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December 8, 2011



**Hand Delivered**

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602
HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of a Reply to Respondents' Return to the Petition for a Writ of Certiorari in the above-referenced matter. Please file the original and return a clocked-in copy via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,

Michael J. Anzelmo

MJA:jlee

cc: Hutson S. Davis, Jr., Esquire
James Edward Bradley, Esquire
Andrew G. Melling, Esquire
Andrew F. Lindemann, Esquire
Weldon R. Johnson, Esquire
Monteith P. Todd, Esquire

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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December 5, 2011

C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Nelson Mullins Riley
& Scarborough
P O Box 11070
Columbia, SC 29211

Re: Walterboro Comm Hosp v. Meacher, David

Dear Counsel:

This is an amended letter denying the Motion to Strike Portions of Respondent's Return to the Petition for Writ of Certiorari. In view of this the return to the petition for writ of certiorari has been filed as it was received.

By copy of this letter we are advising opposing counsel that the amended reply to the return to the petition for writ of certiorari should be served and filed on or before December 8, 2011.

Very truly yours,

Daniel E. Shearouse
35
CLERK

DES/lda

cc: Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
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# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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December 1, 2011

C. Mitchell Brown, Esquire
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Nelson Mullins Riley & Scarborough
P O Box 11070
Columbia, SC 29211

Re: Walterboro Comm Hosp v. Meacher, David

Dear Counsel:

The following Order has been endorsed on your Motion to Strike Portions of Respondents' Return to the Petition for Writ of Certiorari in the above entitled case on appeal.

"Motion denied.

s/ Jean H. Toal C.J.
For the Court

December 1, 2011."

By copy of this letter we are advising opposing counsel the amended return to the petition for writ of certiorari should be served and filed fifteen (15) days from the date of this letter.

Very truly yours,

CLERK

DES/lda

cc: Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge



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Case No. 2005-CP-15-602

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Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

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**Reply to Respondents' Return to the Petition for a Writ of Certiorari**

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Pursuant to Rule 242(g) of the South Carolina Appellate Court Rules, Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center ("Colleton") hereby files this Reply to Respondents' Return to the Petition for a Writ of Certiorari in the above-captioned matter. In this matter, the trial court made two clearly erroneous rulings. The Court of Appeals acknowledges these erroneous rulings, but rather than reverse, has affirmed based on grounds it originated in the first instance, which grounds are flawed. Respondents attempt now to defend the Court of Appeals' decision based on still newer arguments not advanced by the Court of Appeals, none of which have merit. For the reasons stated herein, and in Colleton's petition for a writ of certiorari, this Court should issue a writ of certiorari to review and reverse the opinion of the Court of Appeals.

## Argument

Despite Respondents David E. Meacher, MD, David E. Meacher, PA, and Carolina Health specialists, PA a/k/a CareFirst Health Specialists, and The South Carolina Medical Malpractice Liability Joint Underwriting Association's assertions to the contrary, certiorari should be granted. The Court of Appeals' *sua sponte* decision on Colleton's breach of contract claim conflicts with South Carolina's established precedent for triggering an insurer's "duty to defend." Further, our courts have yet to expressly address the impact of the doctrine of vicarious liability on the fault elements in the traditional *Vermeer* test for equitable indemnification. Finally, the Court of Appeals erred in failing to treat the parties' stipulations as equivalent to evidence. Accordingly, the grounds set forth in Rule 242, SCACR, exist for this Court to issue of a writ of certiorari.

### I. CareFirst misconstrues Colleton's "duty to defend" argument.

CareFirst sets forth several points to support the Court of Appeals' ruling on the breach of contract issue. None have merit. Each is addressed below.

CareFirst first attempts to rely on preservation of error rules to defend the Court of Appeals' *sua sponte* decision on the breach of contract cause of action. {Return p. 12}. This claim is without merit. Colleton properly preserved this issue for appellate review.[1] In its complaint, Colleton argued that CareFirst breached Section 4.1 of the

[1] In the return, CareFirst makes reference to the fact that Colleton's breach of contract cause of action was discussed as contractual indemnity at the indemnification hearing. {Return p. 11-12}. While some confusion did exist at the hearing as to what this cause of action was called, this does not mean this issue is unpreserved. Our courts adhere to the well-settled rule that the substance of a cause of action—breach of contract here—will prevail over technical arguments regarding the form or language used by the parties. *See, e.g., Estate of Patterson v. Palmetto Bank*, 374 S.C. 116, 120, 646 S.E.2d 885, 888 (Ct. App. 2007) (holding that a party need not use the exact name of a legal doctrine in order to preserve it)

agreement by failing to purchase the agreed upon insurance. {App. p. 19, 20}. However, the trial court incorrectly characterized this claim as one for contractual indemnity, rather than breach of contract. As a result, Colleton filed its Rule 59(e), SCRCP, motion alerting the trial court to its misconstruction of the breach of contract cause of action. {App. 154; 161-163}. Colleton specifically noted that the second cause of action was for "relief for the damages caused by CareFirst's failure to procure vicarious liability/ostensible agency coverage for Colleton" as required by Section 4.1 of the agreement. {App. p. 154}. The trial court denied the motion without further analysis. {App. p. 9}. This issue was properly preserved for appellate review.

CareFirst further claims the Court of Appeals "was correct in its analysis and decision on the breach of contract claim . . . ." {Return p. 12}. Specifically, CareFirst argues that Section 4.1 of the contract meant "CareFirst **agreed** to obtain coverage that would provide a *defense* to Colleton under certain delineated circumstances." {*Id.* at 13 (italics in original but other emphasis added)}. Thus, CareFirst admits it had an obligation to purchase coverage to protect Colleton from certain actions. It is undisputed that CareFirst ***failed to purchase the insurance*** as it admittedly **agreed** to do. ***That failure was the breach of the contract for which Colleton sought damages***. As a result, the Court of Appeals' finding of no breach is incorrect and warrants certiorari review by this Court.

Next, CareFirst misapprehends Colleton's "duty to defend" argument. CareFirst alleges that "Colleton was not entitled to a defense furnished by CareFirst" and that "Colleton is mistaken in its belief that CareFirst is an insurance company or

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(internal quotations and citations omitted). As shown above, this issue was properly preserved for appellate review. In addition, the Court of Appeals addressed the issue on the merits in its opinion.

the equivalent of an insurance company with respect to Colleton." {Return p. 13, 14}. Colleton did not argue that CareFirst was required to provide the defense of Colleton in the underlying action or that CareFirst was Colleton's insurer. Rather, Colleton maintained that CareFirst was ***required to purchase the agreed insurance***. That **insurer** (the one CareFirst was to have procured, but failed to procure) would then have a duty to defend Colleton in the underlying action based on South Carolina's well-settled "duty to defend" precedent. Thus, CareFirst has no duty to defend Colleton; rather, that duty would have been borne by the insurance carrier CareFirst procured to protect Colleton. CareFirst breached the contract because it never procured that insurance to protect Colleton.

CareFirst also argues that Colleton attempts to read certain terms out of Section 4.1 in order to claim breach of contract. {Return p. 14}. This is incorrect. Colleton maintains that had CareFirst purchased the contractually mandated insurance, then the issue of whether the underlying action was covered by the policy would be analyzed under this Court's long-standing "duty to defend" rules. CareFirst asks this Court to ignore this controlling precedent. Moreover, CareFirst contends the duty to defend cannot be triggered because the complaint in the underlying action contained a direct claim of negligence against Colleton. {Return p. 14-15}. This contradicts our well-settled "duty to defend" precedent. The presence of an independent claim directly against Colleton in the underlying suit does not allow for avoidance of that duty to defend. *See, e.g., Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 470, 265 S.E.2d 38, 40 (1980) (holding that if the complaint creates a ***possibility of coverage***, then the insurer is obligated to defend); *Town of Duncan v. State Budget and*

*Control Bd.*, 326 S.C. 6, 16, 482 S.E.2d 768, 773-74 (1997) (finding that this Court adheres to the rule that the inclusion of some non-covered claims does not abrogate the duty to defend when a complaint raises claims covered by the policy). The Court of Appeals overlooked this precedent when it affirmed the trial court based on this *sua sponte* theory. The opinion holds that an insurer's duty to defend is only triggered when all claims made by the third party are covered under the policy. This is error. Thus, this Court should issue a writ of certiorari to ensure consistency in our "duty to defend" jurisprudence.[2]

Lastly, CareFirst alternatively claims that, even if it breached the contract, then Colleton cannot establish damages. CareFirst posits a new reason not relied upon by the Court of Appeals for this proposition. {Return p. 15-16}. It argues *Sloan Construction Co. v. Central National Ins. Co.*, 269 S.C. 183, 236 S.E.2d 818 (1977) stands for the proposition that Colleton cannot recover damages under these facts. *Sloan* does not support Respondents here. In *Sloan*, the insured had two polices that provided it with identical coverage. One company refused to provide a defense, but the second company provided the defense as it was contractually obligated to do. *Sloan* addressed the issue of whether ***the insurance company that provided the defense*** could recover from the insurance company that refused to defend. Ultimately, this Court held the defending insurance company could not recover from the other insurer. The defending insurer was obligated to provide a defense, and did so. It was not permitted to recover

[2] CareFirst also claims the stipulation that Colleton was pursued solely under a vicarious liability theory cannot alter this analysis. This ignores the fact that the stipulation replaced and eliminated the allegations of the complaint that the Court of Appeals construed to be a cause of action other than one solely based on vicarious liability. *See* 83 C.J.S. *Stipulations* § 86 (2010) (reciting that a stipulation of fact is equivalent to an admission in the pleadings).

from another insurer. *Sloan* does not apply here. *Sloan* does not impact ***Colleton's*** ability to recover for the damages stemming from CareFirst's breach of its contract to procure insurance. CareFirst is essentially trying to convert *Sloan* into support for a claim that Colleton has suffered no damages, but *Sloan* does not stand for this and this attempt is further blocked by the collateral source rule. *See, e.g., Mitchell v. Fortis Ins. Co.*, 686 S.E.2d 176 (2009)(damages may not be decreased due to payment to plaintiff of all or part of damage from a collateral source). In any event, the record shows that Colleton introduced evidence that it incurred fees and costs which were attributable to the underlying claim against Colleton. {e.g., App. p. 63-64}. This Court should issue a writ of certiorari on this issue and reverse the Court of Appeals.

## II. The Court of Appeals erred in failing to recognize that the vicarious liability doctrine operates to establish the fault elements of the equitable indemnification test by operation of the doctrine.

No court has addressed how vicarious liability impacts the *Vermeer* test for equitable indemnification in an imputed fault context. The acknowledgment that one party is pursued via a vicariously liability theory removes the need for a further finding in an indemnity action that the party seeking indemnity was "adjudged without fault." This Court should grant certiorari because the Court of Appeals failed to properly account for the impact of the doctrine of vicarious liability on the fault elements of the *Vermeer* test. In the return, Meacher sets forth reasons he contends certiorari is not warranted on this issue. Each argument is without merit, as addressed below.

First, Meacher claims "Colleton seeks a writ of certiorari so that this Court may modify the *Vermeer* test for vicarious liability cases." {Return p. 9}. Likewise, the Court of Appeals found that "Colleton never specifically argued to the circuit court that

the *Vermeer* test should be modified for vicarious liability cases." {Opinion No. 4674 at p. ____; App. p. 293-307}.[3] Both Meacher and the Court of Appeals misapprehend Colleton's position. Colleton did not argue that a modification of the traditional *Vermeer* test is needed in vicarious liability tests. Colleton maintained that a party liable to the underlying plaintiff through the imputed fault of vicarious liability is, by operation of law, not liable due to any actual fault of his own. The liability is instead imposed by the operation of law based on the relationship of the vicariously liable party to the party that caused the underlying plaintiff's damages. Thus, Colleton argued that the application of the vicarious liability doctrine establishes the *Vermeer* "adjudged without fault" requirement for Colleton here. The Court of Appeals holding conflicts with the principles and rationale behind the vicarious liability doctrine. This Court should grant certiorari to address this error.

Second, Meacher contends the merits of this argument fail because the second amended complaint in the underlying action contained direct allegations of negligence against Colleton. {Return p. 10}. This argument fails on its merits. It is well-settled that the allegations of a complaint are not determinative of whether a party can receive equitable indemnification. Instead, such a determination is based on the evidence found by the trial court in the indemnity action. *See, e.g., Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64, 518 S.E.2d 301, 307 (Ct. App. 1999) (recognizing that the allegations of the complaint are not determinative of whether a

[3] As a result of this misapprehension of Colleton's position, the Court of Appeals erred in finding this issue was not preserved for appellate review. The issue regarding vicarious liability was presented to the trial court on numerous occasions. *See, e.g.*, Joint Stipulation of Undisputed Facts at ¶ 16, 17, 19, 21, and 22; R. 147; *see also* Transcript of Hearing dated Oct. 2, 2008, pp. 16, 17, 18, 21, 22, 50, and 52; R. 53-55, 58-59, 87, 89. At the hearing, evidence was offered that established Colleton had no fault in this case and was only pursued via vicarious liability. {Transcript of Hearing dated Oct. 2, 2008, p. 22; R. 59}.

party has the right to indemnity); *Griffin v. Van Norman,* 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) (noting that a complaint serves "merely as background to this indemnification litigation" and that allegations in the complaint "are evidence of nothing"); *Jourdan v. Boggs/Vaughn Contracting, Inc.,* 324 S.C. 309, 476 S.E.2d 708 (Ct. App. 1996) (allegations of the complaint are not determinative of the right to indemnity; rather, such determination is based on evidence and facts found by the fact finder). In this matter, the evidence introduced in the indemnity actions established that Colleton was only allegedly vicariously liable to the underlying plaintiff. As a result, the *Vermeer* requirement that the party seeking indemnity be free from fault was established. The Court of Appeals erred in holding that Colleton failed to establish its lack of fault. The misapprehension of this point warrants a grant of certiorari by this Court.

Third, Meacher alleges that this Court need not even address this issue because the Court of Appeals correctly found Colleton did not prove the fault of Meacher. {Return p. 10-11}. As is fully shown in Section III, *infra*, the Court of Appeals erred in making such a finding.

## III. The stipulations provided valid evidence upon which the trial court and Court of Appeals should have used to determine Colleton's entitlement to indemnification from Meacher.

Meacher claims the Court of Appeals properly accounted for the parties' Joint Stipulations of Undisputed Facts for two reasons. First, Meacher alleges the stipulations cannot constitute "conclusive proof" that Colleton was entitled to equitable indemnification from Meacher. Second, Meacher argues the Court of Appeals properly applied the preponderance of the evidence standard of proof in affirming the trial court.

Both arguments are without merit. Therefore, this Court should grant certiorari in this matter and reverse.

First, Meacher alleges that Colleton seeks to have the stipulations be treated as "conclusive proof" or a "binding agreement" that Colleton was entitled to equitable indemnification from Meacher. {Return p. 6-7}. This misconstrues Colleton's argument. Colleton did not argue the stipulations constituted "conclusive proof" or a "binding agreement" that Meacher was at fault and that Colleton was without fault in causing the underlying damage. Rather, Colleton contended throughout the litigation that the stipulations provided a factual basis applicable to the legal issues that the trial court had to resolve. *See, e.g.*, 83 C.J.S. *Stipulations* § 89 (2010) (providing that the purpose of an agreed statement of facts is to facilitate hearing the case and save the time, trouble and expense of examining witnesses, while still presenting to the court the essential facts for resolving the issues). The trial court was to use these stipulations to resolve Colleton's entitlement to indemnity ***based on*** the facts presented in the stipulations.

For example, the stipulations provided evidence that Colleton was not negligent in their selection and approval of Meacher to furnish medical services as an emergency physician in Colleton's emergency department. {*See* Stipulations ¶ 10; App. p. 149}. The stipulations also provided evidence that, at the trial of the underlying action, neither Grant nor his attorney introduced evidence of any negligent act or omission by any employee of Colleton that caused harm or injury to Grant. {*Id.* at ¶ 16; App. p. 150}. Moreover, the trial court could have used the stipulations to determine that Bert G. Utsey, III, attorney for Grant, stipulated at the Grant trial that his only cause of

action against Colleton was based on a vicarious liability theory. {*Id.* at ¶ 17; App. p. 150}. Additionally, the stipulations set forth factual testimony and expert opinions from the trial expert, Dr. Mazo, as to Meacher's departures from the standard of care and the fact that Colleton had no such fault. Specifically, the stipulations summarized Dr. Mazo's testimony that Meacher's failure to order an ultrasound was a departure from the standard of care and that the only evidence introduced as to the negligence or departure from the standard of care was limited to alleged departures by Meacher. {*Id.* at ¶ 19, 20; App. p. 150}. Dr. Mazo further noted he found no breaches in the standard of care on the part of Colleton. {*Id.* at ¶ 22; App. p. 150}. The trial court should have used this evidence as a factual basis to determine whether Meacher was at fault and that Colleton was without fault, as required by the *Vermeer* equitable indemnification test. TTherefore, this Court should grant certiorari in this matter and reverse.

Second, Meacher claims the Court of Appeals gave "due weight" to the stipulations in applying the preponderance of the evidence standard of review. {Return p. 8}. Meacher relies specifically on language set forth in the order denying Colleton's petition for rehearing, in which the court noted "[a]s considered by the substantial treatment the stipulations were given in Section I of the opinion, this court clearly considered the stipulations and ruled that the record as a whole . . . contained insufficient evidence to enable the circuit court or this court to make any findings . . . by a preponderance of the evidence." {App. 366}.

Meacher's reliance on this language ignores the fact that while the Court of Appeals may have recited the correct standard of review, the court did not consider the

stipulations as evidence. Section I of the opinion establishes the court refused to consider the stipulations as evidence; instead, the court only considered them as non-binding "stipulations as to the law." {Opinion No. 4674 at p. 6; App. p. 293-307}. Thus, in considering the preponderance of the evidence, the trial court and Court of Appeals failed to consider the stipulations at all. This was error. The stipulations constituted the only evidence presented to the trial court to make the appropriate findings of fault. Meacher offered no evidence to refute the stipulations. In fact, Meacher offered no evidence that Colleton committed any negligent act either in the underlying trial or the indemnity action. Meacher likewise failed to offer any evidence that refuted he was solely at fault for causing the damages to the underlying plaintiff. Therefore, the Court of Appeals failed to adhere to the standard of review and make findings in accordance with the preponderance of the evidence before it. This Court should grant certiorari in this matter and reverse.

## Conclusion

Based on the foregoing, this Court should issue a writ of certiorari to review and reverse the Court of Appeals' decision in this matter.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center

Columbia, South Carolina

August 29th, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

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Case No. 2005-CP-15-602

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Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.



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PROOF OF SERVICE

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Reply to Respondents' Return to the Petition for a Writ of Certiorari

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Eileen Hindman
Administrative Assistant

Dated: 8/29/11

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

OCT 14 2011

S.C. Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2005-CP-15-602

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

**Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari**

Pursuant to Rule 240(a) of the South Carolina Appellate Court Rules, Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center ("Colleton") hereby moves this Court for an order striking certain arguments, phrases, and other portions of Respondents' Return to the Petition for a Writ of Certiorari. Respondents attempt to use their Return to reargue the same issue already rejected by this Court in the order denying the motion to supplement the appendix.

The grounds for this motion are (1) that this Court has previously ruled on these arguments and references in the Return when this Court rejected Respondents' Motion to Supplement the Appendix and (2) that inclusion of these portions of the Return would allow Respondents' to make arguments not supported by the Appendix. Therefore,

Colleton moves that this Court issue an order requiring Respondents to strike these arguments, phrases, and other portions of Respondents' Return to the Petition for a Writ of Certiorari. This Court should order Respondents to file a revised return omitting these items while keeping the Return otherwise identical in substance, form, and language to that previously filed with this Court.

Colleton attempted to have Respondents remove the offending portions from the Return without having to burden this Court with this motion. *See* Letter dated October 3, 2011, attached hereto as Exhibit A.[1] However, Respondents declined to voluntarily adjust their Return. *See* Letter dated October 5, 2011, attached hereto as Exhibit B. This motion follows.

**Argument**

On August 16, 2011, Respondents requested that this Court include in the Appendix the vacated December 15, 2010 Court of Appeals' opinion and Colleton's petition for rehearing and rehearing *en banc* addressing that vacated opinion. Respondents requested these documents be included in the Appendix in order to allow them to make certain preservation-type arguments in response to the issues Colleton presented in its Petition for a Writ of Certiorari. *See* p. 2-3 of Memorandum in Support of Motion to Compel Supplementation of Appendix (setting forth Respondents' support for the request as (1) "Respondents take the position in this Court that the Petitioner's successive or second petition for rehearing was improper;" (2) "the arguments in the second petition should have been limited to the changes actually made to the appellate court's original opinion;" and (3) "[t]he second petition for rehearing

[1] The letter is attached without the exhibits listed therein. Those exhibits are contained as set forth in Exhibits C-K of this motion

should not be used to raise an issue that could have been but was not raised in the first petition for rehearing"). However, this Court **rejected** each of Respondents' arguments and denied the request via Order dated September 22, 2011. That Order established that the vacated opinion and any petition for rehearing relating to that opinion were irrelevant and unnecessary to this Court's proceedings.

Despite the September 22, 2011 Order, Respondents attempt to use their Return to the Petition for a Writ of Certiorari to reargue the same issues and arguments already rejected by this Court. Specifically, Respondents' Return includes several references and arguments that directly relate to the documents this Court specifically ruled did not belong in the Appendix.[2] The offending portions of Respondents' Return are as follows:

- On page 3, lines 8-11—"*See, Walterboro Community Hospital, Inc. v. Meacher*, 391 S.C. 24, 703 S.E.2d 233 (Ct. App. 2010). Colleton then filed a petition for rehearing and rehearing *en banc*. On March 2, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing." (*See* Attached **Exhibit C** for marked language in context of Return)

- On page 3, line 12-13—the phrase "which did not alter the Court's decision or reasoning." (*See* Attached **Exhibit D** for marked language)

- On page 3, lines 15-23 through page 4, line 2—the following paragraphs:

> "With the substituted opinion, the Court of Appeals added two paragraphs at the end of section II of the opinion. The two new paragraphs cite to the disclaimer of liability language contained in the settlement agreement between Grant and Colleton. The Court of Appeals made the additional point that the settlement agreement cannot be construed as evidence that Colleton was only liable to Grant under a vicarious liability theory. That is the only change from the original opinion.
>
> Colleton then resubmitted the same petition for rehearing as before, except that the 'new' or second petition for rehearing did include one new

[2] Respondents filed the Return prior to this Court denying the motion to supplement the Appendix.

section - section VI. The argument contained in section VI was new, could have but was not raised in the original petition for rehearing, and was not responsive to the two paragraphs added by the Court to the original petition." (*See* Attached **Exhibit E** for marked language)

- On page 4, line 3—the word "second" preceding "petition for rehearing." (*See* Attached **Exhibit F** for marked language)

- On page 10, footnote 2—should remove the word "two" and change "petitions" to petition. (*See* Attached **Exhibit G** for marked language)

- On page 13, line 18—the word "second" preceding "petition for rehearing." (*See* Attached **Exhibit H** for marked language)

- On page 14—footnote 7 needs to be removed in its entirety. (*See* Attached **Exhibit I** for marked language)

- On page 15, line 4—the phrase "newly made and unpreserved." (*See* Attached **Exhibit J** for marked language)

- On page 17, line 20-21—the phrase "new grounds for rehearing in a successive petition for rehearing." (*See* Attached **Exhibit K** for marked language)

As noted above, this Court already determined that the initial petition for rehearing was irrelevant and unnecessary to the issues before this Court. These sections, arguments, and references should be thus stricken from the Return.

Moreover, our appellate court rules preclude consideration of matters not included in the record on appeal. Rule 210(h), SCACR (setting forth the rule that "the appellate court will not consider any fact which does not appear in the record on appeal"). This Court has previously excluded the vacated Court of Appeals' opinion and original petition for rehearing from the Appendix. Thus, Respondents' arguments set forth above cannot be supported by any fact appearing in the record in this matter. Importantly, Respondents have already admitted that if this Court denied the motion to supplement, then the court would be unable to address the arguments related to the

vacated opinion and petition for rehearing. *See* p. 3 of Memorandum in Support of Motion to Compel Supplementation of Appendix (admitting that "[t]his Court will not be able to review the Respondents' position in that regard without having access to the original decision of the Court of Appeals and the original or first petition for rehearing that was filed and denied"). As a result, this Court should order Respondents to strike these arguments, phrases, and other portions of Respondents' Return to the Petition for a Writ of Certiorari because they lack support in the record.

Lastly, Rule 242(e)(3), SCACR, states that the Appendix shall contain: "[a] copy of the decision of the Court of Appeals on which certiorari is sought." This is not the vacated opinion, but the operative opinion. This rule reinforces that this Court correctly held the Appendix should not contain the vacated opinion. Just as the vacated opinion should not be included in the Appendix, arguments based on the vacated opinion should not be included in Respondent's Return.

## Conclusion

Based on the foregoing, this Court should grant this motion and order Respondents to file a revised Return omitting the above arguments, phrases, and other portions of the Return but keeping the Return otherwise identical in substance, form, and language to that previously filed with this Court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center

Columbia, South Carolina

October 19, 2011

Motion denied

C.J.

for The Court

November 30, 2011

EXHIBIT

A

# Nelson Mullins

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October 3, 2011

**Via Electronic Mail Only**

Andrew Lindemann, Esquire
Davidson & Lindemann, P.A.
1611 Devonshire Drive, Second Floor
Columbia, South Carolina 29202

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602, HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511

Andrew,

In light of the September 22, 2011 Order from the Supreme Court denying your Motion to Compel Supplementation of the Record on Appeal, we have identified a few issues with your Return to the Petition for a Writ of Certiorari that need to be corrected. In your motion, you requested that the December 15, 2010 Court of Appeals opinion and other documents be included in the Appendix in order to allow you to make certain preservation-type arguments in response to issues we presented in our petition for a writ of certiorari. However, the court rejected your position and denied the request to include those items. This order precludes you from rehashing these same arguments in your Return to the Petition for a Writ of Certiorari.

As a result, we request that you remove any reference to these arguments in your Return. In particular, we ask that you strike the following:

- On page 3, lines 8-11—"*See, Walterboro Community Hospital, Inc. v. Meacher*, 391 S.C. 24, 703 S.E.2d 233 (Ct. App. 2010). Colleton then filed a petition for rehearing and rehearing *en banc*. On March 2, 2011, the Court of Appeals issued

an Order Denying Petition for Rehearing." See Attached Exhibit A for marked language.

- On page 3, line 12-13—the phrase "which did not alter the Court's decision or reasoning." See Attached Exhibit B for marked language.

- On page 3, lines 15-23 through page 4, line 2—the following paragraphs:

"With the substituted opinion, the Court of Appeals added two paragraphs at the end of section II of the opinion. The two new paragraphs cite to the disclaimer of liability language contained in the settlement agreement between Grant and Colleton. The Court of Appeals made the additional point that the settlement agreement cannot be construed as evidence that Colleton was only liable to Grant under a vicarious liability theory. That is the only change from the original opinion.

Colleton then resubmitted the same petition for rehearing as before, except that the 'new' or second petition for rehearing did include one new section – section VI. The argument contained in section VI was new, could have but was not raised in the original petition for rehearing, and was not responsive to the two paragraphs added by the Court to the original petition." See Attached Exhibit C for marked language.

- On page 4, line 3—the word "second" preceding "petition for rehearing." See Attached Exhibit D for marked language.

- On page 10, footnote 2—should remove the word "two" and change "petitions" to petition. See Attached Exhibit E for marked language.

- On page 13, line 18—the word "second" preceding "petition for rehearing." See Attached Exhibit F for marked language.

- On page 14—footnote 7 needs to be removed in its entirety. See Attached Exhibit G for marked language.

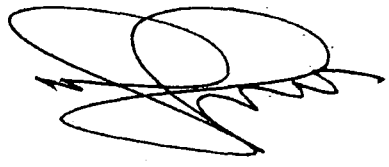
- On page 15, line 4—the phrase "newly made and unpreserved." See Attached Exhibit H for marked language.

- On page 17, line 20-21—the phrase "new grounds for rehearing in a successive petition for rehearing." See Attached Exhibit I for marked language.

The Court has already ruled with finality as to these arguments. Thus, this language should be removed from your return. We ask that you do so and submit a revised return. This revised Return should omit these items but remain otherwise identical in substance, form, and language.

We hope you will agree to make these changes to your return so we can avoid burdening the court with a motion on this issue. Please let me know if you will consent to make these changes no later than close of business Wednesday, October 5, 2011.

Very truly yours,



Michael J. Anzelmo

MJA:jbl

cc: Hutson S. Davis, Jr., Esquire (via US mail only)
James Edward Bradley, Esquire (via US mail only)
Andrew G. Melling, Esquire (via US mail only)
Weldon R. Johnson, Esquire (via US mail only)
Monteith P. Todd, Esquire (via US mail only)

EXHIBIT

B

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October 5, 2011

***Via E-Mail Only***

Michael J. Anzelmo, Esquire
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Columbia, South Carolina 29211-1070

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Michael:

I am in receipt of your letter dated October 3, 2011, requesting that I filed a revised Return to Petition for Writ of Certiorari that redacts certain language and arguments from the Return. You contend that the Order dated September 22, 2011 rejects the arguments contained in the Return. I disagree. The September 22, 2011 includes no such language. That Order simply denied my request that the Appendix be supplemented to include certain post-decision filings at the Court of Appeals. That Order does not address the merits of any preservation issues nor any other arguments that my clients have made in response to your Petition for Writ of Certiorari. The portions of the Return that you have highlighted are not false or inaccurate in any way. There is no denying that there were two Petitions for Rehearing filed. I therefore decline to revise the Return as you have requested.

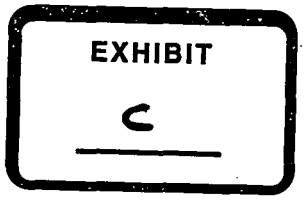
If you have any questions, please advise.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/




was not entitled to any contractual relief based upon language contained in paragraph 4.1 of the Professional Services Agreement entered between Walterboro Community Hospital, Inc. and CareFirst Health Specialists. (R. 1-5).

Colleton subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. (R. 150-152). That motion was denied by order filed December 15, 2008. (R. 6). Colleton thereupon filed an appeal to the South Carolina Court of Appeals.

On December 15, 2010, the Court of Appeals issued a published decision affirming the judgment entered in favor of the Respondents in this non-jury action. *See, Walterboro Community Hospital, Inc. v. Meacher* 391 S.C. 24, 703 S.E.2d 233 (Ct. App. 2010). Colleton then filed a petition for rehearing and rehearing *en banc*. On March 2, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing. The Court of Appeals withdrew the earlier opinion and substituted a new opinion which did not alter the Court's decision or reasoning. *See, Walterboro Community Hospital, Inc. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011).

With the substituted opinion, the Court of Appeals added two paragraphs at the end of section II of the opinion. The two new paragraphs cite to the disclaimer of liability language contained in the settlement agreement between Grant and Colleton. The Court of Appeals made the additional point that the settlement agreement cannot be construed as evidence that Colleton was only liable to Grant under a vicarious liability theory. That is the only change from the original opinion.

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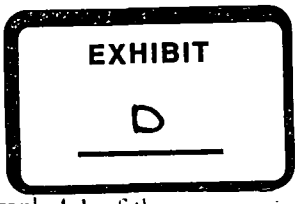


was not entitled to any contractual relief based upon language contained in paragraph 4.1 of the Professional Services Agreement entered between Walterboro Community Hospital, Inc. and CareFirst Health Specialists. (R. 1-5).

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EXHIBIT

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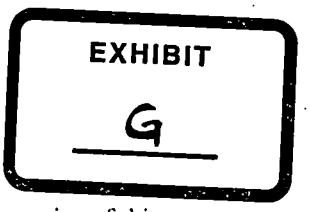
rehearing, and was not responsive to the two paragraphs added by the Court to the original petition.

By order entered May 26, 2011, the Court of Appeals denied the second petition for rehearing. (App. 366-367). The Petitioner Colleton has now filed a petition for writ of certiorari with this Court.


rehearing, and was not responsive to the two paragraphs added by the Court to the original petition.

By order entered May 26, 2011, the Court of Appeals denied the second petition for rehearing. (App. 366-367). The Petitioner Colleton has now filed a petition for writ of certiorari with this Court.




First and foremost, the Court of Appeals did not rule against Colleton on the merits of this issue. Instead, the Court correctly concluded that this issue was not preserved for appellate review because it was raised for the first time on appeal. The Court of Appeals wrote: "Colleton never specifically argued to the circuit court that the *Vermeer* test should be modified for vicarious liability cases." *Walterboro*, 709 S.E.2d at 78. In seeking a writ of certiorari, Colleton does not even take issue with the Court of Appeals' preservation ruling but rather addresses only the merits of that non-preserved issue. Because Colleton does not except to the preservation ruling, there is no need for this Court to even entertain this basis for a writ of certiorari.[2]

Nonetheless, even if this Court looks at the merits of this issue, the record confirms that Colleton presented no evidence that its liability was limited to vicarious liability or imputed fault. In the Second Amended Complaint in the *Grant* action, the plaintiff Grant asserted direct allegations of negligence against Colleton. The Court of Appeals acknowledges this, a point not refuted by Colleton: "Grant's complaint alleges that Colleton was negligent in its own right." *Walterboro*, 709 S.E.2d at 77. While there may have been a different stipulation by Grant's counsel at the close of the malpractice trial, that does not establish that Colleton was not at fault. As the Court of Appeals recognized, Grant's stipulation occurred after the trial as part of the settlement agreement. *Id.* Moreover, there is no indication that the Respondents accepted or joined that stipulation. The Respondents, in other words, have not agreed that Colleton did not have any contributing fault.

Third, it presents an immaterial point that need not be reached to fully adjudicate this action. Because the Court of Appeals correctly ruled that Colleton did not prove the fault of Dr. Meacher, it is technically not even necessary to reach or discuss proof of the second of the *Vermeer* elements.

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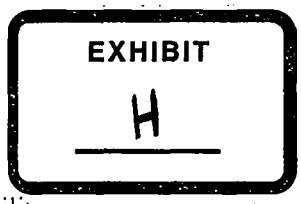
[2] Colleton likewise did not take exception to the Court of Appeals' preservation ruling in its two petitions for rehearing.




> Contractor's [CareFirst's] insurance coverage shall provide Facility [Colleton] *defense* for claims arising *solely* on the basis of vicarious liability or ostensible or apparent agency, for the acts or inaction of Contractor and/or Contractor's Representatives.

(R. 23). (Emphasis added). By this language, CareFirst agreed to obtain coverage that would provide a *defense* to Colleton under certain delineated circumstances.[6] There was no requirement in the contractual provision for CareFirst to have Colleton made an additional insured or to obtain insurance coverage that provided indemnification to Colleton.

The Court of Appeals concluded that CareFirst did not breach paragraph 4.1 because Colleton was not entitled to a defense in the *Grant* litigation. The Court explained that "the Agreement only required CareFirst to provide a defense to Colleton 'for claims arising *solely* on the basis of vicarious liability or ostensible or apparent agency.'" *Walterboro*, 709 S.E.2d at 77. (Emphasis in original). Furthermore, as the Court of Appeals correctly recognized, the action brought by Grant against Colleton included direct liability claims. Because the suit against Colleton did not arise *solely* on a vicarious liability theory, Colleton was not entitled to a defense furnished by CareFirst, and hence, there was no actionable breach of paragraph 4.1.

In an attempt to circumvent the limiting language of paragraph 4.1, Colleton cited for the first time in its second petition for rehearing case law that establishes the duty *of an insurance company* to provide a defense to its insureds if there is any claim pled that may be covered under

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[6] Because paragraph 4.1 required only that a defense be provided to Colleton, its damages would not include the cost of the settlement. Instead, the damages would be limited to the costs of the defense. This now appears to be conceded by Colleton in its Petition for Writ of Certiorari. However, as addressed below, Colleton has not shown that it incurred the costs of the defense in the Grant litigation. To the contrary, a December 16, 2003 letter from Weldon R. Johnson was admitted into evidence. That letter seeks payment from the JUA "in the sum of $127,106.96, which reflects the total of monies *paid by the carrier for the hospital for settlement, fees and expenses*." (R. 130). (Emphasis added).

EXHIBIT

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the insurance policy.[7] Colleton is mistaken in its belief that CareFirst is an insurance company or the equivalent of an insurance company with respect to Colleton. Likewise, the contract between Colleton and CareFirst is *not* an insurance policy, and the statutory and common law governing an insurance policy is not applicable here.

The Court of Appeals' analysis is correct. As indicated, the Court of Appeals focused on the fact that the agreement only required CareFirst to provide a defense "for claims arising *solely* on the basis of vicarious liability or ostensible or apparent agency." Colleton attempts to read the word "solely" out of the paragraph 4.1 of the contract. However, that word must also be given effect, which is precisely what the Court of Appeals' opinion does. The contractual duty to provide a defense is triggered where the claims against Colleton are "solely" based on vicarious liability or ostensible or apparent agency theories. However, the record clearly reflects that was not the case. As the Court of Appeals correctly observed, the claims asserted by Grant included direct claims of negligence against Colleton. Consequently, the contractual duty to provide a

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[7] The Respondents are unaware of any authority that permits the filing of a successive petition for rehearing. However, even if a successive petition were allowed, it should be limited to the changes actually made to the appellate court's original opinion. In the related context of successive post-trial motions, it has been held that a second post-trial motion "is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion." *Coward Hund Construction Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999). This principle was affirmed in *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004). *See also, Robinson v. Robinson*, 365 S.C. 583, 619 S.E.2d 425 (2005). In the present case, however, the new grounds contained in section VI of the second petition for rehearing – which is what Colleton is now arguing in its petition for writ of certiorari – do not challenge the two new paragraphs added to the Court of Appeals' original opinion. Colleton has simply used its second petition for rehearing to raise an issue that could have been but was not raised in its first petition for rehearing. In short, this argument is not properly preserved for review by this Court. *See also, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995) (a party may not present one ground in the trial court and then change his theory on appeal; the same ground argued on appeal must have been argued in the trial court).

Remove

defense was not triggered where Grant did not pursue "solely" vicarious claims against Colleton. Because direct claims were alleged and pursued, the contractual duty to provide a defense was not triggered, and, as the Court of Appeals correctly determined, there was never a breach of paragraph 4.1. In short, Colleton's newly made and unpreserved arguments that CareFirst is an insurance company or should be held to the same statutory and common law duties as an insurance company have no basis in law or fact.

Colleton has also argued that the Court of Appeals misapplied the post-settlement stipulation by the plaintiff Grant that Colleton's liability was vicarious only. Colleton disputes the Court of Appeals' conclusion that the timing of that stipulation controls on any contractual duty by CareFirst to provide a defense to Colleton. The Court of Appeals' analysis, however, is correct. Grant asserted direct liability claims against Colleton and did not stipulate to a vicarious liability theory (if at all) until after the claims against Colleton were settled. At that point, a defense was no longer required. The case was over. Any suggestion that a post-trial stipulation retroactively amends the pleadings or retroactively changes the contractual duties owed earlier in the litigation by CareFirst is illogical and is unsupported by any precedent. Furthermore, the stipulation, if any, was by Grant alone. As discussed previously, none of the Respondents, CareFirst included, ever stipulated that Colleton's liability was vicarious only.

Finally, even if Colleton can show a breach of paragraph 4.1, it cannot show any damage resulting therefrom, which is another reason for denying a writ of certiorari. In its petition for writ of certiorari, Colleton suggests that it "had to pay out of pocket its own defense costs to defend against the Grant lawsuit." *See*, Petition for Writ of Certiorari, p. 13. *That suggestion is absolutely false*. There is *no evidence* that Colleton incurred any defense costs whatsoever nor *any* loss as a result of the *Grant* litigation. To the contrary, the record reflects very clearly that Colleton was

insurer did not defend. Sloan, however, was also insured by Liberty Mutual Insurance Company which paid the defense costs, albeit by means of a loan receipt. This Court observed as follows:

> The fact remains that the Varner suit was concluded without any loss or liability to Sloan. Absent any damage flowing to Sloan as a result of Central's refusal to defend, Sloan had no right to recovery against Central. Moreover, although Sloan nominally paid the costs of defense, it is clear that the burden was actually borne by Liberty, through the guise of a loan receipt. Liberty, in paying for the attorneys it employed, was doing no more than it obligated itself to do under its policy with Sloan.

236 S.E.2d at 820. This Court concluded that "Sloan was not damaged by Central's refusal to defend since it was never legally obligated to pay the costs of defense," and as a result "[a]bsent any damage, a right of recovery from Central cannot exist." 236 S.E.2d at 820-21.

The same is true in this case. Without dispute, Colleton's defense costs and its settlement were paid by its insurer, Health Care Indemnity. Like Sloan, Colleton has sustained no damage. Because Colleton was not damaged by the denial of a defense by CareFirst or by any insurer, it has no right of recovery. For this additional reason, even if Colleton is correct and CareFirst should be held to the same standard as an insurance company, the denial of relief to Colleton on the contract claim was properly affirmed.[9]

In sum, Colleton should not be permitted to raise new grounds for rehearing in a successive petition for rehearing nor a new theory of recovery for the first time on rehearing. Yet, even if the Court considers such grounds, it is still clear that the Court of Appeals' ruling on the contract claim is correct and that a writ of certiorari is not warranted.

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[9] This Court's ruling in *Otis Elevator Inc. v. Hardin Construction Co. Group, Inc.*, 316 S.C. 292, 450 S.E.2d 41 (1994), is inapposite. This Court explained that "if one party is entitled to indemnity from another, the right to indemnity is not defeated by the fact that the loss to be indemnified for was actually paid by an insurance company." 450 S.E.2d at 46-47. Here, Colleton has now made it clear that its contract claim is *not an indemnity claim*, and as a result, the ruling from *Otis* has no application.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

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Case No. 2005-CP-15-602

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Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

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PROOF OF SERVICE

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I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari

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Meredith S. Keane
Senior Paralegal

October 14, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

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Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

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Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

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**RESPONDENTS' RETURN TO MOTION TO STRIKE PORTIONS OF RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI**

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The Petitioner Walterboro Community Hospital d/b/a Colleton Medical Center ("Colleton") has filed a motion to strike designated portions of the Return to Petition for Writ of Certiorari filed by the Respondents on August 8, 2011. Colleton seeks to strike "certain arguments, phrases, and other portions" of that Return on the premise that the Court has already rejected the preservation arguments proffered by the Respondents. Colleton reasons that a summary order issued by the Chief Justice on September 22, 2011, is a *definitive and final ruling*

on the merits of the Respondents' preservation position. The Respondents disagree and oppose the motion.

By way of background, on December 15, 2010, the Court of Appeals issued a published decision affirming the judgment entered in favor of the Respondents in this non-jury action. *See*, *Walterboro Community Hospital, Inc. v. Meacher* 391 S.C. 24, 703 S.E.2d 233 (Ct. App. 2010). Colleton then filed a petition for rehearing and rehearing *en banc*. On March 2, 2011, the Court of Appeals issued an Order Denying Petition for Rehearing. The Court of Appeals withdrew the earlier opinion and substituted a new opinion which did not alter the Court's decision or reasoning. *See*, *Walterboro Community Hospital, Inc. v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011).

With the substituted opinion, the Court of Appeals added two paragraphs at the end of section II of the opinion. The two new paragraphs cite to the disclaimer of liability language contained in the settlement agreement between Johnny C. Grant and Colleton.[1] The Court of Appeals made the additional point that the settlement agreement cannot be construed as evidence that Colleton was only liable to Grant under a vicarious liability theory. That is the only change from the original opinion.

Colleton then resubmitted the same petition for rehearing as before, except that the "new" or second petition for rehearing did include one new section – section VI. The argument contained in section VI was new, could have but was not raised in the original petition for rehearing, and was not responsive to the two paragraphs added by the Court to the original petition. By order entered May 26, 2011, the Court of Appeals denied the second petition for rehearing.

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[1] Grant was the plaintiff in the underlying medical malpractice action brought against Colleton, Dr. David Meacher, and his employer Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists ("CareFirst).

In their Return, the Respondents have cited preservation issues based on the aforementioned procedural history. Specifically, the Respondents question the propriety of successive petitions for rehearing, and more importantly, they challenge whether a second petition for rehearing may be used to raise an issue that could have been but was not raised in the first petition for rehearing. These are legitimate and valid preservation issues.

Because the initial petition for rehearing and related documents were not included in the Appendix when prepared by the Petitioner's counsel, the Respondents filed a Motion to Compel Supplementation of the Appendix. That motion was summarily denied by order issued by Chief Justice Toal on September 22, 2011. The order only states: "Motion to Compel is denied." The order does not provide the reasoning of the Chief Justice in denying the motion and certainly does not purport to decide any legal issues discussed in the Return to Petition for Writ of Certiorari.

Nonetheless, Colleton takes the position that the summary order by the Chief Justice is a ruling in Colleton's favor on the preservation issues. That argument is incorrect for several reasons. First, as already stated, the Chief Justice's order does not give any reasoning and certainly does not discuss or reject the preservation issues addressed by the Respondents. Second, at this procedural stage, the Court has not yet decided to grant or deny the writ of certiorari and thus has not decided the merits of any arguments – those proffered by the Petitioner or those proffered by the Respondents. Third, a single justice cannot by rule make a dispositive ruling on a petition for writ of certiorari or on the merits of any issue raised by a petition for writ of certiorari. *See*, Rule 242(a), SCACR; Rule 240(j), SCACR.[2]

---

[2] Rule 240 does not even allow a party aggrieved by the ruling of a single justice on a procedural motion to obtain a ruling from the entire court unless the action of the single justice has "the effect of dismissing or finally deciding a party's appeal." *See*, 240(i), SCACR. Rule 240(j) suggests that a ruling by a single justice may be

Furthermore, the denial of the request for supplementation of the Appendix does not indicate that the Chief Justice disagrees with or rejects the Respondents' position on preservation. Although her reasoning is unknown, it is certainly possible that the Chief Justice deemed the supplementation as unnecessary. The Court of Appeals' original and substituted opinions are clearly available in that both are decisions published by West Publishing and available in case reporters and through computerized services such as Westlaw. Moreover, the other filings in the Court of Appeals are also subject to judicial notice and may be considered by the Court whether included in the Appendix or not. It is well settled that courts may take judicial notice of their own records, files and proceedings. *See e.g.*, *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984); *Wise v. Wise*, Op. No. 4879 (S.C. Ct. App. filed August 24, 2011). Thus, this Court may certainly take judicial notice of filings in the Court of Appeals when determining whether to issue a writ of certiorari. Therefore, as a technical matter, it was not necessary for the vacated Court of Appeals opinion and filings for the initial petition for rehearing to be included in the Joint Appendix in order for the Court to consider the preservation issues raised by the Respondents.

In sum, there is no basis for striking portions of the Return to Petition for Writ of Certiorari filed by the Respondents. The preservation issues raised by the Respondents may be considered by this Court based on the record presented. The September 22, 2011 order issued by the Chief Justice should not be construed as a dispositive ruling on such issues. For these reasons, the motion to strike should be denied.

---

subject to review by petition for rehearing, but Rule 240(i) then clearly limits a petition for rehearing to those orders that result in a dismissal of the appeal.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

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(843) 815-2171

*Counsel for Respondents*

Columbia, South Carolina

October 28, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

---

Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

---

RECEIVED

OCT 28 2011

S.C. Supreme Court

Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center,..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

---

**CERTIFICATE OF SERVICE**

---

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Respondents' Return to Motion to Strike Portion of Respondents' Return to Petition for Writ of Certiorari** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 28th day of October 2011:

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Hutson S. Davis, Jr., Esquire
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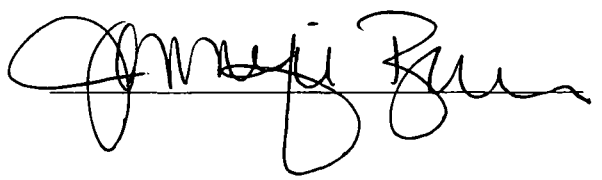

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

---

Case No. 2005-CP-15-602

---



Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

---

**Petitioner's Reply to the Return to the Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari**

---

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center ("Colleton") hereby submits this Reply to the Respondents' Return to the Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari. This Court should grant the Motion to Strike because Respondents attempt to use their Return to reargue the issues that were previously rejected by this Court in the order denying Respondents' motion to supplement the appendix. Additionally, by allowing Respondent to leave the offending arguments, phrases, and other portions of their Return to the Petition for a Writ of Certiorari, this Court would be allowing Respondents to make arguments when the materials relied upon to support those arguments are not contained in the record.

*See, e.g., Therrell v. Jerry's, Inc.*, 370 S.C. 22, 30, 633 S.E.2d 893, 897 (2006) (refusing to grant the relief sought because to do so would entail ruling on evidence not in the record on appeal, effectively giving the party a "second bite at the apple"). Therefore, this Court should grant this motion and strike the arguments, phrases, and other portions of Respondents' Return to the Petition for a Writ of Certiorari as identified in Colleton's Motion to Strike.

In the Return to the Motion to Strike, Respondents again claim they are entitled to argue preservation issues related to the vacated Court of Appeals' opinion. *See* Return to Motion to Strike p.3. This re-hashes the same argument this Court considered and rejected in Respondents' Motion to Compel Supplementation of the Appendix. Respondents had previously argued that inclusion of the vacated Court of Appeals' opinion and other related filings were needed in the Appendix in order to allow them to make certain preservation-type arguments in response to the issues Colleton presented in its Petition for a Writ of Certiorari. *See* Respondents' Motion to Supplement p. 2. Specifically, Respondents wanted these irrelevant materials presented to this Court so that they could "take the position in this Court that [Colleton's] successive or second petition for rehearing was improper." *Id.* **This Court has already expressly rejected this logic and denied Respondents' request**. *See* Order dated September 22, 2011.

Despite this Court rejecting this rationale, Respondents ignore this Order and again argue in response to Colleton's Motion to Strike that "Respondents question the propriety of successive petitions for rehearing. . . ." *See* Return to Motion to Strike p.3. This Court should not permit Respondents to re-argue that which this Court has

previously rejected. The arguments, phrases, and other portions of Respondents' Return to the Petition for a Writ of Certiorari as identified in Colleton's Motion to Strike that re-argue this preservation issue should be stricken.

Respondents also argue the September 22, 2011 Order does not control because the order did not provide any reasoning supporting the denial of their arguments. *See* Return to Motion to Strike p. 3. This argument is without merit. The lack of reasons or grounds in the order does not negate the fact that this Court rejected Respondents' arguments. Respondents attempt to advance those same rejected arguments again in the Return to the Petition for a Writ of Certiorari should be rejected.

Next, Respondents allege that the order denying the motion to supplement does not indicate the court "reject[ed] the Respondents' position on preservation." *See* Return to Motion to Strike p. 4. This again is without merit. This is precisely what the order addressed. By excluding the materials on which Respondents' preservation argument would be based, this Court found that arguments related to the vacated opinion were unnecessary and irrelevant. Further, this Court's decision to exclude the vacated opinion and related filings from the Appendix means Respondents' erroneous preservation arguments should not again be considered, since they would concern matters not of record. *See* Rule 210(h) (mandating that "the appellate court will not consider any fact which does not appear in the record on appeal"). Therefore, this Court should strike the identified portions of the Return to the Petition for a Writ of Certiorari.

Lastly, Respondents claim this Court can take judicial notice of the vacated Court of Appeals' opinion and related filings in order to allow such preservation

arguments.[1] *See* Return p. 4. This position should be rejected. First, this is simply an attempt to circumvent this Court's refusal to permit these materials to be included in the Appendix. Second, the original Court of Appeals opinion has been rendered void by the issuance of its substituted opinion. As set forth in the Court of Appeals' order, the original opinion was "withdrawn and substituted" by the new opinion. Such action by the Court of Appeals vacated the original opinion and rendered it void. *See, e.g., Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 121, 456 S.E.2d 397, 399 (1995) (acknowledging that the issuance of a substituted opinion vacates a prior opinion, stating "[t]he prior opinion in *Sierra Club v. Kiawah Resort Assocs.*, Op. No. 24121 (S.C. Sup. Ct. filed July 18, 1994) (Davis Adv. Sh. 17 at 7), is **vacated** and the following substituted in its place") (emphasis added); *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 521, 443 S.E.2d 537, 537 (1994) ("The prior opinion is **vacated** and the following substituted in its place") (emphasis added); *State Workers' Comp. Fund v. S.C. Second Injury Fund*, 313 S.C. 536, 537, 443 S.E.2d 546, 547 (1994) (("The prior opinion is **vacated** and the following substituted in its place"). Thus, the original opinion has no effect at all. It is void. The Court would not take judicial notice of a nullity.[2]

[1] If Respondents' position is adopted, such a ruling would eliminate the requirement that a petitioner file an Appendix when seeking certiorari. Instead, a petitioner would simply move the court to take judicial notice of the opinion and petition for rehearing. This should not be allowed by this Court.

[2] Moreover, Respondents' belief that because the vacated opinion can be located on Westlaw allows this Court to take judicial notice of it is equally unavailing. The fact that it can be viewed on Westlaw or the like does not mean that the vacated opinion has any legal significance.

## Conclusion

Based on the foregoing, this Court should grant Colleton's Motion to Strike and order Respondents to file a revised Return omitting the identified arguments, phrases, and other portions of the Return but keeping the Return otherwise identical in substance, form, and language to that previously filed with this Court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center

Columbia, South Carolina

November 4, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge



---

Case No. 2005-CP-15-602

---

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

---

PROOF OF SERVICE

---

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Petitioner's Reply to the Return to the Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari

Counsel Served:

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Jennifer B. Lee
Administrative Assistant

November 4, 2011

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November 4, 2011



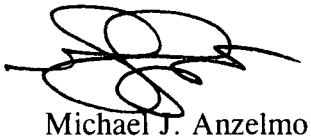
**Hand Delivered**
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602
HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of Petitioner's Reply to Return to the Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me. By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,



Michael J. Anzelmo

MJA:jlee
Enclosure
cc: Hutson S. Davis, Jr., Esquire
Andrew G. Melling, Esquire
Weldon R. Johnson, Esquire
James Edward Bradley, Esquire
Andrew F. Lindemann, Esquire
Monteith P. Todd, Esquire

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Lawrence S. Kerr, M.D.†
Kate A. Rice
Daniel C. Plyler
Joel S. Hughes
Kristy M. Grafton

* Also admitted in North Carolina
† Certified Mediator

October 28, 2011



***Hand Delivered***
The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven copies of the **Respondents' Return to Motion to Strike Portion of Respondents' Return to Petition for Writ of Certiorari** in the above referenced matter. Please file the original and return a clocked-in copy to meby way of my courier.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/out Enclosure)

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# The Supreme Court of South Carolina

Walterboro Community Hospital,
Inc. d/b/a Colleton Medical Center, Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2005-CP-15-602

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ORDER

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For good cause having been shown, the time for serving and filing the Return to the Motion to Strike in the above entitled matter is hereby extended until October 28, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Clerk
Chief Deputy

Columbia, South Carolina

October 27, 2011

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire

# DAVIDSON & LINDEMANN, P.A.

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* Also admitted in North Carolina
† Certified Mediator


October 24, 2011

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015



Dear Mr. Shearouse:

This letter is to request a four day extension through October 28, 2011 for filing the Respondents' Return to the Motion to Strike filed in the above referenced appeal. The Respondents request this extension because of other deadlines and obligations that I have. Specifically, on the same date as the Return is due, I was involved in an all-day deposition of an expert witness in a class action lawsuit. In addition, I also had a Petition for Writ of Certiorari due in this Court on that date, as well as a brief due at the Fourth Circuit.

If you require a formal motion, please let me know. I am enclosing my law firm's check in the amount of $25.00 for the filing fee for this extension request.

If you have any questions, please advise. Thank you very much for your assistance.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

Check # 22181
$25.00

AFL/jmb
Enclosure

cc: (w/out Enclosure)

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October 14, 2011

**Hand Delivered**
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602
HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511



Dear Mr. Shearouse:

Enclosed please find an original and seven copies of a Motion to Strike Portions of Respondents' Return to the Petition for a Writ of Certiorari in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,

Michael J. Anzelmo

check #678706
$250

MJA:jlee
Enclosure

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 30, 2011

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
P.O. Box 8568
Columbia, SC 29202-8568

Re: Walterboro Comm Hosp v. Meacher, David

Dear Counsel:

This is in response to your letter dated September 27, 2011.

Please disregard the last paragraph in our letter of September 22, 2011, as the return had already been filed.

We have received the original reply to respondents' return to the petition for writ of certiorari that was inadvertently filed with the Court of Appeals. All correspondence have been received and filed in this office and all counsel will be notified when action has been taken.

Very truly yours,

CLERK

DES/lda

cc: Monteith P. Todd, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire
C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire

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mitch.brown@nelsonmullins.com



August 29, 2011

**Via Hand Delivery**
The Honorable Tanya A. Gee
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201



RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602
HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511

Dear Ms. Gee:

Enclosed are the original and one copy of Reply to Respondents' Return to the Petition for a Writ of Certiorari in the above-referenced matter. We would appreciate it if you would file the original document and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this document.

With kind regards, I remain

Very truly yours,

C. Mitchell Brown

CMB:eh
Enclosures

cc: Hutson S. Davis, Jr., Esquire
James Edward Bradley, Esquire
Andrew G. Melling, Esquire
Andrew F. Lindemann, Esquire
Weldon R. Johnson, Esquire
Monteith P. Todd, Esquire

DAVIDSON & LINDEMANN, P.A.

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* Also admitted in North Carolina
† Certified Mediator

September 27, 2011



The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Mr. Shearouse:

I am in receipt of your letter dated September 22, 2011, advising that the Court denied our Motion to Compel Supplementation of Joint Appendix. That letter further advised that "any return to petition for writ of certiorari should be served and filed within thirty (30) days from the date of this letter." However, the Respondents have previously filed their Return to Petition for Writ of Certiorari on August 8, 2011. If the Court does not have copies of that Return, please let me know. Likewise, please advise of there is anything further that is required from me.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/

cc: C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
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10 Pinckney Colony Road - Suite 200
Okatie, South Carolina 29909

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 22, 2011

Andrew F. Lindemann, Esquire
Davidson & Lindemann, PA
P.O. Box 8568
Columbia, SC 29202-8568

Re: Walterboro Comm Hosp v. Meacher, David

Dear Mr. Lindemann:

The following Order has been endorsed on your Motion to Compel Supplementation of the Appendix in the above entitled case on appeal.

"Motion to Compel is denied.

s/ Jean H. Toal C.J.
For the Court

September 22, 2011."

Please be advised that any return to petition for writ of certiorari should be served and filed within thirty (30) days from the date of this letter.

Very truly yours,

CLERK

DES/lda

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

---

Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

---



Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

---

**MOTION TO COMPEL SUPPLEMENTATION OF THE APPENDIX**

---

The Respondents respectfully move this Court for an Order requiring the Petitioner to re-print the Appendix or alternatively file a Supplemental Appendix that includes all documents required to be in the Appendix in accordance with Rule 242(e), SCACR. The Appendix as filed by the Petitioner fails to include the following documents from the Court of Appeals:

(1) Court of Appeals Opinion, filed December 15, 2010

(2) Petition for Rehearing and Rehearing *En Banc*, filed January 18, 2011

(3) Return to Petition for Rehearing and Rehearing *En Banc*, filed February 14, 2011

(4) Reply to Respondents' Return to Appellant's Petition for Rehearing and Rehearing *En Banc*, filed February 22, 2011

(5) Order Denying Petition for Rehearing, filed March 2, 2011

The grounds and supporting analysis for the Respondents' motion is set forth in the supporting memorandum filed herewith.

Counsel for the Respondents attempted to resolve this motion prior to filing this motion, but the Petitioner's counsel declined to take the requested corrective action.

DAVIDSON & LINDEMANN, P.A.

BY: _____

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Bluffton, South Carolina 29910
(843) 815-2171

*Counsel for Respondents*

Motion to Compel is denied.

_____ J.
For the Court

September 22, 2011

Columbia, South Carolina

August 16, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

---

Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

---

Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center, ..... Petitioner,

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David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

---

**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL SUPPLEMENTATION OF THE APPENDIX**

---

The Respondents have filed a motion requesting that this Court issue an order requiring the Petitioner to re-print the Appendix or alternatively file a Supplemental Appendix that includes all documents required to be in the Appendix. The Appendix as filed by the Petitioner fails to include the following documents from the Court of Appeals:

(1) Court of Appeals Opinion, filed December 15, 2010

(2) Petition for Rehearing and Rehearing *En Banc*, filed January 18, 2011

(3) Return to Petition for Rehearing and Rehearing *En Banc*, filed February 14, 2011

(4) Reply to Respondents' Return to Appellant's Petition for Rehearing and Rehearing *En Banc*, filed February 22, 2011

(5) Order Denying Petition for Rehearing, filed March 2, 2011

The contents of the Appendix are governed by Rule 242(e), SCACR, which requires that the opinion of the Court of Appeals be included, as well as the petition for rehearing filed in the Court of Appeals and the order denying that petition. Rule 242(e), SCACR, does not expressly address situations where the Court of Appeals issued more than one opinion or where the parties filed more than one petition for rehearing. However, the intent and spirit of Rule 242(e) is clear: The Appendix is intended to include all documents filed in the Court of Appeals to include the opinions of that court and all post-opinion filings. In a case such as this, where the Court of Appeals issued multiple opinions and the parties filed more than one petition for rehearing, the intent of Rule 242(e) is for all such filings to be included in the Appendix so that this Court has a *complete* procedural history of what took place in the court below while considering the merits of a petition for writ of certiorari.

In the present case, it is critical that this Court have access to the complete procedural history from the Court of Appeals, including the original decision of the Court of Appeals and the Petitioner's initial petition for rehearing, because the Respondents take the position in this Court that the Petitioner's successive or second petition for rehearing was improper. The Respondents have pointed out that there is no authority for the filing of a successive petition for rehearing. Yet, even if a successive petition were allowed, the Respondents maintain that the arguments in the second petition should have been limited to the changes actually made to the appellate court's original opinion. The second petition for rehearing should not be used to raise

an issue that could have been but was not raised in the first petition for rehearing. This Court will not be able to review the Respondents' position in that regard without having access to the original decision of the Court of Appeals and the original or first petition for rehearing that was filed and denied.

For these reasons, the Court is respectfully requested to order the Petitioner to file an Appendix that includes the complete procedural history in the Court of Appeals, which includes the five documents as described above.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

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(843) 815-2171

*Counsel for Respondents*

Columbia, South Carolina

August 16, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

---

Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

---

Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center,..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

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## CERTIFICATE OF SERVICE

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The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Motion to Compel Supplementation of the Appendix** and **Memorandum in Support of Motion to Compel Supplementation of the Appendi** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 16th day of August 2011:

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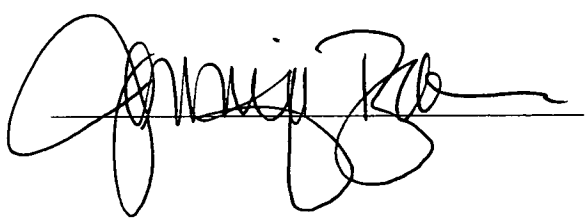

THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2005-CP-15-602

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

**Petitioner's Return to Respondents' Motion to Compel Supplementation of the Appendix**

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center ("Colleton") hereby files this Return to Respondents' Motion to Compel Supplementation of the Appendix in the above-captioned matter. As fully set forth below, Rule 242(e), SCACR, does not require the documents requested by Respondents be included in the Appendix in this matter. The motion to supplement should be denied.

On December 15, 2010, a panel of the Court of Appeals issued its first written pinion in the above-captioned matter.[1] Colleton timely filed a petition for rehearing and for rehearing *en banc*. Next, Colleton received correspondence from the Court of

[1] *See Walterboro Community Hosp. v. David E. Meacher, et al*, Op. No. 4764 (S.C. Ct. App. filed Dec. 15, 2010) (Shearouse Adv. Sh. No. 50 at 35).

Appeals indicating that it withdrew the original Opinion No. 4764 issued December 15, 2010 and substituted a new Opinion No. 4764 issued March 2, 2011 in its place. Substituted Opinion No. 4764 was included in the March 7, 2011 Advance Sheets, indicating it replaced the original opinion. *See Walterboro Community Hosp. v. David E. Meacher, et al*, Op. No. 4764 (S.C. Ct. App. Opinion Withdrawn, Substituted, and Re-filed March 2, 2011) (Shearouse Adv. Sh. No. 8 at 56). In issuing the March 2nd opinion, the Court of Appeals panel denied the petition for rehearing, vacated the original opinion, and substituted a new opinion wherein it added new findings/conclusions that were not present in the original opinion issued by the Court of Appeals. The petition for rehearing *en banc* was not addressed at all by the Court of Appeals—because it was aimed at the prior, vacated opinion. As a result, Colleton timely filed a petition for rehearing and rehearing *en banc* to address substituted Opinion No. 4764. The petition for rehearing and rehearing *en banc* addressing substituted Opinion No. 4764 were denied by the Court of Appeals on May 26, 2011.

**Argument**

Respondent correctly notes that our appellate court rules offer no guidance as to whether a petitioner must include in the appendix the original vacated opinion issued by the Court of Appeals, as well as any petition for rehearing, return, and reply filed in response to that original vacated opinion, when the Court of Appeals withdraws its original opinion and issues a substituted opinion. {Motion to Supplement p. 2}. Respondents allege the original Court of Appeals' opinion, Colleton's petition for rehearing and rehearing *en banc*, Respondents' return, and Colleton's reply should be included in the appendix "so this Court has a *complete* procedural history" from the

Court of Appeals. {*Id.*}. However, this misapprehends the fact that our case law establishes that in such a situation the original opinion is vacated and treated as if it were never issued. The issuance of the substituted opinion likewise rendered Colleton's petition for rehearing and rehearing *en banc* moot and a nullity. Accordingly, there is no reason to include these documents in the appendix. They are deemed not to exist as part of the procedural history of this case. The complete procedural history instead should include only the substituted March 2nd opinion, Colleton's petition for rehearing and rehearing *en banc*, Respondents' return, Colleton's reply, and the order denying the petition. Colleton included these documents in the appendix filed with this Court. Nothing need be added. This conclusion is proper for the following reasons.

First, as set forth in the Court of Appeals' order, the original opinion is "withdrawn and substituted" with the new opinion. Such action by the Court of Appeals vacated the original opinion and rendered it void. *See, e.g., Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 121, 456 S.E.2d 397, 399 (1995) (acknowledging that the issuance of a substituted opinion vacates a prior opinion, stating "[t]he prior opinion in *Sierra Club v. Kiawah Resort Assocs.*, Op. No. 24121 (S.C. Sup. Ct. filed July 18, 1994) (Davis Adv. Sh. 17 at 7), is **vacated** and the following substituted in its place") (emphasis added); *Benton v. Roger C. Peace Hosp.*, 313 S.C. 520, 521, 443 S.E.2d 537, 537 (1994) ("The prior opinion is **vacated** and the following substituted in its place") (emphasis added); *State Workers' Comp. Fund v. S.C. Second Injury Fund*, 313 S.C. 536, 537, 443 S.E.2d 546, 547 (1994) (("The prior opinion is **vacated** and the following substituted in its place"). This precedent establishes that inclusion of this void opinion is not necessary to this Court's decision to

grant certiorari in this matter. The only opinion that this Court should consider in its certiorari determination is the substituted opinion issued by the Court of Appeals on March 2nd. Therefore, this Court should find that the original December 15th opinion issued by the Court of Appeals is not properly included in the appendix.

Second, the issuance of the substituted opinion rendered Colleton's original petition for rehearing and rehearing *en banc* moot and a nullity. This is illustrated by the fact that the Court of Appeals did not act in any manner with regards to Colleton's request for *en banc* review. The Clerk of Court's office at the Court of Appeals advised Colleton that the petition for rehearing *en banc* was moot as a result of the substituted opinion and that the Court of Appeals was not going to act on the request, as such was unnecessary. This establishes that the operative petition for rehearing and rehearing *en banc* is the one addressing the substituted opinion. This operative petition and the substituted opinion are included in the Appendix.

Respondents now "take the position in this Court that [Colleton's] successive or second petition for rehearing was improper." {Motion to Supplement p. 2}. Respondents cite no authority for this proposition. In fact, such a position ignores the fact that our case law establishes that the original opinion was void and rendered Colleton's initial petition for rehearing and rehearing *en banc* moot and a nullity. Rather, Colleton filed rehearing and rehearing *en banc* as to the **only** operative and controlling opinion in this matter. There must be a mechanism for challenging a substituted opinion in this manner.

Most importantly, this Court has previously issued an order indicating agreement with Colleton on these points. Upon issuance of the substituted opinion by

the Court of Appeals, Colleton moved this Court for an extension of time to file a petition for writ of certiorari, pointing out that the appellate rules were unclear as to the procedure to utilize when the Court of Appeals issues a substituted opinion. {*See* Colleton's motion for an extension of time filed March 24, 2011}. The Court granted this request. However, the Court of Appeals failed to rule on Colleton's petition for rehearing and rehearing *en banc* as to the March 2nd substituted opinion before the extended time was set to expire. As a result, Colleton filed a second extension request for a petition for writ of certiorari on the same grounds as the first request. This time, this Court denied the motion, finding an extension was not needed because the Court of Appeals had yet to rule on Colleton's petition for rehearing and rehearing *en banc* addressing the substituted March 2nd opinion. This Court held:

> On March 2, 2011, the Court of Appeals filed an amended opinion in this matter . . . [Colleton] has filed a petition for rehearing and a suggestion for rehearing *en banc* with the Court of Appeals, and those matters are awaiting consideration by the Court of Appeals. . . This request for an extension is denied **as unnecessary since petitioner's time to serve and file the petition for a writ of certiorari will not begin until the petition for rehearing and suggestion for rehearing *en banc* have been acted on by the Court of Appeals.**

{Order dated May 16, 2011 (with emphasis added), attached hereto as Exhibit A}. This order recognized that the only operative petition for rehearing and rehearing *en banc* is the one filed in response to the substituted March 2nd opinion issued by the Court of Appeals. As such, this Court should deny Respondents' motion to supplement.

Additionally, the rule that Respondents advocate would create situations resulting in confusion, argument, and waste of court time and resources. Respondents claim that a party can only file a petition for rehearing and rehearing *en banc* addressing a substituted opinion in a form which is identical to the previous rehearing petition concerning the original opinion, plus changed or new arguments to address changes or new sections in the opinion. This will require comparison of the original opinion and substituted opinion, and it will require comparison of the original petition for rehearing arguments with those related to the substituted opinion. In some situations a substituted opinion may be dramatically different from the original opinion in the eyes of one party, yet be only slightly modified in the eyes of another. Scenarios will inevitably arise where the parties engage in disputes and motions practice respecting the various changes to the substituted opinion by the Court of Appeals and whether new arguments are permissible in a subsequent rehearing petition. This overly complicates this area of appellate practice. Our position is simple and efficient. The operative, substituted opinion and the petitions addressing that controlling opinion are included in the appendix. The prior materials are vacated and void. Therefore, this Court should deny Respondents' motion to supplement.

## Conclusion

Colleton believes this result set forth above is proper when the Court of Appeals issues a substituted opinion. Hence, this Court should issue an order denying Respondents' Motion to Compel Supplementation of the Appendix.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center

Columbia, South Carolina

August 26, 2011

# The Supreme Court of South Carolina

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2005-CP-15-602

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ORDER

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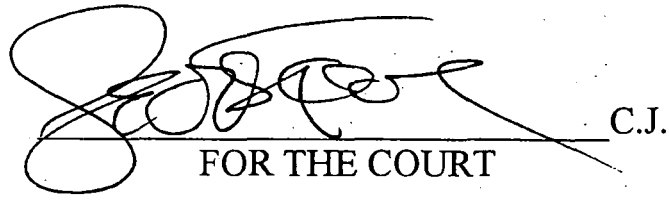
On March 2, 2011, the South Carolina Court of Appeals filed an amended opinion in this matter. This substituted opinion contains paragraphs that were not in the opinion filed in December 2010. Petitioner has filed a petition for rehearing and a suggestion of a rehearing *en banc* with the Court of Appeals, and those matters are awaiting consideration by the Court of Appeals.

Petitioner seeks an extension of time to file the petition for a writ of certiorari and appendix until after the Court of Appeals rules on the petition for rehearing and suggestion of rehearing *en banc*. This request for an extension is denied as unnecessary since petitioner's time to serve and filed the petition for a writ of certiorari will not begin until the petition for rehearing and suggestion of rehearing *en banc* have been acted on by the Court of Appeals.

IT IS SO ORDERED.



C.J.

FOR THE COURT

Columbia, South Carolina

May 16, 2011

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew G. Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire
The Honorable Tanya Gee

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

---

Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

---



Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

---

**REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL SUPPLEMENTATION OF THE APPENDIX**

---

The Respondents have filed a motion requesting that this Court issue an order requiring the Petitioner to re-print the Appendix or alternatively file a Supplemental Appendix that includes all documents required to be in the Appendix. The Appendix as filed by the Petitioner fails to include the following documents from the Court of Appeals:

(1) Court of Appeals Opinion, filed December 15, 2010

(2) Petition for Rehearing and Rehearing *En Banc*, filed January 18, 2011

(3) Return to Petition for Rehearing and Rehearing *En Banc*, filed February 14, 2011

(4) Reply to Respondents' Return to Appellant's Petition for Rehearing and Rehearing *En Banc*, filed February 22, 2011

(5) Order Denying Petition for Rehearing, filed March 2, 2011

The Petitioner opposes this motion by arguing the issuance of a substituted opinion by the Court of Appeals actually renders the original petition for rehearing to be "moot" and a "nullity." The Respondents submit that this position is erroneous for three principal reasons.

First, the Petitioner does not cite to any case or other authority to support this "mootness" or "nullity" proposition. There is simply no basis for the Petitioner's argument.

Second, the Court of Appeals obviously did not believe that the original petition for rehearing was "moot" or a "nullity" when the substituted opinion was issued because the Court actually issued an order denying that original petition. *See*, Order Denying Petition for Rehearing, filed March 2, 2011 (copy attached). That denial incidentally was *not* based on a finding that the original petition was now "moot" or a "nullity."

Third, and perhaps most importantly, existing appellate procedure in this State refutes the Petitioner's claim that the original petition for rehearing is "moot" or a "nullity" when a substituted opinion is issued by the Court of Appeals. It is well settled law that the filing of a petition for rehearing is a prerequisite for filing a petition for writ of certiorari. If a petition for rehearing is not filed in the Court of Appeals, a party waives its right to seek a writ of certiorari in this Court. That principle is indisputable. Yet, there are many examples of cases where this Court granted a writ of certiorari and reviewed Court of Appeals' substituted decisions where only a single petition for rehearing was filed. *See e.g.*, *Angus v. Burrough & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004) (petition for rehearing denied on same day as

substituted opinion filed and writ of certiorari was later granted); *Sloan Construction Co. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006) (same); *Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Comm.*, 367 S.C. 141, 625 S.E.2d 227 (Ct. App. 2007) (same); *Ex Parte Johnson*, 371 S.C. 614, 640 S.E.2d 887 (Ct. App. 2006) (same). These cases demonstrate that the original petition for rehearing was not a "nullity" and is not to be treated as if it were never filed. Quite to the contrary, the Court of Appeals routinely denies the original petition for rehearing when it substitutes a new opinion, and under those circumstances, this Court has routinely exercised jurisdiction over a petition for writ of certiorari despite the fact that a new petition for rehearing is not first filed and denied. In short, the issuance of a substituted opinion does *not* render the original petition for rehearing "moot" or a "nullity." In many instances, that petition is the only one filed. Existing procedure should continue to be adhered to in that respect.

One additional point requires comment. The Petitioner also argues that the May 16, 2011 Order issued by the Chief Justice is somehow dispositive of this question. The Petitioner suggests that that Order "recognized that the only operative petition for rehearing ... is the one filed in response to the substituted March 2nd opinion." That is certainly a stretch. There is no indication that the Chief Justice was deciding whether the original petition is "moot" or a "nullity." As Chief Judge Alex Sanders has been often quoted as saying, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322, 323 (2001). *See also, Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 361 S.E.2d 340, 341 (Ct. App. 1987) (if a question is not presented nor decided in a case, "the decision in that case is not determinative of the decision in the instant case"). Frankly, the issue now before this Court

was not raised or decided in the May 16, 2011 Order. Furthermore, the Chief Justice may have just as likely reasoned that a second petition for rehearing is permitted based on her recognition that "[t]his substituted opinion contains paragraphs that were not in the opinion filed in December 2010." *See*, Order filed May 16, 2011. It is equally plausible that the Chief Justice agrees that a second petition for rehearing is permitted but should be limited to challenging the only the new portions of the opinion. In effect, the May 16, 2011 Order cannot be read as deciding this issue.

The subject of the Respondents' motion is not complicated. The request for a complete Appendix is not overly burdensome. The Respondents simply believe that the Appendix should include the entire record from the Court of Appeals, inclusive of all briefs, opinions, petitions for rehearing, returns to petitions for rehearing, and orders. That will allow this Court to have the complete procedural history of what transpired in the Court of Appeals. There cannot be any harm in providing this Court that complete background. Accordingly, the Respondents renew their request that the Court order the Petitioner to file an Appendix that includes the complete procedural history in the Court of Appeals, which includes the five documents as described above.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

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5 Belfair Village Drive
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(843) 815-2171

*Counsel for Respondents*

Columbia, South Carolina

August 31, 2011

# The South Carolina Court of Appeals

Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center, Appellant,

v.

David E. Meacher, M.D., David E. Meacher, M.D., P.A., Carolina Health Specialists, P.A. a/k/a Care First Health Specialists, and The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2005-CP-15-00602

---

ORDER DENYING PETITION FOR REHEARING

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PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied. However, we substitute the attached opinion for Opinion No. 4764, filed December 15, 2010.

John Cannon Jr. C.J. Few

Thomas E. Huff J. Huff

John D. Geathers J. Geathers

FILED
March 2, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM COLLETON COUNTY
Perry M. Buckner, Circuit Court Judge

---

Op. No. 4764
(S.C. Ct. App. Re-filed March 2, 2011)

---

Walterboro Community Hospital, Inc.
d/b/a Colleton Medical Center,..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and
Carolina Health Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina Medical Malpractice
Liability Joint Underwriting Association, ..... Respondents.

---

**CERTIFICATE OF SERVICE**

---

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Reply Memorandum in Support of Motion to Compel Supplementation of the Appendix** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 31st day of August 2011:

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Michael J. Anzelmo, Esquire
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Lawrence S. Kerr, M.D.†
Kate A. Rice
Daniel C. Plyler
Joel S. Hughes
Kristy M. Grafton

* Also admitted in North Carolina
† Certified Mediator



August 31, 2011

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven copies of the **Reply Memorandum in Support of Motion to Compel Supplementation of the Appendix** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

C. Mitchell Brown, Esquire
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mitch.brown@nelsonmullins.com

August 26, 2011

**Hand Delivered**
Daniel E. Shearouse
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602
HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of a Return to Motion to Compel Supplement of Appendix in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:jlee
Enclosures
cc: Hutson S. Davis, Jr., Esquire
Andrew G. Melling, Esquire
Weldon R. Johnson, Esquire
James Edward Bradley, Esquire
Andrew F. Lindemann, Esquire
Monteith P. Todd, Esquire

DAVIDSON & LINDEMANN, P.A.

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* Also admitted in North Carolina
† Certified Mediator

August 16, 2011


pm 8-17-11

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Mr. Shearouse:

Please find enclosed for filing the originals and seven copies each of the **Motion to Compel Supplementation of the Appendix** and **Memorandum in Support of Motion to Compel Supplementation of the Appendix** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope. I have also enclosed my firm's $25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

Check #2191
$25.00

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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Okatie, South Carolina 29909

# The Supreme Court of South Carolina

Walterboro Community Hospital,
Inc. d/b/a Colleton Medical Center, Petitioner,

v.

David E. Meacher, MD, David E.
Meacher, PA, and Carolina Health
Specialists, PA a/k/a CareFirst Health
Specialists, The South Carolina
Medical Malpractice Liability Joint
Underwriting Association, Respondents.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2005-CP-15-602

---

ORDER

---

For good cause having been shown, the time for serving and filing the Reply to Return to the Petition for Writ of Certiorari in the above entitled matter is hereby extended until August 29, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda F. Shealy
Chief Deputy Clerk

Columbia, South Carolina

August 11, 2011

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
AUG 10 2011
S.C. Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2005-CP-15-602

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

**MOTION FOR AN EXTENSION OF TIME TO FILE REPLY TO RESPONDENTS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center ("Colleton") hereby moves this Court for an order granting an extension of time for Colleton to file its Reply to Respondents' Return to the Petition for a Writ of Certiorari in the above-captioned matter. Colleton respectfully requests a ten (10) day extension of time due to previously scheduled vacations as well as other scheduling and work conflicts. This is Colleton's first request for an extension of time. Respondents will not be prejudiced by this extension of time. According to our calculations, the current due date of Colleton's

Reply is August 18, 2011. With the ten-day extension, Colleton's Reply will now be due on Monday, August 29, 2011.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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Attorneys for Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center

Columbia, South Carolina

August 10, 2011

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Jennifer B. Lee
Administrative Assistant

August 10, 2011

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michael.anzelmo@nelsonmullins.com

August 10, 2011



**Hand Delivered**
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602
HCI#050338
SC Court of Appeals Case No. 2009112227
SC Supreme Court Tracking No. 2011-194290
Our File No. 19793/01511

Dear Mr. Shearouse:

Enclosed please find an original and seven copies of a Motion for an Extension of Time to File Reply to Respondents' Return to the Petition for Writ of Certiorari in the above-referenced matter. Please file the original and return a clocked-in copy to my office via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter we are hereby serving opposing counsel.

Very truly yours,

Michael J. Anzelmo

Check #673483
$250

MJA:jlee
Enclosures

cc: Hutson S. Davis, Jr., Esquire
James Edward Bradley, Esquire
Andrew G. Melling, Esquire
Andrew F. Lindemann, Esquire
Weldon R. Johnson, Esquire
Monteith P. Todd, Esquire

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August 10, 2011

**Hand Delivered**



The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602; HCI#050338
SC Court of Appeals Case No. 2009112227
Our File No. 19793/01511

Dear Mr. Shearouse:

After the filing of the Petition for a Writ of Certiorari and Appendix in the above matter, it was discovered that our caption was in error. We apologize for this error and are providing corrected labels to the Court.

By copy of this letter to counsel of record, we are serving them with a set of the corrected labels. Thank you for your cooperation and should the Court have questions, please do not hesitate to contact me at the above number.

With kind regards, I remain

Very truly yours,

Michael J. Anzelmo

MJA:m

DAVIDSON & LINDEMANN, P.A.

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Kristy M. Grafton

* Also admitted in North Carolina
† Certified Mediator

August 8, 2011



***Hand Delivered***
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven copies of the **Return to Petition for Rehearing** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosure)

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William C. Wood, Jr., Esquire
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# The Supreme Court of South Carolina

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2005-CP-15-602

---

ORDER

---

For good cause having been shown, the time for serving and filing the Return to the Petition for Writ of Certiorari in the above entitled matter is hereby extended until August 8, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Chief Deputy Clerk

Columbia, South Carolina

August 2, 2011

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
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Daniel C. Plyler
Joel S. Hughes
Kristy M. Grafton

* Also admitted in North Carolina
† Certified Mediator

August 1, 2011



***Hand Delivered***
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D., and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
SCSC Case Tracking Number: 2011-194290
Civil Action Number: 2005-CP-15-602
Claim Number: 873614
Our File Number: 22.8015

Dear Mr. Shearouse:

This letter is to request a seven-day extension for filing the Respondents' Return to the Petition for Writ of Certiorari the above referenced appeal. The Respondents request this extension because of other deadlines and obligations that I have, including another brief due in this Court on this same date. I additionally had a case on the trial docket in Orangeburg County for the August 1, 2011 term of court, the preparation time for which prevented me from completing the return in this case.

I have consulted with Michael Anzelmo, one of the attorneys representing the Petitioner. Mr. Anzelmo has informed me by email that his client consents to the requested extension.

If you require a formal motion, please let me know. I am enclosing my law firm's check in the amount of $25.00 for the filing fee for this extension request.

If you have any questions, please advise. Thank you very much for your assistance.

Check #21854
$25.00

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/
Enclosure

cc: C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Michael J. Anzelmo, Esquire
Nelson Mullins Riley & Scarborough, LLP
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Okatie, South Carolina 29909

# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 30, 2011

C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Nelson Mullins Riley
& Scarborough
P O Box 11070
Columbia, SC 29211

Re: Walterboro Comm Hosp v. Meacher, David
Case Tracking No. 2011-194290

Dear Counsel:

This office has received your Petition for Writ of Certiorari in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/lda

Enclosure

cc: Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire
The Honorable Tanya Gee

# Nelson Mullins

**Nelson Mullins Riley & Scarborough LLP**
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June 30, 2011



The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
Civil Action No. 2005-CP-15-602; HCI#050338
SC Court of Appeals Case No. 2009112227
Our File No. 19793/01511

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for a Writ of Certiorari and two copies of the Appendix in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our Firm check in the amount of $100.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of the Petition and the Appendix.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown by via permission

CMB:lpw
Enclosures

Check #669925
$100.00

cc: The Honorable Tanya A. Gee
Hutson S. Davis, Jr., Esquire
James Edward Bradley, Esquire
Andrew G. Melling, Esquire
Andrew F. Lindemann, Esquire
Weldon R. Johnson, Esquire
Monteith P. Todd, Esquire

# The Supreme Court of South Carolina

Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association, Respondents.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2005-CP-15-602

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ORDER

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For good cause having been shown, the time for serving and filing the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until July 1, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Healy
Chief Deputy Clerk

Columbia, South Carolina

June 28, 2011

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
Andrew Gordon Melling, Esquire
Hutson S. Davis, Jr, Esquire
James Edward Bradley, Esquire
Weldon R. Johnson, Esquire
The Honorable Tanya Gee

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

RECEIVED
JUN 27 2011
S.C. Supreme Court

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Case No. 2005-CP-15-602

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Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

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**MOTION FOR AN EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI (with Respondents' Consent)**

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Pursuant to Rules 240 and 242(c) of the South Carolina Appellate Court Rules, Petitioner Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center ("Colleton") hereby moves this Court for an order granting an extension of time until Friday, July 1, 2011 for Colleton to file its Petition for a Writ of Certiorari in the above-captioned matter. This extension is necessitated due to numerous other case obligations and deadlines. By our calculations, Colleton's Petition for Writ of Certiorari is due to this Court on June 27, 2011. Counsel for Colleton consulted with Ward Bradley, counsel for Respondents, and he consents to this short extension.

Wherefore, Colleton requests a short extension until Friday, July 1, 2011 to file its Petition for a Writ of Certiorari. Colleton asks that the current deadline be held in abeyance until the Court considers this motion.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center

Columbia, South Carolina

June 27, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUN 27 2011
S.C. Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Perry M. Buckner, Circuit Court Judge

Case No. 05-CP-15-602

Walterboro Community Hospital, Inc., d/b/a Colleton Medical Center, ..... Petitioner,

v.

David E. Meacher, MD, David E. Meacher, PA, and Carolina Health Specialists, PA a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association,..... Respondents.

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PROOF OF SERVICE

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I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner, do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same as indicated below:

Pleadings:

**Motion for an Extension of Time to File Petition For Writ of Certiorari**

Parties Served:

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Okatie, SC 29909

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Jennifer B. Lee
Administrative Assistant

June 27, 2011

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June 27, 2011

**Hand Delivered**
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211



RE: Walterboro Community Hospital, Inc. d/b/a Colleton Medical Center v. David E. Meacher, M.D. and David E. Meacher, M.D., P.A. and Carolina Health Specialists, P.A. a/k/a CareFirst Health Specialists, The South Carolina Medical Malpractice Liability Joint Underwriting Association
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Enclosed please find an original and seven copies of a Motion for Extension of Time to File Petition for Writ of Certiorari for filing in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving counsel of record.

Sincerely yours,

C. Mitchell Brown

Check #669676
$25.00

CMB:jlee
Enclosure
cc: Hutson S. Davis, Jr., Esquire
Andrew G. Melling, Esquire
Weldon R. Johnson, Esquire
James Edward Bradley, Esquire
Andrew F. Lindemann, Esquire
Monteith P. Todd, Esquire