THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

RECEIVED
SEP 18 2015
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 Cardiovascular & Thoracic, PA; and Trident Emergency Physicians, LLC, are.....Petitioners.

PETITION FOR WRIT OF CERTIORARI

Thomas C. Salane
R. Hawthorne Barrett
Turner Padget 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

Pursuant to Rule 242, SCACR, the Petitioners Palmetto Primary Care Physicians, LLC, and Trident Emergency Physicians, LLC respectfully request that the Court grant a writ of certiorari and review the decision of the South Carolina Court of Appeals in this matter. The Petitioners respectfully assert that the Court of Appeals erred in its Opinion (No. 2015-UP-331, filed July 1, 2015) and that this Court should review the following issues:

> 1. Did the Court of Appeals err in concluding the Petitioners' second argument on appeal was not preserved for review where the Record on Appeal plainly demonstrates that issue was properly raised and ruled upon in the lower court?
>
> 2. Did the Court of Appeals err in failing to affirm the trial court's ruling as to the Petitioners based on the insufficiency of the pre-lawsuit expert affidavit?

STATEMENT OF THE CASE

This appeal arises from an attempt by Johnny Eades and Barbara Eades (collectively "Eades") to pursue a medical malpractice claim against numerous defendants, including the Petitioners. Eades 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. Applying the case law as it existed at the time, the trial court granted the motions to dismiss. As to the Petitioners, the trial court also based its decision to dismiss the Notice of Intent on the substantive insufficiency of the affidavit. This additional ground, which the Court of Appeals erroneously declined to address, lies at the heart of the current petition.

The events purportedly giving rise to Eades' medical malpractice claims occurred in July and August of 2009. Some three years later, on August 15, 2012, Eades filed a Notice of Intent to File Suit (Medical Malpractice) in the Court of Common Pleas for Charleston County. [R. pp. 8-11.] Eades also filed 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 Eades did not file an expert affidavit with the Notice of Intent. [R. pp. 11-15.] On August 17, 2012, Eades filed Supplemental Answers to Standard Interrogatories, which listed Dr. Paul A. Skudder as an expert witness. [R. pp. 16-17.] Eades also filed an affidavit from Dr. Skudder on August 17, 2012. [R. pp. 18-19.]

The Petitioners 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. Eades served copies of the Notice of Intent and related materials on PPC and Trident on December 12, 2012, nearly four months after the 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 Eades 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 Eades 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 Eades' 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 apply to affidavits

[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, Eades' counsel represented to the trial court that Eades 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.]

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 as well.

Eades apparently received written notice of the Order in September 2013 and filed and served a Notice of Appeal on or around October 7, 2013. Eades later filed and served an Amended Notice of Appeal on October 16, 2013. The Court of Appeals 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.[3] In that opinion, the Court of Appeals erroneously concluded that the question of the affidavit's substantive insufficiency (i.e. the second issue on appeal) was not

---

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

[3] The Court of Appeals' basis for reversal was a change in the applicable case law. Between the time of the trial court's decision and the Court of Appeals' opinion, this Court issued its decision in *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014). *Ranucci* mandated reversal as to the trial court's first ruling, but it did not have any impact on the second ruling, which the Court of Appeals refused to address.

preserved for review. The Court of Appeals stated that conclusion in a footnote without any substantive explanation.

Trident and PPC filed a timely Petition for Rehearing, in which they asked the Court of Appeals to address the trial court's ruling that the expert affidavit was insufficient. The rehearing petition included substantive arguments in support of the trial court's ruling, which had been set forth in Trident and PPC's Respondents' Brief. The Court of Appeals denied the rehearing petition without further comment in an Order filed on August 20, 2015.

ARGUMENT

I. The Court of Appeals erred in concluding the issue of the insufficiency of the expert affidavit was not preserved for review because the Record on Appeal plainly demonstrates that issue was raised and ruled upon in the trial court.

In their brief to the Court of Appeals, Trident and PPC presented arguments in support of both rulings made by the trial court. The Court of Appeals reversed the trial court's first ruling (i.e. dismissal based on the lack of contemporaneous filing of the affidavit), but it did not address the second ruling (i.e. the sufficiency of the expert affidavit). Instead, the Court of Appeals 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.)" In reaching that conclusion, the Court of Appeals erred by overlooking clear evidence in the Record on Appeal showing the issue was properly preserved.

On or about April 10, 2013, Trident and PPC (along with their employees/agents, Dr. Patricia Campbell and Dr. Matthew K. Wallen) filed a motion to dismiss the Notice of Intent to File Suit. [R. pp. 31-33.] One of the grounds asserted in the motion was the insufficiency of

Eades' 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.] Trident and PPC submitted a supporting memorandum of law at the motion hearing. [R. pp. 36-43.] The 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, PPC and Trident undoubtedly 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 of Appeals 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 Trident and PPC argued to the trial court that the 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 as to Trident and PPC. Therefore, the Court of Appeals plainly erred in concluding this issue was not preserved for review.

Although the Court of Appeals did not explain its statement that the issue was not preserved, that conclusion might stem from a misapprehension of the relationship between the Petitioners and the defendants Drs. Campbell and Wallen. As demonstrated above, the Petitioners and the two doctors jointly 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 the Court of Appeals believed the trial court ruled on the issue only as to the two doctors.[4] 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 included Trident and PPC and was not limited to the two doctors. In addition, the trial court's Order was sufficiently broad to cover the Petitioners. As noted above, the trial court concluded:

---

[4] The Petitioners are admittedly speculating about the Court of Appeals' reasoning, but this appears to be the only possible basis for the conclusion, unless the Court of Appeals simply overlooked the Record on Appeal materials discussed above.

> 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 Petitioners' arguments on appeal.

Second, even if the ruling had been limited to the individual doctors, it would make no practical difference for purposes of this analysis. Trident and PPC are the practices for which the two doctors worked, and the Petitioners are only defendants in this action because of the alleged malpractice of their employee doctors. Any liability the Petitioners might have in this case would be solely vicarious in nature. Thus, the Petitioners and the two doctors are linked together not only for purposes of Eades' liability claims, but also for purposes of defenses asserted against those claims. In other words, just as the Petitioners share the doctors' potential liability under the doctrine of *respondeat superior*, the Petitioners 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 Petitioners 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 only to the doctors, the decision to dismiss the Notice of Intent as to the doctors would necessarily extend to the Petitioners as well. Dismissing the Notice of Intent as to the doctors on a substantive legal ground automatically dismissed it as to the Petitioners under the rules governing vicarious liability.[5] Thus, the trial court's decision on this issue applied to the Petitioners regardless of what language the court used in the heading to that section of its Order.

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 expert affidavit under the governing statute. The trial court correctly concluded that Eades' 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 Trident and PPC provide medical services. If Eades' expert was not qualified to offer opinions as to the doctors under the controlling statute, he was equally unqualified to do so as to Trident and PPC. 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 Petitioners, the Court of Appeals could (and should) have addressed 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

---

[5] 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.

(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 were satisfied in this case, and the Court of Appeals erred by failing to address this critical and substantive issue.

There can be no question that Trident and PPC argued to the trial court that the expert affidavit was insufficient as to them under the controlling statute. The Record on Appeal further demonstrates beyond any doubt that the trial court ruled on that argument and used it as an additional ground for dismissing the Notice of Intent as to Trident and PPC. Therefore, the Court of Appeals erred in concluding the issue was not preserved for appellate review, and this Court should grant the petition for a writ of certiorari.

II. The Court of Appeals erred in failing to affirm dismissal for Trident and PPC because the trial correctly dismissed the Notice of Intent based on a finding that the expert affidavit was substantively defective.

The trial court concluded that the 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 the Court of Appeals erred in failing to affirm on that basis. Accordingly, this Court should grant the current petition and review the Court of Appeals' decision.

As a threshold matter, Eades did not actually appeal the trial court's ruling regarding the dismissal of Drs. Campbell and Wallen. Neither the Amended Notice of Appeal nor the caption of Eades' Appellants' Brief listed Dr. Campbell or Dr. Wallen as respondents. The Appellants' Brief suggested this omission was due to the fact that Eades never served Drs. Campbell and

Wallen with the Notice of Intent. In other words, Eades appeared 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 this 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 (i.e. Trident and PPC). Eades did not file a Rule 59(e) motion seeking to correct or challenge that decision. As a result, the trial court's ruling on this issue in favor of Drs. Campbell and Wallen remains in place and has become the law of the case. *See First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

This is significant because what is the law of the case as to the individual doctors is also the law of the case to Trident and PPC (i.e. the doctors' employers). As discussed above, Eades' failure to appeal the ruling as to the doctors prevents Eades from challenging the dismissal in favor of their practices. *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).[6]

For this reason, contrary to footnote 1 in the Court's opinion, it is Eades, not the Petitioners, who have not properly preserved or presented an argument on this issue. Indeed, that problem dooms any appellate challenge Eades might have had to the trial court's dismissal of Trident and PPC. This, in turn, requires affirmance of the trial court's ruling on this issue in the Petitioners' 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 Eades' argument on this issue in the Court of Appeals reveals no citation to legal authority. Eades' assertions are conclusory at best, 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 Eades had actually appealed the trial court's ruling on this issue, and had not abandoned that issue, his arguments would still fail. Eades focuses on Dr. Skudder's qualifications and experience in dealing with conditions similar to those that Eades suffered.

---

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

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 that 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 Eades experienced. He then proceeds to describe why he believes the treatment Eades received violated the applicable 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.[7]

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

---

[7] 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 in order to be qualified to offer an expert opinion as to that defendant. 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.

The statute says an expert must have "professional knowledge and experience in the area in which the opinion on the standard of care is offered." While this language does not directly say anything about the expert being the same area of practice as the targeted defendant, that requirement is necessarily implied. Otherwise, an obstetrician could testify as to the standard of care applicable to a neurosurgeon, or vice versa.

The meaning of §15-36-100(B) is straightforward. Section 15-36-100(B) is plainly designed to eliminate the use of such "catch all" experts in professional negligence cases. In order to give an acceptable opinion as to applicable standard of care in a specific area of practice, the proposed expert must have "professional knowledge and experience" in that same practice area or specialty. Interpreting the statute any other way would strip it of any real meaning in this context.

None of this is to say that Dr. Skudder is unqualified (under the statute or otherwise) to give an expert opinion as to practitioners within his own area of expertise (*i.e.* vascular surgery). The Petitioners 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 (Trident and PPC) for purposes of compliance with the affidavit requirements of §15-36-100. The trial court's conclusion to that effect was correct, and the Court of Appeals erred in failing to affirm the dismissal of the Notice Intent on that basis as to Trident and PPC.

In addition, the trial court's conclusion should apply with equal force to Trident and PPC. 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 expert affidavit was insufficient as to those doctors, it was also insufficient as to their employers. Indeed, Eades acknowledged this connection when he stated in his 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 were not listed as respondents in this appeal, the Court of Appeals should have affirmed on this issue in favor of PPC and Trident. Both PPC and Trident are entitled to that relief under the applicable law, and the Court of Appeals erred in failing to grant it.

CONCLUSION

The opinion of the Court of Appeals contains a clear and undeniable error. Despite the Court of Appeals' ruling that the issue was not preserved, the Petitioners asserted a defense based on the insufficiency of the expert affidavit in the trial court, and the court dismissed the Notice of Intent as to the Petitioners on that basis. The Record on Appeal demonstrates beyond any doubt that this issue was raised and ruled upon in the trial court. Therefore, the Court of Appeals erred in refusing to address this issue.

In addition, the Court of Appeals erred in failing to affirm the result below (i.e. dismissal of the Notice of Intent) as to the Petitioners because the expert affidavit did not meet the substantive requirements of S.C. Code §15-36-100(B) with regard to the Petitioners. Again, the basis for the dismissal on that ground plainly appears in the Record on Appeal, and the Court of Appeals should have addressed it. Furthermore, Eades failed to appeal the dismissal of the

Notice of Intent as to the Petitioners' employee doctors based on this ground, and those dismissals, which are now the law of the case, also apply to the Petitioners as a matter of law.

For all of these reasons, this Court should grant the petition, issue a writ of certiorari, and review the Court of Appeals' decision,

Respectfully submitted,

R. Hawthorne Barrett

Thomas C. Salane
R. Hawthorne Barrett
Turner Padget 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
Charleston, SC 29402
(843) 577-4000

Attorneys for Respondent Trident Emergency Physicians, LLC

CERTIFICATION

Pursuant to Rule 242(d)(1), SCACR, the undersigned counsel for the Petitioners certifies that the Petitioners filed a timely Petition for Rehearing in the South Carolina Court of Appeals, which was finally denied in an Order filed on August 20, 2015.

R. Hawthorne Barrett
Thomas C. Salane
R. Hawthorne Barrett
Turner Padget 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
Charleston, SC 29402
(843) 577-4000

Attorneys for Respondent Trident Emergency Physicians, LLC

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,.....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 Cardiovascular & Thoracic, PA; and Trident Emergency Physicians, LLC, are.....Petitioners.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Petitioners Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC, certifies that on this **18th day of September, 2015**, copies of the **Petition for Writ of Certiorari** have been served via United States mail upon counsel for the Respondents 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; Andrew F. Lindemann, Esq., Davidson & Lindemann, PA, P.O. Box 8568, Columbia, SC 29202; Darren Sanders, Esq., Buyck & Sanders Law Firm, LLC, P.O. Box 2424, Mt. Pleasant,

SC 29465-2424; Hutson Davis, Esq. and Jason Ward, Esq., Johnson David Ward, PA, 10 Pinckney Colony Road, Victoria Building, Suite 200, Bluffton, SC 29909.

R. Hawthorne Barrett

Thomas C. Salane
R. Hawthorne Barrett
Turner Padget 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

September 18, 2015