

THE STATE OF SOUTH CAROLINA  
South Carolina Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. MARKLEY DENNIS, Jr., Circuit Court Judge **S.C. SUPREME COURT**

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Appellate Case No. 2018-000489

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Jim Washington,.....Petitioner,

V.

Trident Medical Center, LLC.....Respondent.

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**REPLY TO RESPONDENT RETURN**

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## INTRODUCTION

In **Washington v. Trident Medical Center, LLC**, Op. No. 2018-UP-006(S.C. Ct. App. Filed Jan. 10, 2018), the S.C. Court of Appeals unwarrantedly affirmed the circuit court's order dismissing the action based on the circuit court acceptance of respondent's erroneous misconstruction of these statutory amended complaint pleadings of the S.C. Code Statutes 15-79-125(A) and 15-36-100 pre-suit pleadings of notice of intent to file suit and expert witness affidavit and common knowledge by reading these statutory pleadings in isolation rather than as whole dealing with the same subject matter. At the hearing and in its order the trial court improperly read these statutes pleadings in isolation which limited the operation and application of NOI and ruled petitioner's doctors opinion could not qualify as an expert witness under the medical malpractice statutes on the issue of Trident Medical Center negligence was a breach of the standard of care under same or similar circumstances nor would the pleadings in the complaint and attached affidavit opinion of the doctors meet the statute's common knowledge issue. Petitioner's pleadings met all the statutes requirements. Therefore, in light of petitioner compliance with above statutes the trial court improperly dismiss the action.

[ **Note:** Correction to petitioner's Appendix. For ease of reference to all records for review for the court, both parties and uniformity and consistency with prior citations of the **Record on Appeal** in the court of appeals referencing all issues in those proceedings and in the circuit court. Therefore, the **Appendix-page 1(one)** now begins at Record on Appeal-Order of circuit court page one as correctly cited as page 1(one) and all pages consecutively numbered ending at page 230-Order court of appeals denying rehearing hereinafter shown on new enclosed index ].

Petitioner, Jim Washington (“Petitioner”) now petitions this Court for certiorari. As shown herein, one of the factors in Rule 242 (b), SCRAP does exist to justify issuance of the writ. There is a conflict with the Court of Appeals orders and this Court’s precedents **Wilkinson, Ranucci, II, Brouwer, Cox and Eades v. Palmetto Cardiovascular And Thoracic, PA.** Petitioner, reiterated these arguments identifying these issues in his initial brief, brief in reply to respondent and on rehearing clearly preserving the issues warranting issuance of the writ. The petition should be granted.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Petitioner initiated this action by filing an amended complaint and expert witness affidavit attached and incorporated by referenced to the complaint pre-suit NOI to filed suit and expert witness affidavit alleging medical malpractice against respondent Trident. {App. 9-11}. Petitioner filed his pleadings in the caption of the complaint under Sections 15-79-125 (A), 15-36-100(C)(2) and 15-79-125(E)(2) and attached the amended pre-suit NOI to file suit and expert witness affidavit pleadings filed under Sections 15-79-125 (A) and 15-36-100 **dated 10/25/12** to the complaint. {App.20-23; 70-95}. Respondent move to dismiss the complaint stating petitioner’s pleadings in the complaint were only litigation pleadings and the attached pleadings to the complaint citing Sections 15-79-125(A) and 15-36-100 were totally defective for pleadings pre-suit NOI to file suit and expert witness affidavit and common knowledge under Sections 15-79-125(A), 15-36-100. {App. 62-67}.

At a hearing , the trial court agreed with respondent’s contention petitioner did

not filed a pre-suit NOI to file suit and supporting expert witness affidavit under the medical malpractice statutes and the doctors opinions in the record were not qualified experts witnesses under the medical malpractice statute Section 15-36-100 and found the doctors opinions did not qualified under the common knowledge under Section 15-36-100(C)(2). {App. 1-6;56-61}. The trial court also denied petitioner's request to file an amended complaint for the same reason to dismiss the action and ruled petitioner's memorandum was irrelevant and not material then granted respondent motion to dismiss. (App. 1-6;56-61). Petitioner filed a motion to reconsider raising the grounds that respondent erroneously misconstrue the statutes pleadings under Sections 15-79-125(A) and 15-36-100 and that the two doctor's opinions qualified as experts under Section 15-36-100 (A)(1), (A)(2) and (A)(3) and that the Notice of Intent and complaint were timely.

This appeal followed. The issues raised by Petitioner were fully briefed before the Court of Appeals .{App. 127-164}. Respondent filed it's brief. {App. 168-181}. Petitioner filed a Final Brief in Reply to Respondent Brief totally refuting respondent's ground to affirm the circuit order relying on this Court's precedents. {App. 187-206}. The Court of Appeals affirmed in short cursory Per Curiam Unpublished Opinion without oral argument or further briefing. {App. 228-229}. Petitioner filed a rehearing motion arguing the issue that under Section 15-36-100(E) the Court of Appeals order affirming the trial court to dismiss and denying rehearing were errors because the action was not subject to dismiss before 2/5/16 was overlooked and disregarded. Therefore, it's ruling conflicts with this Court's precedents and the statute. {App. 209-222}. The Court of Appeal denied rehearing in a short cursory order stating that the Court is unable to discover that any material fact or principle of law has been over looked or disregarded,

hence no basis for granting rehearing. {App. 230}. Petitioner then filed a Petition For Writ of Certiorari with this Court.

### ARGUMENTS

**I. The Court of Appeals orders erred in holding the action was subject to dismiss for failure to file the pre-suit Notice of Intent to file suit prior to Filing the complaint.**

In its Opinions, the Court of Appeals erroneously affirmed the trial court's finding and deny rehearing that the action was subject to dismissal for Petitioner failure to file the pre-suit Notice of Intent to file suit. Petitioner directly challenge this finding as an issue in his petition. {See petition at 4; Petition at 7-18}. Petitioner argued that when he filed the amended 10/25/12 pre-suit Notice of Intent to file suit on 9/11/15 under S.C. Code Statutes 15-79-125(A) and 15-36-100 expert witness affidavit attached to the complain he had fully complied with the statute requirements. {Pet., pp. 16-18}. Petitioner filed the amended NOI and attached expert witnesses affidavits which is attached and incorporated by reference into the civil action and filed in the county of Charleston where venue was proper for filing or initiating a civil action. {App., pp. 9-11; App., pp. 70-95}. Respondent was served these documents in accordance with the serve rules of a summons and complaint. {App., pp. 8-9}. Therefore, this filing met the requirement for filing the NOI to file suit. Finally, under Wilkinson Respondent argument that South Carolina law offer no support for a suggestion that a claim filed with a federal agency qualifies as a complaint in South Carolina state court is wholly without merit. {Respondent's Return, pp. 4-5}. Wilkinson V. East Cooper Community Hospital, 410 S.C. 163, 172-173, 763 S.E.2d 426(2014)(As a threshold matter we disagree with any contention that the clerk of court's assignment of separate Common Pleas numbers to the NOI and the complaint

.... The assignment of different case number to the pre-litigation pleadings and the litigation pleadings is of no consequence because they both comprise a single medical malpractice claim. See Fisher v. Pelstring, 817 F. Supp.2d 791, 807 n. 8 (D.S.C. 2011)(analyzing procedures for initiating medical malpractice claims and stating “[s]ection] 15-79-125 also does not include any language indicating that the case number under which a Notice of Intent is served on a defendant must be the same case number assigned to the complaint served on that defendant if a civil action is ultimately initiated”). Therefore, under Wilkinson Respondent’s argument is wholly without merit because state court would still have subject matter jurisdiction for any related claim for medical malpractice against a defendant. Mims v. Babcock Center, Inc., 399 S.C. 341, 344-348, 732 S.E.2d 395(2012)(quoting skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 93, 668 S.E.2d 795, 796(2008))(observing subject matter jurisdiction is define as “the power to hear to hear and determine cases of the class to the proceedings in question belong”). Accordingly, Petitioner did comply with S.C. Code Statute 15-79-125(A) pre-suit Notice of Intent to file suit before filing the action. {App., p. 9; App., p. 70-95}. Therefore, the Court of Appeals findings conflicts with **Wilkinson**. {App., pp. 228-230}. For this reason issuance of the writ is justified.

**II. The Court of Appeals erroneously found that Petitioner did not comply with the pre-litigation affidavit requirements.**

Petitioner timely met and complied with the Statutes requirements to initiate this civil action by amendment of the expert witnesses affidavit allowed under S.C. Code Statute 15-36-100(E) and 15-36-100(B) and filed the expert witnesses affidavit attached and incorporated by reference to complaint under Sections 15-79-125(A) and 15-36-100.

{App., pp. 9-11; App., pp. 70-95). The expert witnesses affidavit rendered their qualified expert opinions which satisfied S.C. Code Statutes 15-36-100(A) meaning of an expert and 15-36-100(A)(3) qualifications that has scientific knowledge which may assist the trier of fact in understanding the evidence and determining a fact in issue in the case, by reason of the individuals study, experience, or both that gave opinions naming at least one negligent act or omission claim to exist and the factual basis base on the available evidence at the time of filing the affidavit that “Respondent negligently omission to follow the generally recognized and accepted procedure to diagnose the source of Petitioner’s injury on MRI and work-up but showed a small stroke; negligent omission to follow the generally recognized and accepted procedure to order a Heparin Drip, consult Neurology and treat per Neurology proiccol for Petitioner’s injury with anticoagulation when cardio embolism was a possibility; negligent omission upon discharge to follow the generally recognized and accepted procedure to treat with anticoagulation and discharge to (PCP) primary care physician for long term follow-up care and that his medication history showed he was allergic to aspirin, treated with aspirin and discharged.” {App., pp. 79-95}. Eades v. Palmetto Cardio vascular and Thoracic, PA., S.C. Supreme Court, Opinion No.27770 (2018) Appellate Case No. 2015-001967( We find the information contained in Skudder’s affidavit clearly sufficient to satisfy this provision. The affidavit lists Skudder’s specialized, technical knowledge regarding the issue of Mr. Eades’s treatment, explaining he is a “ 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.... This knowledge is based upon my education, training and experience.” Skudder further explained his active

practice of medicine includes the evaluation and treatment of occluded arteries, aneurysms, and other issues similar to those which Mr. Eades sought treatment. Thus, we find Skudder demonstrated he possesses the specialized knowledge and training that may assist the trier of fact in this case, and he explained why his credentials qualify him to identify a negligent act or omission committed by Petitioners. According, even if Skudder did not satisfy the requirements of (A)(2) because he did not list the same practice areas as Campbell and Wallen, his affidavit comports with the more general requirements of subsection (A)(3)). The affidavits Petitioner, Washington filed in this action essential tracks the same languages as Skudder in Eades v. Palmetto Cardiovascular And Thoracic,PA., and Ranucci v. Crain, 409 S.C. 493, 507-508, 763 S.E.2d 189(2014)(emphasis in original omitted). Id. See {App., pp. 79-95; Pet., pp. 8-12}. Furthermore, Petitioner also argued in his Petition that the common knowledge exception under S.C. Code Statute 15-36-100(C)(2) applies to his action based upon the medical expert opinions in the records stating what the standard of care required and that Respondent breached this standard by its omission to follow this generally recognized and accepted procedures in its diagnosis and treatment which is the same standard. Therefore, Petitioner argued a jury could then decide the factual issues of simply who to believe was telling the truth. {Pet., pp. 8-13; App., pp. 79-95}. Petitioner relied on two precedent cases from this Court to support his arguments which directly disputes Respondent's arguments on common knowledge issue. {Pet., pp. 8-13; Respondent's Return in opposition, pp. 7-8}. Respondent, has consistently misconstrue Petitioner's anticoagulation claim. The merit of Petitioner's claim on the anticoagulation issue does not depend entirely on the amount, doses and type needed but also the claim centers on

aspirin treatment. Respondent did not breached the standard by treating Petitioner with the wrong amount, type or doses of anticoagulation. Petitioner's claim is that Respondent Breached the standard of care because Respondent did not treat him with anticoagulation Heparin or Coumadin at all for cardio embolism which the expert doctors established is the generally recognized and accepted treatment when embolism is a possibility.

Petitioner claim Respondent treated him with aspirin which is not an anticoagulant and Respondent was also reckless because Respondent knew he was allergic to aspirin but repeatedly treated him with it. {App., p. 11; App., pp. 30-31; App., pp. 216-218}.

Therefore, the findings in **Eades and Ranucci** are controlling precedent in Petitioner's action that the expert doctors rendered opinions that Respondent Trident was negligent in diagnosis and treatment under same or similar circumstances were qualified experts that met Section 15-36-100 requirements as qualified expert witness affidavits documents for filing. { Pet., pp. 7-13}. Likewise, Brouwer v. Sisters of Charity Providence Hospitals, 409 S.C. 514, 519-523, 763 S.E.2d 514(2014)(Same) and Cox v. Lund, 268 S.C. 410, 334 S.E.2d 116 (1985)(same) are controlling precedents on the issue of common knowledge exception does apply to issues Petitioner argues in his petition. {Pet., pp. 8-13}. Finally, Respondent argues that none the medical records attached to Petitioner's filings meets these requirements of a sworn affidavit from an expert witness. {Respondent's Return, pp. 5-6}. However, the attached affidavits which contain Petitioner's medical records were based on the experts personal knowledge who were personally involved in treatment and care whose written opinions were reduce to writing which are sufficient for affidavit purposes based on personal knowledge. Petitioner is not arguing that he verified his complaint. { Pet., pp. 7-11; App., pp. 79-95}; See **3 Am. Jur.2d Affidavit Statute 14.**

**AFFIDAVIT AMERICAN JURISPRUDENCE, second edition, p. 23, Database**

**updated Feb. 2012, Rosemary Gregor, J.D.); Eades v. Palmetto Cardiovascular And**

**Thoracic, PA., Supreme Court of South Carolina, Opinion No. 27770(2018), Appellate**

**Case No. 2015-001967(Notwithstanding our disagreement with Petitioners' proposed**

**application of subsection application of (A)(2), we need not reach that issue because we**

**find Skudder's affidavit comports with section 15-36-100(A)(3). Subsection (A)(3)**

**provides that an individual who is not otherwise qualified under subsections (A)(1) or**

**(A)(2) may still qualify as an expert if he 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." S.C. Code Statute 15-36-100(A)(3); Dozier v. Clayton County Hosp. Auth., 206**

**Ga. App. 62, 65-69, 424 S.E.2d 632(1992)(same) ; Apsey v. Memorial Hospital, 730**

**N.W.2d 695, 699-702, 407 Mich. 120(2007)(legislature provided alternative method of**

**notarial acts for affidavit purposes); Ranucci v. Crain, 409S.C. at 508 (quoting Poch v.**

**Bayshore Concrete Prods./S.C., 405 S.C. 359, 378 n.13, 747 S.E.2d 757 n.**

**13(2013)(declining to reject affidavit presented as proof of workers' compensation...as**

**there no basis...to reject ...by its very nature a sworn statement intended as documentary**

**evidence in a legal proceeding). Petitioner, therefore contends based upon his actual**

**argument in his petition as clearly shown with the above supporting citations of authority**

**Respondent's arguments in **part II and III** of the Return are wholly without merits in its**

**entirety. Accordingly, the Court of Appeals findings were erroneous and conflicts the**

**above precedents from this Court as well as other jurisdictions. Therefore, the writ should**

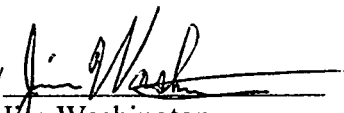
**be Granted.**

**IV. Petitioner's failure to initiate the required mediation is not an appropriate ground to deny the writ.**

On 9/11/15 when Petitioner timely filed the amended pre-suit Notice of Intent to file suit pleadings and expert witnesses affidavit under S.C. Code Statutes 15-79-125(A) and 15-36-100 attached to the complaint pre-suit Notice of Intent to file suit pleadings under 15-79-125(A) and 15-36-100 he checked on the Coversheet requesting mediation. {App., pp. 7-9; App., pp. 70-95}. On 1/7/16 at the hearing Petitioner was denied his request to amend the complaint. {App., pp. 56-61}. If Petitioner was granted to amend he had a additional 4 days to participate in mediation before the 120-day deadline. Petitioner should not be penalized for failing to conduct mediation before the 120-days deadline. Ranucci v. Crain, 409 S.C. 493, 508-509, 763 S.E.2d 189(2014)(same).

**CONCLUSION**

Based on Respondent's arguments are wholly without merits in **Part I Thur IV** in its entirety as Petitioner clearly demonstated, and the Court of Appeals Orders were erroneous the Petition for writ of certiorari should be granted.

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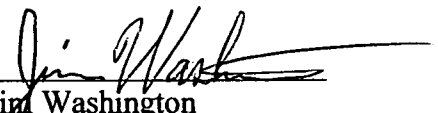
Trident Medical Center, LLC.....Respondent.

**PROOF OF SERVICE**

I, the undersigned do hereby certify that I have serve all counsel of record in this action with a copy of this **Reply To Respondent's Opposition** by mailing a copy of the Same in a prepaid wrapper deposited in a U.S.Post Office to the following addresses:

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