THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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S.C. Supreme Court

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

Johnny Eades and Barbara Eades,.....Respondents,

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 Primary Care Physicians, LLC; and Trident Emergency Physicians, LLC, are.....Petitioners.

APPENDIX

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INDEX TO APPENDIX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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. Mullaney, 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 are the Respondents.

Appellate Case No. 2013-002177

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2015-UP-331
Submitted April 1, 2015 – Filed July 1, 2015

REVERSED AND REMANDED

Gary Lane Cartee, of North Charleston, for Appellants.

Hutson S. Davis, Jr., and Jason Wayne Ward, both of Ward & Bromley, LLC, of Bluffton, for Respondent Mark J. Epler.

Thomas C. Salane and R. Hawthorne Barrett, both of Turner Padget Graham & Laney, PA, of Columbia, for Respondent Palmetto Primary Care Physicians, LLC.

Donald Jay Davis, Jr., Stephen Lynwood Brown, and Russell Grainger Hines, all of Young Clement Rivers, of Charleston, for Respondent Trident Emergency Physicians, LLC.

William Curry McDow, of Richardson Plowden & Robinson, PA, of Columbia, for Respondents Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC.

R. Hawthorne Barrett, of Turner Padget Graham & Laney, PA, of Columbia, for Respondent Trident Emergency Physicians, LLC.

Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Respondents Palmetto Cardiovascular and Thoracic, James M. Benner, and Mark J. Epler.

Darren Kent Sanders, of Buyck, Sanders & Simmons, LLC, of Mount Pleasant, for Respondents Palmetto Cardiovascular and Thoracic and James M. Benner.

PER CURIAM: Johnny and Barbara Eades appeal the trial court's dismissal of their notice of intent to file suit (NOI). The Eadeses argue the trial court erred in

dismissing their lawsuit on the ground that they failed to contemporaneously file an affidavit of an expert witness with their NOI. We reverse and remand for further proceedings. *See* S.C. Code Ann. § 15-79-125(A) (Supp. 2014) ("Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file [a NOI] and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100 . . . ."); S.C. Code Ann. § 15-36-100(C)(1) (Supp. 2014) ("The contemporaneous filing requirement . . . does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit."); *Ranucci v. Crain*, 409 S.C. 493, 504, 763 S.E.2d 189, 194 (2014) ("[S]ection 15–79–125(A)'s reference to the 'affidavit requirements established in [s]ection 15–36–100' constitutes an adoption of all provisions of section 15–36–100."); *id.* at 509, 763 S.E.2d at 197 ("Having found that section 15–79–125 incorporates section 15–36–100 in its entirety, we hold that [plaintiff] should have been permitted to invoke section 15–36–100(C)(1), which extended the time for filing the expert witness affidavit and tolled the applicable statute of limitations under section 15–79–125(A).").[1]

REVERSED AND REMANDED.[2]

SHORT, LOCKEMY, and McDONALD, JJ., concur.

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[1] We note that the issue of the sufficiency of the expert affidavit as to Respondents is unpreserved. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (providing an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

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.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC ("these Respondents") respectfully request that the Court grant a partial rehearing in this matter. Specifically, these Respondents, request that the Court rehear and consider these Respondents' second argument on appeal, which addresses the trial court's ruling that the expert affidavit submitted with the Notice of Intent was insufficient. In making this petition, these Respondents submit that the Court overlooked or misapprehended the following point:

> The Court overlooked evidence in the Record on Appeal that the second argument listed in these Respondents' brief was properly raised and ruled upon in the lower court, and thus was preserved for appellate review.

STATEMENT OF THE CASE

This appeal arises from the Appellants' attempt to pursue a medical malpractice claim against numerous defendants, including these Respondents. The Appellants filed a Notice of Intent to File Suit, but did not contemporaneously file a supporting expert affidavit, and the defendants all moved to dismiss the Notice of Intent pursuant to this Court's decision. Applying the case law as it existed at the time, the trial court granted the motions to dismiss. The Appellants challenged that decision through this appeal.

The events purportedly giving rise to the Appellants' medical malpractice claims occurred in July and August of 2009. Some three years later, on August 15, 2012, the Appellants filed a Notice of Intent to File Suit (Medical Malpractice) in the Court of Common Pleas for Charleston County. [R. pp. 8-11.] The Appellants also filed their Answers to Standard Interrogatories as Exhibit A to the Notice of Intent. [R. pp. 13-15.] Those interrogatory answers did not name or specifically identify an expert witness, and the Appellants did not file an expert

affidavit with the Notice of Intent. [R. pp. 11-15.] On August 17, 2012, the Appellants filed Supplemental Answers to Standard Interrogatories, which listed Dr. Paul A. Skudder as an expert witness. [R. pp. 16-17.] The Appellants also filed an affidavit from Dr. Skudder on August 17, 2012. [R. pp. 18-19.]

The Respondents Palmetto Primary Care Physicians, LLC ("PPC") and Trident Emergency Physicians, LLC ("Trident") were two of the defendants listed in the Notice of Intent to File Suit. The Appellants served copies of the Notice of Intent and related materials on PPC and Trident on December 12, 2012, nearly four months after filing. PPC and Trident filed a motion to dismiss the Notice of Intent to File Suit on or about April 10, 2013.[1] [R. pp. 31-33.] The other defendants whom the Appellants had named and served with the Notice of Intent filed similar dismissal motions around the same time.

The Honorable Kristi Lea Harrington conducted a hearing on all the dismissal motions on July 18, 2013, and she granted the motions in an Order filed on August 16, 2013. [R. pp. 1-6.] Judge Harrington noted that the Appellants had not contemporaneously filed an expert affidavit with the Notice of Intent, as S.C. Code §15-79-125 requires, and therefore the Notice of Intent was subject to dismissal. Judge Harrington also rejected the Appellants' attempt to rely on a provision in S.C. Code §15-36-100 that allows for an additional 45 days to file an expert affidavit after the filing of a Summons and Complaint. [R. pp. 1-6.] Citing the law as it existed at the time, Judge Harrington concluded that the "45 days" provision from §15-36-100 did not

[1] The motion to dismiss was also filed on behalf of Dr. Patricia Campbell and Dr. Matthew Wallen, who were agents/employees of PPC and/or Trident and were listed as potential defendants. Later, however, the Appellants' counsel represented to the trial court that the Appellants would not name Dr. Campbell or Dr. Wallen as defendants in any potential Summons and Complaint. [R. p. 1 at n.1 and n.2.]

apply to affidavits filed in support of Notices of Intent. [R. pp. 1-6.] This ruling by Judge Harrington applied to all the moving defendants.

In addition, Judge Harrington concluded the supporting affidavit did not satisfy the substantive requirements of §15-36-100. The heading of that section of the Order specifically referenced Dr. Patricia Campbell or Dr. Matthew Wallen,[2] but the text of the Order did not limit the finding to those individuals. The judge found that the affidavit "[did] not indicate [the expert] has 'actual professional knowledge and experience' in the practice areas of Dr. Campbell and Dr. Wallen." [R. p. 6.] Further, the affidavit "fail[ed] to provide the proper qualifications, required by Section 15-36-100, that would permit Dr. Skudder to present an expert opinion about Dr. Campbell and Dr. Wallen." [R. p. 6.] These findings by Judge Harrington served as an additional basis for dismissal as to Drs. Campbell and Wallen and, through them, PPC and Trident.

The Appellants apparently received written notice of the Order in September 2013 and filed and served a Notice of Appeal on or around October 7, 2013. The Appellants later filed and served an Amended Notice of Appeal on October 16, 2013. This Court opted to decide the case without oral arguments and filed an unpublished opinion (No. 2015-UP-331) reversing the trial court on July 1, 2015.

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[2] The alleged acts of malpractice by those doctors were the basis for the vicarious liability claims asserted against PPC and Trident.

ARGUMENT

I. These Respondents' argument concerning the insufficiency of the expert affidavit is properly preserved for review.

In their brief, these Respondents presented arguments in support of both rulings made by the trial court. The Court reversed the trial court's first ruling (i.e. the timeliness of the expert affidavit), but the Court did not address the second ruling (i.e. the sufficiency of the expert affidavit). Instead, the Court stated the following in a footnote: "We note that the issue of the sufficiency of the expert affidavit as to Respondents is unpreserved. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (providing an issue must be raised to and ruled upon by the trial court to be preserved for appellate review.)" These Respondents respectfully submit that in reaching that conclusion, the Court overlooked evidence in the Record on Appeal that shows the issue was properly preserved.

On or about April 10, 2013, these Respondents (along with employees/agents Dr. Patricia Campbell and Dr. Matthew K. Wallen) filed a motion to dismiss the Appellants' Notice of Intent to File Suit. [R. pp. 31-33.] One of the grounds asserted in the motion was the insufficiency of the Appellants' expert affidavit, due to the fact that the proposed expert did not practice in the fields of primary care or emergency medicine. [R. p. 32.] The Respondents submitted a supporting memorandum of law at the motion hearing. [R. pp. 36-43.] The supporting memorandum contained a section that addressed the legal insufficiency of the expert affidavit. [R. pp. 39-40.] The arguments in that section were not limited to the two individual doctors. In fact, that section included the following assertions:

> Dr. Skudder indicates he has practiced medicine for more than the past five years dealing with issues including "occluded arteries, aneurysms, and related medical issues." ... Dr. Skudder also indicates that he holds board certifications from the American Board of Surgery, with special qualifications in Vascular Surgery,

> and Surgical Critical Care. ... However, Defendant Primary Care Physicians, LLC, specializes in primary care medicine and Defendant Trident Emergency Physicians, LLC, specializes in emergency medicine. Therefore, Dr. Skudder's affidavit, which contains no indication he has experience in the areas of primary care or emergency medicine, fails to provide the proper qualifications, as required by section 15-36-100, to allow Dr. Skudder to present an expert opinion **about these Defendants**.

[R. p. 40 (emphasis added).] Thus, the Respondents PCP and Trident clearly raised the issue of the insufficiency of Dr. Skudder's affidavit to the trial court.

The trial court also clearly ruled on that issue. 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.] Given this language, there can be no dispute that the Order set forth a ruling on this issue.

As the Court noted in its opinion, an issue must be raised and ruled upon in the lower court in order to be preserved for appellate review. Here, the Record on Appeal plainly demonstrates that these Respondents argued to the trial court that the Appellants' expert affidavit was insufficient under the controlling statute. The trial court accepted that argument and used it as one of two independent bases for dismissing the Notice of Intent to File Suit. Therefore, these Respondents respectfully submit that the Court erred in stating this issue was not preserved for review.

Although the Court does not explain its statement that the issue was not preserved, that conclusion might stem from a misapprehension of the relationship between these Respondents and the defendants Drs. Campbell and Wallen. As demonstrated above, these Respondents and

the two doctors together filed a motion to dismiss the Notice of Intent to File Suit, which included the insufficiency of the affidavit as a supporting ground. Thus, all of those parties raised the issue in the trial court. It is possible, however, that this Court believed the trial court ruled on the issue only as to the two doctors.[3] Any such conclusion would be erroneous for at least two reasons.

First, the trial court did not expressly limit its ruling on this issue to Drs. Campbell and Wallen. The section of the Order that addressed the issue was entitled "The expert affidavit does not comply with S.C. Code Ann. § 15-36-100 with regard to Dr. Campbell and Dr. Wallen." Yet, the argument presented to the trial court was not limited to the two doctors (as opposed to PCP and Trident), and the trial court's Order was broader than that. As noted above, the trial court concluded:

> 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 does not apply only to the two doctors. If the trial court had intended the ruling to be limited to those doctors, the Order would have said "dismissed as to Drs. Campbell and Wallen" rather than simply "dismissed." For this reason, the trial court's ruling on this issue was sufficient for purposes of the Respondents' arguments on appeal.

Second, even if the ruling had been limited to the doctors, it would make no practical difference for purposes of this analysis. These Respondents (i.e. PCP and Trident) are the

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[3] These Respondents are admittedly speculating about the Court's reasoning, but this appears to be the only possible basis for the conclusion, unless the Court simply overlooked the Record on Appeal materials discussed above.

practices for which the two doctors worked, and these Respondents are only defendants in this action because of the alleged malpractice of the individual doctors. Any liability the Respondents might have in this case would be solely vicarious in nature. Thus, the Respondents and the two doctors are linked together for purposes of the Appellants' liability claims, but also for purposes of defenses asserted against those claims. In other words, just as the Respondents share the doctors' potential liability under the doctrine of *respondeat superior*, the Respondents are equally entitled to assert and rely upon the same defenses as the doctors. This is a well-established corollary to the rule of vicarious liability. *See, e.g., Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001) (release or discharge of a servant in a tort action operates as a release or discharge of the master as a matter of law), *rev'd on other grounds*, 356 S.C. 238, 588 S.E.2d 588 (2003).

Here, as previously noted, the Respondents and the two doctors filed a joint motion to dismiss the Notice of Intent to File Suit. Neither the motion nor the supporting memorandum limited the argument based on the insufficiency of the expert affidavit to the doctors. Yet, even if the trial court's ruling could be interpreted as applying specifically to the doctors, the decision to dismiss the Notice of Intent as to the doctors would necessarily apply to the Respondents as well. Dismissing the Notice of Intent as to the doctors automatically dismissed it as to the Respondents under the rules governing vicarious liability.[4] Thus, the trial court's decision on this issue applied to the Respondents regardless of what language the court used in the heading to that section of its Order.

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[4] It is true that an action against a master need not name the allegedly negligent servant as a defendant. However, if the action does include the servant as a defendant, any legal rulings in favor of that servant also apply to the master. For example, if the servant obtains summary judgment on a legal defense, the master would also be entitled to summary judgment.

It is significant to note that the trial court's decision was not merely a procedural means of removing unnecessary parties from the case. Rather, it was a substantive decision on a legal issue – i.e. the sufficiency of the Appellants' expert affidavit. The trial court correctly concluded that the Appellants' expert did not have professional knowledge and experience in the same area of medicine as Drs. Campbell and Wallen (emergency care and primary care). [R. pp. 5-6.] These are, of course, the same specialties in which the Respondents provide medical services. If the Appellants' expert was not qualified to offer opinions as to the doctors under the controlling statute, he was equally unqualified to do so as to the Respondents. This is the only logical way to apply the statute's requirement.

Finally, even if the argument regarding the sufficiency of the affidavit were somehow not preserved specifically as to the Respondents, the Court can (and should) address it as an additional sustaining ground. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). The normal rules of issue preservation do not apply to additional sustaining grounds. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 722-23 (2000). The only requirements are that the additional sustaining ground appears in the record and the prevailing party raises the issue in its appellate brief. *Id.* Both of those requirements are satisfied here, and the Court should grant a rehearing to consider and rule upon the Respondents' second argument on appeal.

II. The trial court correctly dismissed the Notice of Intent based on a finding that the expert affidavit did not come from a doctor who specializes in the areas of medicine practiced by these Respondents.

The trial court concluded the Appellants' expert affidavit did not satisfy the substantive requirements of S.C. Code §15-36-100. Specifically, the trial court found the affidavit did not

indicate that the expert (Dr. Paul Skudder) has "'actual professional knowledge and experience" in the practice areas of Dr. Campbell and Dr. Wallen." [R. p. 6.] This decision was correct and this Court should grant a rehearing and affirm the trial court on this issue.

At the outset, the Appellants have not actually appealed the trial court's ruling regarding the dismissal of Drs. Campbell and Wallen. Neither the Amended Notice of Appeal nor the caption of the Appellants' Brief listed Dr. Campbell or Dr. Wallen as respondents. The Appellants' Brief suggests this omission was due to the fact that the Appellants never served Drs. Campbell and Wallen with the Notice of Intent. In other words, the Appellants appear to claim those doctors were never actually parties and, therefore, could not really have moved to dismiss the Notice of Intent.

There are two problems with the Appellants' argument, however. First, Drs. Campbell and Waller were parties at the outset of this action. They were both listed as defendants in the caption of the Notice of Intent, and they both filed a motion to dismiss. [R. pp. 31-33.] Second, the trial court expressly and specifically granted the motion as to Drs. Campbell and Wallen, as well as to the practices for which they worked. The Appellants did not file a Rule 59(e) motion seeking to correct or challenge that decision. As a result, the trial court's ruling in favor of Drs. Campbell and Wallen remains in place. The Appellants' failure to appeal the ruling as to those defendants prevents the Appellants from appealing the dismissal in favor of their employers. *Cf. Cherry v. Singer Sewing Mach. Co.*, 165 S.C. 451, 455, 164 S.E. 126, 128 (1932) ("In an action against master and servant jointly, based solely upon the negligence of the servant, a verdict against the master alone will not be allowed to stand."); *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001) (release or discharge of a servant in a tort action operates as a release

or discharge of the master as a matter of law), *rev'd on other grounds*, 356 S.C. 238, 588 S.E.2d 588 (2003).[5]

For this reason, contrary to footnote 1 in the Court's opinion, it is the Appellants, not these Respondents, who have not properly preserved or presented an argument on this issue. Indeed, that problem dooms any appellate challenge to the trial court's dismissal of these Respondents. This, in turn, requires affirmance of the trial court's ruling on this issue in these Respondents' favor. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("where a decision is based on more than one ground, the appellate court will affirm unless the appellate appeals all grounds because the unappealed ground will become the law of the case"); *first Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 556, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an unchallenged ruling, right or wrong, is the law of the case and requires affirmance); *see also McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an unappealed order comes to the appellate court with a presumption of correctness, and the appellant bears the burden of demonstrating reversible error).

Moreover, a review of the Appellants' argument on this issue reveals no citation to legal authority. Respectfully, these Respondents submit that the Appellants' argument is conclusory, and may rightfully be deemed abandoned. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); *McCall, supra.*

Even if the Appellants have actually appealed the trial court's ruling on this issue, and it has not been abandoned, their arguments fail. The Appellants focus on Dr. Skudder's qualifications and experience in dealing with conditions similar to those suffered by Johnny

[5] Dr. Campbell was an agent of the Respondent Palmetto Primary Care Physicians, LLC, and Dr. Wallen was an agent of the Respondent Trident Emergency Physicians, LLC.

Eades. Those arguments are irrelevant, however, because the real issue is 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 practices. The trial court concluded the affidavit did not satisfy those standards, and that, if anything, is the only relevant issue for this portion of the appeal.

At all times relating to this case, 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 does not indicate he has professional knowledge or experience in either of those areas of practice. The affidavit contains the following statements addressing Dr. Skudder's knowledge and experience:

> 1. I, Paul Skudder, am a medical doctor licensed, without restriction and in good standing, in the states of Vermont, Massachusetts, and New York, and in the District of Columbia. I currently practice medicine, and I have been actively engaged in the practice of medicine for more than the past five years, and this practice has included the evaluation and treatment of patients with issues including occluded arteries, aneurysms, and related medical issues, which include issues similar to those of Johnny Eades in July and August, 2009. I have the following board certifications: 1986, American Board of Surgery (Recertified 2006); and ABS Surgical Critical Care (Recertified 2001).
>
> 2. 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.
>
> * * *

> 6. I am a board certified Vascular Surgeon in active clinical practice from 1984 to the present, devoting over 90% of my time to direct patient care.

[R. pp. 18-19.] The rest of the affidavit focuses on allegations of breaches of the applicable standard of care, which are not pertinent to the present issue.

The quoted passages from the affidavit make it clear that Dr. Skudder has an apparent specialty in vascular surgery. Dr. Skudder never claims he has training or experience relating to primary care or emergency care. Nor does he state he has knowledge of the standards of care for those specific areas of medicine. Rather, he identifies himself as a board certified surgeon who has treated patients with conditions like those Johnny Eades experienced. He then proceeds to describe why he believes the treatment Johnny Eades received violated the standard of care. While that approach might arguably satisfy the statute as to the defendants who performed surgery on Eades, it fails with regard to Drs. Campbell and Wallen and their employers.[6]

The controlling statute for this issue is 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

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[6] Again, the issue is not whether Dr. Skudder has treated patients like Eades. The issue is whether Dr. Skudder has "actual professional knowledge and experience" in the specific practice areas of the defendants against whom he offers opinions. Dr. Skudder might have sufficient credentials to say how a vascular surgeon should have treated Eades, but he is not qualified to offer similar opinions as to what primary care or emergency care providers should have done.

> (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) (emphasis added).

As the emphasized language demonstrates, 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 as the defendant. Rather, the affiant must be qualified to give opinions as to that defendant's particular practice area. Had the legislature intended otherwise, it would not have included so many references to "area of practice" and "specialty" in the definition of "expert witness." Clearly the legislature meant to require opinions from specialists in like areas of practice. General statements from "one size fits all" affiants are not sufficient.

None of this is to say that Dr. Skudder is not qualified (under the statute or otherwise) to give an expert opinion as to practitioners within his own area of expertise (*i.e.* vascular surgery).

These Respondents take no position on that question because it is not relevant to them. For present purposes, it matters only that Dr. Skudder is not qualified to give opinions regarding primary care or emergency care. As far as his affidavit reveals, he has no training, experience or specialized knowledge in those areas of practice. Therefore, Dr. Skudder is not an "expert witness" as to Drs. Campbell and Waller or their employers for purposes of compliance with the affidavit requirements of §15-36-100. The trial court's conclusion to that effect was correct, and this Court should affirm.

In addition, the trial court's conclusion should apply with equal force to Palmetto Primary Care Physicians, LLC ("PPC") and Trident Emergency Physicians, LLC ("Trident"). Drs. Campbell and Wallen are the agents through whom PPC and Trident, respectively, acted with regard to Johnny Eades. It logically follows that if the Appellants' expert affidavit was insufficient as to those doctors, it was also insufficient as to their employers. Indeed, the Appellants acknowledge this connection when they state in their Appellants' Brief:

> The Order of the Circuit Judge indicates that the Notice of Intent to File Suit is dismissed as to Dr. Campbell and Dr. Wallen. It is assumed that the intent of the Judge was to dismiss the Notice of Intent to File Suit as to the Respondents Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC, since Dr. Campbell and Dr. Wallen were not served with the Notice of Intent to File Suit.

[Appellant's Brief, pp. 13-14.] Therefore, even though Drs. Campbell and Wallen are not listed as respondents in this appeal, the Court should affirm on this issue in favor of PPC and Trident. Both PPC and Trident are entitled to that result under the applicable law.

CONCLUSION

The Record on Appeal demonstrates that these Respondents' arguments regarding the insufficiency of the Appellants' expert affidavit were properly before the Court. These

Respondents raised those arguments in their motion to dismiss, and the trial court expressly accepted those arguments as an additional basis for dismissing the Appellants' Notice of Intent. These Respondents respectfully submit that this Court overlooked that record evidence when it concluded this issue was not preserved for appellate review. Therefore, this Court should grant a rehearing and should affirm the trial court's decision on this issue as to the Respondents.

Respectfully submitted,

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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.

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 **13th day of July, 2015**, copies of the **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.

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July 13, 2015

The South Carolina Court of Appeals

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. Mullaney, MD; Tri-County Radiology Associates, PA; and Troy Marlon, MD, Defendants,

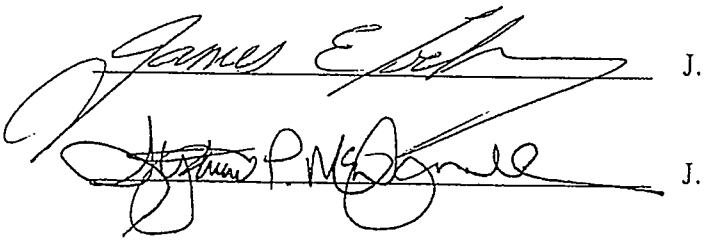
Of whom Palmetto Cardiovascular and Thoracic, PA; James M. Benner, MD; Mark J. Epler, MD; Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC are the Respondents.

Appellate Case No. 2013-002177

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.



J.

J.

Columbia, South Carolina

FILED

August 20, 2015

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