THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-001036

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

v.

Anderson Emergency Associates P.A. and Kevin Moore NP ……. Respondents.

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether a registered nurse with decades of experience in emergency room care is qualified to offer opinions on a nurse practitioner's basic nursing errors including failures to collect a critically hypertensive trauma patient's blood pressure reading and pain level.

2. If a registered nurse lacks these qualifications, whether an affidavit by a board-certified emergency room physician meets the curative provision of S.C. Code Ann. § 15-36-100(E) when filed eight days after the qualification challenge was asserted.

3. Whether the circuit court erred in dismissing Appellants' claims with prejudice based on a statute of limitations ruling Respondents admitted was not part of their motion and that fails to apply S.C. Code Ann. § 15-79-125(A)'s tolling provision.

STATEMENT OF THE CASE

Appellant Travis Walker, Individually and as Personal Representative of the Estate of Douglas Williford and Appellant Lolita Moore (Mr. Williford's wife) initiated this civil action by filing a Notice of Intent to File Suit ("NOI") in the Anderson County Court of Common Pleas on November 5, 2020. (NOI, dated Nov. 5, 2020). The NOI identified as defendants Respondent Anderson Emergency Associates P.A. ("AEA"), its employee Respondent Kevin Morton NP, as well as AnMed Health and two of its employees (Jamie Moon RN and Betty Boyles RN).[1] The NOI included a short and plain statement of the facts entitling Appellants to relief in the form of a proposed complaint as well as answers to the standard interrogatories included in Rule 33(b), SCRCP as required by S.C. Code Ann. § 15-79-125(A). (NOI Exh. A, C). The NOI also contained the affidavit of registered nurse Richard Kevin High ("Nurse High"), who identified seven breaches in the standard of care by Respondents and other providers who attended to Mr. Williford during January 18, 2018 treatment at the AnMed Health emergency room. (NOI Exh. B).

Respondents accepted service on January 7, 2021, and the parties conducted the required pre-suit mediation on March 4, 2021. (Affidavit of Service on AEA; Affidavit of Service on Morton). The mediator submitted proof of the mediation on March 10, 2021. (Proof of ADR). From the time they were served with the NOI through the end of the mediation process, Respondents did not file a motion to dismiss the NOI or assert any perceived deficiency in its attachments. Appellants then filed a Summons and Complaint on March 6, 2021, for which Appellants accepted service on March 15, 2021. (Summons and Complaint; Acceptance of Service for AEA; Acceptance of Service for Morton). The Complaint, to which Nurse High's affidavit was

[1] Appellants' claims against AnMed Health, Boyles, and Moon were dismissed by consent in connection with a settlement the circuit court approved on September 13, 2021. (Consent Order Approving Settlement; Consent Order Dismissing Boyles; Consent Order Dismissing Moon).

attached, alleged wrongful death and survival claims for losses suffered by Mr. Williford and his statutory beneficiaries as a result of allegedly deficient care during the January 2018 AnMed Health emergency room visit. (Compl. ¶¶ 52-57). Ms. Moore also alleged a loss of consortium claim. (Compl. ¶¶ 58-61). Respondents responded to the Complaint on April 13, 2021, by filing a motion to dismiss arguing Appellants failed to provide the expert affidavit required by statute. (Defs.' Mot. to Dismiss) (citing S.C. Code Ann. § 13-36-100 and S.C. Code Ann. § 15-79-125). As part of their opposition, Appellants submitted the affidavit of emergency room physician Michael A. Chansky, M.D., which also identified six standard of care breaches committed by Respondents while caring for Mr. Williford. (M. Chansky Aff. ¶ 4; Pla. Mem. in Opp. to Defs.' Mot. to Dismiss).

The Honorable R. Lawton McIntosh heard the motion on July 23, 2021, and issued a Form 4 order granting dismissal on August 27, 2021. (Hearing Tr.; Form 4 Order, entered Aug. 27, 2021). The circuit court later entered a formal order on September 14, 2021, finding Nurse High's affidavit deficient and Dr. Chansky's affidavit untimely. (Order of Dismissal, entered Sept. 14, 2021). Appellants moved to reconsider this ruling on September 2, 2021, which the circuit court denied by Form 4 order on September 8, 2021. (Plas.' Mot. to Reconsider; Form 4 Order, entered Sept. 8, 2021). A formal order was entered on September 14, 2021. (Order of Dismissal). Appellants served their notice of appeal on September 17, 2021. (Notice of Appeal).

STATEMENT OF THE FACTS

This medical malpractice action stems from Douglas Williford's January 18, 2018 AnMed Health emergency room visit following a motor vehicle collision. (Compl. ¶¶ 13-14). The AnMed Health emergency room was staffed both by AnMed Health's employee nurses and Respondent AEA personnel including Respondent Morton, a nurse practitioner. (Compl. ¶¶ 5-8). Mr. Williford

presented with severe back pain and crisis-level hypertension. (Compl. ¶¶ 15, 19). His blood pressure was measured at 244/130 at admission. (Compl. ¶ 15). Mr. Williford's providers, including Respondents, attributed all his symptoms to soreness from the car crash. (Compl. ¶ 35). However, the constellation of severe symptoms required closer observation and more extensive testing.

A traumatic event like a car crash can cause tears in major blood vessels especially in a patient like Mr. Williford who was past middle age, complained of mid-back pain, and was in the midst of a hypertensive crisis. (Compl. ¶¶ 22-26). Mr. Williford's presentation should have triggered from his providers both some simple nursing care and more advanced interventions. Mr. Williford's pain and blood pressure should have been monitored more frequently and additional tests should have been ordered to determine whether he had suffered an aortic aneurysm or dissection. (Compl. ¶¶ 33, 36-37, 48). Rather than taking these crucial steps, Morton merely gave Mr. Williford aspirin and a beta-blocker before sending him home less than two hours after he had arrived. (Compl. ¶¶ 14, 32, 38).

Mr. Williford's condition deteriorated over the next two weeks, and he returned to the AnMed Health emergency room on February 3, 2018 with back pain so severe that he was unable to sleep. (Compl. ¶¶ 39-40). Mr. Williford was prescribed pain medication and again discharged. (Compl. ¶ 41). Minutes later, Mr. Williford collapsed in his car before leaving the hospital parking lot. (Compl. ¶ 42). Resuscitative efforts were unsuccessful. (Compl. ¶ 43). An autopsy revealed Mr. Williford had indeed suffered an aortic aneurysm that ruptured and caused a fluid buildup around his heart (known as cardiac tamponade) ultimately resulting in cardiac arrest. (Compl. ¶¶ 44-46).

Along with both their NOI and Complaint, Respondents submitted an expert affidavit of Nurse High, a board-certified emergency nurse who has treated thousands of trauma patients during his nearly fifteen-year tenure at Vanderbilt University Medical Center's Level 1 trauma center. (R. High Aff. ¶ 1; R. High CV). Nurse High went far beyond the statutory requirements by identifying at least seven negligent acts or omissions committed by Mr. Williford's providers during the January 18, 2018 emergency room visit. (R. High Aff. ¶ 4). The providers' negligence covered everything from how Mr. Williford was originally assessed ("[i]nappropriate triage") to how he was finally released ("[i]nappropriate discharge") to how he was cared for in between ("[i]nadequate workup"). Id. Nurse High faulted Mr. Williford's providers for failing to order key diagnostic tests like a contrast-enhanced CT scan or transesophageal echocardiogram but also for the most basic nursing functions including collection of vital signs ("[f]ailure to do repeat vitals" and "[f]ailure to do repeat pain"). Id.; see also Compl. ¶¶ 30-31. Consistent with Nurse High's affidavit, the Complaint alleges Morton's errors included his simple failure to recheck Mr. Williford's blood pressure in light of his clear hypertensive crisis. (Compl. ¶ 37).

Respondents accepted service of the NOI and participated in the statutorily-mandated pre-suit mediation without raising any objection to Nurse High's affidavit. Respondents challenged RN High's qualifications and the substance of his opinions only after the mediation ended in an impasse, Appellants filed their Summons and Complaint, and the disputed care was officially more than three years old. Respondents' motion to dismiss argued Nurse High faulted Morton solely for "medical acts" for which Nurse High lacked expertise to comment. (Defs.' Mot. to Dismiss; Defs.' Mem. in Supp. of Mot. to Dismiss at 2-3). Respondents' motion and memorandum did not challenge Nurse High's qualifications to comment on Morton's alleged error in obtaining Mr. Williford's vital signs or in evaluating his pain level. In fact, Respondents' counsel admitted Nurse

High is "qualified to testify as to appropriate care by a nurse . . ." (Hearing Tr. at 30:18-23). Still, Appellants addressed Respondents' objections on April 21, 2021, by submitting the affidavit of Michael A. Chansky, M.D., a board-certified emergency room physician who also identified six negligent acts or omissions committed by AEA/Morton. (M. Chansky Aff. ¶¶ 1-4).

Despite Respondents' admission that Nurse High was qualified to testify on nursing issues and the basic nursing errors Nurse High's affidavit identified, the circuit court concluded Nurse High was "not qualified" and "cannot, as a matter of law, offer testimony as to the standard of care or deviations from that standard by a nurse practitioner . . . ." (Order, entered Sept. 14, 2021, at 15 ¶ 1) (citing S.C. Code Ann. § 13-36-100 and S.C. Code Ann. § 15-79-125). The circuit court also rejected Dr. Chansky's affidavit as untimely. Id. at 11-12. Accordingly, the circuit found Appellants failed to meet the NOI and expert affidavit filing requirements imposed by South Carolina law. (Order at 15). Finally, despite counsel's admission that issues related to the statute of limitations were not part of Respondents' motion[2], the circuit court dismissed Appellants' suit with prejudice. Id. This appeal followed.

STANDARD OF REVIEW

A challenge to the pre-suit filings in a medical malpractice suit is considered a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. S.C. Code Ann. § 15-36-100(E) (stating that a complaint with an allegedly defective expert affidavit is "subject to dismissal for failure to state a claim"); see also Wilkinson v. E. Cooper Cmty. Hosp., Inc., 410 S.C. 163, 169-70, 763 S.E.2d 426 (2014). When reviewing a 12(b)(6) motion, a court must view a complaint in the light most favorable to the plaintiff and every doubt must be resolved in the plaintiff's favor. Plyler v. Burns,

[2] Hearing Tr. at 24:13-17 ("we are not bringing up the tolling of the statute of limitations. That, in this case, will be an issue eventually, on another day perhaps, but it is not an issue today").

373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case," then the court may not grant a 12(b)(6) motion. Sloan Constr. Co. v. Southco Grassing Co., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). A court may not dismiss a complaint merely because the court doubts the plaintiff will prevail. Plyler, 373 S.C. at 645, 647 S.E.2d at 192. An appellate court must apply the same standard. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

Respondents' motion also requires interpretation of the governing NOI and expert affidavit statutes. S.C. Code Ann. § 13-36-100 and S.C. Code Ann. § 15-79-125. For all statutory interpretation matters, this Court owes no deference to the circuit court's analysis. Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 62, 744 S.E.2d 547 (2013) (citing Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012)). Instead, the Court applies a *de novo* review by interpreting the statute to determine legislative intent while always recognizing statutes like these that limit a claimant's right to bring suit must be strictly construed to avoid a "trap for plaintiffs with potentially meritorious claims." Id.

ARGUMENT

1. Nurse High's affidavit met all statutory requirements to support a medical malpractice claim based on Morton's errors.

The circuit court rejected Nurse High's affidavit for two reasons—first finding Nurse High was not qualified to address Morton's alleged negligence and then reasoning Nurse High's purported lack of qualifications made the substance of his affidavit "illegal." (Order at 5, 9, 12). In both instances, the circuit court failed to examine Nurse High's affidavit in full. Morton's alleged negligence included some of the most basic patient care functions that any licensed nurse (or even unlicensed nursing aide) is permitted to do. Nurse High is thoroughly qualified to

challenge Morton's failure to take Mr. Williford's blood pressure and to track the severity of his pain. See R. High Aff. ¶ 4. These are not "medical acts" and no provision of state law bars Nurse High from asserting opinions on these matters. (Hearing Tr. 51:6-18) The circuit court also erred in applying the expert affidavit statute. Since Nurse High properly challenged Morton's basic nursing errors, Nurse High met section 15-36-100(B)'s "one negligent act" requirement, and nothing more was required to make his affidavit valid.

a. The requirements for a medical malpractice expert affidavit are minimal and strictly limited by statutory language.

South Carolina's NOI and expert affidavit statutes impose only a limited number of enumerated requirements for pre-suit filings. Since these statutes limit an injured party's right to bring suit, their mandates must be strictly construed. Ross, 404 S.C. at 63, 744 S.E.2d at 550. Courts may not imply requirements the statutes do not expressly impose. Grier, 397 S.C.at 539-40, 725 S.E.2d at 697-98. (rejecting hospital's claim that section 15-79-125(A) includes implicit requirement for expert testimony on proximate cause).

The pre-suit process for medical malpractice actions governed by section 15-79-125 imposes a NOI requirement, allows for limited pre-suit discovery, and mandates pre-suit mediation. S.C. Code Ann. § 15-79-125. The NOI itself must name all adverse parties as defendants, state facts showing the filer is entitled to relief, and contain the signature of the filer or her attorney. S.C. Code Ann. § 15-79-125(A). Along with the NOI, a potential medical malpractice plaintiff must also file an expert affidavit. Id. Section 15-79-125 imposes no substantive requirements for the affidavit, choosing instead to incorporate by reference the standards set in S.C. Code Ann. § 15-36-100. Id.

Section 15-36-100 states the requirement of and standards for an expert affidavit to support many forms of professional negligence.[3] Only two requirements are enumerated in the statute. First, the affidavit must "specify at least *one negligent act* or omission claimed to exist and the factual basis for each claim." S.C. Code Ann. § 15-36-100(B) (emphasis added). Second, the affiant must qualify as an "expert witness" as defined in section 15-36-100(A). Thus, Nurse High's affidavit is valid so long as he has the requisite education, experience, or training to support any one of the affidavit's seven allegations of negligence committed by Morton.

b. Morton's alleged negligence included his failure to perform rudimentary nursing tasks.

The circuit court read Nurse High's affidavit to fault Morton in only three ways (inadequate work up, failure to order diagnostic tests, and improper discharge), and grounded all of its analysis in this flawed premise. (Order at 7) (concluding these three were "the only allegations against" Morton "and all three are clearly medical acts"). As Appellants argued to the circuit court, this conclusion falsely labels Nurse High's opinions as challenges to medical acts only higher-level medical professionals may provide. (Hearing Tr. 50:15-51:18). Nurse High plainly alleged seven negligent acts and omissions by the group of Mr. Williford's providers that included Morton:

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

[3] The expert affidavit requirement only applies when the defendant is an individual who works in one of 22 enumerated professions or a health care facility employing an individual in those professions. S.C. Code Ann. § 15-36-100(B), (G).

(R. High Aff. ¶ 4). The circuit court failed to acknowledge Nurse High's opinion on the negligent failures to obtain/repeat vital signs and to track Mr. Williford's pain level. These additional allegations of negligence were directed at Morton as further evidenced by the proposed complaint Appellants filed along with the NOI and Nurse High's affidavit. (Proposed Complaint, dated Nov. 5, 2020, at ¶ 37) (specifically faulting Morton for failing to "recheck[] [Mr. Williford's] blood pressure even though he presented with a blood pressure meeting the criteria for hypertensive crisis").

This is perfectly in line with the role a nurse practitioner plays in patient care under South Carolina law. By definition, a nurse practitioner is primarily a registered nurse (S.C. Code Ann. § 40-33-20(40)) and checking vital signs/pain status falls within the definition of the "practice of registered nursing" that includes "assessing the health status" of patients as well as "evaluating and revising responses to interventions" a patient may receive. S.C. Code Ann. § 40-33-20(48)(a), (j). While a nurse practitioner may perform designated medical acts under certain circumstances (S.C. Code Ann. § 40-33-34), that extended scope of practice would not eliminate Morton's duties as a registered nurse that are recognized by statute. Thus, to accurately address Respondents' challenge to Appellants' expert affidavit, the circuit court should have evaluated whether Nurse High was qualified to criticize the errors in Morton's basic nursing functions and the sufficiency of the affidavit in asserting opinions on those errors.

c. Nurse High's education, experience, training, and teaching position qualify him as an "expert witness."

The circuit court erred in concluding Nurse High did not qualify as an "expert witness" as defined by section 15-36-100(A) and in finding he failed to meet the qualifications requirement imposed by Rule 702, SCRE. (Order at 5-9). Since Nurse High's affidavit must only allege any "one negligent act," the operative question here is not whether Nurse High could testify on

"medical acts" but rather if Nurse High was qualified to opine that Morton negligently failed in the basic nursing functions of obtaining a repeat blood pressure reading or tracking Mr. Williford's pain level. Respondents concede Nurse High's qualifications to support these alleged negligent acts. Hearing Tr. at 30:18-23 (Respondents' counsel admitting High is "qualified to testify as to appropriate care by a nurse . . .").

Even without this concession, Nurse High had the requisite qualifications to offer opinions on the need for monitoring a hypertensive trauma patient's blood pressure and pain level. In order to submit an expert affidavit, an individual must be an "expert witness," a term that requires the individual be "qualified as to the acceptable conduct of the professional whose conduct is at issue." S.C. Code Ann. § 15-36-100(A). The individual must also meet the requirements of either subsection (A)(1)-(2) or subsection (A)(3). Subsection (A)(1)-(2) focuses on whether the proposed expert has a certification or special training in the specialty on which his testimony will be offered. In contrast, subsection (A)(3) is far broader and states that an individual is qualified as an expert if, through the individual's study or experience, he has acquired "scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case." This subsection closely tracks Rule 702, SCRE's standard for admitting expert testimony.

Nurse High's affidavit and CV show his extensive education, experience, knowledge, and training met the section 15-36-100(A)(3) requirements to offer opinions on Morton's nursing errors. Nurse High is a practicing emergency room nurse with thirty-years' experience who is board certified in emergency nursing. (R. High Aff. ¶ 1; R. High CV). For the last nearly 15 years, he has served as Vanderbilt University Medical Center's trauma resuscitation manager. (R. High CV). He holds a nursing, bachelors, and master's degree as well as an additional masters in

healthcare professional education from the Vanderbilt University School of Medicine. Id. Nurse High instructs nurses, clinical staff, residents, and other hospital personnel on the proper workup for emergency medicine patients. Id. He has also published a number of pertinent articles including a March 2001 piece on cardiac tamponade (Mr. Williford's cause of death), a May 2002 article called "The Expert Trauma Practitioner," and a March 2006 presentation entitled "Reducing Error in the Trauma Suite." Id.

Despite these extensive qualifications, the circuit court ruled Nurse High was categorically unqualified to offer opinions on the work of a nurse practitioner. (Order at 5). However, neither the language of section 15-36-100 nor the traditional analysis of Rule 702's qualification standards limit expert testimony to individuals practicing in defendant's specialty. Eades v. Palmetto Cardiovascular & Thoracic, PA, 422 S.C. 196, 199, 810 S.E.2d 848, 849 (2018) (finding section 15-36-100(A)(3) "permits the production of an affidavit from an expert who does not practice in the same area of medicine as the allegedly negligent doctor"). Eades held that the focus of section 15-36-100(A)(3)'s qualification requirements is not the proposed expert's practice area but whether he "possesses specialized knowledge to assist the trier of fact." Id. at 203, 810 S.E.2d at 851-52. While the proposed expert in Eades did not practice in the same specialty as the defendant physician, the expert's affidavit clearly stated his familiarity with the specific treatment modality the defendant allegedly mishandled. Id. at 199, 202 n. 4, 810 S.E.2d at 849, 851 n. 4 (noting allegations of malpractice in treating aneurysm of the left iliac artery and the proposed expert's statement that his practice included evaluation and treatment of occluded arteries, aneurysms, and related medical issues).

Eades's reading of section 15-36-100(A) is consistent with courts' long-standing interpretation of the South Carolina Rules of Evidence. For purposes of Rule 702, SCRE, "the test

for qualification is a relative one that is dependent on the particular witness's reference to the subject" and "[a]n expert is not limited to any class of persons acting professionally." Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006); see also Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997). Regardless of job title, a proposed expert's knowledge and experience with the medical procedure in question is the key factor on qualifications. A proposed expert with experience performing a health care procedure is qualified to offer opinions even if the expert has fewer degrees or a narrower scope of practice than the defendant against whom he is testifying. Gooding, 326 S.C. at 253, 487 S.E.2d at 598 (finding EMT qualified to testify against anesthesiologist since case centered on intubation, a procedure the EMT performed regularly). Gooding cited with approval a number of cases where lower-level health care providers were qualified as experts against physicians based on the providers' knowledge and experience with the specific negligent act in issue. Id. (citing Avret v. McCormick, 271 S.E.2d 832 (Ga. 1980) (finding nurse competent to testify against physician on standard of care when drawing a patient's blood sample)).

Accordingly, Nurse High was qualified under section 15-36-100(A)(3) and Rule 702, SCRE to challenge Morton's failure to properly track Mr. Williford's blood pressure and pain levels. Nurse High has earned both a nursing and graduate level health care degrees.[4] His decades of experience and board certification as an emergency nurse amply qualify him to testify on the need to properly track a trauma patient's vital signs. Plus, South Carolina nursing regulations show the conduct at issue lies squarely within the purview of a person licensed as a registered nurse.

[4] This is the point Appellants made in the responses to Respondents' requests to admit cited by the circuit court. (Order at 3) (citing Plas.' Resp. to Defs.' Requests to Admit Nos. 4-6). Regardless of whether Nurse High was qualified to offer testimony on medical acts, many of Morton's errors were failures of basic nursing care.

Pursuant to the South Carolina Nurse Practice Act, collecting vital signs is such a basic nursing function that a registered nurse like Nurse High is even permitted to delegate it to an unlicensed health care aide. S.C. Code Ann. § 40-33-42(B)(5).

In sum, the circuit court's ruling that Nurse High was unqualified to offer opinions on Morton's care should be reversed because it is fails to account for Nurse High's qualifications and permitted practice under the South Carolina Nurse Practice Act and is at odds with South Carolina precedent on the expert affidavit statute and evidentiary rules.

2. Alternatively, Dr. Chansky's affidavit cures any deficiency in Nurse High's affidavit.

Even if Nurse High was not qualified to submit an expert affidavit challenging Morton's conduct, the circuit court incorrectly dismissed Appellants' claims because the purported deficiencies were cured by Dr. Chansky's affidavit.

Section 15-36-100(E) provides a process for addressing objections to an expert affidavit without subjecting a plaintiff's suit to dismissal. Specifically, when an expert affidavit is challenged, "the plaintiff may cure the alleged defect by amendment." Id. The curative action must be taken within thirty days of service of the motion challenging the affidavit, and the circuit court is granted discretion to extend the deadline because the ultimate objective of the curative provision is to allow the case to proceed on the merits when "justice requires." Id. Appellants met all requirements to apply this curative provision. After Respondents filed their motion to dismiss challenging Nurse High's affidavit on April 13, 2021, Appellants responded just eight days later by submitting Dr. Chansky's affidavit on April 21st. Dr. Chansky is a board-certified emergency room physician who identified six negligent acts or omissions committed by AEA/Morton. (M. Chansky Aff. ¶¶ 1-4). Since Respondents have offered no challenge to Dr. Chansky's

qualifications, his affidavit cured any perceived deficiencies in Nurse High's assertions of the same misconduct in his affidavit.

The circuit court rejected Dr. Chansky's affidavit by finding it was untimely and failed to meet the curative provision's form requirement. (Order at 10-12). In particular, the circuit court ruled section 15-36-100(E)'s use of "amendment" limited the curative provision to a second affidavit by the affiant whose earlier filing was deemed deficient. (Order at 11-12). That interpretation should be rejected for several reasons. First, it fails to account for the provision's key language. A plaintiff is granted an opportunity to "cure" a previous affidavit—a term that broadly includes actions to "remove . . . legal defects" or to "correct . . . legal errors." Black's Law Dictionary (11th ed. 2019). Dr. Chansky's affidavit serves to "remove" Nurse High's proposed legal defect (i.e. the lack of a medical degree) and to "correct" his supposed legal error (i.e. commenting on the conduct of a higher-level medical provider). The circuit court then defines "amendment" too narrowly. An amendment includes not just a "correction" of an existing document but also "additions." Black's Law Dictionary (11th ed. 2019) (defining "amendment"). More broadly, the verb "amend" is meant to apply to all actions taken to "rectify or make right" a perceived error or deficiency. Black's Law Dictionary (11th ed. 2019) (defining "amend").

Second, the circuit court's approach also applies "amendment" too narrowly. The curative provision allows a plaintiff to amend not a particular affidavit per se but rather to amend the plaintiff's showing to meet the expert affidavit requirement. Dr. Chansky's affidavit would be an amended showing of expert testimony even if it did not qualify as an amendment of Nurse High's affidavit. Third, the circuit court's approach is at odds with the way the NOI and expert affidavit statutes have been interpreted by the courts. These statutes stand in derogation of common law and may not be interpreted to include requirements beyond what the legislature clearly intended to

install. Grier, 397 S.C. at 536-40, 725 S.E.2d at 696-98. As such, courts are wary of any interpretation of the NOI and expert affidavit statutes that could pose a "trap" for plaintiffs and prevent the airing of a potentially meritorious claim. Ross, 404 S.C. at 63, 744 S.E.2d at 550.

That is exactly where the circuit court's approach would lead. The circuit court essentially ruled that, when a defendant's objection to an expert affidavit is based on the proposed expert's qualifications, the curative provision in section 15-36-100(E) is unavailable to the plaintiff. (Order at 12) (reading "amendment" to be limited to a possible second affidavit by Nurse High and concluding that "[i]f Nurse High filed an amendment, he would still be unqualified . . ."). Since an individual's qualifications is one of the most likely objections a malpractice defendant could raise to a proposed expert's affidavit, this approach would dramatically curtail section 15-36-100(E)'s scope and increase the peril to every plaintiff who might make a good faith mistake in evaluating a proposed expert's qualifications. The Court should reject this interpretation because of the real risk that it springs the very "trap" precedent urges courts to avoid.[5]

3. The circuit court's "with prejudice" dismissal of Appellants' claims was based on a flawed statute of limitations analysis that was not properly before the court.

Alternatively, the circuit court erred in the manner in which it dismissed Appellants' claims. By ordering a dismissal with prejudice (Order at 15 ¶ 3), the circuit court deviated from the normal manner for addressing Rule 12(b)(6) motions, ruled on a statute of limitations question Respondents' counsel admits was not properly presented, and reached an outcome that is not true to the underlying statute or its intended purpose.

[5] The circuit court's ruling is also at odds with persuasive authority. Addressing a similar issue, the Minnesota Supreme Court held that a second filing was an "amended" affidavit even though the two affidavits had different affiants and the second affidavit "identif[ed] a new expert." Wesely v. Flor, 806 N.W.2d 36, 44 (Minn. 2011).

Respondents' motion to dismiss based on alleged expert affidavit deficiencies is considered using the same standard as a Rule 12(b)(6) motion. S.C. Code Ann. § 15-36-100(E) (stating that a complaint with an allegedly defective expert affidavit is "subject to dismissal for failure to state a claim"); Wilkinson, 410 S.C. at 169-70, 763 S.E.2d at 429-30. Generally, a successful Rule 12(b)(6) motion leads to a dismissal without prejudice. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). The circuit court dismissed Appellants' claims with prejudice by finding the statute of limitations had expired and was not tolled by Appellants' NOI. (Order at 14). The circuit court should not have ruled on tolling because Respondents' counsel argued the matter was not part of its motion. Hearing Tr. 24:13-17 ("we are not bringing up the tolling of the statute of limitations" and tolling "is not an issue today").

The ruling is also flawed on the merits. The circuit court ruled the limitations period is not tolled at all if a court later determines a timely NOI or expert affidavit has a deficiency. (Order at 14). However, a strict construction of the tolling provision does not support that reading. Section 15-79-125(A) provides simply that "[f]iling the [NOI] tolls all applicable statute of limitations." Nothing in that language demands tolling be denied if an expert affidavit is deemed insufficient following a motion filed months later. Persuasive authority also rejects the circuit court's approach. Michigan's Supreme Court has held that filing a NOI and expert affidavit is sufficient to toll the limitations period even if their sufficiency is later successfully challenged. Bush v. Shabahang, 772 N.W.2d 272, 280 (Mich. 2009) ("if a plaintiff files a timely NOI before commencing a medical malpractice action, the statute of limitations is tolled despite the presence of defects in the NOI"). The tolling lasts from the date of filing until the date the filing is found insufficient by a court.[6]

[6] Similarly, the circuit court incorrectly evaluated the time lapse between the filing of Nurse High's affidavit and Respondents' challenge of it. Respondents raised no objection to the affidavit during the NOI stage of the litigation, and the circuit court found that was the approach the statutes

Kirkaldy v. Rim, 734 N.W.2d 201, 203 (Mich. 2007) ("A complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged").

The circuit court further concluded its interpretation of the tolling provision was properly applied here because Appellants chose to "knowingly submit an unqualified and unlawful affidavit." (Order at 14). For the reasons discussed in Argument 1 above, Nurse High was not unqualified to offer opinions on Morton's basic nursing errors. Moreover, the circuit court incorrectly concluded Nurse High's affidavit was "illegal." (Order at 9). The supposed illegality was based on S.C. Code Ann. § 40-47-20(36)(h). (Order at 6; Defs.' Mem. in Supp. of Mot. to Dismiss at 4). The circuit court accepted Respondents' assertion that Nurse High's affidavit constituted the "practice of medicine" as defined by this statute and that he could be subject to professional discipline for drafting it. However, section 40-47-20(36)(h) does not apply to nurses. The "practice of medicine" only includes instances when an individual is "testifying *as a physician*" in a civil proceeding. Id. (emphasis added). Nurse High never claimed to be a physician when describing Morton's standard of care violations. (R. High Aff. ¶ 1) ("I am a practicing emergency nurse.").

In sum, even if the circuit court was correct in finding Nurse High/Dr. Chansky's affidavits insufficient, it erred in dismissing Appellants' claims with prejudice. That ruling was based on a

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dictated. (Order at 9-10). However, as Respondents' counsel seemed to acknowledge during the hearing, a challenge to the timing of their motion could have merit. Hearing Tr. at 24:17-22 (Respondents' counsel telling circuit court that Appellants "may have a legitimate question that . . . we didn't file this objection to the affidavit when we first got" the NOI). While the circuit court's order suggests Respondents could not have filed their motion earlier, the South Carolina Supreme Court has recognized motions to dismiss at the NOI stage on multiple occasions. See e.g. Eades, 422 S.C. at 199, 810 S.E.2d at 849; Ranucci v. Crain, 409 S.C. 493, 498, 763 S.E.2d 189, 191 (2014); Ross, 404 S.C. at 62, 744 S.E.2d at 550.

statute of limitations issue that was not properly presented and an interpretation of section 15-79-125 that failed to make the required strict construction of its terms.

CONCLUSION

For all these reasons, Appellants respectfully request the Court reverse the circuit court's order dismissing Appellants' claims. Nurse High's affidavit complied with sections 15-79-125 and 15-36-100 so long as he alleged "at least one" negligent act or omission that he was qualified to offer. Nurse High met that obligation by alleging Morton failed to obtain Mr. Williford's blood pressure and pain level during the January 2018 emergency room visit. These are basic nursing opinions, and Nurse High was qualified to offer them under the standards imposed by both section 15-36-100(A) and Rule 702, SCRE. Even if Nurse High was not qualified, Appellants properly applied the curative provision in section 15-36-100(E) by timely submitting the affidavit of Dr. Chansky, a board-certified emergency room physician. At the very least, the circuit court erred in dismissing Appellants' claims with prejudice by ruling on a statute of limitations issue that was not properly before it and by failing to heed the tolling provision in section 15-79-125(A).

Respectfully submitted,

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