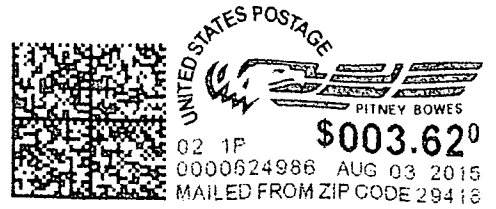
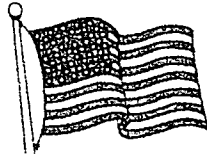
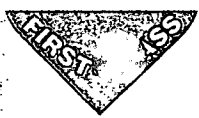
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