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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-001036
Case No. 2021-CP-04-0470

Travis Walker, Individually and as Personal Representative of the Estate of Douglas Williford, and Lolita Moore, ... Appellants,

v.

AnMed Health, Anderson Emergency Associates, P.A., Kevin Morton NP, Jamie Moon RN, and Betty Boyles RN, ... Defendants,

Of Whom Anderson Emergency Associates P.A., and Kevin Morton NP are ..... Respondents.

RESPONDENTS' PETITION FOR REHEARING

The Respondents Anderson Emergency Associates P.A., and Kevin Morton NP petition the South Carolina Court of Appeals for a rehearing of the Court's recent published decision in *Walker v. AnMed Health*, Op. No. 6116 (S.C. Ct. App. filed July 16, 2025).

The grounds for the Respondents' petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondents' petition for rehearing is based on the Court's decision in *Walker v. AnMed Health*, Op. No. 6116 (S.C. Ct. App. filed July 16, 2025); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 240, SCACR; and other rules of court.

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Of Whom Anderson Emergency Associates P.A., and Kevin Morton NP are ..... Respondents.

MEMORANDUM IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

The Respondents Anderson Emergency Associates P.A., and Kevin Morton NP have petitioned this Court for a rehearing of its recent published decision in *Walker v. AnMed Health*, Op. No. 6116 (S.C. Ct. App. filed July 16, 2025). The Respondents respectfully submit that the following points were overlooked or misapprehended by this Court:

I.

In its published opinion, this Court ruled that for purposes of presenting an affidavit of merit with the Notice of Intent to Sue (NOI), the affidavit of Nurse Richard High was sufficient to satisfy

the pre-suit requirements of the South Carolina Medical Malpractice Act and specifically S.C. Code Ann. §§ 15-79-125 and 15-36-100. The Court ruled that High, while only a nurse, was qualified to offer opinions against a nurse practitioner "on topics within the realm of emergency nursing and emergency 'work up' care." (Slip Op. at 11). The Court agreed that High was not qualified to render opinions on all the breaches of care alleged but "one or more of the listed actions (and failure to take them) fall within the purview of emergency nursing care and High is extensively qualified in emergency nursing." (Slip Op. at 11). The Court concluded that "High is qualified to render an opinion – at the very least – as to Morton's failure to recheck Williford's blood pressure and pain levels." (Slip Op. at 11).

In their response brief, the Respondents raised a significant preservation issue which this Court neither addressed nor found to be "manifestly without merit." *See* Rule 220(b)(2), SCACR. In fact, from a review of the opinion, the Court did not even acknowledge that a preservation issue had been asserted.

To recap, the Respondents explained that the Appellants offer new issues or theories not argued in the court below. The Respondents wrote:

> The Appellants contend that he did meet the requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 because the High affidavit addressed "one negligent act" by the Nurse Practitioner Kevin Morton "and nothing more was required to make his affidavit valid." *See*, Appellants' Brief, p. 7. The Appellants attempt to dissect NP Morton's functions into "nursing acts" and "medical acts," and in doing so, maintain that the High affidavit is sufficient to identify nursing malpractice committed by NP Morton such that the dismissal of the Appellants' Complaint was in error.

See Respondents' Brief, pp. 7-8. In particular, the Respondents pointed out that the Appellants' attempt to argue that NP Morton had a dual role in the care of Douglas Williford and that two separate standards of care applied -- the standard of care owed by a medical provider (including a physician or nurse practitioner) and the standard of care owed by a nursing provider. The

Appellants argued that Nurse High was qualified to render opinions on the standard of care owed by NP Morton as a "nurse" while conceding he was not qualified to render opinions on NP Morton's actions as a medical provider.

Obviously, this Court adopted that theory, and as noted above, actually concluded that "High is qualified to render an opinion – at the very least – as to Morton's failure to recheck Williford's blood pressure and pain levels." (Slip Op. at 11). However, this theory was not presented in the court below. The *only argument* made by the Appellants before the trial court was that NP Morton had deviated from the standard of care owed by a nurse practitioner[1] and that Nurse High was qualified to render those opinions because of his experience working in an emergency room. The Appellants never argued that NP Morton served dual purposes, had any nursing functions, or was obligated to meet a dual and separate standard of care. Those were all new arguments made for the first time on appeal and are not preserved for appellate review. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Additionally, those arguments reflect an impermissible change of theory on appeal. *See also*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (litigant is prohibited from "chang[ing] his theory on appeal"). On rehearing, the Court is respectfully requested to address the Respondents' preservation argument.

[1] In their Complaint, the Appellants alleged only that Kevin Morton, NP was a nurse practitioner who held himself out as a "skilled nurse practitioner in the ordinary and customary standards of a nurse practitioner." *See,* Complaint, ¶ 8. (R. 61). In contrast, as to the registered nurses, they pled that they were registered nurses who held themselves out as "skilled and competent RN[s] in the ordinary and customary standards of nursing." *See,* Complaint, ¶¶ 9-10. (R. 61-62).

II.

The Court did "agree with the circuit court that High is not a nurse practitioner, nor is he educated as one." (Slip Op. at 11). Nonetheless, the Court ruled that "this is not dispositive as to whether High is qualified to render an opinion addressing *any* of the breaches alleged as to the care Morton provided (or failed to provide) to Williford." (Slip Op. at 11). (Emphasis in original). The Court then cites the cases of *Eades v. Palmetto Cardiovascular & Thoric, P.A.*, 422 S.C. 196, 810 S.E.2d 848 (2018), and *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 487 S.E.2d 596 (1997). However, with respect to *Eades*, there is a clear distinction between a physician of one specialty testifying against a physician of a different specialty as opposed to what Nurse High and the Appellants are attempting in the case at bar and this Court has allowed. More importantly, with respect to *Gooding*, there is a clear distinction between allowing a nurse to testify as to *how* a test or check is performed, or as in *Gooding*, allowing a paramedic to testify as to *how* an intubation is performed. In other words, there is a difference between allowing a non-physician or non-physician extender to testify *how* to properly take of a blood pressure reading or vital signs, as opposed to *when* the standard of care requires such tests to be performed. As a result, *Eades* and *Gooding* are not controlling authority. Importantly, the "negligent acts" alleged here do not challenge the technique utilized in carrying out a test or check but rather when (or even if) that test or check should be done, including "a recheck of blood pressure and pain levels," on which this Court found Nurse High could opine as a standard of care expert. In actuality, determining when a repeat blood pressure reading or a repeat vital sign check or pain check is warranted requires the exercise of medical judgment, i.e., medical decision-making about which a nurse is not qualified to offer expert opinions. Notably, neither the Appellants nor this Court dispute the trial court's ruling that found specifically that a nurse was not qualified to testify to such medical acts as forming a diagnosis, determining a treatment

plan, and making discharge decisions. The law prohibits a nurse from performing those medical acts as well as testifying as to those medical acts. Yet, a decision as to whether or when to take additional blood pressure readings, vitals, or pain checks also falls within the scope of those treatment decisions about which a nurse cannot offer expert opinions under South Carolina law.

Additionally, in focusing on the "recheck of blood pressure and pain levels," the Appellants cited paragraph 37 of the Complaint, where the Appellants allege:

> 37. Nurse Morton improperly made the diagnosis of muscle strain and discharged Mr. Williford without rechecking his blood pressure even though he presented with blood pressure meeting the criteria for hypertensive crisis.

(R. 64). Nurse High, however, is not qualified as a registered nurse to support that allegation. He cannot diagnose a "hypertensive crisis," and in fact, no one has made such a "diagnosis" other than Nurse High. Likewise, Nurse High cannot opine that a diagnosis of muscle strain was "improper" or a deviation of the standard of care. He also cannot opine on the discharge decision. In short, paragraph 37 is directed at NP Morton's diagnosis of Douglas Williford and the decision to discharge him, neither of which Nurse High can offer expert opinions about. The Court, however, did not anslyze its "recheck of blood pressure and pain levels" ruling within the context of what has actually been alleged against NP Morton in the Complaint. The Court is thus requested to rehear that issue.

III.

Indirectly, if not directly, by allowing Nurse High to render standard of care opinions on nursing care, such as "a recheck of blood pressure and pain levels," the Court is allowing the Appellants to argue that NP Morton had a dual role in the care of Williford and that, in essence, two separate standards of care applied – the standard of care owed by a medical provider (including a physician or nurse practitioner) and the standard of care owed by a nursing provider. However, in addition to that issue not being properly preserved for the reasons already discussed,

NP Morton, as the record demonstrates, was not part of the nursing staff. (R. 10-15). NP Morton was an employee of Anderson Emergency Associates, which provides only medical providers and not nurses. The ER record reflects that Kevin Morton, NP was the "provider" on the "treatment team," and that the nursing care was provided by Betty Boyles, RN and Jamie Moon, RN. (R. 208). The ER record does not reflect any nursing care provided by NP Morton.

In short, this concept of a dual standard of care has no basis in existing case law and fails to take into proper account that NP Morton was acting as a "nurse practitioner" and not as a "nurse" as those roles, functions, and licensure are statutorily distinguished. Additionally, despite the Appellants' argument, the High affidavit does not actually offer the opinion that NP Morton owed two different standards of care, one as a nurse and another as a nurse practitioner, and hence, does not actually offer standard of care opinions as to NP Morton specifically.

IV.

To expand on that last point, the High affidavit fails to even identify NP Morton or any deficiencies specifically committed by him. The Court acknowledges that very point in voicing "agree[ment] that High did not specifically allege Morton committed the negligent acts or omissions at issue." (Slip Op. at 12). Yet, the Court gives Nurse High and the Appellants a pass on that by finding it sufficient that High directed his opinions at an *unidentified group*, namely "agents, and/or employees of AnMed Health and/or private practices staffing the AnMed Health Emergency Department." (R. 50). The Court found Nurse High's opinions were directed at NP Morton because, quite simply, he "falls within this group." (Slip Op. at 12).

The Court, however, cites no existing case law that interprets S.C. Code Ann. § 15-36-100(B) so loosely or leniently, and frankly, the reason for that is there is no such precedent. Most notably, S.C. Code Ann. § 15-36-100(B) does, however, require that the affidavit of merit must include "the factual basis for each claim on the available evidence at the time of the filing

of the affidavit." S.C. Code Ann. § 15-36-100(B). In applying the plain language of that statute and the obvious meaning intended by the General Assembly, the requirement of the "factual basis for each claim" would certainly require Nurse High (and any affiant) to identify by name of the defendant-practitioner against whom he finds a breach of the standard of care and the specific act or omission attributable to that defendant-practitioner, including when and how the negligent act or omission occurred. Those should be the minimum components of the "factual basis" requirement. Otherwise, as logic and common sense dictate, this statutory scheme requiring an affidavit of merit before haling a defendant-practitioner into court is rendered meaningless and is easily circumvented – as is exactly what occurred in this case.

In effect, despite the requirement of a "factual basis for each claim," this Court is permitting Nurse High and the Appellants to treat all the health care providers as a collective group with no distinguishing among them based upon their conduct, roles, responsibilities, and licensure. There should be no disputing that there is not a "group standard of care" for all healthcare providers involved in providing emergency room care.

On rehearing, the Court is respectfully requested to re-examine its ruling that Nurse High was not required to "specifically allege Morton committed the negligent acts or omissions at issue" under the "factual basis" requirement of S.C. Code Ann. § 15-36-100(B). (Slip Op. at 12). The Court is further asked to examine the repercussions of its ruling and to recognize how such a lenient (and imprecise) identification of the practitioner allegedly committing malpractice is inconsistent with not only the statutory language used by the General Assembly but also the clear legislative intent in adopting the requirement of an affidavit of merit to be filed as part of the NOI process. The Court is respectfully asked to conclude that the trial court was correct in rejecting Nurse High's opinions with respect to the diagnoses and care provided by NP Morton. Nurse High, quite simply, is not qualified to opine on the standard of care owed by a nurse

practitioner or whether NP Morton deviated from that standard of care.

V.

Lastly, in its opinion, the Court expressed "agree[ment] with the circuit court that High might not be qualified to render an expert opinion as to *all* of the breaches Appellants allege because High is not licensed, board certified, or specifically educated as a nurse practitioner." (Slip Op. at 11). (Emphasis in original). As mentioned above, the Appellants are not contesting the trial court's ruling that found specifically that a nurse was not qualified to testify to such medical acts as forming a diagnosis, determining a treatment plan, and making discharge decisions. This Court appears to agree, at least, that the law prohibits a nurse from performing those medical acts as well as testifying as to those medical acts. Consequently, the Appellants have not provided an affidavit of merit as to those components of the Appellants' negligence claims against NP Morton, and as a result, the Court should have, at the very least, affirmed the dismissal of those claims and left for remand the breaches for which the Court finds Nurse High to be qualified, presumably the alleged failure to "recheck of blood pressure and pain levels."

CONCLUSION

The Respondents Anderson Emergency Associates P.A., and Kevin Morton NP respectfully request that the Court rehear its decision in this case for the reasons argued herein.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of the Lindemann Law Firm, P.A., counsel for the Respondents Anderson Emergency Associates P.A. and Kevin Morton NP, does hereby certify that service of the **Respondent's Petition for Rehearing** and **Memorandum in Support of Respondent's Petition for Rehearing** was made upon all counsel of record to this appeal by email only this the 31st day of July 2025, as follows:

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**Also Admitted in North Carolina*

July 31, 2025

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
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Email: ctappfilings@sccourts.org

RE: Travis Walker, Individually and as Personal Representative of the Estate of Douglas Williford, and Lolita Moore v. AnMed Health, Anderson Emergency Associates, P.A., Kevin Morton NP, Jamie Moon RN, and Betty Boyles RN
SCCA Appellate Case Number: 2021-001036
Civil Action Number: 2021-CP-04-0470
Our File Number: 22.20510

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), please find enclosed for filing **Respondent's Petition for Rehearing** and **Memorandum in Support of Respondent's Petition for Rehearing** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

My firm's $50.00 check for the filing fee will be mailed to the Court via U.S. Mail. If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jac

cc: Whitney B. Harrison, Esquire *(w/ Enclosures, Via Email Only)*
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