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REPLY TO
JORDAN N. TEICH
HANNAH E. SMITH

September 8, 2025

VIA EMAIL
The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201
supctfilings@sccourts.org

Re: Charles Blanchard Construction Corp, Inc. v. 480 King Street, LLC v. Glick/Boehm & Associates, Inc.
Appellate Case No.: 2024-001403

Dear Ms. Howard,

Petitioner Glick/Boehm & Associates, Inc., through undersigned counsel, submits this letter in accordance with Rule 208(b)(7), SCACR. In the course of preparing for argument in this matter, Petitioner has identified authority pertinent to the briefs submitted by the parties. The first authority is *Walker v. AnMed Health*, No. 2021-001036, 2025 WL 1943756 (S.C. Ct. App. July 16, 2025). The second authority is *Tucker v. Talley*, 267 Ga. App. 820, 600 S.E.2d 778 (Ga Ct. App. 2004). The third authority is *Hankla v. Postell*, 293 Ga. 692, 749 S.E.2d 726 (Ga. 2013). The final authority is *Botehlo v. Bycura*, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984), which is quoted in *Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 891 S.E.2d 682 (Ct. App. 2023) cited by Respondent 480 King Street, LLC in accordance with Rule 208(b)(7). These authorities respond to the interpretation and application of South Carolina Code Section 15-36-100(A)(3) as presented by 480 King Street, LLC in its Brief at pp. 15-18 and its letter to this Honorable Court of this date.

These cases are attached for the Court's convenience.

Sincerely,

s/ Hannah E. Smith
JORDAN N. TEICH
HANNAH E. SMITH

HES/
Enclosures

cc: All Other Counsel of Record (via e-mail only)

KeyCite Yellow Flag
Refused to Follow by Marshall v. Yale Podiatry Group, Conn.App., August 20, 1985

282 S.C. 578
Court of Appeals of South Carolina.

Patsy BOTEHLO, Appellant,
v.
Blair M. BYCURA, Respondent.

No. 0246.
|
Heard March 19, 1984.
|
Decided Aug. 30, 1984.

Synopsis
Former patient brought negligence action against podiatrist alleging professional malpractice. The Court of Common Pleas, York County, Robert L. McFadden, J., granted podiatrist's motion for summary judgment, and patient appealed. The Court of Appeals, Bell, J., held that: (1) podiatrist had not admitted in his testimony that he had violated standard of care of a recognized authority in podiatric field; thus, patient was required to offer expert testimony regarding standard of care of a podiatrist; (2) orthopedic surgeon was not expert on standards of good podiatric practice; and (3) inquiry into facts of patient's informed consent claim was not required after patient presented no expert testimony on standard of disclosure a reasonable podiatrist would be required to meet.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (14)

[1] **Health** Gross or obvious negligence and matters of common knowledge

In a medical malpractice action plaintiff must establish by expert testimony both required standard of care and defendant's failure to conform to that standard, unless subject matter lies within ambit of common knowledge or experience, so that no special learning is needed to evaluate defendant's conduct.

15 Cases that cite this headnote

[2] **Summary Judgment** Duties and Liabilities of Practitioners; Negligence and Malpractice

In medical malpractice action, on defendant's motion for summary judgment, there will usually be no genuine issue of material fact unless plaintiff presents expert testimony on the standard of care and its breach by defendant.

4 Cases that cite this headnote

[3] **Evidence** Scientific and technical works; learned treatises

Journal article by authority in field of podiatry was not competent evidence of standard of care required of podiatrist in the circumstances. Circuit Court Rule 44(d).

[4] **Evidence** Particular admissions
Health Particular procedures

Podiatrist's testimony that he agreed with journal article recommending treatment for persons with conditions similar to that of former patient's which differed from that he had given to former patient, but that he did not agree that article represented professional standard to be observed in patient's case did not constitute admission by podiatrist that he had deviated from standard of care required of a podiatrist treating patient's condition; thus, expert testimony was necessary to establish standard of care required of a podiatrist.

1 Case that cites this headnote

[5] **Health** Podiatry

Podiatrist's duty of care must be measured by practices and principles of particular branch of healing arts in which he is trained and licensed; he is not bound to possess an exercise degree

of skill and learning required of a physician or surgeon. Code 1976, §§ 40–51–10 to 40–51–270.

5 Cases that cite this headnote

[6] **Health** School of medicine

When patient chooses a practitioner of a recognized branch of the healing professions, he elects to undergo kind of care and treatment common to that particular profession; he cannot afterward complain that care he received fell short of standards in another profession.

1 Case that cites this headnote

[7] **Health** Podiatry

In malpractice action against podiatrist, former patient had to present evidence of the standard of care required of a podiatrist, not physicians and surgeons. Code 1976, §§ 40–51–10 to 40–51–270.

2 Cases that cite this headnote

[8] **Health** Particular procedures

Standard of care in podiatry must be established by testimony of one knowledgeable or skilled in podiatric practice.

6 Cases that cite this headnote

[9] **Evidence** Knowledge, experience, and skill

Evidence Training or education

To be competent as expert, witness must have acquired by reason of study or experience or both such knowledge and skill in business, profession, or science that he is better qualified than jury to form opinion on particular subject of his testimony.

15 Cases that cite this headnote

[10] **Evidence** Factors, Tests, and Standards in General

Test of whether witness is competent as an expert is a relative one, depending on the particular witness' reference to the subject; expert is not limited to any class of persons acting professionally.

8 Cases that cite this headnote

[11] **Evidence** Particular fields of expertise

Orthopedic surgeon who testified that he did not have any training in podiatry, was unfamiliar with any publications written by podiatrists, was unfamiliar with standards of professional care generally observed by podiatrists and was unfamiliar with surgical procedure involved in case was not an expert on standards of good podiatric practice. Code 1976, §§ 40–47–10 to 40–47–270, 40–51–10 to 40–51–270.

5 Cases that cite this headnote

[12] **Evidence** Due care and proper conduct

Testimony by orthopedic surgeon that podiatrist had not observed standard of care required of an orthopedic surgeon did not establish that podiatrist had violated standard of care required of a podiatrist.

5 Cases that cite this headnote

[13] **Health** Podiatry

Rule that scope of physician's duty to disclose is measured by those communications a reasonable medical practitioner in same branch of medicine would make under same or similar circumstances applies in malpractice action against a podiatrist.

1 Case that cites this headnote

[14] **Health** Weight and sufficiency of evidence

Further inquiry into facts of former patient's informed consent claim against podiatrist was not required after patient presented no expert testimony on standard of disclosure reasonable podiatrist would be required to meet under circumstances of case.

Attorneys and Law Firms

****61** ***580** John C. Hayes, III of Hayes, Brunson & Gatlin, Rock Hill, for appellant.

John L. Choate of Nelson, Mullins, Grier & Scarborough, Columbia, for respondent.

Opinion

BELL, Judge:

Patsy Botehlo brought this negligence action against Blair Bycura, a podiatrist, alleging professional malpractice. The issues joined were (1) whether Bycura exercised reasonable care in performing foot surgery without first attempting to alleviate Botehlo's problem by conservative management and (2) whether he breached a duty to inform Botehlo of the nature and risks of the surgery, including healing time, before obtaining her consent to the procedure. The circuit judge granted Bycura's motion for summary judgment on the ground that Botehlo failed to present expert testimony on ***581** either issue and Bycura was therefore entitled to judgment as a matter of law. Botehlo appeals. We affirm.

The material facts are largely undisputed. Botehlo suffered from a painful callus on the sole of her left foot. The callus had been there for about thirty-five years, but she had never sought medical treatment for the problem. In April 1980, she went to Bycura, a licensed podiatrist who practices in Rock Hill. After examining Botehlo and x-raying her foot, Bycura diagnosed her as having an intractable plantar keratoma, that is, a callus on the sole of her foot which would not go away. He told her the second and third metatarsals of the left foot were sitting lower than the others. These bones exerted a downward pressure which caused the callus and her painful symptoms. He told her the condition could be corrected by a surgical procedure which involves fracturing the bones and putting them back in place. He also told her she could wear a wide shoe as an alternative to surgery. Botehlo indicated she wanted the surgery and asked Bycura to perform it that same day. Bycura agreed.

With the assistance of a nurse, Botehlo then filled out and signed three written forms. One was a fee schedule indicating the cost of the operation. Another was a diagram of the left foot illustrating which bones would be fractured during the surgery. This form indicated the operation involved "bone fracture" and "bone removal." It listed healing time for the operation as:

85% – 3 mos.

95% – 9 mos.

100% – at least 1 year.

It also listed complications and dangers of the surgery. Botehlo signed and dated this ****62** form in a blank immediately to the right of the list of healing times.

The third form was an authorization for and consent to surgery. It contained a detailed list of complications that might occur as a result of the surgery. On the reverse side it listed seven alternatives instead of surgery. These included seeking a second opinion. Botehlo indicated on the form she did not wish to seek a second opinion. She signed the consent form on the front and the back. Before she signed it, a description of the operation ("Bone fracture Bone removal 2d & 3d ***582** metatarsals left foot") was written immediately below the space for her signature on both the front and back of the form.

After Botehlo signed these forms, Bycura returned and performed the operation, called an osteotomy, on the second and third metatarsals of her left foot. As a result of the operation Botehlo experienced pain, swelling, discoloration, and other discomfort. Because her foot hurt, she had difficulty sleeping at night for several weeks. Although she was able to return to her regular desk job the second day after the surgery, for three months she was unable to return to her parttime job as a sales clerk at a pharmacy, because she could not stand on her foot for any length of time without pain. She testified that her second and third toes no longer moved like the others, that she sometimes had shooting pains in her foot, and that she wished her foot was back the way it was. She felt Bycura had misled her about the amount of pain and disability she would suffer from the operation.

After returning to Bycura's office once to have her surgical dressing changed and once to have her stitches removed, Botehlo failed to keep any further postoperative appointments with Bycura. The purpose of the additional appointments was to fit her with an orthotic device to be worn in her regular shoes. This was supposed to relieve pressure on her foot and reduce the possibility of transfer lesions, i.e., the reappearance of calluses on another part of her foot. Instead of returning to Bycura, she consulted an orthopaedic surgeon, Dr. Robert M. Scoville, who treated her for a period of about six months. According to her own testimony, Botehlo told Dr. Scoville:

> ... I would not wear an orthopaedic shoe. I didn't wear one before the surgery and I wasn't going to wear the ugly things now. He did say something about, well, that might help.

In his deposition Dr. Scoville testified that the osteotomies were done in the correct place, that they healed normally, and that there was no question they did take care of Botehlo's plantar keratosis. By the end of September 1980 the callus was gone and weight reduction from the second and third metatarsals had been accomplished. However, Scoville also testified he would have tried an oxford shoe with padding and a metatarsal ***583** bar for six months before considering surgery to correct Botehlo's problem. He agreed that this conservative course of treatment might not have alleviated Botehlo's preoperative problem and that surgery might have been necessary anyway.

I.

The first issue on appeal is whether Botehlo was required to offer expert testimony on the issue of Bycura's failure to use conservative management before performing surgery.

[1] **[2]** In a medical malpractice action the plaintiff must establish by expert testimony both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge or experience, so that no special learning is needed to evaluate the defendant's conduct. *See Burke v. Pearson,* 259 S.C. 288, 191 S.E.2d 721 (1972); *Welch v. Whitaker,* 317 S.E.2d 758 (S.C.App.1984). The reason for requiring expert testimony is that matters of proper diagnosis and treatment ordinarily involve technical knowledge beyond the ken of laymen. *See Bessinger v. DeLoach,* 230 S.C. 1, 94 S.E.2d 3 (1956). Thus, on a defendant's motion for summary judgment, there will usually be no genuine issue of ****63** material fact unless the plaintiff presents expert testimony on the standard of care and its breach by the defendant. *See Sheppard v. Kimbrough,* 318 S.E.2d 573 (S.C.App.1984).

The disputed issue in this case is whether Bycura's decision to perform surgery violated the professional standard of care required of podiatrists. A decision to perform surgery involves medical judgment outside the realm of lay knowledge or experience. Therefore, expert testimony would normally be required.

Botehlo argues, however, that expert testimony was unnecessary, because Bycura himself admitted he deviated from the standard of care laid down by a recognized authority in the podiatric field. She claims this creates an exception to the normal rule requiring expert testimony. We find the evidence upon which Botehlo relies does not support her position.

During Bycura's deposition, Botehlo's lawyer examined him using an article from the *Journal of Foot Surgery* co-authored by Dr. Joseph B. Addante. Bycura admitted Addante's writings are authoritative in the field of podiatry. The ***584** article discussed the metatarsal osteotomy as a means of treating painful intractable plantar keratosis. One part of the article stated: "In considering use of this procedure [i.e., the metatarsal osteotomy] biomechanical management should be tried first. Surgery is considered if the biomechanical management is not enough to render the patient comfortable." When asked if he agreed with this statement, Bycura said, "With reservations, I agree with it." In response to further questioning, Bycura explained that the statement did not apply to all cases. He believed the statement was not valid in Botehlo's case where the problem had lasted over thirty years. In his judgment, after thirty years Botehlo's problem would not go away with conservative management.

[3] **[4]** This testimony cannot fairly be characterized as an admission by Bycura that he deviated from the standard of care required of a podiatrist treating Botehlo's problem. The Addante article was not competent evidence of the standard of care required of podiatrists in the circumstances. *See Edwards v. Union Buffalo Mills Co.,* 162 S.C. 17, 159 S.E. 818 (1931) (medical treatise not competent evidence even though author is a standard authority on the subject). Therefore, the article itself could not be relied on to create the material issue of fact which would preclude summary judgment. *See* Rule 44(d), Rules of Practice for the Circuit Courts of South Carolina (motion must be opposed by such facts as would be admissible in evidence). Moreover, Bycura did not agree the statement quoted from the article represented the professional standard to be observed in a case like Botehlo's. As he made no such admission, his own testimony did not create an exception to the rule that the plaintiff must present expert

testimony on the issue of malpractice to survive a defendant's motion for summary judgment.

II.

Since expert testimony was required, the next issue is whether Dr. Scoville, an orthopaedic surgeon, could testify as an expert regarding the standard of care to be observed by a podiatrist. This is a question of first impression in South Carolina. [1]

****64 *585 [5] [6] [7]** Podiatry is a recognized profession in South Carolina. *See* §§ 40–51–10 to –270, Code of Laws of South Carolina, 1976, as amended. The duty and liability of a podiatrist correspond to those of health care professionals generally. The law requires a podiatrist to use reasonable care in the performance of professional services and to act according to his best judgment in treating his patients; but he is only bound to possess and exercise that degree of skill and learning which is ordinarily possessed and exercised by similarly situated members of his profession in good standing. *Cf., Bessinger v. DeLoach,* 230 S.C. 1, 94 S.E.2d 3 (1956) (dentists). In other words, the podiatrist's duty of care must be measured by the practices and principles of the particular branch of the healing arts in which he is trained and licensed. He is not bound to possess and exercise the degree of skill and learning required of a physician or surgeon. *Whitehurst v. Boehm,* 41 N.C.App. 670, 255 S.E.2d 761 (1979). When a patient chooses a practitioner of a recognized branch of the healing professions, he elects to undergo the kind of care and treatment common to that particular profession. He cannot afterward complain that the care he received fell short of the standards in another profession. *Id.* For this reason, Botehlo had to present evidence on the standard of care required of podiatrists, not physicians and surgeons.

[8] [9] [10] The standard of care in podiatry must be established by the testimony of one knowledgeable or skilled in podiatric practice. *Cf., Whitehurst v. Boehm, supra.* To be competent as an expert, a witness must have acquired by ***586** reason of study or experience or both such knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony. *Hopkins v. Comer,* 240 N.C. 143, 81 S.E.2d 368 (1954); *Sandford v. Howard,* 161 Ga.App. 495, 288 S.E.2d 739 (1982). The test is a relative one, depending on the particular witness's reference to the subject; an expert is not limited to any class of persons acting professionally. *Memorial Hospital of Alamance County, Inc. v. Brown,* 50 N.C.App. 526, 274 S.E.2d 277 (1981); *cf., State v. Merriman,* 34 S.C. 16, 12 S.E. 619 (1891) (not necessary for witness with medical training and experience to be regularly licensed to practice medicine to qualify as expert); *Hill v. Carolina Power & Light Co.,* 204 S.C. 83, 28 S.E.2d 545 (1943) (physician not incompetent to testify as an expert merely because he is not a specialist in the particular branch of his profession involved); *Daniels v. Bernard,* 270 S.C. 51, 240 S.E.2d 518 (1978) (chiropractor competent to testify as medical expert to extent of his knowledge and experience); *Avret v. McCormick,* 246 Ga. 401, 271 S.E.2d 832 (1980) (nurse competent to testify in medical malpractice action against physician as to standard of care in keeping sterile a needle used to draw blood); *Sanford v. Howard, supra* (orthopaedist competent to testify against podiatrist where orthopaedic and podiatric methods of treatment are same and witness has knowledge of procedure used by podiatrist).

The standards of education and licensure for podiatrists are different from those of medical doctors. Compare §§ 40–51–10 to –270, Code of Laws of South Carolina, 1976, as amended, with §§ 40–47–10 to –270, Code of Laws of South Carolina, 1976, as amended. Both Bycura and Dr. Scoville testified that methods of treatment may differ between podiatry and medicine. Both also testified that the procedures for performing a metatarsal osteotomy are different in podiatry and orthopaedic surgery. [2]

****65 *587 [11]** The circuit judge properly concluded Dr. Scoville was not an expert on the standards of good podiatric practice. Dr. Scoville testified he does not have any training in podiatry, is not licensed in podiatry, and has received no instruction in the practice of podiatry. He was not familiar with any journals, periodicals, or books written by podiatrists. He had never attended any seminars in podiatry. He further testified that he is not familiar with the standards of professional care generally observed by podiatrists, nor the standards of practice of members of the American Academy of Ambulatory Foot Surgeons or the American College of Podiatric Foot Surgeons. Dr. Scoville admitted he had never performed ambulatory foot surgery and that he was not familiar with the surgical procedure Bycura performed on Botehlo. He said he did not know if conservative management was a generally accepted standard for podiatric practice. When asked if he held himself out as an expert, Dr. Scoville answered: “No, not in podiatry. No.”

[12] Taking Dr. Scoville's testimony in the light most favorable to Botehlo, as we must in reviewing a summary judgment,[3] it amounts to an assertion that Bycura did not observe the standard of care Dr. Scoville, as an orthopaedic surgeon, would have observed in deciding to perform surgery on Botehlo's foot. Since the material question was not the standard required of orthopaedic surgeons, but the standard required of podiatrists, Dr. Scoville's testimony created no genuine issue of fact for trial. The circuit court was, therefore, correct in granting judgment as a matter of law on the issue of Bycura's failure to attempt conservative management before performing surgery to alleviate Botehlo's problem.

III.

The final question is whether expert testimony was required on the issue of informed consent. Botehlo alleged that ***588** Bycura breached his duty to inform her of the consequences of foot surgery before obtaining her consent to the procedure. However, she presented no expert testimony on the standard of care required of podiatrists in disclosing the nature and risks of a metatarsal osteotomy prior to obtaining consent to perform the procedure. In view of this lack of expert testimony, the circuit judge found it unnecessary to decide whether Botehlo gave her informed consent to the operation and entered summary judgment against her.

[13] Our recent decision in *Hook v. Rothstein,* 316 S.E.2d 690 (S.C.App.1984), disposes of this issue. In *Hook* we held the scope of a physician's duty to disclose is measured by those communications a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances. Because disclosure is an integral part of the physician's diagnosis and treatment of his patient and because the reasonableness of a disclosure often involves questions of medical knowledge and judgment, we determined the plaintiff in a malpractice action against a physician must ordinarily establish a breach of the duty to disclose by expert testimony. *Id.* We now hold this same rule applies in a malpractice action against a podiatrist.

[14] Because Botehlo presented no expert testimony on the standard of disclosure a reasonable podiatrist would be required to meet under the circumstances of her case, the trial judge was not obliged to enquire further into the facts of her informed ****66** consent claim. We note, however, that the disclosures Bycura actually made to her, both orally and on the written forms she signed, were full and appear to cover all ill effects of the surgery of which she later complained.

The judgment of the circuit court is

AFFIRMED.

SANDERS, C.J., and SHAW, J., concur.

All Citations

282 S.C. 578, 320 S.E.2d 59

Footnotes

1 The courts of other states have addressed the question in different ways. In *Dolan v. Galluzzo,* 77 Ill.2d 279, 396 N.E.2d 13 (1979), the Supreme Court of Illinois held that to testify on the standard of care in podiatry, the witness must be licensed to practice podiatry. Thus, an orthopaedic surgeon was not competent to give expert testimony against a podiatrist. In contrast, the Georgia Court of Appeals in *Sanford v. Howard,* 161 Ga.App. 495, 288 S.E.2d 739 (1982), permitted such testimony where the witness was knowledgeable in the procedure used by the podiatrist and the method of treatment was the same in both professions. In *Whitehurst v. Boehm,* 41 N.C.App. 670, 255 S.E.2d 761 (1979), the court held the applicable standard of care for podiatrists and other “allied occupations” to medicine must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar with and competent in that field. An orthopaedic surgeon was found not to have the knowledge required to qualify as an expert on the podiatric standard of care. Similarly, in *Darby v. Cohen,* 101 Misc.2d 516, 421 N.Y.S.2d 337 (N.Y.Sup.1979), a New York court ruled that a general surgeon was not competent to testify as to standards of podiatric care.

2 Bycura testified that the osteotomy he performs is ambulatory foot surgery done in his office on an outpatient basis. He applies a local anesthetic to the foot and makes a quarter inch incision through the top of the foot. He then uses a drill to fracture the metatarsal, saws through it, and raises it. He removes any bone fragments by grinding them to a fine powder with a dental burr. The patient leaves the office the same day. Dr. Scoville testified that his method of performing an osteotomy requires the patient to be hospitalized for three days. He uses different surgical instruments and makes a wider incision "so you can see what you are doing." If he uses a dental burr he retracts the soft tissues and tendons so they will not be injured by the burr or bone fragments. This is one reason for the larger incision.

3 *Shea v. State Department of Mental Retardation,* 279 S.C. 604, 310 S.E.2d 819 (S.C.App.1983).

293 Ga. 692
Supreme Court of Georgia.

HANKLA
v.
POSTELL.

No. S12G1964
|
Oct. 7, 2013.

Synopsis
Background: Mother filed medical malpractice action against certified nurse midwife and midwife's medical practice, seeking to recover for permanent brachial plexus injury sustained by child during birth. Midwife filed motions to exclude testimonies of mother's expert witnesses. After the Court of Appeals, 305 Ga.App. 391, 699 S.E.2d 610, affirmed in part and reversed in part as to exclusion of expert evidence, the Superior Court, Lowndes County, following jury trial, entered judgment in favor of midwife and medical practice. Mother appealed. The Court of Appeals, 317 Ga.App. 86, 728 S.E.2d 886, reversed and remanded. Certiorari was granted.

Holdings: The Supreme Court, Hunstein, J., held that:

[1] to qualify as an expert in a medical malpractice action, the witness must have actual knowledge and experience in the relevant area through either active practice or teaching and either be in the same profession as the defendant whose conduct is at issue or qualify for the exception to the "same profession" requirement of the expert-witness statute, and

[2] physician was not qualified to testify as expert witness regarding treatment rendered by midwife.

Judgment of Court of Appeals affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] Appeal and Error Statutory or legislative law

Supreme Court's review concerning the construction of statutes is conducted under a de novo standard.

11 Cases that cite this headnote

[2] Evidence Health Care; Medical Malpractice

To qualify as an expert in a medical malpractice action, the witness must (1) have actual knowledge and experience in the relevant area through either active practice or teaching and (2) either be in the same profession as the defendant whose conduct is at issue or qualify for the exception to the "same profession" requirement of the expert-witness statute. West's Ga.Code Ann. § 24–7–702(c)(2)(D).

17 Cases that cite this headnote

[3] Evidence Health Care; Medical Malpractice

Under the exception to the "same profession" requirement of the expert-witness statute, a proffered expert who is a physician is permitted to qualify as an expert as to a non-physician health care provider, but only if she has knowledge regarding the relevant standard of care as a result of having supervised, taught, or instructed such non-physician health care providers. West's Ga.Code Ann. § 24–7–702(c)(2)(D).

13 Cases that cite this headnote

[4] Evidence Restriction to one's own field

In medical malpractice action, physician, who was board-certified obstetrician and gynecologist and had experience performing obstetrical maneuvers to address shoulder dystocia, was not qualified to testify as expert witness regarding treatment rendered by certified nurse midwife in handling shoulder dystocia during delivery, where physician neither was member of the same profession as midwife nor had supervised nurse midwives. West's Ga.Code Ann. § 24–7–702(c)(2)(D).

3 Cases that cite this headnote

Attorneys and Law Firms

****727** Coleman Talley, Wade H. Coleman, Valdosta, Gregory T. Talley, Alphonso A. Howell IV, Huff, Powell & Bailey, Randolph P. Powell, Jr., Atlanta, for appellants.

Laura M. Shamp, Atlanta, for appellees.

Opinion

HUNSTEIN, Justice.

***692** We granted certiorari in this medical malpractice action to determine whether Georgia's expert witness statute permits a physician to testify as to the standard of care applicable to a nurse midwife, where the physician regularly renders the medical treatment at issue in the case but has not supervised nurse midwives in the rendering of such treatment in accordance with the statute's requirements. See OCGA § 24–7–702(c) (2013).[1] Construing the statutory language ****728** in light of the legislative purposes behind the law's enactment, we conclude that the statute does not permit such testimony, even where a physician satisfies the "active practice" requirement of OCGA § 24–7–702(c)(2)(A). Thus, we now hold that, to be qualified to give expert medical testimony, a physician or other health care provider, regardless of her experience in "active practice," must satisfy either the "same profession" requirement of OCGA § 24–7–702(c)(2)(C) or the " supervision" requirement of subparagraph (c)(2)(D). Accordingly, we affirm the judgment of the Court of Appeals.

In 2005, Anita Jackson Postell filed suit against Vicki Hankla, a certified nurse midwife, and Southern OB/GYN Associates, her medical practice, alleging professional negligence in connection with the delivery of Postell's infant son. Postell alleged that Hankla had breached the standard of care in handling an obstetrical complication known as shoulder dystocia, in which the infant's shoulders become lodged in the birth canal. As a result, Postell alleged, her son sustained irreversible nerve and muscle damage that has rendered him permanently unable to move or use his right arm.

***693** At trial, the defense presented expert testimony from Dr. Sandra Brickman, a board-certified obstetrician and gynecologist who completed her residency at Emory University and has practiced obstetrics and gynecology in Tifton, Georgia since 2000. Dr. Brickman, who testified that she had handled well in excess of a thousand deliveries in her career and had experience performing obstetrical maneuvers to address shoulder dystocia, opined that Hankla had not breached the standard of care in her delivery of Postell's son. After trial, the jury returned a defense verdict.

On appeal, the Court of Appeals reversed, holding that the trial court had erred in qualifying Dr. Brickman as an expert. *Postell v. Hankla,* 317 Ga.App. 86(1), 728 S.E.2d 886 (2012). Specifically, the Court of Appeals concluded that Dr. Brickman did not satisfy the requirements of the expert witness statute because she neither was a member of the "same profession" as Hankla as prescribed in OCGA § 24–7–702(c)(2)(C) nor had "supervised, taught, or instructed" nurse midwives in accordance with subparagraph (c)(2)(D). Id. at 88–89(1), 728 S.E.2d 886. Because Dr. Brickman was the only disinterested witness to testify in Hankla's favor as to her compliance with the standard of care, the Court of Appeals held that admission of her testimony was reversible error, requiring a new trial. Id. at 89(1), 728 S.E.2d 886.

We granted certiorari to determine whether the Court of Appeals' construction of the expert witness statute was correct, when the proffered expert physician has had personal experience in her medical practice with the procedure at issue. We conclude that the statute does not permit such a witness to be qualified as an expert based solely on that experience.

[1] As in all appeals involving the construction of statutes, our review is conducted under a de novo standard. *Kennedy Dev. Co. v. Camp,* 290 Ga. 257, 258, 719 S.E.2d 442 (2011). OCGA § 24–7–702(c) provides, in pertinent part:

> ... [I]n professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:
>
> (1) Was licensed by an appropriate regulatory agency ...; and
>
> (2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

> ***694** (A) The active practice of such area of specialty of his or her profession for at least three of the last five years ...; or
>
> ****729** (B) The teaching of his or her profession for at least three of the last five years ...; and
>
> (C) Except as provided in subparagraph (D) of this paragraph:
>
> (i) [i]s a member of the same profession ...; and
>
> (D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed [non-physician health care providers] has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider.

The Court of Appeals has previously considered the grammatical structure of this provision and concluded that

> [t]he legislature's use of the word "or" between subparagraphs (2)(A) and (2013.)(B), followed by its use of the word "and" between subparagraphs (2)(B) and (2)(C), indicates that a medical expert must show *either* "active practice" or "teaching" for "at least three of the last five years," but that whichever of these may be the case, the expert must *also* be "a member of the same profession" as the person whose performance he is evaluating.

Smith v. Harris, 294 Ga.App. 333, 336–337(1), 670 S.E.2d 136 (2008); accord *Ball v. Jones,* 301 Ga.App. 340, 687 S.E.2d 625 (2009). In the proceedings below, the Court of Appeals again construed the statute in this manner. See *Postell v. Hankla,* 317 Ga.App. at 88(1), 728 S.E.2d 886.

[2] **[3]** Based on the statutory language and legislative intent, we now expressly affirm this construction. Thus, to qualify as an expert in a medical malpractice action under OCGA § 24–7–702(c), the witness must (1) have actual knowledge and experience in the relevant area through either "active practice" or "teaching" *and* (2) either be in the ***695** "same profession" as the defendant whose conduct is at issue or qualify for the exception to the "same profession" requirement set forth in subparagraph (c)(2)(D). Under the exception, a proffered expert who is a physician is permitted to qualify as an expert as to a non-physician health care provider, but only if she has knowledge regarding the relevant standard of care "as a result of having ... supervised, taught, or instructed" such non-physician health care providers. See *Pendley v. Southern Reg'l Health Sys.,* 307 Ga.App. 82(2), 704 S.E.2d 198 (2010) (physician not qualified as expert on standard of care for nurse because he did not satisfy requirements of subparagraph (c)(2)(D)); *Anderson v. Mountain Mgmt. Servs., Inc.,* 306 Ga.App. 412(2), 702 S.E.2d 462 (2010) (same).

Though Hankla urges us to construe the statute as deeming an expert qualified so long as she meets the "active practice" requirement of subparagraph (c)(2)(A), we must reject this construction. We acknowledge that the grammatical structure of the statute would, in theory, permit us to read the statute as prescribing the "active practice" requirement as an independent ground for qualification as an expert, as an alternative to the combined requirements of "teaching" and either "same profession" or "physician supervisor" in subparagraphs (c)(2)(B), (C), and (D). Under this construction, only if the proffered witness's expertise in the procedure at issue was derived from "teaching" would the "same profession" requirement apply; if the witness's expertise were derived from "active practice," no further qualification would be necessary.

While this proposed construction is plausible, it would not comport with the legislative intent underlying the statute. See OCGA § 1–3–1(a) ("[i]n all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly"). The current expert witness statute was enacted as part of the Tort Reform Act of 2005, an attempt by the General Assembly to address what it viewed as "a crisis affecting the provision and quality of health care services in this state." See Ga. L.2005, p. 1, §§ 1, 7. Together with the other civil justice and health care regulatory reforms in the Act, the expert witness statute was intended to ****730** help reduce the cost of liability insurance for health care providers and ensure citizens continued access to care. Id. at pp. 1–2, § 1; see also Hannah Yi Crockett et al., Peach Sheets, *Torts and Civil Practice,* 22 Ga. St. U.L.Rev. 221, 223–224 (2005) (advocates promoted tort reform to address "the ever increasing medical malpractice insurance premiums resulting from large jury awards and settlements"). The intent of the expert witness statute in particular is codified in the statute itself: "It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be ***696** admissible in other states."

OCGA § 24–7–702(f); see also *Nathans v. Diamond,* 282 Ga. 804, 806(1), 654 S.E.2d 121 (2007) (purpose of statute was to ensure that expert testimony be given only by those who have "significant familiarity" with subject matter at issue). The "same profession" requirement, which had not previously been recognized in Georgia, see, e.g., *Nowak v. High,* 209 Ga.App. 536, 433 S.E.2d 602 (1993) (nurse qualified to testify as to standard of care for physician), was part of the legislature's effort to impose more exacting requirements on expert witnesses in medical malpractice cases.

Consistent with this overall purpose, we construe the "same profession" requirement to apply to all proffered medical experts, even those experienced in the procedure at issue through "active practice." Had the General Assembly intended for "active practice" to stand alone as a sufficient means of expert witness qualification, it could have drafted the statute to make this point explicit and clear. And, should the General Assembly now find that such a result is preferred in circumstances like those presented here, it retains the power to amend the statute to achieve this effect.

[4] Accordingly, we view the requirements of OCGA § 24–7–702 subparagraphs (c)(2)(A) and (c)(2)(B) as together being conjunctive with subparagraphs (c)(2)(C) and (c)(2)(D). Thus, we hold that, to be qualified to testify as an expert, the proffered witness must be a member of the same profession as the defendant whose conduct is at issue, or be a physician satisfying the "supervision" requirements of (c)(2)(D), even if she has the requisite personal knowledge of and experience with the treatment at issue through "active practice" under (c)(2)(A). See *Bacon County Hosp. & Health Sys. v. Whitley,* 319 Ga.App. 545, 737 S.E.2d 328 (2013) (chiropractor experienced in performing electrostimulation therapy not qualified to testify on standard of care for physical therapist performing same therapy); *Ball,* 301 Ga.App. at 343, 687 S.E.2d 625 (nurse not qualified to testify on standard of care for physical therapist in following care plan of hospital patient); *Smith,* 294 Ga.App. at 337(1), 670 S.E.2d 136 (pharmacist not qualified to testify on standard of care for physician in administering antibiotic). Here, because it is undisputed that Dr. Brickman neither is a member of the same profession as Hankla nor has supervised nurse midwives in accordance with subparagraph (c)(2)(D), the Court of Appeals correctly held that the trial court abused its discretion in allowing her to testify as an expert regarding the treatment rendered by Hankla.

Judgment affirmed.

THOMPSON, C.J., HINES, P.J., BENHAM, MELTON, NAHMIAS, JJ., and Chief Judge BILL REINHARDT concur.

BLACKWELL, J., disqualified.

All Citations

293 Ga. 692, 749 S.E.2d 726, 13 FCDR 3070

Footnotes

1 This Code section is the successor, under the new Georgia Evidence Code, to former OCGA § 24–9–67.1, which was in effect at the time this case was tried. Because the current Code section is substantively identical to its predecessor, see Paul S. Milich, *Georgia Rules of Evidence,* § 15:4, at 491 (2012–2013 ed.), our analysis here applies equally to the previous and current versions of the statute.

267 Ga.App. 820
Court of Appeals of Georgia.

TUCKER
v.
Thomas C. TALLEY, M.D., P.C. et al.

No. A04A0886.
|
June 14, 2004.

Synopsis

Background: Legal guardian of patient brought medical malpractice and general negligence claims against physician and practice group, alleging that patient suffered permanent and irreparable harm after being improperly treated for cryptococcal meningitis. The Superior Court, Dougherty County, Gray, J., granted summary judgment for physician and group. Guardian appealed.

Holdings: The Court of Appeals, Johnson, P.J., held that:

[1] physician and practice group did not timely file motion to dismiss;

[2] evidence did not support general negligence claim; and

[3] nurse practitioner was not competent expert witness on standard of medical care.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion to Dismiss for Failure to State a Claim.

West Headnotes (7)

[1] **Pretrial Procedure** Time for motion; condition of cause

Physician and practice group did not timely file a motion to dismiss medical malpractice suit on the basis of lack of specificity in expert affidavit by nurse practitioner, where they first raised the issue in brief in which they renewed original motion to dismiss, approximately 14 months after affidavit was filed. West's Ga.Code Ann. § 9-11-9.1(d).

3 Cases that cite this headnote

[2] **Appeal and Error** Judgment

Patient's guardian could not raise the issue on appeal that trial court improperly converted motion to dismiss medical malpractice action into motion for summary judgment, where guardian had notice that trial court intended to consider matters outside the pleadings, but guardian failed to object.

1 Case that cites this headnote

[3] **Appeal and Error** Consent, acquiescence, or participation in error

A party will not be heard to complain of a ruling which it sought or to which it acquiesced.

[4] **Appeal and Error** Harmless and Reversible Error

An appellate court will not reverse the trial court's error, if any, absent a showing of harm.

[5] **Health** Infections and infectious diseases

Evidence did not support patient's guardian's general negligence claim against physician and practice group, based on assertion that staff members failed to properly communicate patient's complaints of headache, nausea, and fever to physician, which caused patient's condition of cryptococcal meningitis to go untreated; there was no evidence that substance of patient's telephone call was miscommunicated within the office or there was otherwise some breakdown of administrative procedures.

1 Case that cites this headnote

[6] **Evidence** Restriction to one's own field

Nurse practitioner was not competent expert witness as to standard of medical care applicable to patient who complained of severe headaches;

ordering of medical tests was not an overlapping function between physician and nurse.

1 Case that cites this headnote

[7] **Evidence** Restriction to one's own field

The general rule is that a member of a school of practice other than that to which the defendant belongs is not competent to testify as an expert in a medical malpractice case.

1 Case that cites this headnote

Attorneys and Law Firms

****779** ***826** Charles J. Bowen, Jr., Jay D. Lose, Jr., Savannah, for Appellant.

Chambless, Higdon, Richardson, Katz & Griggs, LLP, Emmitte H. Griggs, David Nelson, Macon, for appellee.

Opinion

***820** JOHNSON, Presiding Judge.

Carolyn Tucker, as legal guardian of Lorie T. Justice ("Justice"), appeals from the trial court's order granting Thomas C. Talley, M.D., P.C.'s ("Talley") and Talley & Stroud, LLC's ("LLC") motion to dismiss. We affirm for the reasons set forth below.

In her complaint, Justice alleges that she sought treatment from Talley and LLC for severe headaches, fever, and nausea, among other things, but that Talley and LLC only prescribed pain medication for her condition and failed to conduct any medical tests. Justice further claims that she was subsequently diagnosed with cryptococcal meningitis, and that she suffered permanent and irreparable harm while the condition went untreated.

Talley and LLC moved to dismiss Justice's complaint for failure to file an affidavit of an expert competent to testify as required by OCGA § 9–11–9.1. The trial court, after considering the pleadings, depositions, and arguments of counsel, granted the motion. Justice contends the trial court erred because (i) Talley and LLC waived objections to the expert affidavit, (ii) the trial court inappropriately converted the motion to dismiss into a motion for summary judgment, (iii) her complaint included an ordinary negligence claim that was not a claim for professional negligence, and (iv) the affidavit was sufficient to support her claims for medical malpractice.

[1] 1. Justice argues that Talley and LLC waived any objection to the Johnson affidavit by failing to act diligently in filing a motion to dismiss which alleged a defect with specificity. We agree, except that such a waiver only extended to whether Justice's complaint was subject to dismissal for failure to state a claim.

OCGA § 9–11–9.1(a) ("Subsection (a)") requires that in a professional malpractice action the plaintiff attach to the complaint an affidavit of an expert competent to testify which sets forth at least one negligent act or omission claimed to exist. OCGA § 9–11–9.1(b) ("Subsection (b)") provides that, in circumstances where the plaintiff ***821** has a good faith belief that the statute of limitation will expire within ten days of the date of filing, the expert affidavit need not be filed contemporaneously with the complaint, and the plaintiff has 45 days to supplement her pleadings with the required affidavit. In this case, Justice relied on Subsection (b) and did not file an expert affidavit with her original complaint, but supplemented her pleadings within the allowed time with an affidavit of nurse Kirsten Johnson who averred that, given the severity of Justice's complaints, "the office of Dr. Thomas C. Talley fell below the applicable standard of care" by failing to conduct additional tests after Justice sought treatment.

Talley and LLC filed a motion to dismiss with their initial responsive pleadings in ****780** which they contended that Justice's case should be dismissed for failure to file an affidavit of an expert competent to testify. In their supporting brief, Talley and LLC asked the court to stay consideration of the motion until after the expiration of the 45–day period, and then to dismiss Justice's case if the pleadings had not been supplemented with the required expert affidavit. Approximately 14 months after the Johnson affidavit was filed, Talley and LLC asked the trial court to rule on their motion to dismiss.

Justice contends that because she supplemented her pleadings within the period allowed by Subsection (b), Talley and LLC were required to file a motion to dismiss which comported with the requirement of OCGA § 9–11–9.1(d) ("Subsection (d)") that a defendant allege a defect in an affidavit with specificity. Subsection (d) provides:

> If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that said affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9–11–15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires. [1]

***822** We agree with Justice that Talley and LLC never filed a motion to dismiss that complied with Subsection (d). Obviously, as Justice did not attach an expert affidavit to her initial pleadings, Talley and LLC could not file a motion to dismiss with their initial responsive pleadings which alleged a defect with specificity as to a filed affidavit. The inability to object in initial responsive pleadings, however, would not prevent a later objection. " Although the statute does not plainly address its application to the present facts, the legislature clearly intended to allow the defendant in a malpractice case to raise the failure to file the required expert affidavit at the defendant's first opportunity." [2] As Talley and LLC could not object in their initial responsive pleadings, the objection should have been made in Talley's and LLC's first subsequent pleading and within a reasonable period of time after the affidavit was filed. [3] The specific grounds for Talley's and LLC's objection to the Johnson affidavit were not made clear, however, until they filed the brief in which they renewed the original motion to dismiss, approximately 14 months after the affidavit was filed. The delay in making a specific objection to the Johnson affidavit was patently unreasonable and not in compliance with OCGA § 9–11–9.1(d).

Talley and LLC argue that the original motion to dismiss identifies the defect with specificity because Justice never did file an affidavit by an expert competent to testify. However, there is a material difference between not attaching an affidavit and filing a defective affidavit because a defective affidavit can be cured under Subsection (d). Talley and LLC's original motion to dismiss could not and did not identify a defect in the subsequently filed affidavit. [4]

As Talley and LLC did not object with specificity to the Johnson affidavit, they were not entitled to a dismissal for failure to state a claim on account of a failure to comply with OCGA § 9–11–9.1. It does not follow, however, that their failure to make a valid objection ****781** under OCGA § 9–11–9.1 waived the issue of nurse Johnson's competency for other purposes. [5] Accordingly, we will not reverse because, as discussed below, Talley and LLC's motion to dismiss was converted into ***823** a motion for summary judgment upon which they were entitled to prevail. Although Justice relies on *Glaser v. Meck* [6] for the proposition that issues of expert competency are not reached after a pleading default, *Glaser* is both factually and procedurally inapplicable.

[2] **[3]** **[4]** 2. Justice acknowledges that because the trial court considered depositions and other matters outside the pleadings, the motion to dismiss was converted into a motion for summary judgment. [7] Justice contends that the trial court converted the motion to dismiss into a motion for summary judgment sua sponte, and erred in doing so without giving her 30 days notice in which to present evidence in opposition. [8] However, at the hearing on the motion to dismiss Justice was reasonably apprised of the trial court's intent to consider matters outside the pleadings because the trial court asked for depositions to be filed, "[a]nd I'll get the file and review it, and try to get you an answer, depending on when the depositions are filed." Justice did not object to the trial court's evident intent to use depositions in ruling on the motion to dismiss. "A party will not be heard to complain of a ruling which it sought or to which it acquiesced." [9] Even if the trial court's intent to consider matters outside the pleadings was not so clear as to require an objection, Justice does not show that she would have filed additional affidavits or briefs, or other supporting documentation, had she been given additional time to do so in the context of a motion for summary judgment. [10] To the contrary, at the hearing her attorney represented that "we believed, based on the status of written discovery already in

this case, we can already prove our case." We will not reverse the trial court's error, if any, absent a showing of harm. [11]

[5] 3. Justice amended her complaint to add the following claim:

> Defendants jointly and severally committed negligence through the administrative nonprofessional functions of it employees, including but not limited to the failure to follow procedures regarding the communication of the content of phone calls from patients.

***824** Justice contends that the trial court erred in treating this ordinary negligence claim as a claim for professional negligence. However, even if Justice did set forth a claim of ordinary negligence, the trial court did not err in granting summary judgment to Talley and LLC on those claims because there was no evidence to support the ordinary negligence claim.

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact, and that the undisputed facts, viewed in a light most favorable to the party opposing the motion, warrant judgment as a matter of law. [12] To obtain summary judgment, a defendant need not produce any evidence, but must only point to an absence of evidence supporting at least one essential element of the plaintiff's claim. [13] Our review of a grant of summary judgment is de novo, and we ****782** view the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmovant. [14]

In her deposition, Justice states that she spoke with Dixon at Dr. Talley's office about her headache, but does not remember if she told Dixon about any other problems or symptoms. From Justice's deposition and the affidavit of nurse Johnson, it appears that Talley prescribed pain medication to Justice in response to Justice's complaint about her headaches. Thus it appears that Talley and LLC acted on Justice's telephone call. There is no evidence that the substance of the call was miscommunicated within the office or there was otherwise some breakdown of administrative procedures. Thus there is an absence of evidence that Talley and LLC committed ordinary negligence through the administrative functions of their employees, and the trial court did not err in granting summary judgment to Talley and LLC on Justice's ordinary negligence claim.

[6] 4. Justice contends that nurse Johnson was competent to testify in support of Justice's professional malpractice claims. Again, we disagree.

In her affidavit, nurse Johnson, a registered nurse and nurse practitioner, claims:

> On May 12, 2000, Lorie Justice was a patient of Dr. Thomas C. Talley. On that date, Lorie Justice complained to Dr. Talley's office of severe headaches of such tremendous magnitude that they woke her up at night and caused her to ***825** vomit. Ms. Justice also complained of fever, nausea, sensitivity to bright light, and neck pain.
>
> I am familiar with the standards of care required during the diagnosis, treatment, and care of pregnant women in a medical environment. Based upon the facts set out above, the office of Dr. Thomas C. Talley fell below the applicable standard of care by engaging in negligent acts and omissions, including but not limited to the following: (a) Given the severity of Lorie Justice's complaints, they should have conducted additional testing.

[7] "The general rule is that a member of a school of practice other than that to which the defendant belongs is not competent to testify as an expert in a malpractice case." [15] "The question presented here is whether there is sufficient proof of overlapping expertise to establish that nurse [Johnson] was competent to give the affidavit against [Talley], a medical doctor." [16] We agree with the analysis of the trial court that a nurse practitioner cannot speak to an alleged missed case of cryptococcal meningitis on the part of a physician. The specific act of negligence alleged in Johnson's affidavit is failure to conduct additional testing, and the act of negligence asserted in the complaint is that "Defendants knew or should have known that Plaintiff's complaints were symptoms of a far more serious disease. Defendants should have followed up on Plaintiff's complaints and ordered additional testing." The ordering of medical tests is not shown to be an overlapping function between a nurse practitioner and a medical doctor inasmuch as a nurse does not have independent authority to order diagnostic tests. [17]

Justice attempts to frame nurse Johnson's expertise and the allegations of negligence such that Johnson's expertise overlaps that of Talley and LLC's "staff" in "failing to follow up on a telephone complaint." However, as discussed in Division 3 above, Justice's telephone complaint was responded to, and, to the extent diagnostic tests were required, that is not shown to be a matter within nurse Johnson's expertise. Accordingly, Justice presented no competent evidence that Talley and LLC had breached the applicable standard of care, and the trial court did not err in granting summary judgment to Talley and ****783** LLC on Justice's medical malpractice claims. [18]

Judgment affirmed.

SMITH, C.J., and PHIPPS, J., concur.

All Citations

267 Ga.App. 820, 600 S.E.2d 778, 04 FCDR 2063

Footnotes

1 OCGA § 9–11–9.1(d). Current Subsection (d) became effective on July 1, 1997, and was not part of the analysis in cases relied on by Talley and LLC such as *Riggins v. Wyatt,* 215 Ga.App. 854, 452 S.E.2d 577 (1994), *Milligan v. Manno,* 197 Ga.App. 171, 397 S.E.2d 713 (1990), and *Chandler v. Koenig,* 203 Ga.App. 684, 417 S.E.2d 715 (1992).

2 *Harris v. Murray,* 233 Ga.App. 661, 664(2), 504 S.E.2d 736 (1998).

3 See id. (because defendant acted diligently in raising the defense in the first pleading he filed after discovering evidence causing him to challenge the validity of the affidavit, he satisfied the statutory requirement that the defendant raise the failure in its initial responsive pleading).

4 See, e.g., *Smith v. Morris, Manning & Martin, LLP,* 264 Ga.App. 24, 25, 589 S.E.2d 840 (2003) (discussing power to amend defective affidavit under OCGA § 9–11–9.1(d)).

5 See generally *Hewett v. Kalish,* 264 Ga. 183, 184(1), 442 S.E.2d 233 (1994) (if a defendant believes that the application of pleading rules would not lead to the conclusion that the plaintiff's expert is incompetent to testify but the defendant nevertheless believes that the plaintiff's expert is in fact incompetent, the defendant may attempt to resolve this discrepancy at a hearing which, should evidence be presented outside the pleadings, must be considered to be a hearing on motion for summary judgment).

6 258 Ga. 468, 369 S.E.2d 912 (1988).

7 See *White House, Inc. v. Winkler,* 202 Ga.App. 603, 605–606, 415 S.E.2d 185 (1992).

8 See *Bonner v. Fox,* 204 Ga.App. 666, 667, 420 S.E.2d 312 (1992).

9 (Citation omitted.) *Firstline Corp. v. Valdosta–Lowndes County Indus. Auth.,* 236 Ga.App. 432, 434(2), 511 S.E.2d 538 (1999).

10 *Christensen v. State of Ga.,* 219 Ga.App. 10, 11–12(4), 464 S.E.2d 14 (1995).

11 Id. at 12(4), 464 S.E.2d 14.

12 OCGA § 9–11–56(c); *Lau's Corp. v. Haskins,* 261 Ga. 491, 405 S.E.2d 474 (1991).

13 Id.

14 *Supchak v. Pruitt,* 232 Ga.App. 680, 682, 503 S.E.2d 581 (1998).

15 (Punctuation and footnote omitted.) *Bennett v. Butlin,* 236 Ga.App. 691, 692(1), 512 S.E.2d 13 (1999).

16 *Nowak v. High,* 209 Ga.App. 536, 538, 433 S.E.2d 602 (1993).

17 See OCGA § 43–34–26.1 (physician may delegate authority to a nurse to order dangerous drugs, medical treatments, and diagnostic tests under nurse protocol, which is a written document signed by a physician).

18 See *Williams v. Hajosy,* 210 Ga.App. 637, 638(2), 436 S.E.2d 716 (1993) (while affidavit was sufficient for purposes of OCGA § 9–11–9.1, it was not sufficient to show doctor failed to comply with standard of care for purposes of summary judgment motion).

2025 WL 1943756
Only the Westlaw citation is currently available.
Court of Appeals of South Carolina.

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 which Anderson Emergency Associates P.A. and Kevin Morton NP are the Respondents.

Appellate Case No. 2021-001036
|
Opinion No. 6116
|
Heard March 6, 2024
|
Filed July 16, 2025

Appeal From Anderson County, R. Lawton McIntosh, Circuit Court Judge

Attorneys and Law Firms

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Andrew F. Lindemann, of Lindemann Law Firm, P.A., of Columbia, and Howard W. Paschal, Jr., of Greenville, both for Respondents.

Opinion

MCDONALD, J.:

***1** Travis Walker, individually and as personal representative of the Estate of Douglas Williford, and Lolita Moore (Appellants) appeal the circuit court's dismissal of their medical malpractice action. Appellants argue the circuit court erred in (1) finding the affidavit filed with their notice of intent to file suit (NOI) was insufficient to satisfy the statutory prerequisite for their malpractice claims against certain medical providers, (2) finding a physician's supplemental affidavit did not cure the purported defects in their initial expert's affidavit, and (3) dismissing their malpractice action with prejudice. We reverse and remand.

Facts and Procedural History

On January 18, 2018, Douglas Williford was involved in a motor vehicle accident and drove himself to the AnMed Health emergency room (ER) in Anderson County. Appellants' complaint notes Williford arrived in the ER at approximately 9:08 p.m. and was discharged at 10:39 p.m., "ten minutes after his brief examination" by nurse practitioner (NP) Kevin Morton. Williford was discharged despite presenting with a "significantly elevated" blood pressure of 244/130, an initial pain level of 9 out of 10, and mid-back pain he described as a " 'catch' in his left back near his left shoulder blade." Two weeks later, Williford returned to the AnMed ER at 6:57 a.m., reporting "the pain had gotten worse causing him to be unable to sleep." He was discharged with pain medication at 10:44 a.m. that same day. Williford was later found "unresponsive, not breathing, and pulseless in his car in the emergency room parking lot and was brought back into the ER at 3:45 p.m. Despite aggressive treatment and resuscitative efforts," Williford was pronounced dead at 3:52 p.m. An autopsy revealed he "had suffered a rupture of an aortic aneurysm resulting in an aortic dissection in the ascending aorta." The cause of death was "cardiac tamponade due to a ruptured aortic aneurysm."

On November 5, 2020, Appellants filed the NOI required by section 15-79-125 of the South Carolina Code (Supp. 2024) against AnMed Health; nurse practitioner (NP) Morton; Anderson Emergency Associates, P.A. (AEA); registered nurse Jamie B. Moon; and RN Betty A. Boyles.[1] Attached with Appellants' NOI was the affidavit of Richard Kevin High, a practicing emergency nurse; a proposed complaint setting out the requisite short and plain statement of facts; and answers to standard interrogatories.

High has worked in emergency nursing for over thirty years and is board certified in emergency nursing. In his curriculum vitae (CV), High detailed his decades of experience in the field of emergency medicine, including his current position as a Senior Associate in Emergency Medicine at the Vanderbilt University Medical Center. High described this work as follows:

> My position includes administrative, teaching and patient care duties within the Vanderbilt Emergency System.

> Vanderbilt is an academic medical system that acts as a tertiary care center, Level 1 Trauma Center and Burn Center for a referral area of roughly 50,000 square miles.
>
> ***2** My work entails bedside, clinical and didactic teaching of nurses, clinical staff, residents, fellows and faculty within the Vanderbilt system; mainly within the Emergency Department and Vanderbilt's prehospital provider system. I perform clinical work within the department and on occasion with LifeFlight. I'm also responsible for managing the oversight of the intake and resuscitation of ~8000 trauma patients that present to the department.

High's CV further describes his coordination, moderation, and teaching of a weekly multidisciplinary conference which examines trauma patients presenting to Vanderbilt's Emergency Department. "This conference involves the review of patient resuscitations, team dynamics, injury patterns and treatment rendered. The conference is attended by nurses, prehospital/EMS personnel, medical students, residents and faculty." High began this work in 2007, and he teaches 47 of these weekly conferences per year.

In his affidavit, High expressed his "belief that [his] education, training and experience qualify [him] to render an expert opinion in regard to the expected care that should have been rendered to" Williford in the emergency room. High then gave his opinion, "within a reasonable degree of medical certainty, that agents, and/or employees of AnMed Health and/or private practices staffing the [ER] committed negligent acts or omissions in their care and treatment" of Williford. High identified these alleged breaches of the standard of care to include:

- Inappropriate triage;
- Inadequate workup;
- Failure to do repeat vitals;
- Failure to do repeat pain;
- Failure to obtain/record vitals prior to discharge;
- Failure to obtain further imaging prior to discharge; [and]
- Inappropriate discharge.

High averred that he had reviewed Williford's medical records, including those from AnMed Health, AnMed Family Medicine, and the Anderson County Coroner's Office, and noted these records provided the factual bases for his opinions. In High's opinion, the identified breaches of the standard of care caused or contributed to Williford's injuries and premature death.

Appellants' proposed complaint includes actions for wrongful death, survival, and loss of consortium. With respect to Williford's significantly elevated blood pressure of 244/130 upon presentation on the day of the accident, the complaint notes, "A blood pressure in this range is considered a hypertensive crisis" and Williford "met the criteria for hypertensive crisis for both the systolic and diastolic pressures."

In addition, the complaint asserts it is "known to medical providers working in emergency rooms that": (1) "pain in the mid back is a known sign and/or symptom of aortic aneurysm and/or dissection"; (2) "motor vehicle accidents and other forms of trauma are known to cause tears in major blood vessels resulting in aortic aneurysms and/or dissections"; (3) "motor vehicle accidents and other forms of trauma are known risk factors for aortic aneurysms and/or dissection"; (4) "patients with a history of hypertension" and "patients over the age of 50 are at increased risk of aortic aneurysm and/or dissection"; and (5) "hypertensive crisis is often associated with aortic aneurysms and/or dissection." Appellants contend the treating medical professionals "should have considered aortic aneurysm/dissection [as] potential causes of his symptoms" based on multiple warning signs.

According to Appellants, NP Morton (1) did not include aortic aneurysm/ dissection as a potential diagnosis or consider it to be a possible cause of Williford's symptoms, (2) "did not order any imaging studies" even though "contrast-enhanced computed topography (CT) [and] transesophageal echocardiogram (TEE)" are readily available in the ER setting, (3) improperly diagnosed Williford with muscle strain of his left upper back without considering an aortic aneurysm or "ordering any testing to rule out aortic aneurysm in order to properly protect" his health, and (4) improperly diagnosed and discharged Williford "without rechecking his blood pressure even though he presented with a blood pressure meeting the criteria for hypertensive crisis." NP Morton's only submitted orders for Williford upon his presentation to the ER prescribed aspirin and blood pressure medication.

***3** Appellants further alleged Morton and AnMed Health's employees failed to provide Williford with proper medical treatment in accordance with "general common sense and/

or the appropriate standard of care." They claim these lapses were caused by the negligence and carelessness of Morton, Moon, Boyles, and/or other employees of AnMed Health "in failing to possess and exercise that degree of care, competence, and skill ordinarily and customarily possessed and exercised by employees rendering nursing care under similar circumstances." Appellants asserted Morton and other AnMed employees failed to adhere to "the prevailing standard of emergency medicine" for the reasons listed in High's affidavit, failed "to properly treat a patient in a hypertensive crisis," and failed to "consider aortic aneurysm/dissection as possible causes of [Williford's] complaints." According to Appellants, had Williford received proper medical care "within the standard of care and/or common sense," the treating medical professionals would, more likely than not, have identified and treated his aortic aneurysm and prevented his death.

Following an unsuccessful pre-suit mediation, Appellants filed their complaint against AnMed Health, AEA, Morton, Moon, and Boyles. [2] The complaint asserted the same factual bases and causes of action set forth in the proposed complaint filed with the NOI and High's supporting affidavit.

Respondents answered and moved to dismiss, arguing Appellants "failed to file an affidavit from a qualified *medical* expert regarding the *medical providers'* treatment in this case: to wit, [NP] Morton and AEA." Although Respondents acknowledged High was qualified to render an opinion as to the acts of the nursing co-defendants, they sought dismissal based on Appellants' failure "to provide an affidavit *against the physicians and physician extender,* [*NP*] *Morton*, as required as a mandatory prerequisite to bring [a] medical malpractice action under the S.C. Medical Malpractice Act. S.C. Code **Section** 15-79-125 and **Section** 15-36-100." Respondents asserted High was not qualified by his education, experience, training, or licensing to provide "non-nursing" opinions because he was not board certified to practice in the same discipline as NP Morton. They further argued **section** 40-47-20(36)(h) of the South Carolina Code (Supp. 2024) bars nurses from expressing medical opinions addressing medical acts. In Respondents' view, because nurses are prohibited from performing medical acts, it must be illegal for them to testify as to such acts. And, because NP Morton was performing medical acts as the identified medical provider, he is held to the standard of care of a physician. Thus, Respondents took the position that High—as an emergency medicine nurse—was prohibited by law from rendering an opinion addressing non-nursing medical acts or the standard of care for a physician extender providing such care.

One week after Respondents moved to dismiss, Appellants filed a supplemental affidavit from emergency physician Michael A. Chansky. Dr. Chansky noted that in his thirty years practicing emergency medicine, he has both treated patients and taught resident physicians "the proper work up for emergency medicine patients." After reviewing Williford's medical records, Dr. Chansky opined, to a reasonable degree of medical certainty, that AEA and NP Morton committed the following negligent acts or omissions in treating Williford:

- Inappropriate triage
- Failure to address severe high blood pressure and tachycardia
- Failure to perform repeat vital signs
- Failure to address and properly work up severe hypertension and tachycardia in the setting of a [motor vehicle accident] and left upper thoracic back pain
- Failure to obtain appropriate imaging prior to discharge [and]
- Inappropriate discharge

Dr. Chansky further opined that these breaches of the standard of care caused or contributed to Williford's injuries and death.

Following a hearing, the circuit court granted Respondents' motion to dismiss, with prejudice. The circuit court found that although Appellants "provided an affidavit regarding nursing acts effective against the nurse codefendants," they failed to file "an affidavit contemporaneously with the NOI[ ] from a qualified medical expert regarding" the care provided by Respondents, "resulting in an absent affidavit as to" those providers. The circuit court reasoned that a nurse is not qualified to offer testimony or an opinion as to a nurse practitioner's standard of care or any potential breach of such standard "as to the performance of medical acts" because a nurse does not have the necessary education, training, and licensing. Although a nurse could "assess a patient [and] implement doctor's or physician extender's orders and treatment plans," a registered nurse could not perform medical acts, including medically diagnosing, ordering, or interpreting diagnostic tests; providing a medical treatment plan; or issuing prescriptions" as an NP can. The court further noted High's affidavit never specifically identified Morton

and offered no opinion as to the standard of care applicable to an NP, as evidenced by Appellants' answers to certain requests for admission. The circuit court then found the NOI statute required an expert's allegation be particularized as to a defendant's practice and recognized that different standards of care apply to nurses and nurse practitioners.

***4** The circuit court found High did not meet the requirements of **section** 15-36-100(A)(2) of the South Carolina Code (Supp. 2024) to testify as to the care Morton provided because High was "not licensed, board certified[,] nor does he work within the same discipline (nursing vs. medicine)." The court noted the South Carolina Nurse Practice Act differentiates nurses from NPs and each such provider has their "own distinct licensing scheme, educational requirements, and area of specializations." The circuit court concluded that as a result of additional education, licensing, and training as well as their practice and employment agreements and authorizations granted pursuant to the Nurse Practice Act, NPs perform delegated medical acts, including "the ordering and interpreting of tests," "the forming of a medical diagnosis," "determining a medical treatment plan and prescribing medications," "ordering any work-up on a patient," and "ordering the disposition of a patient."

The circuit court held Morton "acted as the extender of the physician to provide delegated medical acts in the work up of [Williford], just like the doctor" when performing these medical acts. The circuit court further found the practice of medicine includes submitting "an affidavit to the court that *expresses a medical opinion as to medical acts*." Thus, the circuit court concluded Appellants failed to file the required contemporaneous affidavit "from a qualified medical expert regarding" the medical care provided by Morton and AEA.

The circuit court then rejected Appellants' timeliness argument because both **section** 15-36-100(E) of the South Carolina Code (Supp. 2024) (governing the filing of a defective affidavit) and **section** 15-36-100(F) of the South Carolina Code (Supp. 2024) (governing the failure to file *any* affidavit) provide that a defendant should file a motion to dismiss "contemporaneously with its initial responsive pleading." The circuit court also rejected Appellants' argument that Dr. Chansky's affidavit qualified as an amendment and thus cured any defect in the use of High's affidavit because the applicable statutes contain no exception for an "absent" affidavit. Instead, the circuit court noted, Appellants filed a "new and separate" affidavit from a different expert more than five months after filing the NOI. Although the circuit court identified **section** 15-36-100(C) of the South Carolina Code (Supp. 2024) as the only provision allowing a "new or different" affidavit after the filing of the NOI, it held this provision did not apply because the expiration of the statute of limitations was not imminent at the time Appellants filed their NOI. And, in the circuit court's view, Appellants failed to properly address their inability to obtain a contemporaneous expert affidavit.

The circuit court also found **section** 15-36-100(E)'**s** language permitting an amended affidavit inapplicable because Appellants did not merely amend the High affidavit. The court found Dr. Chansky's affidavit did not cure the affidavit deficiency because (1) "a party cannot amend an absent affidavit," (2) "an amendment to an unqualified unlawful affidavit would be just as unqualified and unlawful," and (3) this was not an " 'amendment' to an existing affidavit which is the only subsequent affidavit permitted by statute." In sum, the circuit court ruled Appellants failed to file the affidavit required by **section** 15-79-125 or present an adequate legal excuse for this lapse. The circuit court thus concluded that the "result of filing an unqualified and unlawful opinion is in effect the filing of no affidavit" and "the failure to provide an affidavit" is "mandatory grounds for dismissal."

Finally, the circuit court found Appellants' NOI did not toll the statute of limitations because Appellants failed to file a "legal" affidavit and knowingly submitted "an unqualified and unlawful affidavit." The circuit court denied Appellants' subsequent Rule 59(e) motion, and Appellants timely appealed.

Standard of Review

***5** "Questions of statutory interpretation are questions of law, which [an appellate court is] free to decide without any deference to the court below." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). If a plaintiff fails to file an affidavit or files a defective affidavit with their NOI, and the defendant to whom it pertains raises this deficiency by motion to dismiss, the plaintiff's complaint is subject to dismissal. *See* **§** 15-36-100(C)(1) & (E)-(F). "**[S]ection** 15-36-100 restricts a plaintiff's common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed, and **section** 15-36-100 cannot extend any further than what the General Assembly clearly intended." *Grier*, 397 S.C. at 538, 725 S.E.2d at 697.

Analysis

Appellants contend High's affidavit was sufficient for purposes of section 15-36-100 of the South Carolina Code (Supp. 2024) because High has the education, training, and experience required to offer an opinion addressing the breaches of the standard of care referenced in his affidavit. Appellants assert the circuit court should have evaluated whether High was qualified to opine as to Morton's errors in performing the functions of basic emergency care because the acts addressed in their complaint fall within the realm of emergency nursing care—regardless of the nurse practitioner's ability to perform other physician-level medical acts. It is Appellants' position that High's extensive education, training, and experience—including his decades spent teaching nurses, prehospital personnel, medical students, medical residents, and faculty—qualified him for purposes of section 15-36-100(A)(3) to render an opinion as to Morton's emergency room "work up" errors. We agree.

"As part of the Tort Reform Act of 2005 Relating to Medical Malpractice, the Legislature enacted section 15-79-125 of the South Carolina Code, which requires a medical malpractice plaintiff to file and serve a Notice of Intent to File Suit [NOI] before the plaintiff may initiate a civil action." *Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 59, 744 S.E.2d 547, 548 (2013) (footnote omitted). Section 15-79-125(A) further requires a plaintiff to contemporaneously file "an affidavit of an expert witness, subject to the affidavit requirements established in section 15-36-100 ...." Section 15-79-125(C) then mandates that the parties participate in pre-suit mediation within a specified timeframe. "It is clear that the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." *Ross*, 404 S.C. at 63, 744 S.E.2d at 550.

The NOI "must name all adverse parties as defendants, must contain a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories or similar disclosures required by the South Carolina Rules of Civil Procedure." § 15-79-125(A). Section 15-79-125 "provides no specifics for the expert affidavit"; rather, it "directs the reader to section 15-36-100." *Grier*, 397 S.C. at 537, 725 S.E.2d at 696. Section 15-79-125 "incorporates section 15-36-100 in its entirety." *Ranucci v. Crain*, 409 S.C. 493, 509, 763 S.E.2d 189, 197 (2014).

Section 15-36-100(B) requires:

> Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G)[3] or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), 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 on the available evidence at the time of the filing of the affidavit.

***6** Section 15-36-100(A) defines an expert witness as "an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue" and who meets the criteria listed in subsections 15-36-100(A)(1) and (2), or (3). Notably, section 15-36-100(A)(3) specifically contemplates an expert who "has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both" but is not licensed or board certified "in the area of practice or specialty about which the opinion on the standard of care is offered." *See* § 15-36-100(A). "[A]n affidavit filed pursuant to subsection [15-36-100(B)] by an expert qualified under this subsection [15-36-100(A)(3)] must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B)." § 15-36-100(A)(3). "The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E)." *Id.* If a plaintiff fails to submit an affidavit or submits a defective affidavit with their NOI and a defendant to whom it pertains files a motion to dismiss, the case is subject to dismissal for failure to state a claim. *See* § 15-36-100(C)(1) & (E). The contemporaneous affidavit provision also includes a "safe harbor" provision extending the time for filing the

required affidavit in certain circumstances. *See Ranucci*, 409 S.C. at 509, 763 S.E.2d at 197 (concluding the medical malpractice plaintiff "should have been permitted to invoke **section** 15-36-100(C)(1), which extended the time for filing the expert witness affidavit and tolled the applicable statute of limitations under **section** 15-79-125(A)").

Here, the circuit court erred in finding High's affidavit failed to satisfy the requirements of **sections** 15-79-125 and 15-36-100 on topics within the realm of emergency nursing and emergency room "work up" care. High is board certified in emergency nursing, has practiced emergency nursing for over thirty years, and has taught medical personnel —including medical students, residents, and faculty—"the proper work up for emergency medicine patients" for over fifteen years. Based on this experience, education, and training, High is qualified to render an expert opinion regarding the basic care and work up Williford should have received upon his presentation to the AnMed emergency room.

And, while we agree 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, we find High is qualified to render an opinion as to one or more of the breaches alleged in his affidavit based on his "scientific, technical, or other specialized knowledge" in the emergency medicine context. High's expertise is specifically contemplated by **section 15-36-100(A)(3)**, one or more of the listed actions (and the failure to take them) fall within the purview of emergency nursing care, and High is extensively qualified in emergency nursing. Because 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, his affidavit sufficiently alleged "at least one negligent act or omission claimed to exist" as required by the statute. *See* **§** 15-36-100(B) (requiring a plaintiff to 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 on the available evidence at the time of the filing of the affidavit").

We agree with the circuit court that High is not a nurse practitioner, nor is he educated as one. But 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. *See, e.g., Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 251-54, 487 S.E.2d 596, 597-98 (1997) (holding a proposed expert, who testified he was a "certified paramedic and EMT, had intubated over one hundred patients, and instructs and tests physicians on intubation and extubation procedures," should have been qualified as an expert witness in intubation at medical malpractice trial against an anesthesiologist because his "training and experience qualified him to testify as an expert in the limited area of intubation," "[t]here was no requirement that [plaintiff's] expert witness be an anesthesiologist in order to testify about intubation procedures," and "experience teaching and interacting with persons in the applicable specialty" may be sufficient to support a medical practitioner's qualification as an expert); *see also Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 203, 810 S.E.2d 848, 851-52 (2018) (stating **section 15-36-100(A)(3)** "contemplates the production of an expert affidavit from a doctor who is not certified in or does not practice in the same area of medicine as the defendant doctor, but otherwise possesses specialized knowledge to assist the trier of fact").

***7** We also agree that High did not specifically allege Morton committed the negligent acts or omissions at issue; however, he stated "within a reasonable degree of medical certainty, that agents, and/or employees of AnMed Health and/or private practices staffing the ... [ER] committed negligent acts or omissions in their care and treatment of" Williford. Morton falls within this group. High opined the medical providers who treated Williford committed one or more negligent acts or omissions in breaching the standard of care. This is precisely what **section** 15-36-100(B) requires. *See* **§** 15-36-100(B) (requiring a plaintiff to 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 on the available evidence at the time of the filing of the affidavit"); *Grier*, 397 S.C. at 537-38, 725 S.E.2d at 696-97 (interpreting the term "one negligent act or omission" as a reference to breach, not causation).

For these reasons, the circuit court erred in finding High's affidavit insufficient to satisfy the pre-filing requirements of **sections** 15-79-125 and 15-36-100, in labeling High's affidavit "unqualified and unlawful," and in dismissing this matter.

Conclusion

We reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED. [4]

THOMAS, J., and VERDIN, A.J., concur.

All Citations

--- S.E.2d ----, 2025 WL 1943756

Footnotes

1 Morton worked for AEA, a physician's group providing medical staff for the ER.

2 The circuit court approved Appellants' subsequent settlement with AnMed Health, RN Boyles, and RN Moon.

3 **Section** 15-36-100(G) of the South Carolina Code (Supp. 2024) lists the professionals to whom the statute applies.

4 Because our findings here are dispositive, we decline to address Appellants' remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address remaining issues when resolution of another issue is dispositive).