

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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AUG 08 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Kristi Lea Harrington, Circuit Court Judge

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AUG - 8 2016

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

SC SUPREME COURT

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.

PETITIONERS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Court of Appeals err in concluding the Petitioners' second argument on appeal was not preserved for review and not addressing it on the merits where (a) the Record on Appeal plainly demonstrates that issue was properly raised and ruled upon in the lower court, and (b), in any event, the Petitioners were respondents in the Court of Appeals and, therefore, free to argue for affirmance on any ground appearing in the record—and, at that, in light of the Court of Appeals' reversal of the lower court on the first issue on appeal, this second argument was a distinct point necessary to the decision of the appeal as to the Petitioners?

II. Did the Court of Appeals err in failing to affirm the dismissal as to the Petitioners based on the trial court's independent and alternative ruling that, as to the Petitioners, the Respondents' statutorily required pre-medical-malpractice-lawsuit expert affidavit was substantively insufficient where (a) the Respondents did not carry their burden to preserve and present argument to undermine the ruling on appeal, and (b), regardless, the ruling is correct on the merits?

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 (Palmetto Primary Care Physicians, LLC and Trident Emergency Physicians, LLC). 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, specifically the fact that the physician giving the affidavit did not demonstrate experience or qualifications in the fields of primary care or emergency care.

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 ("Palmetto") and Trident Emergency Physicians, LLC ("Trident") were two of the defendants listed in the Notice of Intent to File Suit. Eades served Palmetto and Trident with copies of the Notice of Intent and related materials on December 12, 2012, nearly four months after the filing. Palmetto 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.

¹ The motion to dismiss was also filed on behalf of Dr. Patricia Campbell and Dr. Matthew Wallen, who were agents/employees of Palmetto and 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.]

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 that time, Judge Harrington concluded the "45 days" provision from §15-36-100 did not 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, however, as an independent and alternative basis to dismiss the Notice of Intent as to the Petitioners, Judge Harrington concluded the supporting affidavit did not satisfy the substantive requirements of §15-36-100 as to Palmetto and Trident. [R. p. 5 ("Although this Court finds the expert affidavit did not comply with the statutory contemporaneous filing requirement, an additional ground for dismissal was raised by Defendants. . . . This Court agrees that even if Plaintiffs' expert affidavit were timely filed, the affidavit is defective because it does not conform with the content requirements of section 15-36-100(A). Thus, the affidavit is insufficient to provide the requisite expert testimony to support the Notice of Intent to File Suit.") (emphasis added).] The heading of that section of the Order specifically referenced Dr. Patricia Campbell and Dr.

Matthew Wallen (who were employees of Palmetto and Trident, respectively),² but the text of the Order did not limit the finding to the individuals. The judge found 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, Palmetto 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 preserved for review. The Court of Appeals stated its conclusion on that point in a footnote without any substantive explanation.

Palmetto and Trident 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

² The alleged acts of malpractice by those doctors were the sole claimed basis for the liability claims asserted against Palmetto and Trident. There were no allegations of any other negligence by either practice.

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 failed to address.

insufficient as to those practices and their physicians.⁴ The rehearing petition included substantive arguments in support of the trial court's ruling, which Palmetto and Trident had set forth in their original Respondents' Brief. The Court of Appeals denied the rehearing petition without further comment in an Order filed on August 20, 2015. Palmetto and Trident then filed a timely petition in this Court for a writ of certiorari. The Court granted that petition in an Order dated June 16, 2016.

ARGUMENT

I. The Court of Appeals erred in concluding the issue of the insufficiency of the expert affidavit was not preserved for review because (a) the Record on Appeal plainly demonstrates the issue was raised and ruled upon in the trial court, and (b), in any event, the Petitioners were respondents in the Court of Appeals and, therefore, free to argue for affirmance on any ground appearing in the record—and, at that, in light of the Court of Appeals' reversal of the lower court on the first issue on appeal, this second argument was a distinct point necessary to the decision of the appeal as to the Petitioners.

The Court of Appeals concluded, in a footnote, that the trial court's second basis for dismissal as to Palmetto and Trident was not preserved for review. This conclusion was incorrect at the outset because Palmetto and Trident were not the appealing parties in the Court of Appeals; thus, Palmetto and Trident did not bear the burden of showing they had argued the issue below and obtained a ruling on it—Eades did. *See Watson v. Underwood*, 407 S.C. 443, 452, 756 S.E.2d 155, 160, n. 9 (Ct. App. 2014) (“[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt.” “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.”) (citations omitted); *McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order

⁴ Palmetto and Trident did not seek rehearing of the reversal of the first issue, which was based on this Court's decision in *Ranucci*. That issue is no longer part of this appeal.

comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); *cf. First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 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”). Consequently, the Court of Appeals not only improperly imposed this undue preservation burden on the Petitioners, but also improperly lifted off of Eades—effectively reversing the trial court’s ruling on this point notwithstanding its presumptive validity, which, as will be addressed below, was not even properly challenged by Eades. *See I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (“In contrast, different preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record.”).

Nevertheless, the record demonstrates beyond any doubt that this issue was raised and ruled upon in the trial court. For this reason, the Court of Appeals erred in this ruling and should be reversed. In their Respondents’ Brief to the Court of Appeals, Palmetto and Trident presented arguments in support of both rulings made by the trial court in its decision to dismiss the Notice of Intent as to the Petitioners. 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, Palmetto and Trident (together with their respective 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 because the proposed expert did not practice in the fields of primary care or emergency medicine. [R. p. 32.] Palmetto and Trident 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.] Significantly, 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 [Palmetto] 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, Palmetto and Trident raised the issue of the insufficiency of Dr. Skudder's affidavit to the trial court. The record does not allow any other conclusion.

There can also be no doubt that the trial court ruled on this 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 (emphasis added).] Through this language, the Order clearly set forth a ruling on this issue.

Even assuming, *arguendo*, the raised-to-and-ruled-upon preservation standard cited by the Court of Appeals was applicable to the Petitioners as respondents to the Eades' appeal, the Record on Appeal demonstrates that Palmetto and Trident argued the expert affidavit was insufficient under the controlling statute in the trial court. 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 Palmetto and Trident. Therefore, the Court of Appeals erred in concluding this issue was not preserved for review.

Although the Court of Appeals failed to explain its statement about the issue not being preserved, that conclusion might stem from a misapprehension of the relationship between the Palmetto and Trident and the defendants Drs. Campbell and Wallen. As discussed above, Palmetto, Trident 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 perhaps possible, however, that the Court of Appeals believed the trial court ruled on the

issue only as to the two doctors.⁵ 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. Granted, the section of the Order addressing 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 Palmetto and Trident and was not limited to the two doctors individually. In addition, the trial court’s actual language (as opposed to the heading) was sufficiently broad to cover Palmetto and Trident. 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,” especially when the practices had joined with the doctors in asserting this ground for dismissal. For this reason, the trial court’s ruling on the 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. Palmetto and Trident are the

⁵ Palmetto and Trident are 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.

medical practices for which the two doctors worked, and those practices are only defendants in this action because of the alleged malpractice of their employee doctors. Any liability Palmetto and Trident could have in this case as it is alleged would be solely vicarious in nature. Thus, the practices 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 practices share the respective doctors' potential liability under the doctrine of *respondeat superior*, the practices 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, Palmetto, Trident 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 as individuals. 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 them would necessarily extend to their practices as well.⁶ Dismissing the Notice of Intent as to the doctors on a substantive legal ground automatically dismissed it as to the practices under

⁶ Such a result arguably might not occur if a plaintiff had stated separate and additional allegations of negligence against the employer that were not based on the named employee's conduct. But in situations such as this case, where the only allegations against the employer were vicarious in nature, dismissal of the employee mandates dismissal of the employer as well.

the rules governing vicarious liability.⁷ Thus, the trial court's decision on this issue applied to Palmetto and Trident regardless of what language the court used as the heading for 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 the requisite professional knowledge and experience in the same area of medicine as Drs. Campbell and Wallen (emergency care and primary care, respectively). [R. pp. 5-6.] These are, of course, the same specialties in which Palmetto and Trident provide medical services. If Eades' expert was not qualified to offer opinions as to those doctors under the controlling statute, he was equally unqualified to do so as to Palmetto and Trident. This is the only logical way to apply the statute's requirement under established principles of agency law.

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*, 338 S.C. at 419-20, 526 S.E.2d at 722-23. The only requirements are that the additional sustaining ground appears in the

⁷ 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.

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—and, indeed, in light of the Court of Appeals’ reversal of the trial court on the first issue in the appeal, the second argument was a distinct point necessary to the decision of the appeal as to the Petitioners. *See* Rule 220(b), SCACR (“In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court’s decision, be preserved in the record of the case.”).

There is no question that Palmetto and Trident argued to the trial court that the expert affidavit was insufficient under the controlling statutes as to their areas of practice. 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 Palmetto, Trident and their employee-doctors. Therefore, the Court of Appeals erred in concluding the issue was not preserved for appellate review and not ruling on the merits, and this Court should address the merits of Palmetto and Trident’s arguments regarding the substantive insufficiency of the expert affidavit (or, at least, remand this matter to the Court of Appeals for it to do so).

II. The Court of Appeals erred in failing to affirm dismissal as to Palmetto and Trident based on the trial court's independent and alternative ruling that, as to the Petitioners, the Respondents' statutorily required pre-medical-malpractice-lawsuit expert affidavit was substantively insufficient where (a) the Respondents did not carry their burden to preserve and present argument to undermine the ruling on appeal, and (b), regardless, the ruling is correct on the merits.

The trial court concluded 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 respective 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 reverse the Court of Appeals' decision.

As a threshold matter, Eades never 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 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. First, Drs. Campbell and Waller were parties at the outset of this action. The caption of the Notice of Intent listed both doctors as defendants, and both doctors filed a motion to dismiss along with the medical practices that employed them. [R. pp. 31-33.] Second, the trial court expressly and specifically granted the motion to dismiss as to Drs. Campbell and Wallen, as well as to the practices for which they worked. 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 (and, through them, Palmetto and Trident) 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 for the individual doctors must also be the law of the case for Palmetto and Trident. 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).

For this reason, contrary to footnote 1 in the Court of Appeals’ opinion, it is Eades, not the Petitioners, who have not properly preserved or presented an argument on this substantive issue. Indeed, that problem dooms any appellate challenge Eades might have had to the trial court’s dismissal of Palmetto and Trident. 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 appellant appeals all grounds because the unappealed ground will become the law of the case”); *Soden*, 333 S.C. at

556, 511 S.E.2d at 378 (holding an unchallenged ruling, right or wrong, is the law of the case and requires affirmance); *see also McCall*, 380 S.C. at 659-60, 670 S.E.2d at 701 (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 the argument in the brief is conclusory, an issue is deemed abandoned); *McCall*, *supra*.

Even if Eades had actually appealed the trial court's ruling on this issue and had not abandoned it, his arguments would still fail. Eades focuses on Dr. Skudder's qualifications and experience in dealing with conditions similar to those that Eades suffered. 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 practice areas. 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, which are undoubtedly different than those applicable to a specific surgical practice. 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 Dr. Campbell, Dr. Wallen and their respective employers.⁸

The controlling statute for this issue is S.C. Code §15-36-100. Subsection (B) of that statute requires a plaintiff to submit a supporting “affidavit of an expert witness which must specify at least one negligent act or omission” S.C. Code Ann. §15-36-100(B). Subsection (A) defines an “expert witness” as:

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

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

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

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

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

⁸ 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.

(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).

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

“What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *Id.* (quotation omitted). Thus, courts must follow the plain and unambiguous language in a statute and have “no right to impose another meaning.” *Id.* It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that courts look beyond the statute’s plain language. *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011).

As the emphasized language demonstrates, the statute uses the definite article “the” and 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. *See Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346 428 S.E.2d 889, 892 (Ct. App. 1993)

(“The use of the definite article ‘the’ and the singular noun ‘state’ shows that the Legislature intended the word ‘located’ to refer to one state, not many.”). 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 in 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. In that example, although both professionals would be licensed physicians with perhaps some general understanding of the other’s practice area, it would be illogical to assume that one could be an “expert” as to the standard of care applicable to the other’s specialty. The differences between the practice areas would be too significant. Thus, this type of result cannot be what the legislature intended.

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.

Under Eades' reading of the statute, the only real requirement would be that the proposed expert be licensed in the general profession in which the opinion was to be offered. A license to practice in the general profession would make the proposed expert qualified to offer an opinion as to any specific area of practice within that profession. The problem with this interpretation is that it would strike part of the statute. The definition of an expert under §15-36-100(A) includes a requirement that the proposed expert be licensed in the general profession, but it also requires, in a separate subsection, that the proposed expert have "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." S.C. Code Ann. §15-36-100(A)(2)(b). If the standard were as lenient as Eades claims, this latter requirement would have no meaning. This cannot be a reasonable interpretation of the statute. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) (when interpreting a statute, appellate courts must presume that the legislature did not intend a futile act).

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). Palmetto and Trident 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 (and his affidavit is all the Court can go by in this context), Dr. Skudder 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 Wallen 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 the Court of Appeals erred in failing to affirm the dismissal of the Notice Intent on that basis as to both Palmetto and Trident.⁹

As previously discussed, it is irrelevant to this analysis that the heading of this section of the trial court's Order mentioned only Drs. Campbell and Wallen. Regardless of that heading, the actual ruling must apply with equal force to Palmetto and Trident. Drs. Campbell and Wallen are the agents through whom Palmetto and Trident, respectively, treated Eades. It logically (and legally) 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 their respective employers, Palmetto and Trident. Both Palmetto and Trident are entitled to that relief under the applicable law, and the Court of Appeals erred in failing to grant it. For this reason, the Court should reverse the result in the Court of Appeals and reinstate the trial court's Order to the extent it dismisses Palmetto and Trident.

⁹ Again, Eades has never challenged the trial court's decision to dismiss Drs. Campbell and Wallen on this basis.

CONCLUSION

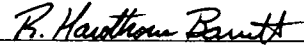
The Court of Appeals' opinion contains a clear and undeniable error. Despite the Court of Appeals' ruling that the issue was not preserved, Palmetto and Trident asserted a defense based on the insufficiency of the expert affidavit in the trial court, which dismissed the Notice of Intent as to the Palmetto and Trident 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 Palmetto and Trident because the expert affidavit did not meet the substantive requirements of S.C. Code §15-36-100(B) with regard to those two medical practices. 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 Palmetto and Trident's employee-doctors based on this ground, and those dismissals, which are now the law of the case, also apply to the Palmetto and Trident as a matter of law.

For all of these reasons, this Court should reverse the Court of Appeals' decision and reinstate the trial court's dismissal of Palmetto and Trident (or, at least, as a lesser alternative, remand this matter to the Court of Appeals to rule upon the merits of the Petitioners' argument).

(Signature on next page)

Respectfully submitted,



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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

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~~AUG 08 2016~~
SC Court of Appeals

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AUG - 8 2016

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

SC SUPREME COURT

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,

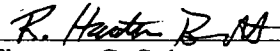
Of whom

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

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 **8th day of August, 2016**, copies of the **Petitioners' Brief** 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;

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August 8, 2016