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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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 Corp. of SC; 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 & Thoracic, PA; James M. Benner, MD;
Mark J. Epler, MD; Palmetto Primary Care Physicians, LLC; and
Trident Emergency Physicians, LLC, are.....Respondents.

REPLY IN SUPPORT OF PETITION FOR REHEARING

Thomas C. Salane
R. Hawthorne Barrett
Turner Padgett Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for Respondents Palmetto
Primary Care Physicians, LLC, and
Trident Emergency Physicians, LLC

Stephen L. Brown
D. Jay Davis
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
(843) 577-4000

Attorneys for Respondent Trident
Emergency Physicians, LLC

The Respondents Palmetto Primary Care Physicians, LLC (“PCP”) and Trident Emergency Physicians, LLC (“Trident”) respectfully submit this Reply in support of their Petition for Rehearing.

ARGUMENT

Trident and PCP make the following arguments in response to the Appellants’ Return to Petition for Rehearing.

1. The Appellants claim “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.” [Return, p. 2 (emphasis in original).] That statement is plainly incorrect. The Order contained an entire section devoted to the insufficiency of the affidavit. [R. pp. 5-6.] In that section, the trial court stated: “Because the affidavit does not contain the substantive content requirements of section 15-36-100, it is insufficient to supply the required affidavit in section 15-79-125. **The Court hereby finds the Notice of Intent to File Suit is properly dismissed for failure to provide an expert affidavit which comports with the affidavit requirements of section 15-36-100.**” [R. p. 6 (emphasis added).] This language demonstrates that the Court considered, and accepted, the insufficiency of the affidavit as a separate and additional ground for dismissing the NOI as to the Trident and PCP and their respective employee doctors.

Although the Appellants do not specifically state as much, they appear to be relying on an assertion that the quoted language was insufficient because it did not name any particular defendants. The Court should reject this hyper-technical argument. Trident and PCP (along with their doctor-employees) raised this issue in their Motion to Dismiss and supporting memorandum. [R. pp. 31-43.] The other defendants listed in the case’s caption did not include this ground in their dismissal motion. Thus, there can be no doubt that the language quoted

above applied to PCP, Trident and their employee doctors. The ruling stated in the quoted passage could not possibly have applied to anyone else because the other defendants never raised or relied upon that defense. Under those circumstances, the section of the Order did not need to contain specific references to any parties for this Court to determine which defendants were covered by the ruling. Any reasonable interpretation of the Order as a whole makes the answer to that question abundantly clear.¹

2. The Appellants' Return fails to address the argument in the Petition for Rehearing that the ruling in favor of PCP and Trident's respective employee physicians also applied with equal force to PCP and Trident under theories of agency liability. While this omission might not constitute a concession on this point, it is telling that the Appellants have not cited any authority to dispute it.

Regardless of the interpretation given to the Order, it clearly dismissed the NOI as to Drs. Campbell and Wallen based on the insufficiency of the expert affidavit. For the reasons set forth in the Petition for Rehearing, that ground for dismissal applied with equal force to Trident and PCP (the doctors' employers) as a matter of law. Therefore, even if the Appellants could credibly claim that the trial court's ruling on this issue did not expressly apply to Trident and PCP, the law governing vicarious liability (including vicarious defenses) would provide the missing link. Either way, the Order had the effect of dismissing the NOI as to Trident, PCP and the employee doctors based on the insufficiency of the expert affidavit. Therefore, this issue was not only raised, but also ruled upon in the trial court and it is preserved for appellate review.

¹ In addition, the heading to that section of the Order **does** identify PCP and Trident's respective employee physicians by name. Given that fact, the Appellants cannot reasonably claim that this ruling by the trial court did not apply to any of the defendants.

3. The Appellants argue Trident and PCP could have filed a Rule 59(e) motion to seek a specific statement in the Order that the ruling on the insufficiency of the expert affidavit also applied to Trident and PCP. The Appellants further argue Trident and PCP could have included such a direct statement in their proposed order to the trial court. Neither thing was necessary, however. As discussed above, there was no reasonable doubt as to which defendants had sought and obtained the ruling on this issue. Trident and PCP included this issue in their Motion to Dismiss and supporting memorandum, and the trial court plainly intended the ruling to apply to those entities as well as the individual doctors who worked for them.

At the very least, Trident and PCP could read the Order as granting relief on this ground to its employee doctors, who were the only bases for Trident and PCP being named as parties. That ruling extended to Trident and PCP as a matter of law, which meant there was no need for them to seek any additional language in the Order.

Simply put, Trident and PCP had no reason to request alteration or amendment of the Order, nor were they required to include any specific language in their proposed order. The actual Order, as written, leaves no doubt that the ruling on the insufficiency of the expert affidavit applied to Trident and PCP. The Appellants are now attempting to manufacture doubt on this issue, but the Court should give no credit to that effort.

4. The Appellants claim there was an insufficient record to support dismissal based on the substantive failures of the expert affidavit, but that assertion is mistaken. The trial court was faced with a Motion to Dismiss the NOI based on the contents of the expert affidavit. In that situation, the trial court limited its analysis to the affidavit's description of Dr. Skudder's qualifications, including his areas of practice. There was no reason for the parties to submit any other materials for the trial court to consider.

The issue for the trial court to determine was whether the affidavit demonstrated Dr. Skudder had “actual professional knowledge and experience” in the specific practice areas of Dr. Campbell and Dr. Wallen and their respective employers. The trial court properly concluded he did not. The Motion to Dismiss and the supporting memorandum informed the trial court that Dr. Campbell practiced in the area of primary care, and Dr. Wallen practiced in the area of emergency care. As the trial court noted in its Order, Dr. Skudder’s affidavit did not indicate he has professional knowledge or experience in either of those areas of practice. The lack of those credentials, based on a reading of the affidavit, was all the trial court needed in order to decide the issue before it. Any other materials would have been beyond the proper standard of review.

Even if the trial court **could** have considered outside materials, the court had no need to do so because it had sufficient information to decide the issue in the motion, the supporting memorandum and the affidavit itself. The trial court needed to know the areas in which Drs. Campbell and Wallen practiced and the qualifications of the proposed expert. All of that information was before the court. The Appellants fault Trident and PCP for not submitting affidavits, depositions or other documents, but they do not even hint at, let alone discuss, what information such additional materials would have provided. The existing record gave the trial court all of the necessary information for purposes of the Motion to Dismiss, and any additional materials would have been superfluous. Therefore, the Appellants’ assertion on this issue must fail.

5. The Appellants argue Dr. Skudder’s affidavit was sufficient to meet the requirements of the governing statute, S.C. Code § 15-36-100. Subsection (B) of that statute requires a supporting “affidavit of an expert witness which must specify at least one negligent act

or omission ...” S.C. Code Ann. §15-36-100(B). Subsection (A) defines an “expert witness” as:

... an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written or oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area or specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iv) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion ...

S.C. Code Ann. §15-36-100(A).

The statute requires an “expert witness” to have experience, training and knowledge in the specific “area of practice or specialty” of the defendant professional. It is not sufficient that the person giving the affidavit be a member of the same general profession. Rather, the proposed expert must be qualified to give opinions as to that defendant’s particular practice area. The

multiple references to “area of practice” and “specialty” in the definition of “expert witness” support this interpretation of the statute.

Here, Dr. Skudder’s affidavit gave no indication that he practices, or has ever practiced, in the areas of primary care or emergency care. Those are the areas of practice for Drs. Campbell and Wallen, as well as PCP and Trident. Based on the language of the statute, Dr. Skudder had to demonstrate professional knowledge and experience in those practice areas, and his affidavit failed to do that. Consequently, the affidavit was insufficient to support the NOI pursuant to S.C. Code § 15-36-100. The Appellants’ Return has not demonstrated otherwise.

The Appellants also argue that Trident and PCP “seek to unduly restrict the term ‘area of practice’ in the statute ... [by] seek[ing] to equate ‘area of practice’ and ‘specialty.’” [Return, p. 5.] There are two problems with this argument. First, the statute uses those terms together, which suggests the General Assembly considered them to be essentially synonymous. The Appellants do not acknowledge or address this point in the Return. Second, the Appellants imply a definition of “area of practice or specialty”² that so broad as to render it meaningless. If **any** physician can testify about **any** area of medicine (and this is what the Appellants’ position suggests), then the definition of “expert witness” in § 15-36-100(A) would not be necessary. As long as the proposed expert held a valid medical degree and license, the doctor would qualify. By enacting a statute with more specific standards, the legislature clearly rejected that general “one size fits all” approach. *Cf. Holmes v Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014) (possessing a legal degree and a license to practice law does not automatically qualify a person to be an expert in a legal malpractice case).

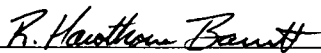
² This phrase appears multiple times in S.C. Code 15-36-100.

6. Finally, the Appellants claim that recent decisions by our Supreme Court have indicated a judicial preference for liberally interpreting S.C. Code § 15-79-125 and that the same principle should apply to S.C. Code § 15-36-100. The problem with this argument is that it attempts to rob § 15-36-100 of any force and effect. As discussed above, the legislature intended that statute to establish qualifications for an expert submitting a pre-suit affidavit that go beyond merely holding a professional degree and license. Ignoring that intent, as the Appellants are implicitly asking the Court to do, would not be liberally interpreting the statute; rather, it would be rewriting the statute. Such an undertaking is beyond the scope of review, and the Court should therefore reject the Appellants' position.

CONCLUSION

For the reasons set forth above, as well as those stated in the original petition, this Court should grant the Petition for Rehearing and affirm the decision of the trial court as to Trident and PCP based on the ground that was not addressed in the Court's original opinion.

Respectfully submitted,



Thomas C. Salane
R. Hawthorne Barrett
Turner Padgett Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for the Respondents Palmetto Primary
Care Physicians, LLC and Trident Emergency
Physicians, LLC

Stephen L. Brown
D. Jay Davis
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
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Mark J. Epler, MD; Palmetto Primary Care Physicians, LLC; and
Trident Emergency Physicians, LLC, are.....Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC, certifies that on this **10th day of August, 2015**, copies of the **Reply in Support of Petition for Rehearing** have been served via United States mail upon counsel for the Appellants and all other record counsel at the following addresses: Gary L. Cartee, Esq; 3251 Landmark Dr., Suite 136, N. Charleston, SC 29418; William C. McDow, Esq., Richardson Plowden & Robinson, P.O. Drawer 7788, Columbia, SC 29202, and Andrew F. Lindemann, Esq., Davidson & Lindemann, PA, P.O. Box 8568, Columbia, SC 29202.

R. Hawthorne Barrett

Thomas C. Salane
R. Hawthorne Barrett
Turner Padgett Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for Respondents Palmetto
Primary Care Physicians, LLC, and
Trident Emergency Physicians, LLC

Stephen L. Brown
D. Jay Davis
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
(843) 577-4000

Attorneys for Respondent Trident
Emergency Physicians, LLC

August 10, 2015

Turner | Padget

R. Hawthorne Barrett

REPLY TO:

E-Mail: TBarrett@TurnerPadget.com
Writer's Direct Dial: (803) 227-4219
Direct Fax: (803) 400-1454

August 10, 2015

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
AUG 10 2015
SC Court of Appeals

Re: Johnny Eades, et al. v. Palmetto Cardiovascular & Thoracic, PA, et al.
Appellate Case No.: 2013-002177
Our File No.: 10350.00108

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and seven copies of the Reply in Support of Petition for Rehearing by the Respondents' Brief of the Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC, and (2) the original and one copy of the Proof of Service. Please file the originals and necessary copies and return the stamped extra copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

R. Hawthorne Barrett

R. Hawthorne Barrett

RHB:
Enclosures

TURNER PADGET

The Hon. Jenny Abbott Kitchings

August 10, 2015

Page 2

cc: Gary L. Cartee, Esq.
William C. McDow, Esq.
Andrew F. Lindemann, Esq.
D. Jay Davis, Esq.
Russell G. Hines, Esq.