

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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

vs.

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

IN THE COURT OF COMMON PLEAS

C.A. File No. 2021CP0400470

**Order of Dismissal
Order Granting Defendant's
Motion to Dismiss**

RECEIVED

Sep 17 2021

SC Court of Appeals

This matter came before the Court on a Motion to Dismiss for an absent affidavit in the Notice of Intent to Sue (herein after referred to as "NOIS") brought by Nurse Practitioner (NP) Kevin Morton, as well as the physician group for which he works (Anderson Emergency Associates, or "AEA") which provides the medical services for the AnMed Emergency Room. The matter was heard by this Court on July 23, 2021, at which time the Defendants were represented by H.W. Pat Paschal of the Greenville Bar, while the Plaintiff \s were represented by Jay Wright of the Anderson Bar. Based on the arguments heard and exhibits presented, this Court makes the following findings of fact and law and the conclusions from those facts and law, all as detailed below.

INTRODUCTION

This is a medical malpractice action brought on November 5, 2021 by the Personal Representative for the alleged professional negligence in the treatment of the Plaintiffs' decedent in the AnMed Emergency Room by the medical and nursing providers. The Plaintiffs brought this lawsuit against NP Kevin Morton as well as registered nurses employed by AnMed by filing a NOIS in accordance with the S.C. Medical Malpractice Act. The only affidavit contemporaneously filed by the Plaintiffs in support of the NOIS as required in the Section 15-79-125 was by a Registered Nurse, Richard Kevin High. The Motion to Dismiss was brought as a specific defense in the Answer filed on April 13, 2021, and by a Motion to Dismiss filed contemporaneously with that Answer on the same day. The basis of the Motion to Dismiss is the failure of the Plaintiffs to provide any affidavit by a licensed medical provider in the NOIS as required by the S.C. Medical Malpractice Act. S.C. Code Section 15-79-125 and Section 15-36 -100.

FACTS AND FACTUAL BACKGROUND

1. This lawsuit involves the treatment in the Emergency Room of the Plaintiff-decedent on January 24, 2018, by the Nurse Practitioner Kevin Morton, the medical provider, as well as AnMed registered nurses following an automobile collision earlier that same day. The Plaintiff-decedent was discharged that night by NP Kevin Morton. Two weeks later, on February 3, 2018, the Plaintiff-decedent died from an aortic dissection.

2. There are three different health care providers involved in the treatment of this patient:

a. The physician extender Nurse Practitioner (“NP”), Kevin Morton, the Movant in this motion, is a nurse practitioner and in this case was the designated “medical provider” performing the *medical acts* as the physician extender the same as if performed by an AEA physician.

b. The physician group for which the NP worked (Anderson Emergency Associates or “AEA”) provides the physicians and the physician extenders, both the NPs and PAs, to be the *medical providers* in the ER.

c. The two co-defendants, Jamie Moon and Betty Boyles, are *registered nurses* employed by AnMed. The Court is aware that the nurses and AnMed Health have settled with the Plaintiffs and are no longer parties in this action. Importantly for purposes of the instant motion, the only expert to provide an affidavit in support of the NOI and prior to filing the lawsuit was also a registered nurse, that being Richard Kevin High. A nurse, however, is not trained or licensed to practice as either a nurse practitioner, physician, or other physician extender. Accordingly, a nurse is not qualified to opine on the standard of care for a nurse practitioner or physician in the practice of medicine including the practice of medical acts as outlined above.

3. A nurse practitioner is a physician extender and is trained and licensed in the practice medicine as is a physician, in particular, performance of medical acts, specifically:

- a. ordering and interpreting diagnostic tests,
- b. diagnosing any disease process,
- c. determining medical treatment plans,
- d. ordering any work-up on a patient,
- e. ordering the disposition of a patient.

All parties agree that a nurse practitioner is held to the standard of care for a physician in the performance of these medical acts. As a matter of fact, a nurse is not trained or licensed to practice as either a nurse practitioner, physician, or other physician extender. Accordingly, a nurse is not qualified to opine on the standard of care for a nurse practitioner or physician in the practice of medicine, the performance of or otherwise on the issues of the practice of medical acts as outlined above.

4. The NOIS and the Complaint both alleged professional negligence against NP Kevin Morton in failing in his performance as a Nurse Practitioner to provide medical acts or, more particular, in the performance as a nurse practitioner and physician extender in the following:

- a. the ordering and interpreting of tests,
- b. the forming a medical diagnosis,
- c. determining a medical treatment plan and prescribing medications,
- d. ordering any work-up on a patient,
- e. ordering the disposition of a patient.

5. The only affidavit in support of the NOIS and filed prior to the filing of the lawsuit was by a RN Richard Kevin High. The affidavit was executed on July 18, 2020—110 days prior to the filing of the NOIS. The affidavit never identifies NP Kevin Morton, but made assertions against the AnMed Nurses, employees of AnMed Health (which NP Morton is not) and “private practices staffing the AnMed health ER”.

6. The Motion to Dismiss before the Court was filed on April 13, 2021, contemporaneously with the Answer which also raised this matter.

7. Subsequent to the filing of the Motion to Dismiss before the Court, the Plaintiffs responded to Requests for Admission from the Defendant NP Kevin Morton. Those Requests for Admission included three specific requests (#4, #5 and #6) regarding the qualifications of a nurse to express an opinion on the standard of care of nurse practitioners and physicians:

- “4. That a nurse cannot testify as to standard of care or the exercise of the standard of care in the practice of medicine by a physician or nurse practitioner.
- 5. That a nurse cannot testify as to the standard of care by a physician or physician extender, i.e., a nurse practitioner in the performance of the medical acts defined in Request #3 above.
- 6. That Richard Kevin High is not qualified to testify as to the standard of care for the practice of medicine or medical acts by a physician or nurse practitioner.”

To each, the Plaintiffs replied:

“Denied. *However, Plaintiffs would note that Nurse High is not rendering specific opinions as to the “practice of medicine” or the standard of care of a “physician or nurse practitioner.”* Nurse High is offering opinions of the appropriate ER treatment that reasonable healthcare providers should provide to patients presenting in Mr. Williford’s condition and has the appropriate qualifications to express an opinion as to the appropriateness of a patient’s treatment in the emergency room irrespective of the provider.” Emphasis provided.

Section 15-36-100 (B) requires “an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist...” Although the RN High affidavit may meet this requirement as to the Nurse Defendants, the Plaintiffs concede by these Responses that the affidavit offers no opinion as to standard of care of a “physician or nurse practitioner”. As a result, the Court finds no affidavit as to standard of care or deviation from the standard of care was produced contemporaneously with and in support of the NOIS against NP Morton or AEA as required by statute-an absent affidavit. The statute requires the expert’s allegation to be particularized as to the Defendant’s practice. There is no one standard of care in the emergency room for all “healthcare providers...irrespective of provider.” Instead, the S.C. Medical Act and the Nurse Practice Act, as discussed below, apply a different standard of care to nurses from that of the medical standard of care for physicians and nurse practitioners. As a matter of fact, RN High may opine as to the patient’s appropriate treatment by nurses but does not and cannot form an opinion to the appropriate treatment by the physicians and the nurse practitioner because the licensing laws prohibits it.

8. RN Richard Kevin High, is employed at Vanderbilt University Medical Center. In reply to a subpoena, VUMC has replied that Mr. High does not engage in the practice of medicine at VUMC and is not engaged in the following:

- a. ordering and interpreting diagnostic tests,
- b. diagnosing any disease process,
- c. determining medical treatment plans,
- d. ordering any work-up on a patient,
- e. ordering the disposition of a patient.

9. On April 21, 2021, which was 157 days after the filing the NOI and 46 days after the lawsuit itself was filed, the Plaintiffs filed a second affidavit, purportedly in support of the NOI, by a physician, Dr. Michael Chansky, alleging a deviation of standard of care by NP Kevin Morton.

LEGAL ANALYSIS

I. S.C. Code Sections 15-36 -100 requirements for an affidavit by an expert.

S.C. Code Section 15-79-125 requires an affidavit by an expert and a NOIS as a legal prerequisite to file a medical malpractice lawsuit. Section 15-36-100 (A) that provides the requirements for that affidavit. Pursuant to Subsection A of that statute, an "expert witness" is defined as "an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who":

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has 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:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion.

S.C. Code Ann. § 15-36-100(A).

In applying this language, the Court concludes that Nurse High may meet requirements to provide an affidavit *as to the registered nurses*, but none *as to the physician extender*, NP Morton. RN High is not licensed, board certified nor does he work within the same discipline (nursing vs. medicine) as NP Morton¹.

¹ The Plaintiffs stated in the Response to this Motion to Dismiss that Nurse High was an "Associate Professor" at VUMC, however, the VUMC's return to the subpoena indicates that Nurse High is not.

II. Under the S.C. Medical Practice Act, giving testimony by affidavit in a civil matter is “the practice of medicine.”

The South Carolina Medical Practice Act defines the “*practice of medicine*” as including: “testifying as a physician in an administrative, civil, or criminal proceeding in this State by *expressing an expert medical opinion*.” § 40-47-20 (36)(h) (Emphasis provided.) As a result, the submitting of an affidavit to the court that *expresses a medical opinion as to medical acts* is the “practice of medicine”. Accordingly, only a physician or a “physician extender” like a nurse practitioner can “practice medicine” as defined by this statute. See Section 40-33-29, *et seq.* A registered nurse cannot. In addition, an expert can only testify as to acts which the licensing statutes authorizes the witness to perform. If the statutes prohibit a witness from performing *medical acts*, then that witness cannot testify as to those *medical acts*. As explained below, a nurse is prohibited from performing medical acts and therefore cannot testify as to medical acts.

III. The Nurse Practice Act and the practice of medicine.

The South Carolina Nurse Practice Act makes a clear distinction between a nurse (RN) and a nurse practitioner (NP). Each has its own distinct licensing scheme, educational requirements, and area of specializations. The difference is: the nurse practitioner can *practice medicine*, i.e., do “*delegated medical acts*”; whereas the registered nurse cannot. See S.C. Code Section 44-33-20. More specifically, the difference is as follows:

a. A nurse practitioner:

1. Training: A Nurse Practitioner is a nurse with a specific/unique course of additional medical training. Section 40-33-34 requires a minimum of a master’s degree from an accredited college *in a nurse practitioner program* and a current certification by a board-approved credentialing organization. As a result, NP Morton has this specific additional training greater than that of RN High.

2. By practice: As a result, of this additional training, the NP is licensed to “practice medicine” as an extension of the physician conducting the *medical acts* referenced above including, but not limited to: the work up evaluation, medical diagnosis, prescribing medication, and forming medical treatment plans. A nurse is not. See Section 40-33-20, *et seq.* Between the practice agreement, the employment agreement and the authorizations granted to NPs under the S.C. Nurse Practice Act, an NP is authorized to “practice medicine” in certain, among other, delegated medical acts, including:

- a. the ordering and interpreting of tests,
- b. the forming a medical diagnosis,
- c. determining a medical treatment plan and prescribing medications,
- d. ordering any work-up on a patient,
- e. ordering the disposition of a patient.

3. License and certification: South Carolina recognizes by statute these differences between a nurse and a NP:

- a. To practice as a nurse practitioner in South Carolina, one must have an APRN ("Advanced Practice Registered Nurse") license in addition to any nursing license. S.C. Code Section 40-33-5, et seq.
- b. The NP license authorizes performance of *medical* care prohibited to a nurse. Section 40-33-20(5) was amended in 2018 to read specifically:

"(5) 'Advanced Practice Registered Nurse' or 'APRN' means a registered nurse who is prepared for an advanced practice registered nursing role by virtue of additional knowledge and skills gained through an advanced formal education program of nursing in a specialty area that is approved by the board. ...

...
An APRN also may perform specified medical acts pursuant to a practice agreement as defined in item (45) and approved written guidelines as defined in item (9)."

In this case, the Court finds that NP Kevin Morton was:

1. licensed and trained to perform medical acts, (and is held to the standards of a physician in the performance of those medical acts),
2. was hired by AEA to provide medical care and perform medical acts as a physician extender, and
3. the chart identified him as the medical provider.

Accordingly, the Court finds NP Morton acted as the extender of the physician to provide delegated medical acts in the work up of this patient, just like the doctor:

- a. the ordering and interpreting of tests,
- b. the forming a medical diagnosis,
- c. determining a medical treatment plan and prescribing medications,
- d. ordering any work-up on a patient,
- e. ordering the disposition of a patient.

As explained below, the Court also finds that a nurse is not trained nor qualified to perform these acts and is prohibited by law from offering testimony on these subjects. *Section 40-33-34.*

b. A registered nurse (RN):

1. In contrast, a registered nurse is *not* trained nor qualified and as a result, cannot do any of these delegated medical acts by statute and it is sanctionable misconduct to do so. Section 40-33-110.

2. The registered nurse can assess a patient, implement doctor's or physician extender's orders and treatment plans. However, a RN cannot medically diagnose, order or interpret diagnostic tests, provide a medical treatment plan or issue prescriptions —unlike a NP which is by law licensed to do each of these medical acts and, mor specifically, the medical acts described above. See Section 40-33-20 (46) and (48).

3. In fact, it is unlawful for a registered nurse RN to practice as a NP or practice outside the scope of the RN license. Section 40-33-110 states the grounds for discipline of licensees as follows:

“(A) In addition to the grounds provided in Section 40-1-110, upon finding misconduct the board may cancel, fine, suspend, revoke, issue a public reprimand or a private reprimand, or restrict, including probation or other reasonable action such as requiring additional education and training, the authorization to practice of a person who has:

...
(21) *practiced outside the scope of the license by assuming duties and responsibilities without adequate education as determined by the board.*

...
(27) *engaged in practice as an NP, CNS, or CNM without a compliant practice agreement as defined in Section 40-33-20(45)”.
(Emphasis provided)*

4. Notably, RN High is licensed as a registered nurse in the Tennessee. The Tennessee Nursing Act provides that: “the practice of professional nursing does not include acts of *medical diagnosis or the development of a medical plan of care and therapeutics for a patient, ...*” Tenn. Code Section 63-7-103 (b).

Although the Plaintiffs have provided an affidavit regarding nursing acts effective against the nurse codefendants, the Court concludes that the Plaintiffs failed to file an affidavit contemporaneously with the NOIS from a qualified medical expert regarding the medical providers' care in this case, specifically the care by NP Morton and AEA, resulting in an absent affidavit as to those Defendants.

IV. Common Law

Although an expert need not be of the same specialty, the proffered witness must be qualified in the subject matter of the proffered testimony. *Watson v. Ford Motor*, 389 SC 434, 699 S.E.2d 169, (2010). *Watson* holds that Rule 702, *SCRE*, requires that a proffered expert need not be of the same specialty but must have “acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.” 699 S.E. 2d at 175. In the case at bar, the subject matter in question is the performance of medical acts (diagnosis, ordering and interpretation of tests and forming medical treatment plans).

V. The Plaintiffs Arguments

The Plaintiffs make two arguments that contends the High affidavit should be accepted by the Court:

a. First, the Plaintiffs contend that the affidavit should be accepted and the Motion to Dismiss should be denied because it was not raised at the time of the NOIS and instead raised contemporaneously with (and as part of) the Answer once the Complaint was filed. The Court finds that argument to lack merit because two statutory provisions exclusively govern the time to raise an objection:

1. Section 15-36-100(E) directly addresses the timing of a motion to dismiss for an “allegedly defective” affidavit:

“(E) 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 the 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 within thirty 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 an amendment or response to the motion, or both, as the trial court determines justice requires....” (Emphasis provided.)

2. In addition, Section 15-36-100(F) provides when a motion to dismiss is to be filed in a case when no affidavit is filed:

“(F) If a plaintiff fails to file an affidavit as required by this section, *and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading*, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake...” (Emphasis provided.)

Accordingly, the statute provides that the Motion to Dismiss should be filed *contemporaneously with the filing of the Answer*. See also, *Ranucci vs Crain*, where our Supreme Court held that “any challenge to alleged deficiencies” and “assertions regarding defects in the authorship and content” of the purported expert’s qualifications or in the affidavit “would be made by (the Defendant) filing the appropriate motion to dismiss in circuit court pursuant to 15-36-100(E)”, as was done here. 409 S.C. 493, 507, 763 S.E.2d 189, 196 (SC 2014).

b. Secondly, the Plaintiffs contend that the affidavit by a physician, Dr. Michael Chansky, --submitted 157 days after the NOIS, 46 days after the lawsuit was filed, and 7 days after this Motion to Dismiss was filed-- is an “amendment” and cures a “defect” in the RN High affidavit. The NOIS statute allows for one limited situation for a *second affidavit* to cure a defect. However, this is not that situation, and no exception applies to an absent affidavit. As discussed above, the requirements for a NOIS affidavit are provided in the two governing statutes, Section 15-79-125 and 15-36-100. The two statutes are in *pari materia* and must be construed together. *Ranucci v Crain*, 763 S.E.2d at 193. Notably, no *amended* affidavit by Nurse High has been filed. Instead, only a new and separate affidavit by a completely different affiant, Dr. Chansky, was filed over 5 months after, not contemporaneously with, the NOIS.

As indicated, the two statutory provision, Section 15-79-125 and 15-36-100, provides the statutory framework and requirements for affidavits. Those two statutes combine to specifically govern the case before the bar as follows:

1. The General Rule: contemporaneous affidavit required: Section 15-79-125 (A) specifically requires a “*contemporaneous filing*” of an affidavit with the NOIS:

“(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action. ...”

2. Two exceptions: The statute, however, provides for only two exceptions to this general rule – the “safe harbor” exception and the “amended affidavit” exception.

a. The “Safe Harbor” exception- Section 15-36-100 (C) (1): The General Assembly provided *one, and only one, exception* to general rule requiring a contemporaneous filing to allow a filing of a new or different after the NOIS—known as “safe harbor” provision—and applicable only in a certain set of cases under statute of limitation time constraints.

Section 15-36-100 (C) (1) reads (with emphasis provided):

“(C)(1) The contemporaneous filing requirement of subsection (B) *does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared.* In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit... ...”

This Court concludes that sub-section (C) is the only exception to the general rule requiring a contemporaneous filing of the expert affidavit. It is the only provision allowing a filing of any new or different affidavit after the NOIS. The General Assembly exclusively limited the safe harbor provision to one specific class of medical malpractice suits—*those actions filed within ten days prior to the expiration of the statute of limitations.* In the case at bar, the NOIS was filed on November 5, 2020, which was three months prior to the expiration of the statute of limitations on February 4, 2021. In addition, to avail of this safe harbor, the Plaintiffs must file an affidavit as to why a contemporaneous expert affidavit could not be obtained. In this case, the Plaintiffs do not and could not because he had the RN High affidavit *seven months* prior to expiration of the statute of limitations.

b. Amended affidavit exception: The only other exception to the general rule is “the amended affidavit” provision in Section 15-36-100 (E). The statute does not allow for a new and separate affidavit to be filed after the NOIS. Instead, it only allows for an “*amendment*” to the initial properly filed contemporaneous affidavit. This is not the case here, where a new and different affidavit by a new author, not an amendment to the existing affidavit, has been filed for an absent affidavit. The statute reads:

“(E) 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 the 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 within thirty days of service of the motion* alleging that the affidavit is defective. ...”. Section 15-36-100(E), *emphasis provided.*

The most fundamental rule of statutory interpretation require a finding of a “plain meaning” and that “(w)hen faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.” *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 446 S.E.2d 404 (1994). The Court may rely on dictionaries “where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.” *Estate of Nicholson vs SC Department of Health and Human Services*, 377 S.C. 590, 660 S.E. 2d 303 (SC 2008). In particular, the Courts have consistently resorted to *Black’s Law Dictionary* to provide the meaning of a word not defined in the statute. See e.g., *Centex Int’l, Inc. v. S.C. Department of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013) (*Black’s Law Dictionary* and *Merriam-Webster’s Collegiate Dictionary* were used as authorities). All of the defining authorities are consistent in defining the term “amendment” as “a change in an existing document.” See, *Black’s Law Dictionary* (4th Edition), *Merriam-Webster’s Collegiate Dictionary*, *Oxford Dictionary*, and *Funk and Wagnalls International Dictionary of the English Language*. None of these dictionaries define the term “amendment” as the Plaintiff contends as a subsequent, new, and different document executed almost a year after the first document by a different author and with no reference to the initial document.

In sum, the Court finds that the Chansky affidavit does not cure the High affidavit for three reasons:

First, a party cannot amend an absent affidavit. Second, an amendment to an unqualified unlawful affidavit would be just as unqualified and unlawful. Third, the Chansky affidavit is not an “amendment” to an existing affidavit which is the only subsequent affidavit permitted by statute. It is a new and separate affidavit by a different author with no reference to the High affidavit. The statute does now allow for a “substitute” affidavit.²

In addition, the Plaintiffs must demonstrate that the second affidavit constitutes an “amendment.” That requires, in the Court’s view, the same expert correcting an error in the first affidavit. That is not the case here. In fact, Nurse High cannot file an amendment in this case because he is not qualified, and it is unlawful for him to do so. If Nurse High filed an amendment, he would still be unqualified to offer the opinions on medical acts and the amended affidavit would remain improper and illegal. Thus, this Court concludes that the Chansky affidavit is not proper under S.C. Code Ann. § 15-36-100(E).

² The provision in S.C. Code Ann. § 15-36-100(F) allowing for an affidavit where “the failure to file the affidavit is the result of a mistake” does not apply in this case.

VI. S.C. Code Ann. § 15-79-125 requires an affidavit as a prerequisite to suit.

It is well settled that S.C. Code Section 15-79-125 requires an affidavit by an expert and the NOIS as a legal prerequisite to file a medical malpractice lawsuit. Our Supreme Court has been clear that a purpose of the NOIS statute, in part, is to discourage frivolous claims and the affidavit requirement is not “meaningless” in serving this purpose. *Ross vs. Waccamaw Community Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013), see also, *Ranucci v Crain*, 409 S.C. 493, 763 S.E.2d 189 (S.C. 2014). Failure to comply can result in dismissal. *Ranucci v Crain*, *supra* and *Ross vs Waccamaw Community Hosp.*, *supra*. The Plaintiffs have not appealed to the Court’s discretion, and nonetheless, any exercise of discretion to allow the matter to proceed would ignore the fact that the Plaintiffs knew or should have known at the inception of this case that a nurse is not qualified to offer testimony on the standard of care to be practiced by a nurse practitioner and proceeded without a legally sufficient affidavit subjecting NP Morton to this lawsuit. This is admitted in the responses to the requests for admission discussed above. In addition, the Plaintiffs admit the medical records were obtained within 35 days after the death of the Plaintiff-decedent over two years prior to filing suit. The RN High affidavit was executed 110 days before the NOIS. Despite this knowledge that a nurse could not testify as to standard of care of a nurse practitioner, the Plaintiffs pursued this litigation for 221 days without providing the mandatory statutory protection, the affidavit, required by the statute nor providing an acceptable legal excuse for the failure. The result of filing an unqualified and unlawful opinion is in effect the filing of no affidavit.

The Court has reviewed the caselaw provided by the parties.³ This case is different. This is not a technical or mere procedural defect like failing to meet a mediation deadline as in *Ross vs Waccamaw Community Hosp.*, *supra*. Nor is it a question of interpretation of statutory language as in *Grier vs AMISUB*, *supra* and *Ranucci vs Crain*, *supra*. It is not an affidavit by a qualified doctor against a defendant doctor of a different specialty as in *Eades vs Palmetto Cardi vascular*, *supra*. The language of Section 15-36-100 is plain: it requires an affidavit by a duly qualified expert “which must specify at least one negligent act or omission claimed to exist.” This requirement is the substantive core of the protection for professionals offered by this statute against frivolous, unmerited, or stale claims. Accordingly, to hold otherwise would be to eviscerate the statute requirements and protections. The Court thereby concludes that the failure to provide an affidavit by a duly qualified expert is mandatory grounds for a dismissal. Section 15-79-125, See also, *Seastrunk v. U.S.*, 25 F.Supp.3d 812, and *Duckett v. SCP*, 225 F.Supp.3d 432 (D.S.C 2006).

³ In particular, the Court has reviewed the five recent cases offered by the parties involving the pre-suit procedure of Sections 15-37-125 and Section 15-36-100: *Eades vs. Palmetto Cardiovascular*, 422 S.C. 196, 810 S.E.2d 848 (S.C.-2018); *Ranucci v Crain*, (409 SC 493, 763 SE2d 189 (SC 2014);), *Brouwer vs Sisters of Charity*, 409 S.C. 514, 763 S.E.2d 200 (S.C. 2014); *Ross vs Waccamaw Community Hospital*, 404 S.C. 56, 744 S.E.2d 547 (2013); *Grier vs AMISUB*, 397 S.C. 532, 725 S.E.2d 693 (2012)

VII. The statute of limitations was not tolled.

Finally, the Court concludes that the statute of limitations in Section 15-3-545 was not tolled. A valid, qualified, and legal affidavit filed contemporaneously with the NOIS is mandatory requirement of the Section 15-79-125. The requirement of the expert's affidavit is the one provision of a statute drafted to provide protection from frivolous suits. See *Ross vs. Waccamaw Community Hosp.*, *supra*. Section 15-79-125 will toll the statute—only when all the requirements of the statute are met: including a legal affidavit by a qualified and lawful affiant. In this case, as addressed above, no legal affidavit was filed against these Defendants, and accordingly, the statute was never tolled against these Defendants.

Nonetheless, even if a qualified and lawful affidavit had been filed, the statute of limitations would have been tolled only to the present action. Section 15-36-100 provides for a motion to dismiss the *subsequent lawsuit after the NOIS* with no caveat that any statute of limitations is tolled if the Motion is successful. Section 15-79-125 only tolls the statute until an action is filed. It does not toll the statute indefinitely or preclude any defenses once the lawsuit is filed. A motion to dismiss is just that, a motion to dismiss.

Moreover, the Court finds that the statute of limitations also provides citizens protection and is a substantive right. To knowingly submit an unqualified and unlawful affidavit (as evidenced by the responses to request for admissions discussed above) and to claim that this unlawful affidavit tolls the statute of limitations indefinitely and for any subsequent lawsuits would effectively render meaningless any protection health care providers could have in the statute of limitations. It would be particularly injurious if a plaintiff could effectively toll the statute of limitations by obtaining an unlawful affidavit six months prior to the expiration of the statute and then file a new affidavit two months after the statute had run with no repercussions.

Conclusion:

Each of the above conclusions and findings of fact are repeated and incorporated here. In addition, based on the law and evidence, the Court further specifically concludes:

1. A nurse is not qualified and accordingly cannot, as a matter of law, offer testimony as to the standard of care or deviations from that standard of care by a nurse practitioner or as to the performance of medical acts by a nurse practitioner. In addition, the affidavit of Nurse High fails to specify a standard of care or deviation of standard care as to any physicians or nurse practitioners as required by Section 15-36-100.

2. As a result, the Plaintiffs have failed to provide a contemporaneous affidavit with the NOIS by a duly qualified expert as required by statute. S.C. Code Sections 15-79-125 and 15-36-100.

3. Accordingly, the Motion to Dismiss filed by the Defendants Morton and Anderson Emergency Associates, with prejudice, is hereby granted.

IT IS SO ORDERED.

September ___, 2021

R. Lawton McIntosh
Judge, Fourteenth Judicial Circuit



Anderson Common Pleas

Case Caption: Travis Walker , plaintiff, et al VS Anmed Health , defendant, et al

Case Number: 2021CP0400470

Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH