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S.C. Supreme Court

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Respondents Palmetto Primary Care Physicians, LLC ("PPC") and Trident Emergency Physicians, LLC ("Trident") respectfully submit this Reply in support of their Petition for Writ of Certiorari.

ARGUMENT

Trident and PPC make the following arguments in response to the Respondents' Return to Petition for Writ of Certiorari.

1. The Respondents 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 trial court considered, and accepted, the insufficiency of the affidavit as a separate and additional ground for dismissing the NOI as to Trident and PPC and their respective employee doctors.

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

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 Writ of Certiorari, that ground for dismissal applied with equal force to Trident and PPC (the doctors' employers) as a matter of law. Therefore, even if the Respondents could otherwise claim that the trial court's ruling on this issue did not expressly apply to Trident and PPC, 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, PPC and the employee doctors based on the insufficiency of the expert affidavit. Therefore, this issue was

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

[2] The Respondents have argued only that there is no "evidence" connecting the individual doctors to Trident and/or PPC. Yet, it was the Respondents who first attempted to sue those doctors and, through them, Trident and PPC. Given this fact, the Respondents cannot credibly argue that no basis exists in the record for determining that those doctors were agents of their practices.

not only raised, but also ruled upon in the trial court, and it is preserved for appellate review. The Court of Appeals' conclusion to the contrary was plainly erroneous.

3. The Respondents suggest Trident and PPC could have filed a motion pursuant to Rule 59(e), SCRCP, to seek a specific statement in the Order that the ruling on the insufficiency of the expert affidavit also applied to Trident and PPC. The Respondents further argue Trident and PPC could have included such a direct statement in their proposed order to the trial court. This assertion misses the crucial point: neither thing was necessary. As discussed above, there was no reasonable doubt as to which defendants had sought and obtained the ruling on this issue. Trident and PPC included this issue in their joint 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 PPC could read the Order as granting relief on this ground to its employee doctors, who were the only reasons for Trident and PPC being named as parties. That ruling extended to Trident and PPC 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 PPC 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 PPC. The Respondents are now attempting to manufacture doubt on this issue, but the Court should give no credit to that effort.

4. The Respondents 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 Respondents fault Trident and PPC for not submitting affidavits, depositions or other documents, but they do not even hint at, let alone discuss, what information such additional materials should, or 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 Respondents' assertion on this issue must fail.

5. The Respondents argue that 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:
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> (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 PPC 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 Respondents' Return has not demonstrated otherwise.

The Respondents also argue that Trident and PPC "seek to unduly restrict the term 'area of practice' in the statute ... [by] seek[ing] to equate 'area of practice' and 'specialty.'" [Return, pp. 6-7.] 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 Respondents do not acknowledge or address this point in the Return. They also fail to offer any other explanation as to why the legislature would have used those terms in conjunction with one another.

Second, the Respondents are necessarily argument for a definition of "area of practice or specialty"[3] that is so broad as to render it meaningless. If **any** physician can testify about **any** area of medicine (and this is the gist of the Respondents' position), then the definition of "expert

[3] This phrase appears multiple times in S.C. Code 15-36-100.

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).

The Respondents also claim that because Dr. Skudder has experience treating the specific kind of medical problem from which Johnny Eades suffered, he is qualified to give an affidavit in this case. The problem with this assertion is that it assumes, erroneously, that a single standard of care exists for **all** doctors who encounter a patient with that specific condition, regardless of the setting or circumstances in which a given doctor saw the patient. Here, for example, the Respondents' position presupposes the same standard of care for an ER physician as for a specialist who routinely treats that kind of condition. No such "global" standard of care exists, and while Dr. Skudder might be qualified to give an opinion on the standard of care within his area of specialty, he is not qualified under the statute to give such an opinion for unrelated specialties such as emergency care and primary care.

6. The Respondents further point to Dr. Skudder's training and experience as indications that he is qualified to serve as an expert under the statute. Those efforts must fail, however, because they miss the statute's point. The proper statutory inquiry is not whether Dr. Skudder is a "knowledgeable" or "well trained" physician. For present purposes, the Court can assume that he is both. The proper question, however, is whether Dr. Skudder has training, knowledge and experience in certain **specific** areas of medical practice – i.e. emergency care and primary care. Nothing in Dr. Skudder's affidavit demonstrates that he meets that standard.

Again, while Dr. Skudder's affidavit might show that he is qualified to opine on the standard of care for some of the defendants, he is **not** qualified to offer any such testimony regarding Trident, PPC, or their respective employee doctors.

Essentially, the Respondents are asking this Court to interpret the statute as creating an "all or nothing" standard. Under that interpretation of the statute, a professional would either be qualified to opine as to **all** other members of his or her profession, or be unqualified to opine as to **any** other professionals. This would reduce the analysis to one simple question: does the proposed expert have a professional degree and a valid license to practice? As discussed above, making the inquiry that simplistic would render S.C. Code §15-36-100(A) entirely meaningless. There would be no need to list the criteria for qualifying as an expert in a statute if a degree and a license were the only real requirements.

The General Assembly could have created or adopted such an "all or nothing" approach to experts. Had that been the legislature's intention, the resulting statute would have been much shorter and more basic. But the legislature did not enact that type of watered down statute. Instead, the General Assembly passed §15-36-100(A) as it currently exists, and this statute places a heavier burden on a proposed expert than just showing that he or she has a professional degree and a license to practice. Therefore, if it reaches this issue, the Court should reject the Respondents' interpretation of the governing statute.

7. Finally, the Respondents claim that recent decisions by this 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 the statute to establish qualifications beyond merely holding a professional degree and a license for an

expert who submits a pre-suit affidavit. A plain reading of the statute makes that intention abundantly clear. In such situations, courts are bound to honor the plainly stated meaning, and no statutory construction is required or proper. *See Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

Ignoring that intent, as the Respondents are asking the Court to do, would not be liberally interpreting the statute. Rather, it would be **rewriting** the statute so as to delete almost all of the definitional elements of "expert witness." Even if one assumes, for the sake of this argument, that the Court generally disapproves of the requirements as stated in § 15-36-100(A), such a judicial revision of the statute would be improper. As this Court has stated in another context, "although we are troubled by this result, we are not at liberty to rewrite the statute, and any amendment must come from the Legislature." *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 143, 628 S.E.2d 38, 42 (2006).

Trident and PPC base their interpretation of § 15-36-100(A) on the intention of the General Assembly as revealed by the statute's plain language. Stated another way, Trident and PPC are simply asking this Court to affirm the trial court's decision to apply the statute **as written**. The Respondents, on the other hand, ask this Court to usurp the role of the legislature and change the statute to create a much lower threshold for a person to qualify as an "expert witness." The Court must decline that invitation. Instead, the Court should grant the current petition, reverse the Court of Appeals, and reinstate the order of dismissal as to Trident and PPC.

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 PPC based on the ground that was not addressed in the Court of Appeals' opinion.

Respectfully submitted,

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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 **27th day of October, 2015**, copies of the **Reply in Support of 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,

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