THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

KRISTI LEA HARRINGTON, Circuit Court Judge

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Appellate Case No.: 2015-001967
Case No. 2012-CP-10-5366
(NOI) and 2013-CP-10-4475

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JOHNNY EADES AND BARBARA EADES . . . . . . . . . . . . . . . . . . . . . . . . ~~Appellants~~ Petitioners.

v.

PALMETTO CARDIOVASCULAR AND THORACIC, PA; JAMES M. BENNER, MD; MARK J. EPLER, MD; TRIDENT MEDICAL CENTER, LLC; COLUMBIA/HCA HEALTHCARE CORPORATION OF SOUTH CAROLINA; HCA HEALTHCARE-SOUTH CAROLINA; TRIDENT MEDICAL CENTER; TRIDENT HEALTH SYSTEM; PALMETTO PRIMARY CARE PHYSICIANS, LLC; TRIDENT EMERGENCY PHYSICIANS, LLC; BRIAN R. WHIRRETH, MD; PATRICIA CAMPBELL, MD; CHRISTINE E. MCNEAL, MD; MATTHEW WALLEN, MD; CHARLESTON RADIOLOGISTS, PA; JOSEPH M. 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 . . . . . . . . . . . .Respondents.

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# RESPONDENTS' BRIEF

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September 26, 2016

Gary L. Cartee
Attorney at Law
3251 Landmark Dr., Suite 136
N. Charleston, SC 29418
(843) 767-1800
Attorney for ~~Appellants~~ Respondents

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## STATEMENT OF THE ISSUES ON APPEAL

1. Did the Court of Appeals Err in Ruling that the Sufficiency of the expert affidavit as to Respondents is unpreserved?

2. Was the expert affidavit sufficient to meet the requirements of S.C. Code Ann. Section 15-79-125?

3. If the Court of Appeals' ruling is vacated, will it be found that the Respondents should have included Dr. Patricia Campbell and Dr. Matthew Wallen as respondents in their appeal of the Circuit Court Order dismissing the Notice of Intent to File Suit?

## STATEMENT OF THE CASE

This matter was commenced on August 15, 2012, when the Respondents filed a Notice of Intent to File Suit and Answers to Standard Interrogatories in this medical malpractice matter pursuant to S.C. Code Ann. Section 15-79-125. The signed Affidavit of Dr. Paul Skudder was not received by counsel for the Respondents until August 16, 2012. The affidavit was filed along with Supplemental Answers to Interrogatories on August 17, 2012. [R. pp. 33-34.]

A number of Defendants were originally named in the NOI. Five Defendants, including the two Petitioners were served with the NOI.

The Petitioners were timely served with the NOI, Answers to Standard Interrogatories, the Affidavit of Dr. Skudder, and Supplemental Answers to Interrogatories on December 12, 2012. The Petitioners filed a Notice of Appearance on January 23, 2013. About two and one half months later, April 10, 2013, the Petitioners filed a Motion to Dismiss. [R. pp. 31-33.] One of the other three remaining Defendants filed a Motion to Dismiss on February 14, 2013. The other two remaining Defendants filed a Motion to Dismiss on April 19, 2013. [R. pp. 27-30.]

The Petitioners' Motion to Dismiss contained the following footnote: (Footnote 1): Counsel for Plaintiffs has agreed not to name Dr. Campbell or Dr. Wallen in any potential Summons and Complaint since they have never been served." [R. p. 32.]

The five Defendants all asserted in their respective Motions to Dismiss

that the NOI should be dismissed because the expert affidavit was not filed until two days after the NOI, and thus was not contemporaneous with the filing of the NOI.

The Petitioners, in their Motion to Dismiss, alleged two additional grounds for dismissal. The statute of limitations ground was abandoned by Petitioners at the hearing.

The remaining alleged ground is the issue before this Honorable Court. That ground involved a challenge to the sufficiency of the expert affidavit.

The Petitioners' Motion to Dismiss stated that it would "be based upon the pleadings, depositions, (and) any furnished affidavits...." [R. p. 32.] No pleadings, depositions or furnished affidavits were filed by Petitioners. The Petitioners' Motion to Dismiss also stated that it would be based upon "rules of Court." [R. p. 32.] No rule of Court applicable to the Petitioners' Motion to Dismiss has ever been cited by Petitioners. Section 15-79-125 does not establish a civil action or cause of action, rather it provides for mandatory pre-suit mediation before a medical malpractice action can be filed.

This matter was mediated without success on June 10, 2013. The Defendants, including Petitioners, participated in the mediation with the reservation of their rights to move forward with their previously filed Motions to Dismiss.

The Motions to Dismiss were heard in the Circuit Court on July 18, 2013.

The Circuit Court Order was dated August 9, 2013, and it was filed August

16, 2013. [R. pp. 106.] The first page of the Order of the Circuit Court contained Two footnotes as follows:

(Footnote 1): "Counsel for Plaintiffs has agreed not to name Dr. Campbell in any potential Summons & Complaint since she has never been served."

(Footnote 2): "Counsel for Plaintiffs has agreed not to name Dr. Wallen in any potential Summons & Complaint since he has never been served." [R. p. 1.]

The Circuit Court Order contained the following ruling: "Defendants' Motion to Dismiss is GRANTED as to the claims presented by Plaintiffs. Plaintiffs' claims as to the above named Defendants are hereby DISMISSED." [R. p. 6.]

Notice of entry of the Order was received by Counsel for Appellant on September 7, 2013, without a copy of the Order, and a written notice of the entry of the Order with a copy of the Order was received by Counsel for Appellant on September 11, 2013. Notice of Appeal was filed by Counsel for Respondents on October 7, 2013.

The Court of Appeals filed its opinion reversing and remanding the Circuit Court Order on July 1, 2015. Unpublished Opinion No. 2015-UP-331. The case was decided without oral argument. The reversal was based upon S.C. Code Ann. Section 15-36-100(C)(1) being incorporated into S.C. Code Ann. Section 15-79-125, and it cited Ranucci v. Crain, 409 S.C. 493, 504, 763 S.E.2d 189, 194 (2014).

A footnote of the opinion stated as follows:

(Footnote 1): "We note that the issue of the sufficiency of the expert affidavit as to Respondents is unpreserved. *See S.C. Dep't of Transp. v. First Carolina Corp. of*

*S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (providing an issue must be raised to and ruled upon by the trial court to be preserved for appellate review)."

The Petitioners filed a Petition for Rehearing, on the issue of the sufficiency of the expert affidavit. The Court of Appeals denied the Petition for Rehearing without elaboration by an Order dated August 20, 2015. Petitioners subsequently filed their Petition for Writ of Certiorari to this Honorable Court, and this Court granted the petition by Order dated June 16, 2016.

## ARGUMENT

I. Did the Court of Appeals err in ruling that the sufficiency of the expert affidavit as to Petitioners is unpreserved?

The Petitioners, in their Petitioners' Brief before this Court, seem to make the assumption that the Court of Appeals doesn't understand the correct standard to preserve issues for review as applied to Respondents in appeals before appellate courts. A better assumption, perhaps, would be that the Court of Appeals is aware of the appropriate standard, and that the Petitioners have not met that standard.

It is obvious that all litigants, including litigants in the position of the Petitioners, have the responsibility to properly submit evidence to the Court which supports their position. Rule 220(c) of the SCACR provides that an appellate court may affirm for any reason appearing in the record. But it is axiomatic that the appellate court may not rely upon matters not in the record. It is also axiomatic that for a ruling to be affirmed, it must exist. Obviously, the appellate court cannot affirm a ruling which does not exist.

A. The Court of Appeals correctly found that "the issue of the sufficiency of the expert affidavit as to Respondents is unpreserved."

1. There was no factual record to preserve the Petitioners' position on the issue of the expert affidavit.

The Petitioners failed to submit any evidence at the hearing on their Motion to Dismiss. There were no affidavits, no documents, and no depositions submitted; and no other evidence was submitted. The Petitioners filed nothing to show which doctors worked for which practice. The Petitioners filed nothing to show the

specialty and area of practice of Dr. Wallen or of Dr. Campbell. The Petitioners filed nothing to show the names of all the doctors in their respective practices who saw Mr. Eades. The Petitioners filed nothing to show that a board certified vascular surgeon is unqualified to render an opinion on the necessity for physicians to review medical records for a patient in a similar condition as Mr. Eades. The Petitioners filed nothing to show that a board certified vascular surgeon such as Dr. Skudder, cannot be familiar with standards of care for other physicians in examining patients and reviewing records for patients in a similar condition of Mr. Eades. The Petitioners filed nothing to show that Dr. Skudder lacked credibility. The Petitioners filed nothing to show that an emergency medicine physician's examination and review of medical records for a patient such as Mr. Eades is unique and unknown to other physicians. The Petitioners filed nothing to show that a primary care physician's examination and review of medical records for a patient such as Mr. Eades is unique and unknown to other physicians.

2. <u>The Circuit Court Order did not reference essential facts to support its ruling.</u>

The Court Order, did not identify the practice specialty, if any, or employer for either Dr. Campbell or Dr. Wallen. The Court Order could not identify the practice specialty or employer of Dr. Campbell or Dr. Wallen because it does not exist in the record. Also, the Court Order does not mention either Petitioner at all in the heading or anywhere in the body of Part II which deals with the sufficiency of the affidavit of Dr. Skudder. [R. pp. 5-6.] The Order could not include anything

about the Petitioners because no record was made by Petitioners in the trial court.

3. <u>The Circuit Court Order did not include a separate ruling on Part II, which involved the sufficiency of the affidavit.</u>

The Circuit Court Order contains no ruling on Part II of the Order, which discusses the sufficiency of the affidavit, so there was no ruling for the Court of Appeals to affirm.

The only ruling in the Order is as follows: "Defendants' Motion to Dismiss is GRANTED as to the claims presented by Plaintiffs. Plaintiffs' claims as to the above named Defendants are hereby DISMISSED." The only ground for dismissal asserted in all three Motions to Dismiss was the contemporaneous filing (<u>Ranucci</u>) ground. The Motions to Dismiss filed by the other parties (the surgeons and the surgeons' practice) asserted only the contemporaneous filing (<u>Ranucci</u>) ground.

Part II of the order includes a heading which mentions Dr. Campbell and Dr. Wallen, but not Petitioners. Part II may refer to the heading when it says the "above named" Defendants "argued before this Court that the expert affidavit submitted by plaintiffs failed to meet the additional requirements required by section 15-36-100." The Court Order does not mention any specific area of practice or specialty for either Dr. Campbell or Dr. Wallen. The Court Order ends Part II with the sentence, "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." However, the Order does not go on to make the ruling of an insufficient affidavit as to any specific Defendant. The

Order should have included a specific ruling naming the specific Defendants who were dismissed on the additional ground. Such a ruling is not difficult to draft. It could be, "For Defendants Palmetto Primary Care Physicians, LLC (and whoever else the Court intended to include) the Motion to Dismiss is GRANTED on the additional ground that the expert's affidavit is insufficient." It is significant that the Circuit Court's Order tracks almost verbatim the proposed order submitted by counsel for the Petitioners. [R. pp. 90-95.]

It is also significant that Petitioners in their Brief at page 2 note the following:

(Footnote 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 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 note 2.]

The Petitioners above footnote is only partially correct. Actually, the agreement between counsel for Respondents and Counsel for Petitioners that Dr. Campbell and Dr. Wallen would not be parties was made <u>before</u> the filing of the Petitioners' Motion to Dismiss. The Petitioners Motion to Dismiss made reference to this same agreement in a footnote:

(Footnote 1): "Counsel for Plaintiffs has agreed not to name Dr. Campbell or Dr. Wallen in any potential Summons and Complaint since they have never been

served." [R. p. 32.]

So it becomes clear why the Circuit Court Order, which was drafted almost in its entirety by counsel for Petitioners, did not include a ruling that Dr. Campbell and Dr. Wallen were dismissed in Part II of the Order. That is, there was already an agreement before the filing of the Motion to Dismiss, months before the hearing, and months before the Circuit Court's Order that Dr. Campbell and Dr. Wallen would not be parties. The Order also did not include a ruling dismissing the Petitioners on the ground of an insufficient affidavit, and as discussed above, there was no record to support such a ruling.

The Circuit Court Order also makes reference to the agreement between Counsel for the Respondents and Counsel for the Petitioners that Dr. Wallen and Dr. Campbell, would not be parties. Page one of the Circuit Court Order includes two footnotes as follows:

(Footnote 1): Counsel for the Plaintiffs has agreed not to name Dr. Campbell in any potential Summons & Complaint since she has never been served.

(Footnote 2): Counsel for Plaintiffs has agreed not to name Dr. Wallen in any potential Summons & Complaint since he has never been served. [R. p. 1.]

The footnotes in the Circuit Court Order and the footnote in the Motion to Dismiss both say "Counsel for the Plaintiffs has agreed." That agreement was obviously between Counsel for the Respondents and Counsel for the Petitioners.

For whatever reason, Counsel for the Petitioners in drafting the proposed

Order failed to include a ruling for Part II of the Order, and the Circuit Court Order was almost verbatim the same as the proposed order. So there was no ruling on the sufficiency of the affidavit for the Court of Appeals to affirm. Thus the issue was unpreserved.

B. Athorities and Application

Rule 220 (c), SCACR provides that an appellate court can affirm a ruling or order for any reason appearing in the Record on Appeal. See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E. 2d 716 (2000).

In this case the Court of Appeals ruled that "...the issue of the sufficiency of the expert affidavit as to Respondents is unpreserved." This clearly means that the Court of Appeals found that the Record on Appeal in this case was inadequate to support the Petitioners' arguments regarding the expert affidavit. The Court of Appeals obviously is aware of Rule 220(c). The Court of Appeals also stated, "*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)." Unpublished Opinion No. 2015-UP-331, Filed July 1, 2015, Footnote 1. The Court of Appeals obviously cited this opinion as an analogy since it deals with an appellant and not a respondent, but it illustrates that a ruling must exist before it can be affirmed. The Court of Appeals thus indicated that the record would not support the Petitioners' arguments regarding the sufficiency of the affidavit. In addition to the lack of a factual record,

the Court of Appeals indicated that the issue was unpreserved because of the lack of a specific ruling on the issue of the sufficiency of the affidavit.

Rule 220 (b)(2) provides that "The Court of Appeals need not address a point which is manifestly without merit." So the Court of Appeals was not required to go through all of the reasons that the record was lacking to support the Respondents' arguments regarding the sufficiency of the affidavit.

The Court of Appeals was correct in its ruling that "the sufficiency of the expert affidavit as to Respondents is unpreserved."

II. <u>Was the expert affidavit sufficient to meet the reqirements of S.C. Code Ann. Section 15-79-125?</u>

The Petitioners' challenge to the qualifications of Dr. Skudder are contrary to both the statute and to established case law in South Carolina. Section 15-79-125 specifically incorporates the affidavit requirements of Section 15-36-100.

The Petitioners in their Motion to Dismiss, only challenged Dr. Skudder's qualifications in one respect: "..., this matter should be dismissed because Dr. Skudder is a vascular surgeon and does not practice in the field of either primary care or emergency medicine." [R. p. 32.]

In South Carolina it has been held that, "An expert is not limited to any class of persons acting professionally." <u>Gooding v. St. Francis Xavier Hospital</u>, 326 S.C. 248, 487 S.E. 2d 596 (1997). In Gooding it was held that an EMT could testify as an expert witness against an anesthesiologist. He was found to be qualified to testify as an expert witness regarding intubation. "There was no requirement that Gooding's expert witness be an anesthesiologist in order to testify about intubation procedures." <u>Gooding v. St. Francis Xavier Hospital</u>, <u>supra</u>, at 326 S.C. 253, 487 S.E.2d 598. In <u>McGee v. Bruce Hospital System</u>, 321 S.C. 340, 468 S.E. 2d 633 (1996), an emergency room physician was found qualified to testify in a medical malpractice action about the standard of care for the placement of a catheter by a surgeon. In <u>Brown v. Carolina Emergency Physicians, P.A.</u>, 348 S.C. 569 at 579, 560 S.E.2d 624 at 629 (Ct. App. 2001), the Court stated, "A witness is not required to work or have worked in the same filed or area of practice to be competent to

testify as an expert in that area." "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" Gooding, supra, 326 S.C. at 252-253, 487 S.E. 2d 598.

The above referenced case law is consistent with Section 15-36-100 (A)(3):

> (A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:
> (3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B)...."

In applying this law to Dr. Skudder's affidavit, it should also be kept in mind that Section 15-79-125 has been held to be a statute in derogation of the common law which is to be strictly construed. Grier v. Amisub, 397 S.C. 532 at 536, 725 S.E. 2d 693 at 696 (2012); Ross v. Waccamaw Community Hosp., 404 S.C. 56 at 63, 744 S. E. 2d 547 at 550 (2013).

Also, it should be kept in mind that the purpose of Section 15-79-125 is to have pre-suit mediation. Section 15-79-125 is not even covered by most of the Rules of the SCRCP because it is not a "civil action." Rules 2 through 80 deal with "civil actions." Only Rule 81, and possibly part of Rule 1 apply together with the SCADRR. It is not intended to adjudicate cases on the merits. That function is

performed by a "civil action" subject to the SCRCP.

Dr. Skudder's affidavit indicates that he has vast experience evaluating and treating patients with issues similar to Johnny Eades in July and August, 2009. The affidavit indicated that he was highly educated, board certified in vascular surgery, and highly experienced in the examination and treatment pertinent to Mr. Eades. He reviewed the medical records. He indicated that he is familiar with the applicable medical standards for the evaluation and treatment of patients similarly situated as Johnny Eades. He indicated that he is 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. He expressed the opinion that the physicians who saw him after the initial surgical procedure failed to properly examine the patient or consult the records of the recent admission and these failures were deviations from the standard of care. He also expressed the opinion that failing to recognize that complications from the aneurysm were possibly the explanation for the patient's symptoms deviated from the standard of care. Dr. Skudder indicated that he has been in clinical practice since 1984 and he has vast experience regarding the left iliac artery, aneurysm of the same artery, and related issues. [R. pp. 18-19.]

Clearly, Dr. Skudder was more than qualified to render opinions as to the physicians who examined and treated Mr. Eades. Clearly, Dr. Skudder set forth training and experience which qualified him to render opinions on the examination

and treatment of aneurysms of the left iliac artery and of physicians who were undertaking to deal with the associated symptoms including the standard of care for such dealing with such conditions.

The only challenge to Dr. Skudder's qualifications was that he was a vascular surgeon rather than an emergency room doctor or primary care physician. The Petitioners did not deny that they were treating Mr. Eades for symptoms which turned out to be of an aneurysm of the left iliac artery. They did not deny that they were examining and treating him after the initial operation and before the ruptured aneurysm. They did not deny that Dr. Skudder rendered opinions of more than one deviation of the standard of care for the physicians who treated Mr. Eades after the initial procedure. The Petitioners did not question whether Dr. Skudder was correct in his opinions of the deviations of the standard of care by their physicians. They only challenged that he was not an emergency physician or a primary care physician. The Petitioners' position is directly contrary to both the applicable statute, quoted above, and to the case law of this State.

Dr. Skudder was qualified to render an opinion on the standard of care in this matter.

In motions to dismiss "civil actions," even with pleadings, discovery, and a full record, the SCRCP require that all facts and inferences must be taken in the light most favorable to the non-moving party. In a proceeding whose only goal is pre-suit mediation, the standard should be weighted even more heavily in favor of the non-moving party. The Respondents should be allowed to move forward with a

"civil action."

The Circuit Court should be reversed for dismissing the NOI.

III If the the Court of Appeals' ruling is vacated, will it be found that the Respondents' should have included Dr. Patricia Campbell and Dr. Matthew Wallen as respondents in their appeal of the Circuit Court Order dismissing the Notice of Intent to File Suit?

A. Patricia Campbell and Matthew Wallen were not parties and were not real parties in interest; and they were not necessary parties to the appeal.

The Petitioners make the assertion in their Brief that the Respondents were required to name Dr. Patricia Campbell and Dr. Matthew Wallen in their appeal of the Circuit Court's Order in order to preserve their right to appeal as to the Petitioners.

However, such an appeal would have been a sham because those two persons were not real parties in interest as was known by Counsel for Respondents months before the Circuit Court issued its Order. Perhaps Petitioners Circuit Court Counsel and Appellate Counsel had a lack of communication or a miscommunication. There is no doubt that Counsel for Respondents agreed with Counsel for Petitioners to not pursue the case against those two individuals who had never been served with the NOI.

"In South Carolina, a party must also be the 'real party in interest.'" Dockside Association, Inc., 285 S.C. 565 at 568, 330 S.E.2d 537 at 539 (Ct. App. 1985). See also Rule 17(a) SCRCP.

Since Dr. Patricia Campbell and Dr. Matthew Wallen were not served with the NOI and related documents, they were not real parties in interest, and therefore they were not parties to the matter at bar. Therefore it would have been a nullity to

include them in the Respondents' appeal.

Counsel for Petitioners notified the Circuit Court in Petitioners Motion to Dismiss that there was an agreement of Counsel that those two individuals would not be pursued in this case. The Petitioners' Motion to Dismiss stated that "Counsel for Plaintiffs has agreed not to name Dr. Campbell or Dr. Wallen in any potential Summons and Complaint since they have never been served." [R. p. 32 at n. 1.] Counsel for Petitioners notified the Circuit Court of the agreement a second time when Counsel for Petitioners submitted a proposed order to the Circuit Court. The proposed order stated, "Counsel for Plaintiffs has agreed not to name Dr. Campbell in any potential Summons & Complaint since she has never been served. Counsel for Plaintiffs has agreed not to name Dr. Wallen in any potential Summons & Complaint since he has never been served." [R. p. 90 at n. 1 and n. 2.]

The Circuit Court Order was almost word for word the same as Petitioners' proposed order, and it tracked exactly the same language in its footnotes. [R. p. 1 at n. 1 and n.2.]

Rule 208(b)(1)(C) and Rule 208(b)(2) SCACR, provide that the parties shall be bound by any matters stated or alleged in appellant's statement of the case. In Petitioner's Statement of the case, the Petitioners referred to Dr. Campbell and Dr. Wallen as "potential defendants." That is a binding admission on Petitioners. Elsewhere in the Petitioners brief at page 8 and pages 13-14, Petitioners insist that Dr. Campbell and Dr. Wallen were Defendants. The full text of the referenced

footnote is as follows:

(Footnote 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. Petitioners' Brief, p. 2. The footnote is, of course, inaccurate; the agreement not to pursue those two parties had been made months before, and was communicated to the Court by Counsel for the Petitioners.

At the hearing on the Petitioners Motion to Dismiss, Petitioners' Counsel said the following:

"May it please the Court Bill McDow for Palmetto Primary Care, Trident Emergency Physicians, and under those two headings, Patricia Campbell and Matthew Wallen." [R. p 63, lines 3-6.]

Finally, the Circuit Court Order on its first page indicates that there was an agreement of Counsel that Patricia Campbell and Matthew Wallen would not be pursued further. The Circuit Court Order makes no separate ruling regarding Patricia Campbell and Matthew Wallen.

Obviously, an appeal as to those two individuals could not result in a lawsuit against them or a recovery against them. They had no interest in the case, and, therefore, an appeal naming them as respondents would have been unnecessary,

futile, and improper. Further, since Counsel for the Plaintiff had agreed not to pursue them further, it would have been improper to break that agreement. It would also have been a nullity since they had never been made parties through service of process.

Because Dr. Campbell and Dr. Wallen were not served with the NOI, they were not proper parties for the appeal.

The Petitioners' Brief asserts that Patricia Campbell and Matthew Wallen were the only employees of the Petitioners involved in the treatment of Mr. Eades.. [R. p. 4 at footnote 4.] However, that does not appear anywhere in the Record of the Circuit Court. There is also no record in the Circuit Court of the specialty for Dr. Campbell or Dr. Wallen, and there is no record in the Circuit Court of the employer of Dr. Campbell or Dr. Wallen.

Respectfully, Dr. Campbell and Dr. Wallen were not parties, they were not real parties in interest, and they were not necessary parties to the Respondents' appeal.

B. The procedure established in Section 15-79-125 is for mediation, and it was not intended by the legislature to be a vehicle for rulings on the merits.

Section 15-79-125 is explicitly designed purely as a strictly limited procedure for mandatory pre-suit mediation in medical malpractice actions. Clearly the legislature did not intend for this rule to be a substitute for a "civil action" or a vehicle for deciding the merits of cases. It is explicitly governed by the ADR rules, and it is not covered by the body of the SCRCP. Therefore any ruling pursuant to

this section should not be considered a ruling on the merits of the case for *res judicata* or other similar purposes.

## CONCLUSION

There was no adequate record to preserve the issues of the Petitioners regarding the sufficiency of the expert affidavit. The Circuit Court in its Order did not rule on the issue of the sufficiency of the expert affidavit. Respectfully, it is submitted that the opinion of the Court of Appeals should be affirmed.

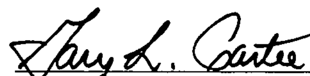
The affidavit of Dr. Skudder meets the statutory requirements of Section 15-79-125 and the similar case law and is qualified to express expert opinions concerning the Petitioners. Both the case law and the statute provide for the testimony of experts who not practice in the same specialty, but have expert knowledge of one or more aspects of the areas of practice in another specialty.

Dr. Patricia Campbell and Dr. Matthew Wallen were not parties and were not real parties in interest since they were not served with the NOI and related documents. There was an agreement between Counsel for the Respondents and Counsel for the Petitioners that the case would not be pursued as to those two individuals.

The Respondents respectfully request this Honorable Court to affirm the opinion of the Court of Appeals. If necessary, Respondents request that this Court rule that the affidavit of Dr. Skudder was sufficient to satisfy the requirements of the statute, and to allow the lawsuit to go forward against the Petitioners. If necessary, the Respondents request that this Court rule that it was not necessary to

name Dr. Campbell and Dr. Wallen in the appeal of the Circuit Court's Order dismissing the Notice of Intent to File Suit.

Respectfully submitted,



Gary L. Cartee
Attorney at Law
3251 Landmark Dr., Suite 136
N. Charleston, SC 29418
(843) 767-1800

September 26, 2016

Attorney for the Respondents

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

KRISTI LEA HARRINGTON, Circuit Court Judge

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Appellate Case No.: 2015-001967
Case No. 2012-CP-10-5366
(NOI) and 2013-CP-10-4475

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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 CORPORATION OF SOUTH CAROLINA; HCA HEALTHCARE-SOUTH CAROLINA; TRIDENT MEDICAL CENTER; TRIDENT HEALTH SYSTEM; PALMETTO PRIMARY CARE PHYSICIANS, LLC; TRIDENT EMERGENCY PHYSICIANS, LLC; BRIAN R. WHIRRETH, MD; PATRICIA CAMPBELL, MD; CHRISTINE E. MCNEAL, MD; MATTHEW WALLEN, MD; CHARLESTON RADIOLOGISTS, PA; JOSEPH M. 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

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PROOF OF SERVICE

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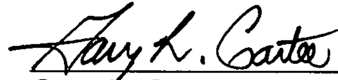
The undersigned counsel for the Respondents hereby certifies that he has served the Respondents' Brief in this matter by depositing copies in the United States Mail, postage prepaid, on September 26, 2016, addressed to Petitioners' counsel and all other counsel of record as follows: Thomas C. Salane, Esq., R. Hawthorne Barrett, Esq., Turner Padgett Graham & Laney P.A., PO Box 1473, Columbia, SC 29202; Andrew F. Lindemann, Esq., Davidson & Lindemann, P.A., PO Box 8568, Columbia, SC

29202; Darren K. Sanders, Esq., Buyck & Sanders Law Firm, LLC, PO Box 2424, Mt. Pleasant, SC 29465-2424; William C. McDow, Esq., Richardson Plowden & Robinson, PA, PO Drawer 7788, Columbia, SC 29202; D. Jay Davis, Jr., Esq., Stephen L. Brown, Esq., Russell G. Hines, Esq., Young Clement Rivers, LLP, PO Box 993, Charleston, SC 29402; and Hutson S. Davis, Jr., Esq., Jason W. Ward, Esq., Johnson Davis Ward, PA, 10 Pinckney Colony Road, Victoria Bldg., Suite 200, Bluffton, SC 29909.



Gary L. Cartee
3251 Landmark Drive, Suite 136
N. Charleston, SC 29418
(843) 767-1800

Attorney for Respondents