

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Tracking No.: 2016-000429

Phillip Durrett Appellant,

v.

Palmetto Health Alliance d/b/a Palmetto Richland Memorial
and W. Ross, M.D..... Respondents.

BRIEF OF RESPONDENT PALMETTO HEALTH
ALLIANCE D/B/A PALMETTO RICHLAND MEMORIAL

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PALMETTO HEALTH ALLIANCE D/B/A
PALMETTO RICHLAND MEMORIAL

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT CORRECTLY GRANT SUMMARY JUDGMENT TO RICHLAND MEMORIAL ON THE BASIS THAT DURRETT FAILED TO ADDUCE ANY EVIDENCE DEMONSTRATING A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL?
- II. AS AN ALTERNATIVE SUSTAINING GROUND, SHOULD THE COURT FIND THAT DURRETT'S NOTICE OF INTENT AND COMPLAINT WERE SUBJECT TO DISMISSAL FOR FAILURE TO TIMELY FILE THE AFFIDAVIT OF AN EXPERT WITNESS AS REQUIRED BY STATUTE AND THAT HIS CLAIMS ARE NOW TIME BARRED?

STATEMENT OF THE CASE

Appellant Phillip Durrett ("Durrett") initiated this medical malpractice action against Respondents Palmetto Health Alliance d/b/a Palmetto Richland Memorial ("Richland Memorial") and W. Ross, M.D. ("Dr. Ross")¹, with the filing of his Notice of Intent, along with the supporting affidavit of his attorney, in the South Carolina Court of Common Pleas for Richland County on August 5, 2009. (R. pp. 66-69, 164) Defendants moved, pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100 and Rules 12(b)(1) and 12(b)(6), SCRCF, to dismiss Durrett's Notice of Intent. (R. pp. 70-71) The Court of Common Pleas for Richland County filed its order dismissing Durrett's Notice of Intent on May 25, 2011. (R. pp. 1-5) Durrett moved for reconsideration, and, via Form 4 Order filed April 3, 2012, the court ruled "[m]otion to reconsider granted. Formal order to follow." (R. pp. 107-108; pp. 6-7) The circuit court order contemplated by its earlier Form 4 order was entered January 8, 2014. (R. pp. 8-9)

Durrett filed his Summons and Complaint, without any supporting affidavit, on or after February 28, 2013, and Defendants filed a timely Answer asserting numerous defenses, including expiration of the statute of limitations and Durrett's failure to file the required expert affidavit. (R. pp. 109-121) Following the close of discovery, Richland Memorial filed its Amended Motion for Summary Judgment and Memorandum in Support of Amended Motion for Summary Judgment on July 17, 2014. (R. pp. 126-201) Following oral argument, the circuit court entered its Order Denying Motion for Summary Judgment on December 3, 2014. (R. pp. 10-16) Richland Memorial moved for reconsideration, and Durrett responded in opposition to that motion. (R. pp. 202-222)

¹ Dr. Ross was dismissed from this action via Stipulation of Dismissal With Prejudice as to W. Ross, M.D., filed April 9, 2014. (R. p. 125)

Following oral argument, the circuit court entered its order granting Richland Memorial's motion and directing entry of summary judgment in Richland Memorial's favor on January 27, 2016. (R. pp. 17-29) This appeal followed.

STATEMENT OF THE FACTS

Durrett sustained physical injuries in a multi-vehicle collision that occurred August 7, 2006. Durrett, who was cited for driving too fast for conditions, failed to observe the flashing lights of an ambulance parked in the eastbound median of Interstate 20, struck the ambulance from behind, and became entrapped in his own vehicle for approximately 15-20 minutes. (R. pp. 146-149) Durrett sustained “incapacitating injuries”, was extricated from his vehicle, and transported from the scene by paramedics with Richland County EMS. (R. pp. 151) According to the DHEC Patient Care Form, Durrett was agitated but remained stable during transport to Richland Memorial. (*Id.*) No medications other than saline were administered.

According to Richland Memorial Emergency Department records, Durrett was “awake, alert, and oriented . . . upon arrival” in the ER, displayed a “very aggressive, violent nature”, and “was on a back board and C-collar, complaining of left leg pain.” (R. pp. 153-154) He denied tobacco, alcohol, or illicit drug use² and indicated to hospital personnel that he is allergic to Morphine. (*Id.*) During examination, Durrett “was verbal, cussing, noncompliant, and very uncooperative.” (*Id.*) For his protection, and to facilitate his medical examination, Durrett was sedated, intubated, examined, and prepped for further radiologic studies to confirm initial impressions of left leg fracture and abdominal injuries. (*Id.*) During his course of treatment in the Emergency Department, Durrett was started on propofol, became hypotensive, and underwent two precordial

² Durrett’s urine drug screen was positive for amphetamines, the significance of which is addressed below. (R. p. 162)

thumps³ prior to returning to sinus tachycardia. (R. p. 156) Durrett remained at Richland Memorial until his August 23, 2006 discharge. (R. pp. 158-160)

In his Notice of Intent, Durrett alleged Richland Memorial and others were negligent in disregarding his instructions and administering “certain (unspecified) anesthetic and sedative drugs” to him in the emergency room, which caused him to go into cardiac arrest. (R. pp. 66-69, ¶¶ 7-12) These allegations are repeated essentially *verbatim* in Durrett’s Complaint. (R. pp. 109-112, ¶¶ 6-8) Richland Memorial filed its Answer on or about June 24, 2013, in which it asserted a general denial and numerous defenses, including expiration of the statute of limitations, comparative fault, and Durrett’s failure to file the required expert affidavit. (R. pp. 113-121, ¶¶ 1, 6, 14, and 15)

³ “Hypotensive” refers to abnormally low blood pressure. “In a precordial thump, a provider strikes with a single blow of the fist to the middle of a persons [sic] sternum. The intent is to interrupt a potentially life-threatening rhythm.” http://en.wikipedia.org/wiki/Precordial_thump (last accessed July 16, 2014).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO RICHLAND MEMORIAL ON THE BASIS THAT DURRETT FAILED TO ADDUCE ANY EVIDENCE DEMONSTRATING A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL.

In addition to Durrett's failure to file the affidavit of an expert witness, raised as an alternative sustaining ground in Section II of this Brief, the circuit court correctly granted summary judgment to Richland Memorial given Durrett's failure to adduce any evidence, expert or otherwise, demonstrating an issue of fact for trial. Specifically, Durrett did not provide any evidence to support his allegation that agents of Richland Memorial disregarded his instructions, administered "anesthetic and sedative drugs" to which he claimed to be allergic, and that the administration of these unspecified drugs caused him to sustain injuries and damages. (R. pp. 109-112, ¶¶ 6, 8, 12-15) To the contrary, the only medical evidence of causation demonstrates Durrett's alleged injuries and damages stem from the interaction of medically necessary medications with the illegal methamphetamine present in Durrett's body at the time of his automobile accident. Furthermore, this case clearly falls outside of the common knowledge exception found in § 15-36-100(C)(2), addressed in greater detail below, given the complicated nature of drug interaction, both with other drugs and with the human body. As such, Richland Memorial was entitled to summary adjudication in its favor on all claims asserted against it in this action.

Pursuant to South Carolina law, "medical malpractice actions require a greater showing than generic allegations and conjecture." *David v. McLeod Regional Medical Center*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006). The South Carolina Supreme Court has observed, "if the patient receives allegedly negligent professional medical care, then

expert testimony as to the standard of that type of care is necessary, and the action sounds in medical malpractice.” *Dawkins v. Union Hospital District*, 408 S.C. 171, 758 S.E.2d 501 (2014), *reh’g denied* (June 11, 2014) (internal citations omitted). In the uncontroverted opinion of Durrett’s treating physicians, “[t]he subject matter of this lawsuit involves the use and administration of various anesthetic and/or sedative medications as well as contraindications for various anesthetic and/or sedative medications [, and] that the utilization of these medications is not within the common knowledge of the ordinary lay person and expert testimony is required.” (R. p. 166, ¶ 4) In contrast, Durrett relied solely on “generic allegations and conjecture” to support his claims and has not produced evidence or testimony from any expert who will testify to a reasonable degree of medical certainty on his behalf.

According to Durrett’s own testimony, he was anesthetized and unable to provide any medical history to hospital personnel upon admission to Richland Memorial. (R. p. 183, lines 14-20; p. 184, lines 19-20) He further testified that from the time he presented in the emergency room, it “[m]ight have been a minute” that he remained conscious and that he does not remember anything else until waking up days later. (R. p. 185, lines 5-21) Durrett could not identify by name any medical provider associated with Richland Memorial, including the physician he named as a defendant in this lawsuit and later dismissed with prejudice. (R. p. 186, lines 8-23; p. 188, lines 19-24) Similarly, he did not have any knowledge of what medications he actually received while a patient at Richland Memorial or what made him vomit following sedation in the emergency room. (R. p. 186, lines 6-24) Durrett also testified he did not tell EMS or Richland Memorial about any allergies to anesthetic or sedative medications. (R. p. 190, lines 18-25)

Durrett simply had no memory of what treatment he received or anything specific he discussed with his doctors regarding his treatment. (R. p. 187, lines 4-15) Durrett also candidly admitted he did not recall giving any medical history to anyone at the hospital, including his alleged allergy to anesthetic and/or sedative medications. (R. p. 189, lines 9-15) Further, when questioned about which medications he received, Durrett himself acknowledged the medically complex nature of drug interaction when he testified “I have no idea. My getting sick from that stuff like that is kind of hard to research.” (R. p. 190, lines 12-15) Nevertheless, Durrett failed to identify an expert to explain that his injuries resulted from Richland Memorial’s administration of medications to which he later claimed to be allergic.

To the extent Durrett relied on the testimony of Michael Charpia to provide a causal link between Richland Memorial’s administration of anesthetic medication and his subsequent complications, that reliance was misplaced for several reasons. First, Charpia is not qualified by education or experience to offer medical opinion testimony. He is a high school graduate who also took auto repair and accounting classes at Trident Technical College. (R. p. 225 (p. 7, lines 4-16)) He has no medical training. (R. p. 226 (p. 12, lines 8-10)) Any knowledge he has about Durrett’s alleged allergy to sedative medication comes from Durrett; he has had no conversations with physicians or medical staff who treated Durrett. (*Id.* (p. 13, lines 5-9); p. 227 (p. 15, lines 6-11)) Further, he was not aware of any particular medication Durrett received and didn’t “even know what they put you under with.” (R. p. 227 (p. 14, lines 20-21)) Charpia cannot speak to what transpired in the emergency room because Durrett “was already in triage. . . .” and unavailable for the remainder of the day. (*Id.* (p. 17, lines 20-23); p. 228 (p. 18, lines 5-

6)) Finally, any statements regarding Durrett's medical condition attributed to unidentified doctors and hospital staff amount to nothing more than inadmissible hearsay.

The only other medical expert witness who offered any causation opinion in this case is Richland Memorial's retained expert witness, Dr. Robert Clodfelter ("Dr. Clodfelter"). Dr. Clodfelter is board certified in emergency medicine and serves as the Medical Director of the Emergency Department of the Hilton Head Hospital. (R. p. 193, lines 5-12) From his review of relevant medical records, Dr. Clodfelter noted Durrett arrived at Richland Memorial in an uncooperative and combative state and, therefore, was given a paralytic agent and a sedative in order to facilitate a "very rapid trauma assessment." (R. p. 194, lines 12-23)

Dr. Clodfelter also noted that medical records indicate Durrett admitted ingesting methamphetamine the day before the accident, that Durrett's urine drug screen yielded a positive result for methamphetamine, and that Durrett is allergic to morphine and codeine⁴. (R. p. 195, lines 1-8) Further, the methamphetamines were still present in Durrett's system because that drug metabolizes quickly and would not have been detectable in a urine screen twenty-four hours after it had been ingested. (R. p. 197, line 16 – p. 198, line 1) In Dr. Clodfelter's opinion, the methamphetamine in Durrett's system could interact adversely with everything and anything given to the patient, resulting in symptoms including altered mental status, cardiac dysrhythmia, and tachycardia. (R. p. 196, line 25 – p. 197, line 9)

⁴ Neither morphine nor codeine was administered during Durrett's course of treatment at Richland Memorial.

Turning to the paralytic agents hospital staff actually administered (Norcuron and Anectine), Dr. Clodfelter testified these medications are not indicated to have caused Durrett's cardiac issues. (R. p. 199, line 24 – p. 200, line 4) Instead, Dr. Clodfelter agreed with Durrett's treating cardiologist that Durrett's cardiac issues likely resulted from a combination of the methamphetamines in his system, the administration of propofol, and a sharp drop in blood pressure. (R. p. 200, lines 5-10; p. 156) Specifically, Dr. Clodfelter opined that Durrett's "cardiac problems were related to dysrhythmia, which means an abnormal cardiac rhythm due to hypotension and the effects of amphetamines." (R. p. 200, line 25 – p. 201, line 2)

Contrary to Durrett's assertion that drug interaction is a matter within the common knowledge of a lay juror, he is nothing like the plaintiff in *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 522, 763 S.E.2d 200, 203-204 (2014) (plaintiff with a known latex allergy noted on pre-procedure paperwork successfully invoked common knowledge exception at the pre-suit phase). In comparison to plaintiffs in *Brouwer* and related cases, complex issues relating to drug interactions and Durrett's concession that he never conveyed *any* medical history, including known allergies, to hospital staff, prevent him from invoking the common knowledge exception. The dearth of evidence substantiating Durrett's allegations of medical malpractice plainly demonstrates the absence of any genuine material issue of fact for trial. Given Durrett's reliance on supposition and conjecture, and his failure to come forward with competent expert testimony in support of his claims, Richland Memorial was entitled to summary judgment on each and every allegation asserted against it, and the circuit court order granting summary judgment should be affirmed.

II. AS AN ALTERNATIVE SUSTAINING GROUND, THE COURT SHOULD FIND THAT DURRETT'S NOTICE OF INTENT AND COMPLAINT WERE SUBJECT TO DISMISSAL FOR FAILURE TO TIMELY FILE THE AFFIDAVIT OF AN EXPERT WITNESS AS REQUIRED BY STATUTE AND THAT HIS CLAIMS ARE NOW TIME BARRED.

As an alternative sustaining ground, this Court should find that Durrett's claims are procedurally barred given his failure to timely file the affidavit of an expert witness to support his medical malpractice claims⁵. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina*, 62 (2nd Ed. 2002) (On appeal, the respondent may raise "any additional reasons the appellate court should affirm the lower court's ruling.").

Durrett's initial notice of intent was properly dismissed in 2011 because he failed to file the affidavit of an expert witness in support of his Notice of Intent to File Suit or his Complaint, which is an absolute prerequisite to the filing or initiating of a civil action alleging injury as a result of medical malpractice. See S.C. Code Ann. § 15-79-125(A) ("Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and

⁵ Of course, if the Court affirms the grant of summary judgment, it need not consider the alternative sustaining ground addressed in this section. *Heikler v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 424, 552 S.E.2d 42, 54 n. 2 (Ct. App. 2001) ("In light of this disposition, we need not address the Zoning Board's alternative sustaining grounds.") (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (noting appellate court need not review remaining issues when disposition of prior issues is dispositive.")).

an affidavit of an expert witness. . . .”). Instead, he submitted the affidavit of his attorney, which expressly relied upon inapplicable provisions of S.C. Code Ann. § 15-36-100(C)(2), in an attempt to excuse his failure to comply with the mandatory affidavit requirement. As such, Durrett’s Notice of Intent to File Suit was procedurally defective, as the circuit court initially held, and his claims are now barred by the statute of limitations.

A. Procedural Background

Durrett filed his Notice of Intent to File Suit pursuant to S.C. Code Ann. § 15-79-125 on or after August 5, 2009. In that Notice of Intent, Durrett alleged he sustained injuries and damages during his course of medical treatment at Richland Memorial following his August 9, 2006 automobile accident.

Durrett’s Notice of Intent did not include the expert affidavit required pursuant to S.C. Code Ann. § 15-79-125(A). Instead, Durrett submitted the affidavit of his attorney and contended no expert affidavit was required in light of S.C. Code Ann. § 15-36-100(C)(2) (excusing the contemporaneous filing of an affidavit with the complaint “to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.”). Implicitly recognizing the expert affidavit requirement, Durrett’s counsel acknowledged in his affidavit that the notice of intent was filed within ten days of expiration of the statute of limitations and pledged to “file an expert’s affidavit to supplement the filing of a Complaint in this matter within forty five (45) days of the filing of such a pleading and a determination by the Court of Common Pleas that such an affidavit is required.” (R. p. 164, ¶ 3) Durrett never filed the affidavit

required by §15-79-125(A) (Notice of Intent to File Suit) or the affidavit contemplated by § 15-36-100 (complaint alleging professional negligence).

Richland Memorial moved to dismiss Durrett's Notice of Intent pursuant to S.C. Code Ann. §§ 15-79-125 and 15-36-100, as well as Rules 12(b)(1) and 12(b)(6), SCRPC, on or after September 22, 2009. The motion was based upon: (a) Durrett's failure to follow the statutory conditions precedent to the filing of a medical malpractice action as set forth in § 15-79-125; and (b) Durrett's failure to provide an expert affidavit within 45 days of the filing of a complaint as provided for in § 15-36-100(C). Richland Memorial supported the motion with the Affidavit of William Ross, M.D., who opined to a reasonable degree of medical certainty, and without contradiction, that Richland Memorial did not deviate from the applicable standard of care and that administration of the types of medications at issue in Durrett's Complaint "is not within the common knowledge of the ordinary lay person and expert testimony is required." (R. p. 166, ¶¶ 3-4)

The Court of Common Pleas for Richland County filed its order dismissing Durrett's Notice of Intent on May 25, 2011. In its order, the court concluded this case involves complex interactions with drugs allegedly resulting in cardiac arrest and other medical complications. (R. pp. 171-172) Further, the court concluded Durrett ran afoul of S.C. Code Ann. §§ 15-36-100(C)(1) and 15-79-125(A) because he did not file a timely expert affidavit in support of medical malpractice allegations. (R. pp. 172-173) Durrett moved for reconsideration, and, via Form 4 Order filed April 3, 2012, the court ruled the "[m]otion to reconsider granted. Formal order to follow." (R. pp. 175-176) In an order filed nearly 18 months later – on January 8, 2014 – the court noted that "after

consideration,” the earlier order should be vacated but provided no additional discussion or analysis of the substantive issues presented. (R. p. 180) Further, the circuit court determined, pursuant to § 15-36-100(C)(2), that no affidavit was required because Durrett’s claims fell within the ambit of common knowledge and ordered the parties to engage in mediation. (R. pp. 179-180)

Durrett filed his Summons and Complaint on or after February 28, 2013, in which he largely re-asserted the allegations set forth in his Notice of Intent. Richland Memorial answered with a general denial and asserted numerous defenses, including the statute of limitations, comparative fault, and Durrett’s failure to file the required expert affidavit.

B. Legal Analysis

Section 15-79-125(A) addresses the notice of intent as a prerequisite to filing an action for medical malpractice and requires the plaintiff to file, contemporaneously with his notice of intent, “an affidavit of an expert witness, subject to the affidavit requirements⁶ established in Section 15-36-100” Turning to Section 15-36-100, that provision sets forth certain requirements for complaints alleging professional negligence and the requirement that such complaints be supported by the contemporaneously filed affidavit of an expert witness.

Section 15-36-100(B) makes clear that “in an action for damages alleging professional negligence against . . . any licensed health care facility . . . the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based

⁶ These requirements are set forth in § 15-36-100(A)(1)-(3) and address issues such as, but not necessarily limited to, licensure and other relevant credentials and experience.

on the available evidence at the time of the filing of the affidavit.” Subsection (C)(1) affords plaintiffs an additional 45 days to file the required affidavit where “the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared.” Subsection (C)(2) excuses the contemporaneous affidavit requirement where the alleged negligent act or omission involves subject matter that lies with the ambit of common knowledge and experience. Finally, Subsection (D) makes clear that “[t]his section does not extend an applicable period of limitation” absent an exception that does not apply in this case.

Durrett failed to file an affidavit of any expert as required pursuant to the statutory provisions addressed in the preceding paragraph. As such, his Notice of Intent to File Suit and Complaint were subject to summary dismissal, and the statute of limitations bars him from seeking recovery against Richland Memorial. To the extent Durrett relies upon *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) or *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693 (2012), to compel a different result, his reliance is misplaced. *Ranucci* addressed the interplay between §§ 15-79-125 and 15-36-100 at the *pre-suit* phase and affirmed the legislative intent that those provisions be read in harmony. *Grier* addressed (and rejected) the contention that the plaintiff’s *pre-suit* expert affidavit is required to contain an opinion as to proximate cause. Unlike Durrett, the plaintiffs in both of those cases ultimately proffered the affidavit of an expert witness to bolster their medical malpractice claims.

Inasmuch as Durrett failed to comply with the clear requirements of S.C. Code § 15-79-125(A) by filing the required affidavit contemporaneously with his Notice of Intent or at any point thereafter, Durrett's filings were procedurally defective and should have been dismissed. The Bannister Affidavit does nothing to change this result. As a result, this Court should sustain the entry of judgment on behalf of Richland Memorial on this alternative sustaining ground.

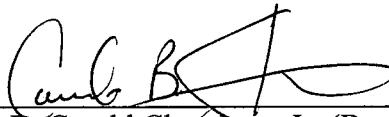
CONCLUSION

For all of the reasons stated herein, this Court should affirm the order below granting summary judgment to Richland Memorial. As an alternative sustaining ground, this Court should hold that Durrett failed to meet statutory conditions precedent to the filing of his Notice of Intent and his Complaint and, therefore, his claims are now barred by the statute of limitations.

TURNER, PADGET, GRAHAM & LANEY, P.A.

January 18, 2017

By:



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APPEAL FROM RICHLAND COUNTY
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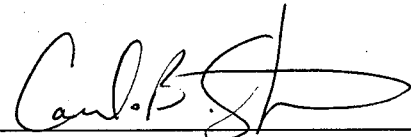
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CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF RESPONDENT PALMETTO
HEALTH ALLIANCE D/B/A PALMETTO RICHLAND MEMORIAL complies with
Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April
15, 2014.

January 18, 2017

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