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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

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

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

I. Factual Background

This is a medical malpractice action commenced on November 5, 2020, by the Appellants Travis Walker, as the Personal Representative of the Estate of Douglas Williford, and Lolita Moore, who is alleged to the decedent's spouse. This litigation involves the treatment received by the decedent Douglas Williford at the AnMed Health Emergency Room on January 24, 2018.[1] The decedent was treated following a motor vehicle accident that had occurred earlier that evening. At the Emergency Room, the decedent's medical treatment was managed by the Respondent Kevin Morton, who was a nurse practitioner ("NP") employed by the Respondent Anderson Emergency Associates, P.A. He also received care from registered nurses Betty Boyles and Jamie Moon, both of whom were employees of AnMed Health. The decedent was discharged that night by NP Morton. Two weeks later, on February 3, 2018, the decedent died from an aortic dissection.

By way of further explanation, the Respondent Anderson Emergency Associates is the physician group for which NP Morton worked. Anderson Emergency Associates provides the physicians and the physician extenders, both

[1] The Appellants have alleged in error that the date of the Emergency Room visit was January 18, 2018. The correct date is January 24, 2018.

the nurse practitioners and physicians assistants, that serve as the medical providers in the AnMed Health Emergency Room.

The Respondent Kevin Morton, NP is a nurse practitioner.[2] He was the designated "medical provider" performing the medical acts as the physician extender the same as if those medical acts were performed by an Anderson Emergency Associates physician. Those "medical acts," as defined in law and practice, included ordering and interpreting of tests, forming a medical diagnosis, determining a medical treatment plan, and prescribing medications. NP Morton was the medical provider for the Appellants' decedent in the Emergency Room on January 24, 2018, performing these medical acts the same as if performed by a physician.

Importantly, the parties do not dispute that a nurse practitioner, like other physician extenders authorized by law, is held to the standard of care for a

[2] A "nurse practitioner" is defined by statute as follows: "'Nurse Practitioner' or 'NP' means a registered nurse who has completed an advanced formal education program at the master's level or doctoral level acceptable to the board, and who demonstrates advanced knowledge and skill in assessment and management of physical and psychosocial health, illness status of persons, families, and groups. Nurse practitioners who perform medical acts must do so pursuant to a practice agreement as defined in item (45)." S.C. Code Ann. § 44-33-20(40). "Medical acts performed by a nurse practitioner … must be performed pursuant to a practice agreement between the nurse and the physician or medical staff." S.C. Code Ann. § 44-33-34(D)(1). Based upon the practice agreement, the employment agreement, and the authorizations granted to nurse practitioners under the South Carolina Nurse Practice Act, an nurse practitioner is authorized to "practice medicine" in certain delegated medical acts, including preparing an evaluation work up, formulating a differential diagnosis, ordering and interpreting diagnostic tests, prescribing medicine, and determining a care plan.

physician. In contrast, a registered nurse is not trained or licensed to practice as either a physician, nurse practitioner, or other physician extender.

II. Procedural Background

On November 5, 2020, the Appellants filed a Notice of Intent to Sue ("NOI"), with which they filed an affidavit of Richard High, RN that had been executed and notarized on July 18, 2020. Thus, the Appellants had a signed affidavit of Nurse High available to them at least 110 days before the NOI was filed.

The statute of limitations expired at the latest on February 3, 2021, which is three years from the decedent's date of death.

The parties conducted the required pre-suit mediation on March 4, 2021, which resulted in an impasse. Thereafter, on March 6, 2021, the Appellants filed their Complaint which alleges a medical negligence action against the Respondents as well as the AnMed defendants.[3] The Respondents filed an Answer on April 13, 2021, which was accompanied by a motion to dismiss that was filed contemporaneously with the Answer. The "absent affidavit" defense was asserted in the Answer and by way of the motion to dismiss. The Respondents asserted that that Appellants had failed to provide an affidavit by a licensed medical provider

[3] The AnMed defendants have settled with the Appellants.

contemporaneously with the filing of the NOI as required by the South Carolina Medical Malpractice Act, S.C. Code Ann. §§ 15-79-125 and 15-36-100.

On April 21, 2021, the Appellants filed a new and separate affidavit of Michael Chansky, M.D., an emergency physician. That affidavit was filed over five months after, and not contemporaneously with, the NOI.

While the motion to dismiss was pending, the Appellants also responded to requests to admit served by the Respondents. Those requests to admit included the following three specific requests regarding the qualifications of a nurse to express an opinion as to the standard of care owed by nurse practitioners and physicians:

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

To each such request for admission, the Appellants replied:

> Denied. However, *Plaintiffs would note that Nurse High is not rendering specific opinions as to the "practice of medicine" or the standard of care of a "physician or nurse practitioner*." Nurse High is offering opinions of the appropriate ER treatment that reasonable healthcare providers should provide to patients presenting in Mr.

> Williford's condition and has the appropriate qualifications to express an opinion as to the appropriateness of a patient's treatment in the emergency room irrespective of the provider."

(R. ___). (Emphasis added).

On July 23, 2020, Circuit Court Judge R. Lawton McIntosh heard the Respondents' motion to dismiss. That motion was granted by form order issued on August 27, 2021. Thereafter, Judge McIntosh issued a formal Order Granting Defendant's Motion to Dismiss on September 14, 2021, whereby he dismissed the action with prejudice. Judge McIntosh ruled as follows:

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

(Order, p. 15). On September 2, 2021, prior to the trial court's issuance of its formal order, the Appellants filed a motion for reconsideration. That motion was denied by form order entered on September 8, 2021. However, no Rule 59(e) motion was filed as to the formal order entered on September 14, 2021.

The Appellants subsequently filed an appeal to this Court.

STANDARD OF REVIEW

In accordance with S.C. Code Ann. § 15-36-100(E), "[i]f a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit if defective, the plaintiff's complaint is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(E). The appellate courts have not addressed the standard of review applicable to a motion filed pursuant to S.C. Code Ann. § 15-36-100(E).

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011).

As for any factual matters, however, the standard of review for an action at law requires the appellate court to not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976).

ARGUMENTS

I. The trial court correctly granted the Respondents' motion to dismiss because a nurse is not qualified and accordingly cannot, as a matter of law, offer testimony as to the standard of care or deviations from that standard of care by a nurse practitioner or as to the performance of medical acts by a nurse practitioner.

The trial court granted the Respondents' motion to dismiss because (1) Nurse Richard High, as a registered nurse, is not qualified to offer expert testimony as to the standard of care or deviations from the standard of care by a nurse practitioner or to offer any testimony as to the performance of "medical acts" by a nurse practitioner and (2) the affidavit of Nurse High, as submitted by the Appellants, failed to meet the requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100. On appeal, the Appellants offer new issues or theories not argued in the court below. The Appellants contend that he did meet the requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100 because the High affidavit addressed "one negligent act" by the Nurse Practitioner Kevin Morton "and nothing more was required to make his affidavit valid." *See*, Appellants' Brief, p. 7. The Appellants attempt to dissect NP Morton's functions into "nursing acts" and "medical acts," and in doing so, maintains that the High affidavit is sufficient to identify nursing malpractice committed by NP Morton such that dismissal of the Appellants'

Complaint was in error.[4] The Appellants' position fails on both procedural and substantive bases.

A. Applicable Law on Expert Affidavits

In 2005, as part of comprehensive tort reform, the South Carolina General Assembly enacted S.C. Code Ann. § 15-79-125 which requires that a medical malpractice plaintiff must initially file a Notice of Intent to File Suit ("NOI") together with an affidavit of an expert witness. The plaintiff must provide "a short and plain statement of the facts showing that the party filing the notice is entitled to relief" and must provide responses to standard interrogatories. *See*, S.C. Code Ann. § 15-79-125(A). The statute grants the parties subpoena power to obtain medical records and other relevant records. *See*, S.C. Code Ann. § 15-79-125(B). Section 15-79-125(C) further requires that the parties conduct a mediation conference. *See*, S.C. Code Ann. § 15-79-125(C). The purpose of these provisions is to "provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." *Ross v. Waccamaw Community Hospital*, 404 S.C. 56, 744 S.E.2d 547, 550 (2013).

[4] The Appellants now claim on appeal that NP Morton was negligent as a nurse rather than as a nurse practitioner, despite the fact that in their Complaint they allege liability by Morton as a nurse practitioner only.

S.C. Code Ann. § 15-79-125(A) provides that a plaintiff in a medical malpractice case must "contemporaneously file a Notice of Intent to File Suit and *an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100*, in a county in which venue would be proper for filing or initiating the civil action. S.C. Code Ann. § 15-79-125(A). (Emphasis added). In *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014), the Supreme Court incorporated the expert affidavit requirements of S.C. Code Ann. § 15-36-100 into S.C. Code Ann. § 15-79-125 in their entirety. Pursuant to S.C. Code Ann. § 15-36-100, a plaintiff is required to file "an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B). In addition, the affidavit must be offered for an "expert witness" as that term is defined in S.C. Code Ann. § 15-36-100(A).

B. The Appellants impermissibly raise new issues or theories for the first time on appeal.

The trial court correctly ruled that the affidavit of Nurse Richard High, as submitted by the Appellants, failed to meet the requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100. In addition to Nurse High not qualifying as an "expert witness" who could opine as to the standard of care and deviation therefrom by a

nurse practitioner, the affidavit does not specify any negligent act or omission committed by NP Kevin Morton nor provide the factual bases for each negligent act or omission alleged.

On appeal, the Appellants now raise new issues or theories not argued or ruled upon in the court below. The Appellants attempt to argue that NP Morton had a dual role in the care of Douglas Williford and that two separate standards of care applied -- the standard of care owed by a medical provider (including a physician or nurse practitioner) and the standard of care owed by a nursing provider. The Appellants insist that Nurse High was qualified to render opinions on the standard of care owed by NP Morton as a "nurse" while conceding he was not qualified to render opinions on NP Morton's actions as a medical provider. This new theory fails on both procedural and substantive grounds.

As indicated, this theory was not presented in the court below. The *only argument* made by the Appellants before the trial court was that NP Morton had deviated from the standard of care owed by a nurse practitioner[5] and that Nurse High was qualified to render those opinions because of his experience working in an emergency room. The Appellants never argued that NP Morton served dual

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

purposes, had any nursing functions, or was obligated to meet a dual and separate standard of care. Those are all new arguments made for the first time on appeal and are not preserved for appellate review. *See, Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). Additionally, those arguments reflect an impermissible change of theory on appeal. *See also, Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (litigant is prohibited from "chang[ing] his theory on appeal").

C. The Appellants' new issues or theories raised on appeal also lack merit, and the trial court's order correctly found that the affidavit of Richard High, RN failed to meet the requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100.

Even if the Court were to reach of the merits of those new issues or theories, the trial court's dismissal order should still be affirmed for numerous reasons.

First, in his affidavit, Nurse High does not attribute any specific "acts of negligence" to NP Morton. He treats all the health care providers as a collective group with no distinguishing among them based upon their conduct, roles, responsibilities, and licensure. Nurse High addresses the negligent acts or omissions collectively of the "agents, and/or employees of AnMed Health and/or private practices staffing the AnMed Health Emergency Department." (High Aff.). Nurse

High then states a generalized list of seven purported "negligent acts" as follows: "inappropriate triage, inadequate workup, failure to do repeat vitals, failure to do repeat pain, failure to obtain/record vitals prior to discharge, failure to obtain further imaging prior to discharge, and inappropriate discharge." (High Aff.). Then, in absolute disregard of S.C. Code Ann. § 15-36-100(B), Nurse High fails to provide "the factual basis *for each claim* based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B). If that information had been provided, as required by statute, Nurse High would have identified the factual bases for each of those seven negligent acts or omissions, and presumably, he would have identified the providers whose conduct was in breach of the standard of care.

Nonetheless, in a futile attempt to circumvent the obvious defects in Nurse High's affidavit, the Appellants try to assess the standard of care for all emergency room providers as a group, which the law obviously does not allow. *See generally*, South Carolina Medical Practice Act, S.C. Code Ann. § 40-47-5, *et seq*.; South Carolina Nurse Practice Act, S.C. Code Ann. § 40-33-5, *et seq*. The Appellants tried this as well in their responses to requests to admit. After initially conceding that "Nurse High is not rendering specific opinions as to the 'practice of medicine' or the standard of care of a 'physician or nurse practitioner,'" the Appellants proceed to aver: "Nurse High is offering opinions of the appropriate ER treatment

that reasonable healthcare providers should provide to patients presenting in Mr. Williford's condition and has the appropriate qualifications to express an opinion as to the appropriateness of a patient's treatment in the emergency room irrespective of the provider." (R. ___). Needless to say, there is not a "group standard of care" for all healthcare providers involved in providing emergency room care, and the trial court was correct in rejecting Nurse High's opinions with respect to the diagnoses and care provided by NP Morton.

As the trial court correctly ruled, Nurse High offered expert opinions on "medical acts" which are outside the scope of a registered nurse's education, knowledge, and statutory authority. Under South Carolina law, a registered nurse, such as Nurse High, is not trained nor qualified nor licensed and, as a result, cannot do any delegated medical acts by statute, and it is sanctionable misconduct to do so. *See*, S.C. Code Ann. § 40-33-110. A registered nurse can assess a patient and implement doctor's or physician extender's orders and treatment plans. However, as the Medical Practice Act and Nurse Practice Act provide, a registered nurse cannot medically diagnose, order or interpret diagnostic tests, provide a medical treatment plan, or issue prescriptions -- unlike a nurse practitioner which is by law licensed to do each of these medical acts. *See*, S.C. Code Ann. § 40-33-20(46) and (48). In fact, it is unlawful for a registered nurse to practice as a nurse

practitioner or practice outside the scope of the registered nurse license.[6]

In considering the seven "negligent acts" as delineated in Nurse High's affidavit, the Appellants are now focusing on only two of those "negligent acts" on appeal. In their opening brief, the Appellants argue that the trial court "failed to acknowledge Nurse High's opinion on the negligent failure to obtain/repeat vital signs and to track Mr. Williford's pain level." *See*, Appellants' Brief, p. 9. The Appellants insist those "negligent acts" are directed at NP Morton because in paragraph 37 of the Complaint the Appellants allege:

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

(R. ___). Nurse High, however, is not qualified as a registered nurse to support that allegation. He cannot diagnose a "hypertensive crisis," and in fact, no one has made such a "diagnosis" other than Nurse High. He cannot opine that a diagnosis of muscle strain was "improper" or a deviation of the standard of care. He also cannot opine on the discharge decision. In short, paragraph 37 is directed at NP Morton's diagnosis of Douglas Williford and the decision to discharge him, neither of which Nurse High can offer expert opinions about.

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[6] Notably, Nurse High is licensed as a registered nurse in the State of Tennessee. The Tennessee Nursing Act provides that "the practice of professional nursing does not include acts of medical diagnosis or the development of a medical plan of care and therapeutics for a patient." Tenn. Code § 63-7-103(b).

Nonetheless, the Appellants try to characterize the "recheck blood pressure" as part of the "nursing" standard of care, when in reality determining whether a repeat blood pressure reading is warranted prior to discharge falls within the scope of medical treatment planning, which is not a nursing function. Citing such cases as *Eades v. Palmetto Cardiovascular & Thoric, P.A.*, 422 S.C. 196, 810 S.E.2d 848 (2018), and *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 487 S.E.2d 596 (1997), the Appellants contend that a nurse should not be prohibited from testifying against a physician or, in this case, a nurse practitioner. However, there is certainly a difference between a physician of one specialty testifying against another physician, than what Nurse High and the Appellants are attempting in the case at bar. More importantly, there is a clear distinction between allowing a nurse to testify as to *how* a test is performed, such as the taking of a blood pressure reading or vital signs, as opposed to *when* the standard of care requires such tests to be performed. In other words, the "negligent acts" alleged here do not challenge the technique utilized in carrying out a test but rather when (or even if) that test should be done. When a repeat blood pressure reading or a repeat vital sign check or pain check is warranted requires the exercise of medical judgment, i.e., medical decision-making about which a nurse is not qualified to offer expert opinions. Notably, the Appellants are not contesting the trial court's ruling that found specifically that a nurse was not qualified to testify to such medical acts as forming

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

Finally, the Appellants' new claims or theories not asserted in the trial court are unsupported factually and legally. The Appellants never argued in the court below that NP Morton had dual roles, was subject to dual standards of care, or was acting as a nurse in any respect in his care of Douglas Williford. Moreover, the record demonstrates that NP Morton was not part of the nursing staff, which incidentally has settled with the Appellants. (Settlement Order). NP Morton was an employee of Anderson Emergency Associates, which provides only medical providers and not nurses. The ER record reflects that Kevin Morton, NP was the "provider" on the "treatment team," and that the nursing care was provided by Betty Boyles, RN and Jamie Moon, RN. (ER Record). The ER record does not reflect any nursing care provided by NP Morton.

In sum, the Richard High Affidavit was never intended to and, in fact, does not offer the opinion that NP Morton owed two different standards of care, one as a nurse and another as a nurse practitioner. That has been a post-dismissal change in

theory in what can only be viewed as a last-ditch attempt by the Appellants to salvage their lawsuit. Such changes in theory made for the first time on appeal, however, are not permissible under appellate preservation rules. Moreover, this was not a claim or theory argued to the trial court and is certainly not addressed by the trial court's orders. These new claims and theories do not appear in the written filings by the Appellants in the trial court (including their motion for reconsideration or their responses to requests to admit) or in the oral argument made to the trial judge. In adjudicating the claims and theories that were pursued in the court below, the dismissal order issued by the trial court is correct and should be affirmed. Nurse High, quite simply, is not qualified to opine on the standard of care owed by a nurse practitioner or whether NP Morton deviated from that standard of care.

II. The trial court correctly ruled that the new and different affidavit of Michael Chansky, M.D. does not qualify as an "amendment" of the defective affidavit of Richard High, RN pursuant to S.C. Code Ann. § 15-36-100(E).

As an alternative ground on appeal, the Appellants contend that the trial court erred in dismissing their Complaint because he submitted an affidavit of Michael Chansky, M.D. as an "amendment" that "cures" the deficiencies in the affidavit of Nurse Richard High. The trial court correctly rejected that argument.

The statutory scheme permits in one limited scenario for a *second affidavit* to cure a defect. However, that scenario is not presented in this case. As discussed above, the requirements for an expert affidavit are provided in the two governing statutes, S.C. Code Ann. §§ 15-79-125 and 15-36-100. The two statutes are in *pari materia* and must be construed together. *Ranucci*, 763 S.E.2d at 193. Notably, no *amended* affidavit by Nurse High was filed. Instead, only a new and separate affidavit by a completely different affiant, Dr. Chansky, was filed, and that affidavit was filed over five months after, not contemporaneously with, the NOI.

As indicated, S.C. Code Ann. § 15-79-125(A) specifically requires a "contemporaneous filing" of an affidavit in support of the NOI:

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

S.C. Code Ann. § 15-79-125(A). (Emphasis provided). The statute, however, provides for only two exceptions to this general rule -- the "safe harbor" exception and the "amended affidavit" exception.

The General Assembly provided only one exceptio*n* to the general rule to allow a filing of a new or different affidavit *after* the NOI -- known as the "safe harbor" provision -- which is applicable only in cases under specifically defined

statute of limitations time constraints. S.C. Code Ann. § 15-36-100(C)(1) reads:

> (C)(1) The contemporaneous filing requirement of subsection (B) *does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared*. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), SCRCP.

S.C. Code Ann. § 15-36-100(C)(1). (Emphasis provided). That subsection (C), however, is the only exception to the general rule requiring a contemporaneous filing of the expert affidavit. It is the only provision allowing a filing of any new or different affidavit after the NOI. The General Assembly exclusively limited the safe harbor provision to one specific class of medical malpractice suits -- those actions filed within ten days prior to the expiration of the statute of limitations. In the case at bar, the NOI was filed on November 5, 2020, which was three months *prior* to the expiration of the statute of limitations on February 3, 2021. In

addition, to avail this safe harbor, a plaintiff must file an affidavit as to why a contemporaneous expert affidavit could not be obtained. In this case, the Appellants did not and could not meet that requirement because he had the High affidavit in hand seven months prior to expiration of the statute of limitations.

The only other exception to the general rule is the "amended affidavit" provision in S.C. Code Ann. § 15-36-100(E). The statute does not allow for a *new* affidavit to be filed after the NOI. Instead, it only allows for an "*amendment*" to the initial properly filed contemporaneous affidavit. This is not the case here, where a new and different affidavit by a new affiant has been filed -- not an amendment to the existing affidavit. S.C. Code Ann. § 15-36-100(E) explicitly states:

> (E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that *the plaintiff may cure the alleged defect by amendment* within thirty days of service of the motion alleging that the affidavit is defective.

S.C. Code Ann. § 15-36-100(E). (Emphasis provided).

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Sumter Police Department v. Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894, 896 (Ct. App. 1998). "All rules of statutory

construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Id.* "Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language." *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 491, 495 (Ct. App. 1997). "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." *Brown v. South Carolina Dept. of Health & Environmental Control*, 348 S.C. 507, 560 S.E.2d 410, 414 (2002). In other words, the court has "no right to impose another meaning" to the statute. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 725 S.E.2d 693, 695 (2012).

"Where the legislature elects not to define a term in a statute, the courts will interpret the term in accord with its usual and customary meaning." *Adoptive Parents v. Biological Parents*, 315 S.C. 315, 446 S.E.2d 404, 409 (1994). Courts are directed to utilize dictionaries for the plain meaning of statutory terms: "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Lee v. Thermal Engineering*, 452 S.C. 81, 52 S.E.2d 298, 303 (Ct. App. 2002), *quoting Estate of Nicholson v. South*

Carolina Department of Health and Human Services, 377 S.C. 590, 660 S.E.2d 303 (2008).

In particular, the courts have consistently resorted to *Black's Law Dictionary* to provide the meaning of a legal word not defined in the statute. *See e.g.*, *Centex International, Inc. v. South Carolina Department of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013) (using *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary* as authorities). All of the defining authorities are consistent in defining the term "amendment" as "a change in an existing document." For instance, *Black's Law Dictionary* defines "amendment" as a "minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specifically, a change made by addition, deletion, or correction; especially, an alteration in wording." *See*, *Black's Law Dictionary*, "Amendment" (11th Ed. 2019). The *Oxford Dictionary* defines "amendment" as "a small change or improvement that is made to a document or proposed new law." No dictionary defines the term "amendment" as a subsequent, new, and different document executed almost a year after the first document by a different author and with no reference to the initial document.[7] In sum, the Chansky affidavit is not an

[7] By way of analogy that may be instructive, Rule 15, SCRCP, governs "amendments" to pleadings. An "amendment" to a pleading which modifies the existing pleading is distinguished from a "supplemental pleading" which is a new pleading.

"amendment" to an existing affidavit, which is the only subsequent affidavit permitted by S.C. Code Ann. § 15-36-100(E).[8]

Moreover, S.C. Code Ann. § 15-36-100(E) requires the showing of two elements, none of which the Appellants have satisfied. First, that the second affidavit must address a "defect" in the first affidavit. The High affidavit is not defective; it is actually improper or illegal because it is authored by an affiant that is prohibited by law to practice medicine or to provide sworn testimony regarding "medical acts." As discussed above, the High affidavit served its purpose of addressing deficiencies in the care provided by the nurses who were sued. Nurse High cannot, however, be an expert witness against the Respondents, and, as a result, there is effectively no valid or legal affidavit that can be amended.

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

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

III. The trial court did not abuse its discretion in entering the dismissal with prejudice.

The Appellants also challenge the trial court's dismissal of their Complaint with prejudice which was based on the court's finding that the statute of limitations was not tolled when the dismissal was entered. The Appellants contend that the court was precluded from dismissing the case with prejudice when deciding a Rule 12(b)(6) motion. The Appellants are mistaken. The trial court was well within its discretion to make the dismissal with prejudice under the prevailing circumstances.

To reiterate, S.C. Code Ann. § 15-36-100(E) provides in pertinent part:

> If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit if defective, the plaintiff's complaint is subject to dismissal for failure to state a claim..

S.C. Code Ann. § 15-36-100(E). The statute does not dictate that the dismissal must be with or without prejudice. That remains within the trial court's discretion.[9]

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[9] The same is true with respect to S.C. Code Ann. § 15-36-100(C)(1), which provides:

> If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.

S.C. Code Ann. § 15-36-100(C)(1).

The Appellants contend, nonetheless, that the dismissal was required to be without prejudice because the S.C. Code Ann. § 15-36-100(C)(1) treats the dismissal motion as one brought pursuant to Rule 12(b)(6), and according to the Appellants' reasoning, a Rule 12(b)(6) motion must always be without prejudice. That reasoning is in error. In fact, in the very case cited by the Appellants -- *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006) -- the Supreme Court recognized that the "general prohibition against pleading an affirmative defense in a motion to dismiss has been relaxed in modern practice." 628 S.E.2d at 878. The Supreme Court ruled that affirmative defenses may be raised in a motion to dismiss "when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense." 628 S.E.2d at 878. While the Supreme Court found that a dismissal under Rule 12(b)(6), SCRCP, should generally be without prejudice, and "[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint," that is not the case where the dismissal is premised purely on legal grounds." 628 S.E.2d at 881. In fact, where the dismissal is premised on legal grounds which cannot be corrected by an opportunity to amend, the dismissal should properly be entered with prejudice and without an opportunity to replead or amend. *Id*.

That is what occurred in the case at bar. Not only did the Appellants never request that the trial court allow him to amend their Complaint, any amendment would be futile as to the legal question presented. The trial court correctly found that the Appellants failed to present a contemporaneously filed expert affidavit to establish a breach of the standard of care owed by NP Kevin Morton. The time for filing such an affidavit had expired. Moreover, the trial court correctly recognized that the statute of limitations expired on February 3, 2021, which was prior to the Appellants' filing of their Complaint on March 6, 2021.

S.C. Code Ann. § 15-79-125(A) provides that "[f]iling the Notice of Intent to File Suit tolls all applicable statutes of limitations." S.C. Code Ann. § 15-79-125(A). However, the statute of limitations is only tolled for a finite period of time -- either until sixty days after the pre-suit mediation is impassed or the expiration of the statute of limitations, whichever is later. S.C. Code Ann. § 15-79-125(E). Thus, by the time that the trial court issued its dismissal order on September 14, 2021, the tolling period had clearly expired. There is no provision within S.C. Code Ann. § 15-79-125 or S.C. Code Ann. § 15-36-100 allowing for the tolling of the statute of limitations beyond what is stated in S.C. Code Ann. § 15-79-125(E). In other words, contrary to the Appellants' suggestion, the statute of limitations does not remain tolled while a motion to dismiss filed pursuant to S.C. Code Ann. § 15-36-100(E) is pending. Under the best of scenarios for the Appellants, the

tolling period cannot be extended beyond what is provided for in S.C. Code Ann. § 15-79-125(E).

Thus, when the trial court dismissed the Plaintiff's Complaint for lack of a proper expert affidavit contemporaneously filed with the NOI, the tolling period had already expired *and* the statute of limitations had already expired. Knowing that, the trial court entered the dismissal with prejudice. Frankly, even if the trial court's dismissal with prejudice was somehow in error, it would be harmless error. Clearly, a dismissal without prejudice on September 14, 2021, would have had the same legal effect. Any subsequent attempt by the Appellants to re-file their NOI and lawsuit on or after September 14, 2021, would have been time-barred by the statute of limitations.

Moreover, the trial court was correct in supporting its ruling by addressing the public policy ramifications if the filing of an unqualified or unlawful affidavit were allowed to toll the statute of limitations for some indefinite period, as the Appellants are asserting should be the law -- although that would be in clear contravention of S.C. Code Ann. § 15-79-125(E). As the trial judge points out, a party should not be able to knowingly submit an improper expert affidavit and then toll the statute of limitations while attempting to obtain a proper affidavit that

complies with the statutory requirements. The statute of limitations should not be subject to such machinations by a party.[10]

In sum, the trial court properly entered the dismissal of the Appellants' Complaint with prejudice.

[10] The Appellants also complain that the Respondents did not raise an objection to the High affidavit during the NOI stage of the litigation. However, that is a contention that has no merit or effect. Not only have the Appellants never asserted some type of waiver argument; in reality, the Respondents followed the proper procedure as set forth by statute. In *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014), the Supreme Court incorporated the expert affidavit requirements of S.C. Code Ann. § 15-36-100 into S.C. Code Ann. § 15-79-125 in their entirety. That means that S.C. Code Ann. § 15-36-100(E) dictates when the defendant may file a motion to dismiss based upon the filing of a defective expert affidavit. The challenge to the affidavit is accomplished by the filing of a motion to dismiss contemporaneously with the defendant's initial responsive pleading. There is no provision dictating (or even allowing) an objection or challenge to the expert affidavit to be lodged earlier. That, by the way, is the precise explanation provided by the Respondents' counsel during the hearing. (Tr. pp. 24-26).

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents Kevin Morton NP and Anderson Emergency Associates P.A. respectfully request that the Court affirm the orders issued by Circuit Court Judge R. Lawton McIntosh granting the Respondents' motion to dismiss.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

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January 31, 2022

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Jan 31 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

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

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondents Anderson Emergency Associates P.A., and Kevin Morton NP, does hereby certify that service of the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in

the above-captioned matter was made upon all counsel of record by email only this the 31st day of January 2022:

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January 31, 2022

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

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

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record to this appeal by email only.

If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Jordan C. Calloway, Esquire *(w/ Enclosures, Via Email Only)*
Jay F. Wright, Esquire *(w/ Enclosures, Via Email Only)*
Howard W. Paschal, Jr., Esquire *(w/ Enclosures, Via Email Only)*