

1 In the Court of Common Pleas for the
2 State of South Carolina, County of Anderson

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4 Case No.: 2021CP0400470

5 Travis Walker,

6 Plaintiff(s),

7 vs.

8 AnMed Health,

9 Defendant(s).

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SC Court of Appeals

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15 July 23, 2021

16 Anderson, South Carolina

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21 BEFORE:

22 The Honorable Lawton McIntosh

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APPEARANCES

REPRESENTING THE PLAINTIFF:

Jay Wright, Esquire
135 Edinburgh Court
Suite 202
Greenville, SC 29607

REPRESENTING ANDERSON EMERGENCY ASSOCIATES and KEVIN

MORTON:

Howard Paschal, Jr., Esquire
644 Washington Street
Greenville, SC 29601

REPRESENTING ANMED HEALTH:

James Parham, Esquire
Post Office Box 1576
Irmo, SC 29063

1 PROCEEDINGS

2 THE COURT: All right. This is
3 slated as a Motion to Compel and a Motion to
4 Dismiss. I also see a Motion for Sanctions. Is
5 that --

6 MR. PASCHAL: Not mine, Judge. I'm
7 not doing that.

8 THE COURT: No, it's Plaintiff's
9 Motion for Sanctions, I think. What all motions am
10 I resolving today?

11 MR. PASCHAL: Your Honor, I have a
12 Motion to Dismiss and I have a Motion to Compel.

13 THE COURT: Okay.

14 MR. PASCHAL: Which I would like,
15 with the Court's permission, to go to the Motion to
16 Dismiss, which is a larger, more substantial motion,
17 first.

18 THE COURT: Absolutely.

19 MR. PASCHAL: It may make the second
20 motion -- it may alter the second motion.

21 THE COURT: Okay.

22 MR. WRIGHT: Your Honor, the
23 Plaintiffs only have the Motion for Sanctions.

24 THE COURT: Okay.

25 MR. PASCHAL: I'm ready to go

1 forward, Judge.

2 THE COURT: Go for it.

3 MR. PASCHAL: Your Honor, my name is
4 Pat Paschal, I represent the nurse practitioner
5 Kevin Morton, and I represent the physician group,
6 Anderson Emergency Associates, which I'll refer to
7 as AEA. Your Honor, this is a Motion to Compel I
8 would like to hand up to the Court. And I don't
9 know how to do this. And that is one. And I
10 remember from long ago, have a copy for the clerk.

11 THE COURT: This is her last day.

12 MR. PASCHAL: Oh, is it her last day?

13 THE COURT: Yeah, so I doubt that she
14 is going to be much help for me today.

15 (Laughter.)

16 MR. PASCHAL: Well, she may either
17 love or hate me at the conclusion.

18 Your Honor, also I am going to hand
19 exhibits to the court reporter to be incorporated.
20 Although many of these are just copies of the law,
21 so they are not true exhibits. But I want to make
22 them a part of the record.

23 THE COURT: All right.

24 MR. PASCHAL: Your Honor, this is a
25 motion -- this is a Motion to Dismiss for the

1 failure to provide an affidavit of a qualified
2 witness and as to particular standards of care
3 violations in the notice of intent to sue as
4 required by Section 15-36-100, incorporated by
5 15-79-135.

6 What I'm going to do, Your Honor, I
7 believe the analysis is going to be two things. One
8 is, is this witness qualified. And after we
9 establish that, then the next would be, is there an
10 exception or reason that the defendant -- the
11 plaintiffs brought up that, even if it's
12 unqualified, that the action should proceed at this
13 point in time. And what I would like to do, Judge,
14 I know that I'm taking up the Court's time --

15 THE COURT: Well, let me ask you
16 this: At a Motion to Dismiss, can I waive
17 qualifications in making that determination?

18 MR. PASCHAL: No, sir. No, sir.

19 THE COURT: I didn't think that I
20 could. Okay.

21 MR. PASCHAL: And I'll get into that.

22 THE COURT: All right.

23 MR. PASCHAL: And that is -- and
24 there are five cases that deal with this.

25 MR. WRIGHT: Your Honor, one point on

1 that --

2 THE COURT: No, sir. Go ahead.

3 MR. PASCHAL: And there are five
4 cases that deal with that, and I'll come back to
5 that, that deal with this affidavit requirement
6 that, and in particular, the statute deals with it.
7 With the Court's permission, if I can first show
8 that this witness was not qualified, then I'll
9 directly answer your question. I've been before you
10 enough to know that when you ask -- I know at some
11 point in time you are going to ask me questions and
12 you don't want me to evade that question, you want
13 me to answer it, and I am. But if you will give me
14 the liberty to establish that, I will come right
15 back to it.

16 What I have done is this, Judge, I
17 know I am taking up the Court's time, so I have
18 tried to organize this.

19 THE COURT: I'm fine. I'm good.

20 MR. PASCHAL: And what I have done is
21 I have on the -- as I have said, we have copied the
22 law and would like to go through it. Judge, the
23 issue is this: Is a nurse qualified to testify
24 against a physician or a physician extender; in
25 particular, nurse practitioners and physician

1 assistants. And the law is clear that testifying in
2 South Carolina by statute is the practice of
3 medicine.

4 THE COURT: Say that again.

5 MR. PASCHAL: Testifying by statute
6 in South Carolina is the practice of medicine, it is
7 part of the practice of medicine. In any event, the
8 law is clear that a nurse cannot practice medicine.
9 What I mean by practice medicine is I'll point to
10 the statute. The statute is specific in defining
11 practice of medicine as certain medical acts, which
12 is a term of art throughout the statute includes the
13 medical decision process to diagnose. The
14 evaluation is more important -- the diagnosis, the
15 forming of a treatment plan, the carrying out of
16 that treatment plan, and making prescriptions,
17 ordering tests, and interpreting those tests --
18 doctor physicians. And the law is clear that a
19 nurse cannot do doctor functions.

20 And, Your Honor, the section that we
21 have given you, that Section 10036 -- excuse me,
22 15-36-100 specifically provides that a -- that the
23 affidavit, the notice of intent to proceed, must
24 begin with an expert witness who means an expert who
25 is qualified as to the acceptable conduct of the

1 professional whose conduct is at issue. That is
2 physician and physician assistants, that is nurse
3 practitioners. In other words, we have a nurse that
4 must be qualified in the conduct of a nurse
5 practitioner and a physician.

6 Judge Kitt -- Justice Kittredge in
7 one of the cases we mentioned, Ross versus Waccamaw
8 said that the case, that the affidavit requirement
9 is not meaningless, and that a case can be dismissed
10 for not complying with the affidavit requirement.
11 He said that the intention of this statute, that --
12 and the five cases, and I am sure that the Court is
13 aware of those, the procedural cases, where Justice
14 Kittredge points out that this is a substantive
15 matter and that a case may be dismissed because this
16 statute, the intent of the Legislature, was a
17 protection to a certain degree of the health -- not
18 just healthcare professionals, but the 22 different
19 professions that are identified in 15 -- in the
20 section that we are dealing with here, 15-36-100.

21 And in particular it mentions the
22 physicians. Justice Kittredge said, This is the
23 protection against unfounded or frivolous lawsuits,
24 and it is a substantive right.

25 Now, the section that we pointed out

1 to you, Your Honor, is Kevin Morton, the nurse
2 practitioner, was identified as the medical
3 provider, which is also a term of art. The medical
4 provider is that, either the physician or an
5 extender of the physician, in the place of the
6 physician, the nurse practitioner or a physician
7 assistant.

8 These are governed by the South
9 Carolina Medical Practices Act. The standard for
10 them are set by the South Carolina Medical Practices
11 Act. They are authorized to carry out those things
12 that I told you, the practice of medicine and the
13 medical acts, the medical decision making, the
14 diagnosis and carrying out of the treatment process.

15 So, you have three health care
16 providers involved in this case. You have the
17 physician. Number two, you have the nurse
18 practitioner who is an extension of the physician.
19 And number three, you have the nurse.

20 Now, it's clear in this case that,
21 even from the inception in the complaint that that
22 is what we were dealing with in this particular
23 case.

24 THE COURT: Can I ask you a question
25 right quick so I understand?

1 MR. PASCHAL: Yes, sir.

2 THE COURT: What is the distinction
3 between a nurse and a nurse practitioner?

4 MR. PASCHAL: The nurse -- the
5 distinction between the nurse and nurse
6 practitioner, Your Honor, is going to be if not the
7 primary, the essential issue that is going to be
8 before you today.

9 THE COURT: Is going to be what?

10 MR. PASCHAL: If not the primary, the
11 essential, controlling item.

12 THE COURT: I can't hear you. I hate
13 these things.

14 MR. PASCHAL: It is disconcerting,
15 and I apologize. What I said, Judge, was this:
16 Your question is the difference between a nurse
17 practitioner and a nurse is going to be the primary,
18 if not dispositive, controlling issue in this case.
19 And the difference is night and day.

20 A nurse is not qualified to carry out
21 the functions, to carry out the duties and opine on
22 either the standard of care or the practice of a
23 nurse practitioner. The nurse practitioner, for
24 yours purposes, is an extension of the doctor. That
25 the nurse practitioner, by licensing, as I'll point

1 out right now, by licensing, by practice, and by
2 this case in South Carolina, which is not unique to
3 South Carolina, because we are a member of what is
4 called a nurses licensure compact -- everything
5 compact to a nurse's licensure. These rules apply
6 in all 48 contiguous states. And I venture that,
7 but on a large scale.

8 That is what I wanted to point out to
9 you right now is the difference between a nurse and
10 a nurse practitioner.

11 THE COURT: Okay.

12 MR. PASCHAL: Unfortunately, the
13 difference in this case is controlled by what the
14 issue is. And in the complaint there's no question
15 about what the issue is against Kevin Morton, the
16 nurse practitioner. And that is that the nurse
17 practitioner didn't properly consider aortic
18 aneurysm and likely the possible cause, which means
19 it is a diagnosis function. He didn't diagnose that
20 disease.

21 That nurse practitioner did not
22 include aneurysm in his potential diagnosis. That
23 the confirmation of an aneurysm dissection was not
24 done ICT. He didn't order or interpret a test.
25 That the only orders that the nurse practitioner did

1 was aspirin, and that he diagnosed a muscle strain
2 that would be an error.

3 In other words, the complaint, as it
4 should, makes allegations of a deviation in the
5 finding of the practice of medicine and these
6 medical acts: Diagnosis, treatment, prescriptions.

7 Now, in South Carolina, Your Honor,
8 to answer your question, that is clear in South
9 Carolina, that only a physician or a physician
10 assistant or nurse practitioner can do those acts.
11 And you ask what is the difference, the difference
12 is, first of all, that only the physician can do the
13 practice of medicine. And let me first -- that they
14 define this as medical act. Your Honor, for the
15 record, this is Section 40-47-20 out of the Medical
16 Practices Act.

17 That the practice of medicine means
18 the offering and undertaking to prescribe, order,
19 give, or administer any drug, medicine to another
20 person. The offering or undertaking to prevent or
21 to diagnose, correct or treat in any manner, by any
22 methods -- means, methods, or devices, disease,
23 illness, pain, wound, fracture, infirmity, or
24 defect.

25 In other words, Your Honor, it is

1 undertaking to diagnose, the treatment and the
2 diagnosis of a disease. A nurse can't do that.
3 I'll show you that in a minute. That rendering a
4 written or otherwise documented medical opinion
5 concerning the diagnosis or treatment of a patient
6 or the actual rendering of the treatment to a
7 patient within this state. And again, Your Honor,
8 it is the diagnosis to create a treatment and
9 carrying out the treatment. Rendering a
10 determination of a medical necessity or decision
11 affecting the diagnosis -- and I'll skip here --
12 and/or treatment of the patient is the practice of
13 medicine.

14 And section (h) is what I referred to
15 earlier. It is testifying, either by deposition,
16 trial testimony, or in this case by affidavit is the
17 practice of medicine. As a result, only physicians
18 are licensed to do that. Now, we have provided
19 earlier to the Court and, Your Honor, we filed a
20 brief in this case back in April when we filed the
21 initial complaint. I don't know if you have had an
22 opportunity to see that, Your Honor. We sent more
23 copies, so I can get you another copy.

24 THE COURT: I think I -- I'll double
25 check that I have everything.

1 MR. PASCHAL: I know this particular
2 Court reads briefs, so we sent one in April. But in
3 that, Your Honor, we get into that a nurse
4 practitioner's scope is established by his scope of
5 practice agreement with the hospital. And in
6 Anderson, without going in detail because we made
7 reference to it earlier, the core duties of nurse
8 practitioners recognize that statute and allows
9 them, especially in this case, emergent nurse
10 practitioner, to carry out the medical acts of a
11 doctor, prescription, ordering, prescribing,
12 interpreting tests, medical necessity, medical
13 opinion, and practice of medicine. Which is the
14 exact allegations against Kevin Morton in this case.

15 Now, a nurse, as you said, what is
16 the difference, a nurse is a deviant, because a
17 nurse is covered -- and South Carolina is not
18 unique -- to have the practice of medicine governed
19 by one board, LLR, and the doctors governed by
20 another board. We have a medical board down there
21 and we have a medical board governing and regulating
22 the doctors' conduct. We have a nursing board
23 regulating a nurse's conduct because they are
24 separate disciplines and separate professions.

25 But more important is that we had a

1 statute, which is not the Nursing Practice Act,
2 40-33-20, which specifically provides what a nurse
3 can do and what a nurse cannot do. And what a
4 nurse -- the practice of registered nursing means
5 performance of health acts in the nursing process.
6 And the nursing process is defined as certain
7 limited functions carrying out orders by a doctor
8 for all practical purposes.

9 Now it goes through, without going
10 into detail, the specifics, section -- the section
11 in the medical act, 40-32-20 goes to specifically
12 what a nurse is authorized to do. But it's more
13 important what a nurse is not authorized to do. And
14 a nurse cannot, as a matter of law in South
15 Carolina, do those acts that Kevin Morton is accused
16 of in the complaint and that we pointed out are
17 permitted in the medical -- in the doctors act of,
18 again, the medical acts of evaluation, diagnosing,
19 treatment, plan of treatment, ordering, interpreting
20 the tests, and carrying out the treatment. And a
21 nurse, by law, can't do it.

22 Now, two other things in that regard,
23 Your Honor, and that is this: That South Carolina
24 and Tennessee, where this nurse is from, are members
25 of the interstate impact -- the interstate compact

1 for the license of -- nurse licensure. Which means
2 that we incorporate both laws both ways. So,
3 whatever I'm telling you applicable today will be
4 applicable in Tennessee for this nurse that filed
5 the affidavit. Because the only thing between that,
6 the affidavit in this case is by a nurse, and that
7 is why we say they are not qualified.

8 The difficulty there is that he's in
9 Tennessee so -- but by law in South Carolina, the
10 testifying in South Carolina is the practice, so
11 he's subject to our laws. It doesn't matter,
12 because we are in an interstate compact with
13 Tennessee, so in Tennessee he would subject to the
14 same laws. And those laws are only a doctor can
15 practice medical acts, without going through it
16 again. And that a specific nurse cannot do those
17 things.

18 But in South Carolina, and Tennessee,
19 have a particular statute that says not only by
20 practice and training is a nurse not qualified to do
21 what a nurse practitioner does. If a nurse attempts
22 to do so, as in this case, that it would not only be
23 improper, it would violate the law. And it would
24 violate the law in Section 100 -- 110 of the medical
25 act. That the ground providing -- that this is a

1 grounds for discipline.

2 Without going into it, the grounds
3 for discipline for licenses, in addition to the
4 grounds provided in Section 40-1-110, upon finding
5 misconduct the board may cancel, fine, suspend,
6 revoke, issue a public reprimand, a private
7 reprimand -- in other words, can carry out the
8 disciplines against the nurse. This is a nurse
9 statute.

10 And in that statute, Your Honor, it
11 provides that practice outside of the scope of
12 license by assuming duties, responsibilities without
13 accurate education is determined by the board. And
14 the board has made that determination that only
15 doctors and nurse practitioners can exercise and
16 carry out medical acts. The board has noted
17 specifically that nurses cannot.

18 So, it is not only, they are not
19 licensed to do it, to attempt to do so would violate
20 the law. Section 27 says, To engage in practice as
21 an NP could not be more direct. When you said, What
22 is the difference in a nurse and nurse practitioner,
23 if a nurse tries to practice as a nurse
24 practitioner, they would have violated the statutory
25 law of South Carolina. And that is the difference.

1 So, the difference is training,
2 standard of care, but in this case also licensing.
3 And in particular, it is illegal for a nurse to
4 attempt to do those acts and perform those acts that
5 they are making an affidavit for/against a nurse
6 practitioner. A nurse is disqualified to opine on
7 the conduct of a nurse practitioner in this state.
8 In every state that is a member of that compact,
9 including Tennessee, it is illegal, a nurse is not
10 qualified to opine on the conduct of a nurse
11 practitioner.

12 Now, that is what you asked me. So,
13 that is why I didn't want to belabor that, but I
14 wanted to answer it correctly, and that is what the
15 status of the case is. So, three things, Your
16 Honor, three things in this particular case. And
17 the second one that I have got is Section 7 and
18 Section 8. Three things. First, a nurse is not
19 qualified to testify against a nurse practitioner as
20 a matter of law. The second thing is the affidavit
21 that Mr. High, a nurse, provided is clearly a nurse,
22 only a nurse, not a nurse practitioner, not a
23 doctor.

24 However, in this affidavit, his
25 affidavit is an opinion within a reasonable degree

1 of medical certainty that agent and/or employees of
2 AnMed Health and private practices staffing the
3 AnMed Health emergency department committed
4 negligent acts or omissions. Your Honor, it is no
5 more particularized than that.

6 He's given an affidavit that doctors,
7 nurses, consultants, nurse practitioners, scrub
8 nurses, medical assistants, secretaries have to meet
9 the standard of care. I'll come back to that.
10 Because, if anything, our statute requires some
11 particularization as to the individual. But we do
12 know this, Your Honor, we know that, in particular,
13 this statute requires, (100), that items of
14 negligence be dealt with. That is, Statute 100
15 requires that a nurse -- that the witness be
16 qualified. It is subsection (A). But it goes on
17 that --

18 THE COURT: Is "qualified" defined in
19 the statute?

20 MR. PASCHAL: I am sure qualified may
21 well be defined somewhere. I don't know whether it
22 is in the medical act or nurses act, no, sir, I
23 don't. But I am not -- I am going back to my law
24 school experience where they said that the weakest
25 subject that law students have is statute

1 interpretation. A common -- the most common statute
2 interpretation is the words have to be understood in
3 their most common and everyday selves.

4 And qualified means only one thing.
5 And it goes through it. But it, by inference, does
6 qualify it because it says it has got to be someone
7 that is qualified -- let me answer that too, that
8 the statute says that it has to be qualified. We,
9 as we sit here, we know that we have this statute.
10 We also know that we have Rule 702.

11 THE COURT: Say that again.

12 MR. PASCHAL: We also know that we
13 have Rule 702, and we also know that we have the
14 legacy of Watson versus Ford as you sit here as the
15 gatekeeper today. So, qualification definitely,
16 under statutory rule or regulatory, definitely means
17 a nurse who is legal by law to perform -- to
18 practice that and to form opinions is not qualified
19 to testify against a nurse practitioner.

20 Now, one other thing the statute
21 does, it requires the itemization of medicals. The
22 Grier case, Justice Hearn's case, says -- we are
23 going to read that -- it doesn't mention proximate
24 cause, it doesn't require proximate cause. But you
25 have got to name an element of negligence.

1 So, number one, this nurse and this
2 affidavit is not qualified. Number two is this:
3 This week we got a request for admissions by the
4 plaintiff so -- answered by the plaintiff. Earlier
5 we sent to the plaintiff a request that went right
6 straight from the statutory language that a nurse
7 was not qualified to answer -- excuse me, that a
8 nurse was not qualified to opine on conduct of a
9 nurse practitioner.

10 And we ask for -- to recognize the
11 definition of the medical act as the statute
12 identifies, to order and interpret tests, form a
13 medical diagnosis, matters that I have gone through.
14 These are nurse practitioner functions, not a nurse
15 function. And they can deny that, that is fine, we
16 can handle that on another day if that is denied.
17 The denial, if it is a problem, we will just handle
18 it another day.

19 But this is what is critical in these
20 answers that we got Tuesday. In these answers we
21 ask that a nurse cannot testify to standard of care
22 or the exercise of the standard of care in the
23 practice of medicine by a physician or nurse
24 practitioner. That was the particularization of the
25 negligence that the affidavit requires. Their

1 answer was this: Denied. However -- excuse me,
2 Denied. They have offered to withdraw Mr. High as a
3 witness. In any event, they said, However,
4 plaintiff would note that Nurse High is not
5 rendering specific opinions as to standard of care
6 of physicians or nurse practitioners.

7 Affidavit must provide a qualified
8 finding, and he is not. But at a minimum it has got
9 to state some deviation of care. And they admit
10 here that he is not testifying as to standard of
11 care for a doctor or a nurse practitioner. He is
12 qualified to standard of care on a nurse. A nurse
13 is fine, I have got no problem with that. We had no
14 problem since the inception on that.

15 But this, so first, Your Honor, as
16 the Court sits here today you have got an
17 unqualified witness, and now you have an admission
18 that he is not even going to identify a particular
19 negligence. He is not testifying to standard of
20 care in his affidavit. So you have a completely --
21 what we said is this: We said this affidavit is
22 illegal. And when you read the brief, I define
23 "illegal" for these purposes. I define illegal as
24 being in the most conventional sense of the word.

25 THE COURT: Say that again.

1 MR. PASCHAL: In the most
2 conventional sense of the word, illegal, which is
3 contrary to law. That this affidavit is contrary to
4 law, because it is not a qualified witness, that
5 this affidavit is contrary to law because it doesn't
6 give the particulars of negligence, or negligence at
7 all. As a result, Your Honor, it is not an act
8 affecting the affidavit, it is an absent affidavit.
9 It is a completely empty shell, absent affidavit
10 this lawsuit has brought. And that is what we
11 presented to the Court, Your Honor.

12 Now, Judge, we got, we got their
13 reply to our brief yesterday afternoon. And we have
14 anticipated, so you will see, we actually filed a
15 supplemental brief because we anticipated that they
16 might bring up subsection (E), so we amend.

17 But in that, and I appreciate it, I
18 got the brief very, very late, so I was looking at
19 it, but I appreciate the brief. You have got people
20 coming to argue, and I got the brief at the last
21 minute, but I'm glad that I got this brief. And the
22 reason is, let's talk, let's talk about it, let's
23 get to the bare -- let's get to the issues. And if
24 this is what he's raising, then let's look at the
25 issues that they are raising.

1 And what they are raising, Your
2 Honor, is this: Is they are raising four points.
3 And I would be -- I would not be honest with the
4 Court if I didn't say that a couple of these points
5 should be considered by you. They should be. They
6 are material issues. Now, the first one is that
7 they raise in their affidavit -- I mean, the brief
8 that was provided to you, they raise first this:
9 That the three-year statute of limitations was
10 tolled due to the Defendant's failure to object to
11 the deficiency of Nurse Hide's affidavit when it was
12 filed as part of the notice of intent to sue.

13 Now, two things. The toll -- we are
14 not bringing up the tolling of the statute of
15 limitations. That, in this case, will be an issue
16 eventually, on another day perhaps, but it is not an
17 issue today. But they are correct -- not correct,
18 they may have a legitimate question that we didn't
19 file this, which I anticipated, that we didn't file
20 this complaint -- excuse me, we didn't file this
21 objection to the affidavit when we first got the
22 notice of intent to sue.

23 And they -- you know, and that is
24 what they are raising. And you may say, Well, why
25 didn't y'all do that; why are you coming after the

1 suit and asking me to do this? And the reason is
2 very simple, Your Honor, we are doing exactly what
3 the statute told us to do.

4 The statute in particular, Your
5 Honor, says this, it tells you when, be it right, be
6 it wrong, be it better or worse, it tells us when to
7 file a complaint about deficiencies in the
8 qualification or the content of the affidavit. And
9 it specifically provides -- and if I had to file a
10 reply brief to their brief, it would be inconclusive
11 to this -- I hand you section 100, Statute 100.

12 But it says, in particular this, If a
13 plaintiff files an affidavit which is allegedly
14 defective -- this is subsection (E) 15-36-100,
15 subsection (E), If a plaintiff files an affidavit
16 which is allegedly defective, and the defendant to
17 whom it pertains alleges, which specifically --
18 excuse me. Excuse me, Ms. Court Reporter.

19 Let me read it again, Your Honor. If
20 a plaintiff files an affidavit which is allegedly
21 defective, and the defendant to whom it pertains
22 alleges, with specificity, by motion to dismiss
23 filed contemporaneously with its initial responsive
24 pleading.

25 If you will look at the record, that

1 is why I gave you, to the Court, a brief in April,
2 because that is when we filed our answer. We filed
3 this motion the same day we filed our initial
4 response to the pleading, in accordance with the
5 statute. So, when it is asked, why did we file on a
6 certain day, we filed it because the statute
7 directed us to. And the record clearly demonstrates
8 that.

9 It is not just subsection (E), which
10 is a defective affidavit. Our position is, there is
11 no affidavit at all in this case because it is an
12 illegal affidavit. But this same language applies,
13 if a plaintiff fails to file an affidavit as
14 required by this section and the defendant raises
15 failure to file by affidavit by -- to file an
16 affidavit by a Motion to Dismiss filed
17 contemporaneously with responsive pleadings. We did
18 exactly what the statute told us.

19 Now, Justice Kittredge recognized
20 that in one of five cases -- and we have given the
21 Court a copy. Justice Kittredge recognized that in
22 the Ross versus Waccamaw -- excuse me, Ranucci
23 versus Crain, which is a finding -- a needle
24 aspiration on a lung collapse. And it is section --
25 it is going to be section 9 in the packet that we

1 gave you.

2 And I am going to come back to this
3 case in a minute, Your Honor. I am trying not to
4 take up too much of your time. This is a case where
5 the complaint was, it should be dismissed because
6 they didn't conduct pretrial mediation in 180 days.
7 And Justice Kittredge points out that, medical
8 malpractice -- and this is right in this -- is the
9 most complicated, complex civil litigation that we
10 have. And it is busy stuff. And he said, If you
11 couldn't be in mediation today, that doesn't go to
12 the substance.

13 Now, he will go on and say, But it is
14 not meaningless and there is some substance to this,
15 and if the substance was violated, then this could
16 be dismissed. And if not, it is a protection
17 against a frivolous lawsuit. It is not meaningless.

18 Now, in doing so he talked about the
19 complaints of deficiency in qualifications, which we
20 have. It also talks about failures of the
21 affidavit, which we have, since they filed to
22 suppress their admissions saying there was no --
23 this guy -- excuse me, this witness is not
24 testifying as to standard of care. So, two flaws in
25 this affidavit.

1 But in doing so he talks about, as
2 they sit there, that you can look at the face of the
3 affidavit. And he discusses that in detail, and
4 that there was nothing wrong with the face of the
5 affidavit in that case. Not like this case. This
6 case, on the very face of the affidavit, you have a
7 nurse testifying against a nurse practitioner on
8 medical acts. On its face.

9 But that's not what is important for
10 your consideration. What is important for your
11 consideration is this: He goes on and says that
12 they talk about when this should be ready, because
13 this was a notice of intent to sue case. That, when
14 should this be ready. And what he's talking about
15 there, in particular, is not the procedural
16 complaint of not -- the date of mediation, but the
17 alleged deficiencies in the qualifications of the
18 expert, the exact same issue that we have here.

19 And in that he said that the
20 qualifications of that expert are to be raised, can
21 be raised, despite the affidavit. But when is the
22 issue. And he said, Thus, we conclude that any
23 challenge to the alleged deficiencies have to be
24 made by Dr. Crain on the appropriate Motion to
25 Dismiss in circuit court pursuant to subsection (E).

1 And subsection (E) is the one that says that it is
2 to be filed contemporaneous with the filing, with
3 the answer. That is what we have.

4 Now, I am not going to go into much
5 detail, Your Honor, but this -- I do invite -- but
6 that is where we are. Your Honor, it is not a
7 question of balancing equities.

8 THE COURT: It is not a question
9 about what?

10 MR. PASCHAL: Of balancing equities in
11 making this determination. This particular case,
12 and this exhibit in this particular case, Exhibit
13 9A, the plaintiff had the medical records in this
14 case three years prior to filing suit. The
15 affidavit that we complained of was got in July.
16 The suit was filed in March. So, now you have got
17 another seven months.

18 The burden of proof is on the
19 plaintiff to provide a sufficient affidavit, and
20 that is why I say it is not a balance of equities.
21 The law is clear, and we complied with the law and
22 filed this on the date that the law told us to do
23 so. Your Honor, the second thing that they raised
24 in their brief is this: They raised that the
25 plaintiff has complied with expressed requirements

1 of S.C. Code Section 15-79-125 of the medical
2 malpractice statute and 15-36-100(A). And they
3 allege allegations, you will see this, they say that
4 High is qualified. And in doing so they make a
5 statement that Nurse High is an associate professor
6 in emergency medicine. And I'm going to get to that
7 in a second.

8 Nurse High is not a doctor. There is
9 not a medical school from our research, and I would
10 bet the proverbial dollar against a doughnut, there
11 is not a medical school that is a member of the AAMC
12 that allows a non-doctor to be a tenured tract
13 assistant professor or associate. Never. It
14 doesn't happen. I think, to defend Mr. Wright, I
15 think that he just misspoke. And I'll get to that
16 in a second. Because Mr. High doesn't say that in
17 his affidavit.

18 But it goes on to say that he is
19 qualified to offer testimony as to the appropriate
20 care and treatment of the patient. He's qualified
21 to testify as to appropriate care by a nurse, but he
22 is not qualified to testify about medical acts and
23 carrying out the practice of medicine. As we
24 explained before, it is only a doctor question.

25 Now, we have -- three things in that

1 regard. The first thing is this: Is that we have
2 provided in section 10 this -- we have provided Mr.
3 High's actual affidavit. And Mr. High is, indeed,
4 an associate in medical -- an associate in emergency
5 medicine, not an associate professor. But he, clear
6 by what he does, and that is, I teach regularly to a
7 multitude of disciplines on all issues related to
8 trauma care, airway management, emergency nursing,
9 EM, EMS, and transport.

10 I don't doubt for a second that Mr.
11 High can teach anybody, a physician, brain surgeon,
12 anybody, on how to handle a patient. He is EMS
13 flight certified. We had a case -- I'm trying to
14 remember if you sat on it -- we had a case where an
15 orthopedic surgeon one time, they said, Why didn't
16 you do intubation on this patient and why would you
17 step back and let the respiratory,
18 high-school-educated respiratory do it? And he
19 said, Because they are more qualified than I am. I
20 can tell you when to do -- be intubated, but a nurse
21 is more qualified to intubate. It is a skill set.

22 I have no doubt that he can teach
23 certain skill sets, but he doesn't teach medical
24 acts. He doesn't teach the diagnosing and
25 recognizing, the creation of medical treatment,

1 interpreting tests, and creating medical care. He
2 doesn't. That is number one in the CV.

3 And number two is this: Is that in
4 this particular case, when this was raised in the
5 affidavit, and this is in subsection 10. This idea
6 that he taught, our immediate step was to do this,
7 our immediate step was to subpoena Vanderbilt his
8 teaching information, his license that would allow
9 him to practice medicine, make medical diagnosis,
10 interpret tests, to determine medical treatment, the
11 medical acts of a doctor. We wanted to know what
12 licensing is required to teach medical providers the
13 practice of medicine. We wanted to know that. If
14 he's teaching doctors like they claim, medical acts,
15 in Vanderbilt, show us that. So, we did that.

16 We filed the affidavit -- excuse me,
17 we filed a subpoena down here with the Clerk of
18 Court. We took that subpoena and we filed it in
19 Davidson County, Tennessee pursuant to the
20 interstate -- the Uniform Interstate Deposition
21 Discovery Act. Had an order issued up there and
22 served it on them. They were friendly service.
23 Called them. Vanderbilt had no objection to it. We
24 went and we talked to them. Nurse High never
25 registered an objection.

1 THE COURT: Nurse High --

2 MR. PASCHAL: Nurse High never
3 registered an objection. Nobody objected to this.
4 This is exactly what they claim we have failed to be
5 able to show. And we subpoenaed and nobody objected
6 until, Your Honor, the plaintiff did. And we filed
7 this earlier. The plaintiff filed a Motion to Quash
8 the exact stuff they are complaining we don't have.
9 And when we tried to get it, they filed a Motion to
10 Quash, which is still pending in Davidson County,
11 and probably will be forever up there. Because I
12 notified them, as I was under the duty to do, that
13 the pending litigation down here was still pending.
14 And we know well that no Tennessee judge is going to
15 step into a South Carolina case.

16 But the point is this: They should
17 not -- they have not established that he has some
18 special qualifications. Because his CV doesn't show
19 that, number one. And, number two, they should be
20 estopped. And now that I am clear about it, they
21 took steps to stop us from using the appropriate
22 mechanism in the appropriate way to get the same
23 information.

24 Now, the third thing is this, Judge:
25 Both of those matters are, what is he authorized to

1 do. And we don't know on that. And what I mean by
2 that, you don't know either way. They have got the
3 burden to establish it, they don't establish it.
4 So, that is an issue we are way beyond allowed to
5 do, and we don't know it. And we do -- the third
6 thing we are dealing with, what we knew was what he
7 is not authorized to do. And we know that, because
8 Tennessee is a member of the nurses licensure
9 compact. And it is subject to the same rules here.

10 And the rules here, that those
11 specific medical acts that we put in an affidavit,
12 that are in the complaint, that are in -- excuse me,
13 that we put in the subpoena, that are in the
14 complaint and are in the affidavit, that he can't
15 practice those as a matter of law and licensing.
16 Tennessee has the exact same act, that if a nurse
17 attempted to do so, they would be in violation of
18 the law and they would lose their license and be
19 subject to fines. That is what you know. So, the
20 answer to that, was Mr. High qualified, it is
21 unquestionable as a matter of law, but also as a
22 matter of fact that he is not qualified to state
23 that position.

24 Now, the other thing is this, Your
25 Honor: The third thing they raised is one that we,

1 in fact, anticipated. I filed a supplemental brief
2 because of the emails they indicated, and they
3 filed, since the lawsuit began, they filed another
4 affidavit by a doctor. They filed another
5 affidavit. And that is explaining the facts of the
6 brief that we gave them. And what they basically
7 say is, that that second affidavit cures the defect
8 in the first affidavit where they said, We are going
9 to recall, we are not going to use Mr. High.

10 THE COURT: When was the second
11 affidavit filed?

12 MR. PASCHAL: It was filed seven days
13 after the lawsuit was filed. And let me get to
14 that, let -- the statute, Your Honor, 100 discusses
15 that. We anticipated that, that this might be an
16 issue, and it is in our supplemental brief we gave
17 to the Court earlier this week. But the statute
18 recognizes this. The statute recognizes that there
19 is a requirement for a -- excuse me, the statute
20 provides that the general rule is a
21 contemporaneously filed affidavit. An affidavit
22 must be filed contemporaneously with the complaint,
23 that is the general rule. They want to say -- I
24 will get to that in a second.

25 The affidavit -- the statute only

1 recognizes two exceptions. And the first exception,
2 Your Honor, is in subsection (E) which -- excuse me,
3 subsection (C), which is the safe harbor provision.
4 And this is what was the subject matter of the
5 Ranucci case. We handed a copy up to you. And what
6 that was is that section 100 has in it that, If a
7 contemporaneous affidavit -- if the statute of
8 limitations are expired in ten days, and the
9 plaintiff files an affidavit that I cannot get an
10 expert affidavit, that he's allowed to file an
11 affidavit subsequent to the filing, not
12 contemporaneously, but after it is filed. That is
13 the exception. It doesn't apply in this case.

14 In this case they had this affidavit
15 in July of 2020. And the statute of limitations
16 expired in February 2021. So, by -- that exception
17 doesn't apply. Now, the other exception is this:
18 The other exception is subsection (E), and
19 paraphrases, and I won't paraphrase, (E) says that
20 if an affidavit is defective, plaintiff's complaint
21 is subject to dismissal for failure to state a
22 claim, except the plaintiff may cure the alleged
23 defect by amendment within 30 days of the motion
24 alleging. And that is what they claim this Dr.
25 Chansky affidavit is.

1 This is the only other exception.

2 And this exception by language says this: You can
3 cure it by amendment. You can cure it by amendment.
4 It doesn't say that you can cure it by a second
5 affidavit.

6 THE COURT: That amendment applies to
7 the pleadings?

8 MR. PASCHAL: No, sir, the amendment
9 would apply to the original affidavit that was
10 filed.

11 THE COURT: Okay.

12 MR. PASCHAL: In other words, if you
13 file an affidavit contemporaneously with the
14 complaint, as required by law, and then I come up,
15 assuming you are plaintiff and I am defendant, I
16 come and say, There is a defect in this claim. You
17 have the right to cure that affidavit by filing an
18 amendment to the affidavit. But that is it. That
19 is the only two exceptions. The only two exceptions
20 is that the statute of limitations is expiring,
21 which don't apply in this case. And the only other
22 one is if you have a defect you can amend your
23 existing affidavit. It doesn't say you can file a
24 new affidavit.

25 They want to argue, as they filed in

1 their brief, Oh, new means amended. Again, that is
2 the common everyday sense of the words. Amendment
3 doesn't mean new.

4 THE COURT: Is that not defined in
5 the code, amended?

6 MR. PASCHAL: I'm assuming that it
7 is, but this particular one is not.

8 THE COURT: I mean this particular
9 section.

10 MR. PASCHAL: But, again, the
11 everyday sense of the word amendment. Here is the
12 problem they have, they could have filed Mr. High.
13 They could have filed an amended affidavit for Mr.
14 High, that would comply with the statute. But the
15 problem is, he's not qualified and he didn't have
16 the particular standard of care. So, they did not
17 meet the standard. They did not meet the statute.
18 And what they did was invent a cure, say that it is
19 a cure by filing a completely, third -- a new
20 affidavit.

21 Your Honor, if a plaintiff was
22 allowed to file an affidavit like this one, that
23 doesn't comply with the statute, and doesn't comply
24 with regulations, it is not within the statute of
25 limitations safe harbor exception, it is not in the

1 amended exception, but it is just a completely new
2 one they filed. This trial court should be asking,
3 effectively, goes right to those acts, right to the
4 law. And to create a whole new one that allows
5 another affidavit -- and it would allow, Your Honor,
6 if they wanted to file anything, like in this case,
7 if they wanted to file a lab technician affidavit,
8 who is in the same position as a nurse, commonly a
9 nurse practitioner, knowing, as they should have
10 known in this case, it wasn't all right.

11 Just to stop it and toll the statute
12 and then say, well, we are going to file it after
13 the statute and well within the lawsuit. That is
14 subversive and not in line and in step and in the
15 spirit of what Justice Kittredge wrote in Ross
16 versus Waccamaw Community Hospital, that there is a
17 purpose and an intention of these statutes to
18 prevent frivolous lawsuits, and that it is
19 meaningless -- it is not meaningless, it has a
20 meaning. And that is what this case is.

21 Now, Your Honor, and I'll hand for
22 the Court's convenience, that section 100. Again,
23 it is -- the Court I'm sure has a copy, but just for
24 the Court's convenience. The fourth thing that they
25 offer is this: Is that the case of Dr. Elizabeth

1 Calls (phonetic) of Chansky's Howard A. Chansky's
2 deposition. That is not the test. The test is not
3 what you would give to this particular expert
4 witness, who on the stand in litigation we have had
5 in this case, states that he's testified 15 times
6 for this particular plaintiff's firm, or that's my
7 recollection.

8 That the standard is not go to -- the
9 merit of the case is not an issue for determination
10 that has to be made right now. All this is is the
11 same argument so they can come after the fact and
12 cure by filing an affidavit which they know violates
13 the regulation, which they know violates the
14 statute, and which they know violates the case law
15 of Ranucci versus Crain, in particular, in this
16 case.

17 So, that is our position, Your Honor.
18 It is unqualified, number one. But as of Tuesday in
19 these requests for admissions, I think the more
20 fatal effect is he is not testifying to standard of
21 care. It just can't stand. We filed this as the
22 statute told us to do, and they have not found an
23 exception.

24 Your Honor, let me just finish. I
25 know that I have taken up too much of the Court's

1 time, but let me finish with this. As the Court is
2 aware, it is basically five cases on this affidavit.
3 There is this case -- there is the Ranucci case we
4 talked to that talked about the aspiration of the
5 lung where, in that case the issue was -- the
6 affidavit section 100 incorporated in full the
7 medical malpractice statute. Completely procedural.
8 And, in fact, they intentionally don't comment on
9 the area of any expert disqualification.

10 Then we have the Grier case, which is
11 Justice Hearn's case, dealing with bed sores in a
12 nurse's case, where she ruled that the statute
13 doesn't require proximate cause, but nothing about
14 expert qualifications. Again, that is a procedural
15 matter. And nothing about substance.

16 We have Ross versus Waccamaw, Justice
17 Kittredge ruled in that, the pretrial mediation
18 deadline is not a fatal defect or jurisdictional
19 defect. But that statute is not meaningless and it
20 is there to protect against frivolous claims.
21 Nothing about expert qualifications, other than you
22 raise them at the time of the answer.

23 We have got the Brouwer case, Your
24 Honor, Brouwer versus Sisters of Charity, the latex,
25 the latex gloves, where Justice Beatty said that

1 that is not within the -- that that is within the
2 ambit of common knowledge of a juror, so it doesn't
3 require an expert affidavit at all. In doing so, he
4 says that this will pass the 702 standard, which is
5 discussed in the affidavit. He is saying this will
6 pass the Rule 702, which by its nature brings in,
7 again, Watson versus Ford. And this doesn't meet
8 the Watson versus Ford 702 standard. He is not
9 qualified and he is not testifying to standard of
10 care.

11 And the last thing is the Eades case,
12 where there was an objection that a vascular surgeon
13 could not testify against an emergency room doctor
14 about an aneurysm, because they weren't in the same
15 practice. But it's clear they were both the same,
16 doctors. And it is clear that they both treated
17 aneurysms. So, again, it doesn't go to the
18 substance of the protection.

19 In other words this, Your Honor, all
20 of those cases, this case -- the point I'm trying to
21 make is, this case is different. All of those
22 cases, we dealt with procedural complaints. This is
23 a complaint of substance, the heart of the
24 protection. We did it just like the statute told us
25 to do. All of those cases had varying different

1 types of experts. This is the only case where they
2 had been a purported expert, and put it in the
3 affidavit offered to the Court, testifying about
4 acts that this affiant would be illegal to perform.
5 You don't have that in any of the other cases.

6 And that is what we have. I
7 appreciate the Court's time. Thank you very much.

8 THE COURT: Thank you. All right.
9 Mr. Wright.

10 MR. WRIGHT: Yes, Your Honor. Given
11 that that is a lot to respond to, but I think Mr.
12 Paschal and I would be in agreement, there are three
13 ways that the plaintiff is successful in arguing
14 that the Court should dismiss or should not grant
15 his Motion to Dismiss.

16 Number one is whether the statute was
17 tolled by our filing the notice of intent. And this
18 is in the brief. Your Honor, it gets confusing
19 because there's two statutes involved here. Number
20 one is 15-79-125. And that is the statute that
21 deals with the filing requirements with the notice
22 of intent. Okay?

23 The other one, 15-36-100, deals with
24 the filing requirements with the summons and
25 complaint. So, there are two different statutes.

1 The only time that 15-79-125, or the NOI statute,
2 references the other one is basically to say, Hey,
3 if you are filing an affidavit it has to conform to
4 the same requirements as when you filed the summons
5 and complaint.

6 The portions that he references, as
7 far as the timing of filing and objection to the
8 affidavit, that is from 15-36-100. That is not part
9 of 15 -- the NOI statute at all. So, him
10 referencing that, saying, Hey it's okay, we don't
11 have to object to the filing, to the affidavit in
12 the NOI until a responsive filing is required by
13 referencing 15-36-100 is just a complete misuse of
14 that statute. That is dealing with the affidavit as
15 filed with the summons and complaint.

16 There is no written statute anywhere
17 to say that if an affidavit filed with an NOI is
18 defective and you think that it's defective, that
19 you can waive and not bring that up. Okay? And
20 just like we saw Wednesday, it is perfectly fine to
21 make a Motion to Dismiss a notice of intent if they
22 felt the statute -- that my affidavit that I filed
23 with the notice of intent was defective, they
24 certainly could have been free to file for a Motion
25 to Dismiss and bring all of this up. Instead they

1 -- there was no allegation of any defective
2 affidavit with the notice of intent for five months.
3 We did the pre mediation, went through all of that.
4 The NOI case has been closed. Okay?

5 THE COURT: Does the NOI statute have
6 any language in there about filing the Motion to
7 Dismiss?

8 MR. WRIGHT: No, it does not.

9 THE COURT: Have any language at all?

10 MR. WRIGHT: No, no, it does not.

11 But just like anything in law, the standard is to do
12 a contemporaneous objection, unless the statute says
13 otherwise. You are supposed to -- if there is
14 something wrong with a filing, with anything, any
15 objection that you have, you are supposed to do that
16 immediately.

17 And, Your Honor, it is the black
18 letter law in 15-79-125(A), that filing the notice
19 of intent to file suit tolls all applicable statute
20 of limitations. There is no disagreement on that.

21 So, when we -- so, our first
22 argument, Your Honor, would be, when we filed the
23 notice of intent with the affidavit and there was no
24 objection as to the sufficiency of the NOI or the
25 affidavit that was filed with the NOI, all

1 applicable statute of limitations would be tolled.
2 And so the only time bar going forward, since there
3 was no objection at the time of the NOI, and that
4 has been closed, it has been done, would be the
5 six-year statute of repose, which doesn't run until
6 2024. Okay?

7 So, Your Honor, that would be our
8 first argument. If the Court agrees that the
9 statute of limitations has been tolled, as
10 specifically identified in 15-79-125(A), then there
11 is no argument here. The statute has been tolled.
12 We filed the motion -- or filed the affidavit of Dr.
13 Chansky and, you know, their Motion to Dismiss
14 should be denied.

15 And I think that Mr. Paschal would
16 agree with that, that if the Court agrees with that,
17 then his motion should be denied. He would just
18 argue that you shouldn't rule that way. So, that
19 would be the first way that his motion should be
20 defeated.

21 The second one is, if the Court were
22 to argue or were to find that, okay, the statute
23 hasn't been tolled, you know, that it is perfectly
24 okay for him to wait 5 months to not object or to
25 not file any kind of Motion to Dismiss the NOI.

1 Then the second way that the motion should be
2 defeated is if we -- if the affidavit of Nurse High
3 is actually acceptable. And, Your Honor, it is very
4 clear that 15-36-100 that you asked, you know, is
5 there any specification, as far as what is a
6 qualified expert. Yes, there is.

7 15-36-100 says, section (A) says, As
8 used in this section, an expert witness means an
9 expert who is qualified as to the acceptable conduct
10 of the professional whose conduct is at issue and
11 who -- and then there is three categories.

12 In Mr. Paschal's, both of his
13 memorandum in support, he only referenced the first
14 two. He did not even make reference to the third
15 section, which is what we are arguing Nurse High
16 would be qualified under. That third section
17 specifically says, Your Honor, that a -- Your Honor,
18 that this is 15-36-100(A)(3), that if an individual
19 not covered by sections (A)(1) or (A)(2), basically
20 who has the educational or essentially has the same
21 credentials as the defendant in question, that an
22 expert witness can still be qualified under this
23 statute if he has scientific, technical, or other
24 specialized knowledge which may assist the trier of
25 fact in understanding the evidence and determining a

1 fact or issue in the case, by reason of the
2 individual's study, experience, or both.

3 Now, it is uncontroverted, Your
4 Honor, that Nurse High has been working in an
5 emergency room setting dealing with emergency room
6 medicine for -- since the late '80s. He essentially
7 runs the emergency room at Vanderbilt University.
8 And, in fact, as we talked about it, he's an
9 associate in emergency medicine at Vanderbilt
10 University and teaches --

11 THE COURT: Why didn't you file a
12 Motion to Quash Mr. Paschal and give him that
13 information?

14 MR. WRIGHT: I want to address that.
15 He said that there was no objection to that. That
16 is a bold-faced misstatement. I was called at my
17 home by the representative for Vanderbilt and said,
18 What is going on, why do we have to -- we are not
19 involved in this, why do we have to spend time and
20 effort to answer the subpoena. And I said, Well,
21 this is kind of a standard thing, blah, blah, blah.
22 And so they told me, like, Can you do anything about
23 it. I was specifically asked that. And I know that
24 you talked to somebody different.

25 MR. PASCHAL: I --

1 MR. WRIGHT: And I don't need you to
2 interrupt. But that is -- I was called, I was
3 contacted. I did not reach out. I have -- I don't
4 care if he gets a subpoena for that. I have no --
5 but when my expert and his boss calls me and says,
6 You need to file a subpoena, or we would like you
7 to. And second of all, his subpoena didn't even
8 comply with Tennessee law. He only gave them five
9 days to respond. And that subpoena is going to fail
10 because he didn't give them the required 20 days'
11 notice.

12 But, no, I was contact -- there was
13 definitely objection from me and from my nurse
14 expert. And Mr. Paschal has done this in another
15 case, he could have easily come to me and said, Hey,
16 Jay, can you ask your expert to give us all of his
17 syllabuses, all of his, you know, if there is any
18 kind of authorization for him to practice medicine.

19 THE COURT: Do you agree to withdraw
20 your objection to that subpoena up there now?

21 MR. WRIGHT: Your Honor, I --

22 THE COURT: Yes or no.

23 MR. WRIGHT: Again --

24 THE COURT: Yes or no.

25 MR. WRIGHT: I would, yes.

1 THE COURT: Good. It is withdrawn.
2 Let's go forward with your argument.

3 MR. WRIGHT: Yes. And so, and so 100
4 (A) (3) is very clear that you don't have to have,
5 and even the case law that he cited is very clear
6 that an expert witness under the filings of the NOI
7 or the summons and complaint does not have to be the
8 same medical specialty as the defendant.

9 THE COURT: Well, I think that that's
10 not his argument. I think that what I understood
11 him to say is that you have somebody who is a nurse
12 that is trying to opine as to what a nurse
13 practitioner or a doctor might do that is against
14 the statute of what they are allowed to do.

15 MR. WRIGHT: Well, Your Honor, we
16 would disagree with that. I think, and Nurse High
17 is well aware of these requirements. He knows, as
18 far as his licensing, what would put his license at
19 stake and would never sign an affidavit that he knew
20 would put him at stake of being sanctioned by his
21 medical board, or his nursing board.

22 These are fictitious labels, Your
23 Honor. When a person goes into an emergency room
24 setting, he's supposed to receive appropriate
25 medical emergency treatment, Your Honor. And that

1 is what Nurse High is qualified by 30 years of
2 experience. And specifically, Your Honor, he is a
3 certified, not just an RN, he is a certified
4 emergency nurse. And, again, he's been basically
5 running the emergency room for 30 years.

6 It is a false label to say, Oh, well,
7 what is the standard of care for a nurse
8 practitioner, where is the standard of care to an ER
9 doctor. When a patient goes into the emergency
10 room, he's supposed to receive appropriate medical
11 -- emergency medicine treatment. And that is
12 exactly what we put in our affidavit, or in our
13 answers to the requests for admissions, Your Honor.
14 We said, Nurse High is not rendering specific
15 opinions as to the practice of medicine or the
16 standard of care of a physician or nurse
17 practitioner, as Mr. Paschal pointed out, but he
18 didn't read this.

19 THE COURT: Well, let me ask you
20 this: In your complaint you are alleging actual
21 omissions by the nurse practitioner and the doctor,
22 aren't you?

23 MR. WRIGHT: Yes. No actually --

24 THE COURT: So, when you do that in
25 your complaint, don't you have to support that by

1 expert affidavit as to the standard of care and how
2 they deviated from it?

3 MR. WRIGHT: Well, actually, Your
4 Honor, there is no MD involved, it is just a nurse
5 practitioner.

6 THE COURT: There is no MD, okay.
7 Just a nurse practitioner?

8 MR. WRIGHT: Yes. Nurse High --

9 THE COURT: But even so, if you are
10 saying to me -- if you are saying, I think I saw
11 where you said, we are not saying any -- we are not
12 rendering an opinion about the nurse practitioner,
13 then doesn't that cause you a problem from the
14 get-go, because you don't have an affidavit?

15 MR. WRIGHT: That is false. That is
16 semantics. We said we are not -- our expert is not
17 saying, Hey, I'm coming in to render an opinion as
18 to what a nurse practitioner did wrong, he is coming
19 in to say, Look, this is how a patient in this
20 setting should get treated. It includes an
21 appropriate diagnosis. It includes appropriate CT
22 studies. He's giving those opinions, that this
23 patient did not receive an accurate diagnosis.

24 He is going to give testimony that
25 this patient did not receive the CT imaging studies

1 that would have shown his aneurysm and would have
2 prevented his death. He is going to say that this
3 patient being discharged with a blood pressure of
4 244 over 180 in hypertensive crisis is absolutely
5 inappropriate and inexcusable. But he is going to
6 say, I don't care who you point the finger at,
7 whether you point it at a nurse, point it at a nurse
8 practitioner, you point it at an MD, this is
9 inappropriate medical emergency medicine treatment.

10 And my expert is giving that opinion.
11 And he's qualified to give that opinion based on his
12 extensive experience under 100(A)(3), his extensive
13 experience in the emergency room, seeing patients
14 every day, making those decisions. And to say that
15 he cannot, he's totally unqualified to say when a
16 patient who is coming in with -- when there is
17 incredible concern for aortic aneurysm and has a
18 current blood pressure of 244 over 180, in
19 hypertensive crisis, that he is not qualified to say
20 that letting that patient walk out the door and
21 eventually had a ruptured aortic aneurysm and die in
22 the hospital parking lot is inappropriate, that is
23 just ridiculous.

24 And so, Your Honor, we would say that
25 the affidavit of Nurse High 100 percent meets the

1 qualifications of 100(A)(3), that he is accepted,
2 that he is perfectly qualified to render the
3 opinions that he's going to give. And as far as Mr.
4 Paschal putting up on the board, you know, the laws
5 and stuff, I think that is taking those all out of
6 context. I think those list specific medical acts
7 that apply to an MD. I don't think that that is
8 trying to prohibitively say that an MD can't offer
9 any kind of opinions related to these issues. I
10 think that there is a vast difference between --

11 THE COURT: Now, hold on. Say that
12 again, what you said about an MD.

13 MR. WRIGHT: Yes. These requirements
14 for what make an MD, Your Honor. That is one
15 standard. There's a totally different standard that
16 is expressly put forth in 100 (A)(3) as to the
17 qualif -- the level of qualification that an expert
18 needs in order to render an affidavit in a
19 complaint. These are totally separate standards.
20 And for him to reference this when there is a
21 specific listing and description of what qualifies
22 as an expert -- as an affidavit -- as an expert as
23 far as an affidavit for a summons and complaint is
24 just -- is trying to move the ball.

25 If you look at the definition of what

1 satisfies as an affidavit in the actual affidavit
2 statute, 100, 15-36-100, it gives its own
3 definition. You don't need to go to these other
4 places to try to get any kind of further definition,
5 it's very clear what is set forth in the actual
6 statute.

7 So, that would be number two, Your
8 Honor. We feel like specifically, that even if the
9 Court were to disagree that the statute of
10 limitations was tolled, which we argue is very clear
11 from the statute that Nurse High's affidavit would
12 qualify under 15-36 (A) (3).

13 Your Honor, the third way that the
14 Motion to Dismiss can be defeated is if the Court
15 were to rule that the statute -- were to disagree
16 with me that the statute was not tolled based on
17 their lack of any kind of an objection during the
18 notice of intent. And that Nurse High's affidavit
19 is not sufficient, then specifically 15-36-100(E)
20 states that, Whenever there is an allegation that an
21 affidavit is defective, which is what we are talking
22 about in this case, it specifically says that the
23 plaintiff has 30 days to file an amended affidavit
24 to cure the alleged defect.

25 Now, Your Honor, it has been stated,

1 and it is in our brief, that any -- Your Honor, that
2 any statute that limits the ability of a person to
3 bring a lawsuit is a statute restricting the common
4 law will, and that a statute limiting a claimant's
5 right to bring suit are subject to the rule that the
6 statutes are to be strictly construed. Okay?

7 And so there is no description on --
8 there is no limitation put forth in the statute as
9 to what amendments can be made, Your Honor. There
10 is no saying, Hey, you know, it only applies to --
11 there is no limitations. And in strictly construing
12 the statute, that means that we are entitled, that
13 if they say that the defect in the affidavit is the
14 title or the person giving the affidavit, basically
15 the identity of the affiant, then Your Honor, we
16 would be entitled to amend that, specifically under
17 Rule 100(E). Which we did.

18 We said, All right, fine, if you
19 have -- if you think that, for whatever reason, that
20 our expert, the identity of our expert is
21 unqualified, we will be happy to amend that within
22 30 days, directly as we are entitled to under the
23 statute. Which we did. And so, Your Honor, again,
24 strictly construing that statute, there is no
25 limitations on the amendment. And this is not us

1 trying to, you know, put forth some, you know, make
2 an affidavit of Joe Schmoe on the street. This is,
3 again, a qualified expert who has been working in
4 the emergency room for 30 years and basically runs
5 an ER. And, you know, again, we feel like his
6 affidavit is totally -- you know, that he's totally
7 qualified to give the opinions that he's giving.
8 But if they disagree, fine, we will amend the
9 affidavit. You know, if you want an MD, we will
10 give you an MD. If you want a NP, we will give you
11 an NP.

12 But, Your Honor, it is very clear
13 that we are entitled to that step. You know, if
14 they say, Hey, here is a defect, we get 30 days to
15 make whatever amendment we need to make, which we
16 have done. And so, Your Honor, if you would also
17 agree that, you know, we have met that statutory
18 allowance in 100(E), then their Motion to Dismiss
19 would also fail.

20 And I put that fourth thing in a
21 brief, Your Honor, not to make that as any kind of
22 basis for the Court's determination, as far as a
23 frivolous lawsuit. It was referenced in Mr.
24 Paschal's briefs that the whole reason these
25 affidavit requirements exist is to protect the court

1 system from frivolous lawsuits. And I was just
2 making the point, Your Honor, as a matter of public
3 -- I don't know, anyway, that this is obviously not
4 a frivolous lawsuit.

5 This is a patient that went to the
6 emergency room after a motor vehicle accident, had a
7 blood pressure of 244 over 180. And that is
8 definitely the definition of a hypertensive crisis.
9 Was complaining of pain right in the middle of his
10 back, which the experts, you know, at least our
11 experts will say that that is very indicative of an
12 aortic dissection, especially after a motor vehicle
13 accident.

14 We took the deposition of Nurse
15 Morton. He even said that it was on his
16 differential diagnosis in that -- and he testified
17 that the aortic aneurysm, if he had done the test to
18 look for it they would have found it. Now, but he
19 said even if it -- even though it was on his
20 differential, he didn't do the test. And then it is
21 no question that he died because the aortic aneurysm
22 wasn't identified and it ruptured and he died in the
23 AnMed parking lot.

24 So, this is not a frivolous case,
25 Your Honor. And, again, the three ways we feel

1 like, number one, the filing of the notice of intent
2 without objections, that the statute of limitations
3 was tolled. So, there is no statute of limitations
4 once the NOI was filed without objection. And the
5 only time bar is the six-year statute of repose,
6 which doesn't run until 2024.

7 Number two, we feel like Nurse High
8 is duly qualified to render -- to give an affidavit.
9 He would not have provided us with an affidavit that
10 he knew was controverted by law and could get him
11 into sanctions by the medical boards.

12 And, number three, Your Honor, even
13 if, for whatever reason it is determined that Nurse
14 High is unqualified, we are allowed 30 days to make
15 amendments, which we did. And there is no
16 limitations to what amendments we can make under
17 statute; it has to be strictly construed.

18 THE COURT: All right. Thank you,
19 sir.

20 MR. PASCHAL: Real quick. I'm not
21 going to repeat everything.

22 THE COURT: Oh yeah, you would. I
23 know you, Mr. Paschal, you would go back and plow
24 the whole field again.

25 MR. PASCHAL: If I know you, Judge,

1 you wouldn't let me do it. Just this, to say that
2 125 and 100 are to be interpreted separate, it
3 contradicts Ranucci versus Crain, where they said
4 that 100 incorporates in full. 100, the affidavit
5 statute, it is incorporated in full, or incorporates
6 in full the medical malpractice statute, 125. You
7 can't pick and choose between them, and that is what
8 they are urging.

9 The second thing is this: The expert
10 qualification that Mr. Wright read to you, you are
11 probably not familiar with that language, because
12 that language was put in there because that is the
13 ambit of common knowledge of a juror where no expert
14 is necessary. And that is Justice Beatty's case.
15 And wreck cases, I imagine, you have ruled thousands
16 of times there are certain things that are within
17 the ambit of common knowledge and you don't need an
18 expert. That is all that is. It just incorporates
19 it, it is not a new groundbreaking qualification.

20 And the only other thing is that,
21 regardless of what his affidavit says about the
22 practice of medicine, and to allege that we read out
23 of context when we gave the Court the entire
24 document, prevents us from taking anything out of
25 context. He can testify about the practice of

1 emergency medicine by nurses, but he can't testify
2 as to doctors and nurse practitioners.

3 And as to the amendment statute, the
4 amendment statute says you can amend an existing
5 affidavit, it doesn't say that you can get a brand
6 new, second affidavit to come in.

7 THE COURT: Are there any cases out
8 there that you are aware of where there was a
9 substituted affidavit for, you know, like there was
10 done in this case?

11 MR. PASCHAL: I can answer that. I'm
12 not perfect, I could have missed something, but I
13 can -- the five affidavit cases are those five cases
14 that I told the Court about.

15 THE COURT: They don't, none of them,
16 okay.

17 MR. PASCHAL: And that is why I'm
18 going to point out, this is a different case because
19 of that reason.

20 THE COURT: All right.

21 MR. PASCHAL: I appreciate the
22 opportunity, Your Honor. Thank you.

23 THE COURT: Thank you. Do you have
24 anything you want to add?

25 MR. PARHAM: Me, Your Honor?

1 THE COURT: Yes, sir.

2 MR. PARHAM: I have got a lot of
3 opinions, but I'm no longer in the case.

4 THE COURT: Oh, you are not?

5 MR. WRIGHT: No, sir.

6 THE COURT: That is right, you
7 settled your part, didn't you?

8 MR. PARHAM: Yes, sir, we settled our
9 part two or three weeks ago.

10 THE COURT: I thought I was going to
11 let y'all go outside and just wrestle around for a
12 whole --

13 MR. PARHAM: I am sorry, what?

14 THE COURT: I said I thought I was
15 going to let you and Mr. Wright just go out in front
16 and just wrestle around for a little bit.

17 MR. PARHAM: I wouldn't, you know, I
18 am from a family that my father didn't graduate from
19 high school, and in my younger days I would be happy
20 to do that.

21 THE COURT: Me too.

22 MR. PARHAM: And now I'm too old and
23 fat to do that now.

24 THE COURT: I hear you. All right.
25 So, you don't really have anything over here? Do

1 you want to put anything on the record about your
2 settlement?

3 MR. PARHAM: Your Honor, we are
4 fighting over whether certain depositions should be
5 taken when I'm not available.

6 MR. WRIGHT: No, the Motion to
7 Dismiss is the only thing we are --

8 MR. PARHAM: Oh, yes, sir, we don't
9 have documents ready. I don't have the check, so
10 there's nothing.

11 MR. WRIGHT: As to the Motion to
12 Dismiss?

13 MR. PARHAM: Oh, well, I have an
14 opinion, Your Honor, if you want to hear it I'll
15 tell you. I didn't think that you wanted to.

16 THE COURT: No.

17 MR. PARHAM: I am out of the case,
18 but I have done medical malpractices --

19 THE COURT: For a long time.

20 MR. PARHAM: -- a long, long time,
21 Your Honor, and I could tell you what I think about
22 these things but --

23 THE COURT: That is okay.

24 MR. PARHAM: I knew that you didn't
25 want to hear it. Your Honor, if we are going to go,

1 could I go to the restroom?

2 THE COURT: Yeah, yeah, go ahead.

3 MR. PARHAM: It's been several hours,
4 like maybe someone else wants to.

5 THE COURT: That would be great.

6 MR. PASCHAL: I have got that Motion
7 to Compel, but if they are going to withdraw the
8 objections up there, that is -- or we are talking
9 about withdrawing the witness?

10 THE COURT: Is your Motion to Compel
11 as to those?

12 MR. PASCHAL: That is.

13 THE COURT: Well, you withdrew your
14 objection.

15 MR. WRIGHT: Correct, Your Honor.
16 And we have already expressed to Pat that if the
17 Motion to Dismiss is denied and we are allowed to go
18 forward, then we don't intend to call Nurse High or
19 involve him in the case any further, that we would
20 go forward with Dr. Chansky anyway.

21 MR. PASCHAL: And I would like to
22 incorporate that in my Motion to Dismiss also, they
23 are not planning to call his witness anyway. But I
24 would need to get an order to the Motion to Compel
25 to send to Tennessee. I could prepare one for the

1 Court if you give me permission.

2 THE COURT: Absolutely.

3 MR. PASCHAL: Okay. Thank you.

4 THE COURT: So, do you have any
5 issues -- well, I'll wait until Mr. Parham gets
6 back.

7 MR. PASCHAL: Your Honor, on that
8 motion for the Tennessee stuff, that Motion to
9 Compel, we filed an affidavit. Excuse me, a
10 memorandum on that, and I would like to incorporate
11 that in the record. So, if I get an order from you
12 there is some reference that that supplemental was
13 there.

14 THE COURT: Okay. Absolutely.

15 MR. PASCHAL: Pursuant to the
16 interstate compact and the depositions and discovery
17 requirements take part, that is what I was going to
18 do.

19 (Pause.)

20 MR. PARHAM: Thank you, Your Honor.

21 THE COURT: Yes, sir. Now, let me
22 ask you this: Are there any matters that I need to
23 address to hear today? I mean, I know y'all had
24 some back and forth going over these.

25 MR. PARHAM: I don't mind. I had a

1 Motion to Quash the deposition, I don't care if you
2 hear it that way. Or if he has a Motion for
3 Sanctions against me, which is unbelievable, but
4 I'll have the same argument for both of them, Your
5 Honor, so we can go forward.

6 MR. WRIGHT: Your Honor, Mr. Parham
7 has withdrawn, via email, his Motions to Quash.

8 MR. PARHAM: Yes, Your Honor. I'm
9 happy to hear his Motion for Sanctions, it is the
10 same argument for the Motion to Quash.

11 MR. WRIGHT: Your Honor, the Motion
12 for Sanctions was not on the roster today, so I
13 mean, I didn't come prepared with all of the emails.
14 But essentially it just boils down to, look, we
15 filed the notice of Intent in November. We filed
16 the summons and complaints in March. Since late
17 March I have been trying to just schedule a
18 deposition of the employees for AnMed. And every
19 time I have tried, I have said, you know, here is a
20 notice of deposition, date, two months, two and a
21 half months out, if this doesn't work for you, give
22 me an alternative date.

23 The first two times I did that, Mr.
24 Parham ref -- he just said, Hey, that doesn't work
25 for me. He gave no explanation to say that doesn't

1 work for me. You know, it doesn't work for my time
2 schedule. Did not provide any alternative dates.
3 So, then I tried again in May. I worked with Mr.
4 Paschal and said, Hey, guys, we have got about four
5 depositions of AnMed employees that we need to do,
6 can y'all give me some dates.

7 I worked with Mr. Paschal, and we
8 said, we said, July 15th or July 15th and July 29th,
9 again giving almost two months' notice. And we sent
10 it over to Jim saying, or Mr. Parham, Hey, you know,
11 Mr. Parham, does this work for you. You know, we
12 wait a week. Mr. Parham, does this work for you.
13 Got no response. Mr. Par -- we wait another week.
14 Finally after 25 days or something, or 21 days,
15 finally I said, Look, you know, do you want to be
16 involved in helping us to set deposition dates, and
17 again got no response.

18 So, then, I said, All right, fine. I
19 sent a notice of deposition that me and Pat had
20 worked on for the 15th and 29th. Only then did I
21 get a response back, immediately, saying, Oh, those
22 dates don't work with us. And, again, not providing
23 alternative dates, but just being like, Hey, that
24 doesn't work with my schedule, it doesn't matter.
25 Your Honor, I have been trying to communicate with

1 Mr. Parham for literally four months. I have sent
2 emails. I have sent voice mails. 95 percent of
3 those go completely unanswered. No response at all.

4 The ones that he does enter a
5 response to he's just saying, Hey, that doesn't work
6 for me, but gives no solution saying, Hey, you know,
7 this date doesn't work for me, but how about this
8 date. And even today I said, you know, we have
9 scheduled depositions on the 29th. And I said, Hey,
10 Mr. Parham, are your guys going to be there? And he
11 said, No. And, in fact, he said, I don't care what
12 Judge McIntosh says, my guys are not going to be
13 there. And he said --

14 THE COURT: I might take offense to
15 that.

16 MR. PARHAM: I understand that, Your
17 Honor. I am going to fill in the blanks for you
18 when he finishes, Your Honor.

19 THE COURT: Okay.

20 MR. WRIGHT: And so, when somebody
21 doesn't even engage in the basic communication of
22 responding to emails, responding to voice messages,
23 it basically says, The entire court system has to
24 revolve around my schedule, which, you know,
25 evidently requires about five months' notice to do a

1 deposition. I don't know what to do.

2 So, we -- the motion specifically,
3 the Motion for Sanctions involves, we had that
4 deposition, we tried to schedule a deposition for
5 the 15th. We had the court reporter there. Mr.
6 Paschal was there. The witness didn't show up. I
7 don't know if Mr. Parham even told the witness about
8 the deposition. But, again, it didn't just come out
9 of the blue. It evolved out of numerous attempts to
10 be like, Here is the deposition date, does this work
11 for you, if not give me alternative dates.

12 Mr. Parham has never provided me
13 alternative dates, except recently where he said,
14 Oh, I have some availability in September for a date
15 that you asked me about all the way back in May.
16 So, like, yeah, I can give you dates four or five
17 months out.

18 And my duty, Your Honor, under the
19 Rules of Professional Conduct, it is my duty.
20 Specifically it says, I am to expedite my cases. I
21 have a duty to work cases up as quickly as I can,
22 Your Honor. And we need to do depositions of
23 witnesses, because those inevitably lead to more,
24 you know, lead to other discoveries that identify
25 other potential witnesses that we need to do.

1 And I am working with clients who
2 their primary breadwinner of their family has died.
3 They are in financial distress. They need a
4 resolution to this case. And for Mr. Parham to just
5 say that -- you know, I know that he has I think
6 over 50 active cases, for him to say, No, the family
7 has to wait, I need to take as many cases as I can
8 and make as much money as I can, so this family who
9 has had significant injury and death and is in
10 financial distress, they have to wait on my
11 schedule. That is not right, Your Honor.

12 And it is not right for him to
13 completely ghost me on emails and voice mails, and
14 not even have the least bit of professional courtesy
15 to say, Jay, I'm responding to you, hey, if you want
16 a date in July, hey, you know, I will try to give
17 you the best alternative date I can. It is just --
18 and, again, you know, he's been doing this for
19 longer than I have, but in the 10 or 15 years that I
20 have been doing it, I have never experienced this
21 level of professional disrespect, discourtesy, and
22 that is the reason that I brought it forward to you,
23 Your Honor.

24 And for somebody to sit in the back
25 of the courtroom while a Judge is ruling on cases

1 and say, I don't care what the hell the Judge says
2 regarding these depositions, it is just like -- I
3 have just never experienced it before in my 10 or 15
4 years.

5 MR. PARHAM: I don't want to belabor
6 the issue, Your Honor. All of that is patently
7 untrue. This case got filed on March 6th. March 24
8 he unilaterally noticed depositions of all of us,
9 March 24th. He said in a later email, two months
10 later, he never does that. Well, he did. And he
11 has been doing it continuously since he did it on
12 March 24th.

13 He set these depositions for June 9.
14 I was actually available. I was available. There
15 is no emails where I said that I am not available;
16 however, Mr. Paschal was not available. So, he
17 gives him a pass on June 9th for all of these
18 depositions. But later on, you will hear, he
19 doesn't give me any passes.

20 So, when that happened we had more
21 emails. He said, I want to do them in May, and he
22 gave two dates. And I responded and said, I'm
23 unavailable on those dates. And it didn't matter
24 anyway, because Mr. Paschal's client, Kevin Morton,
25 wasn't available. So, he gave Mr. Paschal a pass

1 and didn't say anything about me.

2 So, then he starts emailing me in
3 May. And, Your Honor, I wrote him in April and I
4 told him that I wasn't available for those May
5 dates. And he starts emailing, and I told him, I am
6 completely swamped in May and I have numerous family
7 vacations. My children were in town from out of
8 state, first time I had seen them in a long time
9 because of COVID. And I do not respond to my emails
10 when I'm on vacation, Your Honor. I am sorry, I
11 don't. I don't care about my emails when I'm on
12 vacation.

13 So, when I finally got back to the
14 office on May 26th, I merely responded and said, I'm
15 not available on the 15th and the 29th. Mr. Paschal
16 had offered two other dates, the 13th and 14th of
17 July. I was available those dates, however he
18 wasn't. He decided his schedule was more important.
19 And I told him on the 15th and 19th I had to file
20 another Motion to Quash, which is the one that I
21 have here in my hand, and I laid out the scenario
22 for Your Honor.

23 Interestingly, Mr. Paschal, after he
24 chose the date that he wouldn't change on the 15th,
25 Mr. Paschal noticed on May 10th the depositions of

1 the plaintiffs. It took him five weeks later. Now
2 he's complaining about me not responding in four
3 weeks. It took him five weeks later to tell Mr.
4 Paschal that he couldn't find one of his clients.
5 And when he finally found her five weeks later she
6 had a vacation. And what did Mr. Paschal do,
7 because he is professional, he said, Okay, no
8 problem, we will reschedule it.

9 So, after all of that happened, I got
10 with Mr. Paschal, we talked on the phone in early
11 June, and I can hand up two letters that were
12 written by Mr. Paschal to Mr. Wright where Mr.
13 Paschal, in the first one, said, I am tired of being
14 in the middle, I have never had anybody try and make
15 me show up for depositions on the days when I am
16 already scheduled for other things. Life is too
17 short, let's get this together.

18 We talked at length, and I said,
19 These are the dates I'm available in August. And
20 Mr. Paschal said, Well, I'm not available, these are
21 the dates I'm available. I said, I am not
22 available. Because the first half of August, Your
23 Honor, I am going on a very lengthy family vacation
24 and then I am participating in a medical malpractice
25 trial in Columbia. I checked yesterday to make sure

1 that it was still going forward and it is.

2 Mr. Paschal has a trial at the end of
3 August and needs a full week of preparation before
4 that. We have no dates in August, the two of us.
5 So, we got together and gave Mr. Wright four days in
6 September. Four days. I still have two of those
7 available. The other two are gone because I have
8 got other things to do.

9 And I'm sorry that I am -- I have a
10 very good practice, Your Honor. Always have. And,
11 thank God I do, because I get paid by the hour. And
12 I am very busy, and people in my cases are booked
13 out four and five months, Your Honor. In fact, just
14 Wednesday of this week, to give you an example, we
15 had scheduled a deposition two months ago of a
16 doctor in the case. And the attorney for the doctor
17 wrote us an email two hours before the deposition
18 and said, I can't do it today.

19 Did we act like him? Nobody acted
20 like him, including the plaintiff's lawyer that was
21 supposed to depose this guy that he had been waiting
22 two months for in a case that is much older than
23 this one, two years. And they said, Okay, just let
24 us know when you are available. Real simple, Your
25 Honor.

1 But we gave him dates in September.
2 And I have an email here where he said, I don't
3 care, I'm not going to give him -- I'm available
4 those dates, but I'm not letting him go on those two
5 dates because he wants to file a Motion for
6 Sanctions. So, if you rule on that, he can flash it
7 around. But, Your Honor, I have never refused to
8 let these two nurses be deposed.

9 To add to it, Your Honor, that after
10 all of this went down about the 15th and the 29th in
11 the beginning of June, he files an offer of
12 judgment. Which we, to quote the Godfather, it was
13 an offer we couldn't refuse. It was so good we
14 couldn't believe it, we thought it was a typo, it
15 had to have another number on it, so we accepted it.

16 So, my clients no longer are
17 defendants in this case, Your Honor. I mean, they
18 are fact witnesses. Even less a reason. In July,
19 right now, Your Honor, this case is four months old.
20 There is no scheduling order. As you know from the
21 Rules of Civil Procedure, it cannot be put on the
22 roster until 12 months, which is March of 2022. I
23 don't know about you here in Anderson County, but I
24 can tell you right now in Richland County we have --
25 I have cases from 2018 that still can't get set.

1 In fact, the depositions I have on
2 the 29th, Your Honor, are for a 2019 case that is on
3 the roster for this Monday. And Judge Manning has
4 given us a break about that, but we are going to
5 have a status conference when he gets back from
6 Kershaw County a week from now to talk about when
7 that case is going to be set.

8 So, I'm supposed to just drop these
9 depositions on the 29th and 30th that have been
10 scheduled for months because he wants to do a
11 deposition that he could handle any other time. It
12 is four months old, Your Honor. I don't get it.

13 But we gave him dates. I was
14 available on the 9th of June. I was available on
15 the 13th and 14th of July. We got together. Pat
16 can confirm this, because Pat was tired with all of
17 this mess going on between Mr. Wright and me, and we
18 gave him four dates. And he said, No, I'm
19 available, I don't care.

20 Now, Your Honor, you know, it is your
21 discretion, Your Honor, but I can't be two places at
22 once. And believe me, I would love to take these
23 depositions, I get paid by the hour. But I can't on
24 those two dates. And I have other dates I was
25 available. He gave --

1 THE COURT: Let me stop you for a
2 second if I may. First of all, I'm not issuing any
3 sanctions. Second, Jay, this is not the first time
4 where I have had you noticing depositions without
5 consulting with opposing counsel. And it is -- no.
6 And it is something that is a repetitive issue that
7 comes from -- and it stems from you. And you are
8 just going to have to learn to work with people
9 better than what you are doing.

10 I mean, this is not the first case
11 where we have had similar type conduct, similar
12 complaints. But it's reversed. And it is just not
13 going to be put up with anymore. I'm telling you.
14 I know that you are very zealous and you are a good
15 lawyer, but you need to learn how to play
16 appropriately. I don't want you moving.

17 Now, right now, I want to set those
18 dates in September. Okay? Is that a problem, or
19 you have a problem?

20 MR. PASCHAL: I am the one who
21 proposed those dates, but I didn't expect that I was
22 going to be called. I may have a conflict.

23 THE COURT: Sir?

24 MR. PASCHAL: I may have developed a
25 conflict since June, Your Honor.

1 MR. PARHAM: The only one that I'm
2 available on those four dates, are the 8th and the
3 13th. And I could have my witnesses, because I
4 talked to them this week about those dates.

5 THE COURT: Okay. Let's stop right
6 now, and let's go check and see if y'all can come up
7 with the dates. I want those done today before we
8 get out of here.

9 MR. PASCHAL: Judge, let me say this.
10 My only problem -- I will do anything. I have been
11 willing to do anything from day one. I have a very
12 small case on the docket.

13 THE COURT: If you can't do it, then
14 let's come up with alternative dates.

15 MR. PASCHAL: I have a very small
16 condemnation case that is not date certain in
17 Laurens, and I could get a phone call, that is all
18 I'm saying. I don't want it to disrupt any if we
19 get this back together during that time frame.

20 THE COURT: Well, I am going to take
21 a five-minute break. Y'all try to get together. I
22 will come back out here and we are going to put the
23 date on the record.

24 MR. PASCHAL: That is the date.

25 THE COURT: Okay. Y'all share that

1 around some.

2 (Recess.)

3 THE COURT: All right. Have y'all
4 come up with a time?

5 MR. WRIGHT: Yes, sir, we have.

6 THE COURT: Okay.

7 MR. WRIGHT: Yes, sir, September 8th
8 at 9:30 a.m. at AnMed Hospital.

9 MR. PARHAM: For both nurses?

10 MR. WRIGHT: Yes, sir.

11 THE COURT: That is good for you?

12 MR. PARHAM: Yes, sir.

13 THE COURT: And even though you
14 resolved your aspect of the case, you are going to
15 still attend, I assume?

16 MR. PARHAM: Yes, sir. Well, he
17 asked me that. Right now I think so, Your Honor.
18 You know, anybody beyond that, I'm not sure whether
19 I will still be in it or not. And, Your Honor,
20 since you did such a good job with the schedule I
21 will just keep contacting you about helping me to
22 get things set.

23 THE COURT: I am sorry?

24 MR. PARHAM: I said, Since you did a
25 good job with this schedule today, you don't mind me

1 contacting you again later on down the road in other
2 cases?

3 THE COURT: No, call me. But I tell
4 you what now, if you have got Paschal involved with
5 it, don't call me. Okay? No.

6 (Laughter.)

7 THE COURT: All right. So, Pat, you
8 are good to go with that time too?

9 MR. PASCHAL: Yes, sir, whenever it
10 is, I don't care. We talk, we will make the
11 schedule, we will get whatever needs to be done.

12 THE COURT: All right. I am going to
13 read your submissions. Do I have your memoranda, as
14 to the other?

15 MR. WRIGHT: Oh, yes, sir. As to the
16 Motion to Dismiss? It was filed along with the CV
17 of Nurse High.

18 THE COURT: All right, guys. Between
19 that and listening to planning commission testimony,
20 I am going to have a fun weekend. But I will see
21 y'all later. Thank you. Good to see you.

22 (Whereupon, the hearing concluded.)

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF OCONEE:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 18th day of September, 2021.

Mona L. Manley /s/

MONA L. MANLEY
South Carolina Court Reporter
Circuit Reporter for the 10th Circuit
(850) 893-6662
mmanley@sccourts.org