

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

NOV 04 2015

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2015-002062

Dr. Cynthia Holmes, M.D.

Petitioner,

v.

East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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This case has already been appealed to and affirmed by this Honorable Court. See **Appellate Case No.'s 2011-198092 and 2012-209666 and Appendix at No. 4, Ex. 6 to Respondent's Memorandum of Law in Support of Motion to Dismiss, SC Supreme Court Order March 26, 2014, and June 13, 2014, Remittitur.** The Petition herein stems from a procedurally improper and redundant notice of appeal seeking adjudication of matters already finally determined and rendered moot. In addition, none of the issues presented in the Petition meet the standard for review required of South Carolina Appellate Court Rule 242. For these reasons Petitioner's Writ of Certiorari should be denied.

STATEMENT OF THE CASE

As this Honorable Court is well aware, Petitioner is a medical doctor and attorney who has, over the last 16 years, filed multiple lawsuits arising out of her applications for medical staff privileges at East Cooper Medical Center. Her litigation activities have resulted in a number of reprimands and sanctions judgments issued against her, including the suspension of her license to practice law in South Carolina (“SC”), and an order of the SC Supreme Court directing the clerks of court of this State to reject any filings by her unless signed by another attorney. **Appendix at No. 4, Ex. 1 to Respondent’s Memorandum of Law in Support of Motion to Dismiss, December 2, 2009 Order of SC Supreme Court; November 26, 2014 Order of Definite Suspension of SC Supreme Court.**

Her current Petition arises out of Civil Action Case No.: 2010-CP-10-3410 filed in the Charleston County Court of Common Pleas. As this Court’s file will reflect, this action, which also related to Petitioner’s application for medical staff privileges at East Cooper Medical Center, was appealed to and affirmed by this very Court last year. **Appendix at No. 4, Ex. 6 to Respondent’s Memorandum of Law in Support of Motion to Dismiss, SC Supreme Court Order March 26, 2014, and June 13, 2014, Remittitur.**

The underlying credentialing case was first initiated on April 26, 2010, by a Summons and Complaint. **Appendix at No. 4, Ex. 2 to Respondent’s Memorandum of Law in Support of Motion to Dismiss, Complaint.** In their Answer to the Complaint, Respondents counterclaimed for attorneys’ fees and costs, including counterclaims for violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. **Appendix at No. 4, Ex. 7 and 8 to Respondent’s Memorandum of Law in Support of Motion to**

Dismiss. On July 29, 2011, the Honorable Kristi Lea Harrington granted summary judgment to Respondents.

On January 27, 2012, Judge Harrington issued an order levying sanctions against Petitioner pursuant to the SC Frivolous Proceedings Act and awarding the costs and attorneys' fees Respondents' had originally sought in their counterclaims. **Appendix at No. 4, Ex. 3 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Summary Judgment Order and Ex. 4, Order Awarding Sanctions.**

Thereafter, Petitioner appealed both the summary judgment order and the sanctions order to the SC Court of Appeals. **Appendix at No. 4, Ex. 5 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Petitioner's Notices of Appeal.** The appeals were assigned Appellate Case Numbers 2011-198092 and 2012-209666, were consolidated, and then certified to the SC Supreme Court. Both orders were affirmed by the Supreme Court and on June 13, 2014, remittitur was issued. **Appendix at No. 4, Ex. 6 to Respondent's Memorandum of Law in Support of Motion to Dismiss, SC Supreme Court Order March 26, 2014, and June 13, 2014, Remittitur.**

As demonstrated by the above, this same case has already been fully and finally adjudicated by the trial and appellate courts of this State.

Despite this, on July 7, 2014, Petitioner filed a post-remittitur motion in the trial court seeking to withdraw a motion to dismiss Respondents' counterclaims that Petitioner had filed before entry of summary judgment and the aforementioned appellate process. **Appendix at No. 4, Ex. 7 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Plaintiff's Motion to Withdraw Plaintiff's Motion to Dismiss Defendant's Counterclaims.** This motion was heard on October 27, 2014, by The Honorable Markley

Dennis, Jr. Judge Dennis ruled that the case, including Respondents' counterclaims, had been fully adjudicated by way of Judge Harrington's previous orders and the appeal and affirmation of same. **Appendix at No. 4, Ex. 8 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Transcript of October 27, 2014 hearing.** He further ruled that because there were no remaining issues to be adjudicated in the case Petitioner's motion was moot and not viable, stating "there's no motion to dismiss because there's nothing to dismiss." **Id. at page 5.** On October 29, 2014, Judge Dennis signed a Form 4 order stating "Plaintiff's Motion to Withdraw the Motion to Dismiss, filed on 7/07/2014, is not a viable motion; No viable motions pending in this resolved case." **Appendix at No. 4, Ex. 9 to Respondent's Memorandum of Law in Support of Motion to Dismiss, October 29, 2014 Form 4 Order.** This order was filed on November 3, 2014.

Petitioner then attempted a *pro se* Rule 59(e) motion in the trial court seeking reconsideration of Judge Dennis's October 29, 2014 order. **Appendix at No. 4, Ex. 12 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Pro Se Notice of Motion and Rule 59(e) SCRCF Motion.** The motion, dated November 15, 2014, was not signed by Petitioner's attorney of record, Chalmers C. Johnson, Esq., or any other attorney. **Id.** On December 3, 2014, Judge Dennis issued another Form 4 order rejecting Petitioner's *pro se* motion, reiterating that the case was "closed" and that the *pro se* motion was "improper...in accordance with the Supreme Court's order dated 12/2/09" requiring clerks of court to reject any filings attempted by Petitioner regarding her medical staff privileges unless signed by another attorney. **Appendix at No. 4, Ex. 13 to Respondent's Memorandum of Law in Support of Motion to Dismiss, December 3, 2014 Form 4 Order.** This order was filed December 9, 2014.

On December 3, 2014, Petitioner attempted to file in the Court of Appeals a *pro se* notice of appeal of Judge Dennis' October 29, 2014 order. **Appendix at No. 4, Ex. 10 to Respondent's Memorandum of Law in Support of Motion to Dismiss, December 3, 2014, Pro Se Notice of Appeal.** Again, the notice was not signed by Mr. Johnson or any other attorney. Petitioner's *pro se* notice was rejected by The Honorable Jenny A. Kitchings pursuant to the aforementioned 2009 order of the SC Supreme Court. **Appendix at No. 4, Ex. 11 to Respondent's Memorandum of Law in Support of Motion to Dismiss, January 21, 2015 letter of Kitchings.**

On January 20, 2015, Petitioner served Respondents with yet another *pro se* notice of appeal, this one purporting to appeal the December 3, 2014, order of Judge Dennis rejecting her *pro se* motion for reconsideration. **Appendix at No. 4, Ex. 14 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Pro Se Notice of Appeal dated January 14, 2015.** Again, the notice was not signed or co-signed by another attorney and the undersigned is informed and believes this particular notice was never filed with the Court of Appeals. **Appendix at No. 4, Ex. 15 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.**

On February 5, 2015, Respondents received copies of two letters sent to Charles Goldberg, Esq., from Court of Appeals Deputy Clerk V. Claire Allen. **Appendix at No. 4, Ex. 16 to Respondent's Memorandum of Law in Support of Motion to Dismiss, February 3, 2015, letters of Allen.** The letters indicated Mr. Goldberg had filed a notice of appeal on behalf of Petitioner purporting to appeal both of the aforementioned orders of Judge Dennis. **Id.** The correspondences also indicated that a request for the transcript had

been filed. **Id.** Ms. Allen's letters set forth a number of deficiencies in the filings, including that the notice of appeal did not indicate when notice of the entry of judgment was received and that the transcript request was not signed and did not indicate service on opposing counsel. **Id.** Respondents were not served with Mr. Goldberg's notice. Once made aware of it, the undersigned obtained copies of the notice and the accompanying documents from the Court of Appeals' online filing system. **Appendix at No. 4, Ex. 15 to Respondent's Memorandum of Law in Support of Motion to Dismiss, Affidavit of Smith-Yancey.** This particular notice was received by the Court of Appeals January 30, 2015, and it is this notice that gives rise to the redundant appellate process herein, generating the Court of Appeals' assignment of Appellate Case No. 2015-000187 for this redundant appeal.

On February 11, 2015, Petitioner made more *pro se* filings with the Court of Appeals, these purportedly to address the deficiencies set forth by Ms. Allen. While the filings appear to have been transmitted to the Court of Appeals via facsimile from Mr. Goldberg's office, the filings were signed by Petitioner and not Mr. Goldberg. The first filing was an amended transcript request. The amended request was revised to reflect a signature, but the signature was that of Petitioner, not Mr. Goldberg. The transcript request remained undated. The second filing was an affidavit of Petitioner purporting to address when notice of entry of the orders on appeal were received, stating that notice was received "on or after December 15, 2014" and failing to identify a finite date in this regard. Further, the affidavit failed to specify to which order on appeal the "on or after" date of notice applied. It is assumed that said language applied to notice of entry of the December 3, 2014 order of Judge Dennis. There was no statement indicating when entry of the November 3, 2014 order, also on appeal, was received.

On February 12, 2015, Mr. Goldberg filed a notice of substitution of counsel purporting to substitute Mr. Johnson, Petitioner's actual attorney of record who had never previously moved to withdraw. The accompanying consent signature page signed by Petitioner and Messrs. Johnson and Goldberg was not dated. On February 26, 2015, the Court of Appeals issued an order allowing Mr. Goldberg to withdraw. **Exhibit A, February 26, 2015, Order of Court of Appeals.**

On March 6, 2015, Respondents filed a Motion to Dismiss Petitioner's redundant appeal. **Appendix at No. 4, Respondents' Motion to Dismiss Appeal.** On May 8, 2015, the Court of Appeals granted Respondents' Motion to Dismiss finding Petitioner's appeal to be moot and seeking adjudication of a controversy for which no specific relief existed. **Appendix at No. 2.** Said order was issued for the Court of Appeals by The Honorable Jasper M. Cureton. **Id.**

On May 26, 2015, Petitioner filed an amended notice of appeal purporting to appeal the same trial court orders of Judge Dennis referenced in her various previous notices of appeal. The amended notice of appeal was signed by Mr. Johnson and contained no new information or explanation for the amendment. **Appendix at No. 3.**

Also on May 26, 2015, Petitioner filed a "Rule 240(j) Motion" seeking review of the May 8, 2015 order dismissing her appeal. Rule 240(j) of the SC Appellate Court Rules (SCACR) specifically states "[a]ny review of an order issued by an individual judge or justice shall be by petition for rehearing." **Rule 240(j) SCACR.** Petitions for rehearing are governed by Rule 221 stating in pertinent part that petitions for rehearing "shall be in accordance with Rule 240, and shall state with particularity the points supposed to have overlooked or misapprehended by the court." **Rule 221 SCACR.** In her "Rule 240(j)

Motion” Petitioner argued, *inter alia*, that the Court of Appeals misapprehended a number of points, including the nature of the trial court’s dismissal of the case, the effect of the remittitur, the Court’s reliance on the December 2, 2009, Order of the Supreme Court concerning Petitioner, and whether a remedy existed for Petitioner. **Appendix at No. 10.**

On July 24, 2015, Respondents filed a Return to Petitioner’s request for rehearing, setting forth a number of arguments on the impropriety of rehearing, said arguments being specifically included and incorporated by reference herein as additional grounds for the denial of the instant Petition. **Appendix at No. 11.** On September 2, 2015, the Court of Appeals issued an order denying Petitioner’s request for rehearing reiterating the standard required by reference in Rule 240(j) that “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.” **Appendix at No. 1.** Justice Cureton was among the Justices who signed this order. **Id.**

On September 17, 2015, Petitioner filed “Appellant’s Petition for Rehearing” in the Court of Appeals, seeking rehearing of the September 2, 2015 order. Petitioner appears to have omitted this document in her Appendix. On September 21, 2015, The Honorable Jenny Abbott Kitchings sent written notice to Petitioner as follows:

“We received your second petition for rehearing received September 17, 2015 in the above referenced appeal. Your petition for rehearing was denied on September 2, 2015. Accordingly, no further action will be taken on your second petition pursuant to Rule 221(c), SCACR.”

Appendix at No. 13. Petitioner’s instant Petition for a Writ of Certiorari to the Supreme Court followed.

In her petition, Petitioner argues that Justice Cureton should not have been among the Justices reviewing her first request for rehearing, that the Court of Appeals applied the wrong legal standard in ruling on her “Rule 240(j) Motion,” and that public policy prohibits final determination of an appeal by a single justice. **See Petitioner’s Petition for a Writ of Certiorari.** As shown fully below, the Petition herein is without merit and should not be granted.

ARGUMENT

I. CERTIORARI IS NOT APPROPRIATE UNDER THE STANDARDS OF SC APPELLATE COURT RULE 242.

Rule 242 clearly states that a writ of certiorari “will be granted only where there are special and important reasons.” **See Rule 242, SCACR.** This case presents neither special nor important circumstances justifying the requested review by the Supreme Court. In fact, none of the reasons set forth in Rule 242 is present in this case:

1. There are no novel questions of law;
2. There was no dissent in the decision of the Court of Appeals;
3. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court;
4. No constitutional issues are involved – directly or otherwise; and
5. No federal question was addressed by the Court of Appeals.

A review of the Petition for Writ of Certiorari herein confirms certiorari is not appropriate. Indeed, none of enumerated reasons for certiorari are even argued by Petitioner. At best, the Petition merely hints at the remote involvement of constitutional issues of due process without ever satisfying the requirements of Rule 242.

Should this Court nonetheless decide to review the three issues argued by the Petitioner, there is no showing that the panel review of the subject order was improper, that the Court of Appeals failed to apply the proper legal standard of review to Petitioner's "Rule 240(j)" motion, or that public policy was violated in this case. Further, and as elucidated by the Court of Appeals, Petitioner seeks adjudication of claims already finally determined and rendered moot. For these additional reasons certiorari should be denied.

II. THE COURT OF APPEALS' PANEL REVIEW OF THE ORDER OF DISMISSAL WAS APPROPRIATE

Petitioner argues that because Judge Cureton authored the May 8, 2015, order dismissing her appeal, he should not have been included in the panel reviewing said order pursuant to Petitioner's request for rehearing. She provides no evidence to question Justice Cureton's impartiality or capacity to provide the requisite review. In addition, she states no legal or statutory authority which would preclude his participation in the panel review. Rather, in a failed attempt to support her argument, Petitioner cites a series of cases and statutes inapplicable and distinguishable from the circumstances herein. For instance, in *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) cited by Petitioner, the United States Court of Appeals for the Seventh Circuit specifically distinguished the propriety of a judge being asked to reconsider a former decision he/she made, verses a judge participating in an appeal of his own case. *Id.* at 948. Likewise, 28 USC Section 47 precludes a judge from hearing an *appeal* of a case or decision tried by him or her. (Emphasis added). Here, Justice Cureton was not the trial judge. He was not involved in the appeal of a decision made as a trial judge but, instead, was only participating in the reconsideration of a former decision he'd made. Indeed, in the trial court it is standard practice, if not required, that the same judge rendering

or presiding over a final decision be required to hear motions to reconsider, alter, amend or be relieved from said decision pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure.

Because Justice Cureton was reconsidering a prior decision, rather than participating in the appeal of an underlying decision or case made as a trial judge, his participation in the panel review herein was appropriate.

III. THE COURT OF APPEALS APPLIED THE PROPER LEGAL STANDARD WHEN CONSIDERING PETITIONER'S RULE 240(j) MOTION.

SCACR Rule 240(j) states “[a]ny review of an order issued by an individual judge or justice *shall be by petition for rehearing.*” **Rule 240(j) SCACR.** Petitions for rehearing are governed by Rule 221 stating in pertinent part that petitions for rehearing “shall be in accordance with Rule 240, and shall state with particularity the points supposed to have overlooked or misapprehended by the court.” **Rule 221 SCACR.**

A plain reading of Petitioner's Rule 240(j) Motion shows that she was indeed seeking reconsideration under the standard set forth in Rule 221. In her motion Petitioner argued that the Court of Appeals misapprehended a number of points, including the nature of the trial court's dismissal of the case, the effect of the remittitur, the Court's reliance on the December 2, 2009, Order of the Supreme Court concerning Petitioner, and whether a remedy existed for Petitioner. **Appendix at No. 10.** Regardless of how she titled her request, Petitioner sought reconsideration of and argued a number of alleged “misapprehensions” by the Court of Appeals. In addition, the Court of Appeals appropriately considered and ruled on her motion as a petition for rehearing, which it was specifically bound to do by Rules 240(j) and 221 of the SCACR. As such, the Court of Appeals was correct in rejecting the

subsequent filing attempted by Petitioner on September 27, 2015, as a second petition for rehearing.

IV. THE COURT OF APPEALS' ACTIONS IN THIS CASE DID NOT VIOLATE PUBLIC POLICY

In Issue III of the Petition, Petitioner revisits the same arguments contained in Issues I and II arguing alleged lack of notice of the grounds on which her appeal was dismissed, alleged lack of a sufficient Record on Appeal, and alleged application of an improper legal standard, arguing that all are violative of public policy. This argument also lacks merit. As fully explained below, the dismissal of Petitioner's appeal was based on filings, evidence, and information in the record of which Petitioner was aware and had notice. Further, as indicated in the preceding Section II of this Return, the Court of Appeals used the proper standard for review. As such, the actions of the Court of Appeals cannot be in violation of public policy.

V. THE COURT OF APPEALS' UNDERLYING DISMISSAL OF PETITIONER'S NOTICE OF APPEAL WAS PROPER

A. THE DISMISSAL WAS BASED ON AND SUPPORTED BY EVIDENCE IN THE RECORD OF WHICH APPELLANT WAS AWARE AND HAD NOTICE

Petitioner argues she did not have adequate notice of the grounds on which the Court of Appeals dismissed her notice of appeal, and that there was an insufficient Record on Appeal for a final determination of her appeal. **See Petition for a Writ of Certiorari at pp. 2-7.** This is not the case. As fully set forth in Respondent's Return to Petition for Rehearing, the Court of Appeals' dismissal was supported by findings of facts, filings and evidence in

the record of which Petitioner was aware and had notice. **Appendix at No. 11, pp. 2-4.** Further, Petitioner was on notice of the relief requested by Respondents in their Motion to Dismiss (i.e. dismissal of her appeal). **Id.** Respondents specifically include and incorporate by reference their arguments on this issue contained in their Return to Petition for Rehearing. **Id.**

B. ALL ISSUES IN THIS CASE HAVE BEEN FINALLY
ADJUDICATED AND RENDERED MOOT

Petitioner argues Respondent's counterclaims were never finally adjudicated and that she is entitled to a jury trial on same. Again, this is not the case. As fully set forth above, and is supported by the record herein, Respondents' counterclaims were adjudicated and rendered moot by way of the trial court's orders of summary judgement and for sanctions, the latter of which granted the very same relief sought by Respondents in their counterclaims. **Appendix at No. 11, pp. 6-7.** For this reason, the Court of Appeals dismissed Petitioner's redundant notice of appeal on the principles of mootness. **Appendix at No. 2.** Citing *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The court does not concern itself with moot or speculative questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. A case becomes moot when judgment, if rendered, will have not practical legal effect upon the existing controversy") the Court of Appeals stated "[h]ere, because summary judgment has been granted, affirmed on appeal, and the remittitur sent down, there is no longer an existing controversy."

As fully discussed in Respondent's Return to Petition for Rehearing, Appellant has cited no legal or statutory authority supporting her argument that she is entitled to a jury trial

on claims that have been adjudicated, rendered moot and affirmed on appeal. **Appendix at No. 11, pp. 10-11.** As stated therein “the notion that a party has the right to a jury trial of claims adversarial to them which the filing party has abandoned for another mechanism of remedy is without legal authority, precedent, or reason.” **Id. at p. 11.** Respondents specifically include and incorporate by reference their arguments on this issue contained in their Return to Petition for Rehearing. **Appendix at No. 11.**

C. PETITIONER’S NOTICE OF APPEAL WAS UNTIMELY, PROCEDURALLY DEFECTIVE, AND IN VIOLATION OF THE DECEMBER 2, 2009, ORDER OF THE SUPREME COURT

As also fully set forth in the preceding Statement of the Case, Respondents’ Motion to Dismiss Appeal, and Reply to Appellant’s Response to Respondents’ Motion to Dismiss, Petitioner’s notice of appeal was procedurally defective and in violation of the December 2, 2009, order of the SC Supreme Court in a number of respects as follows:

1. Petitioner’s notice of appeal of Judge Dennis’ October 29, 2014, was untimely, being filed eighteen days beyond the thirty day deadline of receipt of notice of the order; **Appendix at No. 4, pp. 7-8;**
2. Petitioner’s notice of appeal of Judge Dennis’ December 3, 2014, was improper because it was not signed by another attorney in violation of the December 2, 2009, order of the Supreme Court; **Appendix at No. 4, pp. 8-9;**

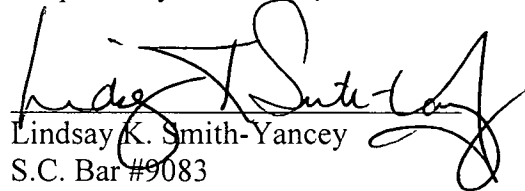
3. The required filings attendant to Petitioner's notice of appeal are not signed by another attorney in violation of the December 2, 2009, Order of the Supreme Court; **Appendix at No. 4, p. 9;**
4. The notice of appeal giving rise to this Petition was not properly served on Respondents; **Appendix at No. 4, p. 10;**
5. Petitioner failed to adequately cure deficiencies in the notice of appeal as requested by the Court of Appeals; **Appendix at No. 4, p. 10-11;**
6. The notice of appeal giving rise to this Petition was not signed by Petitioner's attorney of record; **Appendix at No. 4, p. 11-12;**
7. Petitioner's appeal is the product of hybrid legal representation not recognized in South Carolina; **Appendix at No. 4, p. 12-14;**
8. Petitioner's *pro se* motion to reconsider filed in the trial court did not stay the deadlines for filing and serving her notice of appeal; **Appendix at No. 9, p. 1-3;** and
9. Petitioner's notice of appeal filed by Mr. Goldberg was also untimely filed; **Appendix at No. 9, p. 3-6.**

Respondents specifically include and incorporate by reference their arguments on all these procedural defects and improprieties outlined in Motion to Dismiss Appeal, and Reply to Appellant's Response to Respondents' Motion to Dismiss. **Appendix at No. 4 and 9.**

CONCLUSION

As shown fully above, the Petition fails to set forth the criteria for review as required by SCACR Rule 242, and the Court of Appeals' consideration and dismissal of the notice of appeal was at all times proper. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,



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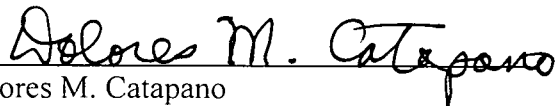
East Cooper Community Hospital, Inc.
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Respondents.

PROOF OF SERVICE

I, Dolores Catapano, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 2nd day of November, 2015, a copy of *Respondents' Return to Petition for Writ of Certiorari* on counsel of record for Petitioner Dr. Cynthia Holmes, M.D., by placing the same in the United States mail, first-class postage pre-paid, to:

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Port Orchard, Washington 98366
Attorney for Petitioner


Dolores M. Catapano

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