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SC Court of Appeals

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.

INITIAL REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ……………………………………………………… iii

Reply Argument

1. Appellants' arguments do not raise "new issues" but rather disputes that were an active part of the circuit court proceedings… 1

2. RN High's affidavit meets all statutory requirements when alleging Morton's nursing errors……………………………….. 4

3. RN High meets the definition of "expert witness" for all of the standard of care violations identified in his affidavit……………… 7

4. Respondents overlook the procedural and substantive limitations of their motion "for failure to state a claim."………………………. 9

5. Respondents propose an unreasonable interpretation of the expert affidavit "amendment" provision at odds with the legislature's intent………………………………………………… 13

6. The circuit court erred in dismissing Appellants' claims "with prejudice" based on a statute of limitations argument Respondents expressly stated was not at issue……………………….. 15

Conclusion ……………………………………………………………. 17

TABLE OF AUTHORITIES

South Carolina Cases

Brazell v. Windsor,
384 S.C. 512, 682 S.E.2d 824 (2009)………………………………………… 10

Camp v. Springs Mortgage Corp.,
310 S.C. 514, 426 S.E.2d 304 (1993)………………………………………. 11

Cartee v. Lesley,
286 S.C. 249, 333 S.E.2d 341 (Ct. App. 1985)……………………………. 8

Clark v. Aiken County Government,
366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005)………………………………. 3

Cole Vision Corp. v. Hobbs,
394 S.C. 144, 714 S.E.2d 537 (2011)……………………………………….. 12

Doe v. Marion,
373 S.C. 390, 645 S.E.2d 245 (2007)……………………………………….. 10

Eades v. Palmetto Cardiovascular & Thoracic, P.A.,
422 S.C. 196, 810 S.E.2d 848 (2018)……………………………………….. 16, 17

Elam v. South Carolina Department of Transportation,
361 S.C. 9, 602 S.E.2d 772 (2004)………………………………………….. 3

Ellis v. Oliver,
323 S.C. 121, 473 S.E.2d 793 (1996)……………………………………….. 6

Grier v. AMISUB of South Carolina, Inc.,
397 S.C. 532, 725 S.E.2d 693 (2012)……………………………………….. 4-6

Hooper v. Ebenezer Senior Services & Rehabilitation Center,
386 S.C. 108, 687 S.E.2d 29 (2009)…………………………………………. 16

Jensen v. South Carolina Department of Social Services,
297 S.C. 323, 37 S.E.2d 102 (Ct. App. 1988)……………………………….. 12

Lindsay v. Lindsay,
328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997)……………………………… 3

McCormick v. England,
328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)……………………………… 10

Ramage v. Ramage,
283 S.C. 239, 322 S.E.2d 22 (Ct. App. 1984)……………………………….. 3

Ranucci v. Crain,
409 S.C. 493, 763 S.E.2d 189 (2014)………………………………………. 16, 17

Ross v. Waccamaw Community Hospital,
404 S.C. 56, 744 S.E.2d 547 (2013)………………………………………… 16

Spence v. Spence,
368 S.C. 106, 628 S.E.2d 869 (2006)……………………………………….. 10

State v. Council,
335 S.C. 1, 515 S.E.2d 508 (1999)…………………………………………… 13

Turner v. Daniels,
404 S.C. 430, 746 S.E.2d 40 (2013)…………………………………………. 11

Other Jurisdictions

Fenias v. Reichenstein,
11 A.2d 10 (N.J. 1940)……………………………………………………... 8

Miller v. Travelers Insurance Co.,
141 S.E.2d 223 (Ga. App. 1965)…………………………………………… 8

Seaboard Air Line Rail Co. v. Lake Region Packing Association,
211 So.2d 25 (Fla. App. 1968)……………………………………………….. 8

Sharp v. 251st Street Landfill, Inc.,
925 P.2d 546 (Okla. 1996)………………………………………………….. 8

Wesely v. Flor,
806 N.W.2d 36 (Minn. 2011)……………………………………………….. 14

Statutes and Court Rules

S.C. Code Ann. § 15-36-100(A)(1)……………………………………........ 7

S.C. Code Ann. § 15-36-100(B)…………………………………………………….. 4, 6

S.C. Code Ann. § 15-36-100(C)(1)…………………………………………………….. 1, 10

S.C. Code Ann. § 15-36-100(E)……………………………………………………1, 10, 12-18

S.C. Code Ann. § 15-36-100(G)……………………………………………………….. 17

S.C. Code Ann. § 40-33-20(40)………………………………………………………… 2

S.C. Code Ann. § 40-33-20(48)……………………………………………………….. 6

S.C. Code Ann. § 40-33-42(B)(5)……………………………………………………… 6

S.C. Code Ann. § 40-47-20(36)(h)…………………………………………………….. 8, 15

S.C. Code Ann. § 15-79-125(A)……………………………………………………….. 7, 12, 17

S.C. Code Ann. § 15-79-125(B)……………………………………………………….. 12

Rule 7(b)(1), SCRCP ………………………………………………………………. 15

Rule 12(b)(6), SCRCP………………………………………………………………. 10

Rule 56(c), SCRCP………………………………………………………………….. 13

Rule 702, SCRE……………………………………………………………………… 13

Secondary Source

Black's Law Dictionary (11th ed. 2019)……………………………………………….. 14

REPLY ARGUMENT

The position Respondents stake out in their brief would transform the expert affidavit requirement for medical malpractice claims, and the statutorily-circumscribed motion to challenge these affidavits, into something very different than what the legislature intended. Respondents would have the Court hold that a claimant's "expert witness" must hold the same job title and professional license as the defendant (Resp'ts Br. at 13-14) even though the statute extends expert status to any individual with potentially helpful specialized knowledge. S.C. Code Ann. § 15-36-100(A)(3). Respondents argue the seven standard of care violations identified in RN High's affidavit are not enough (Resp'ts Br. at 11-12) even though, by statute, the affidavit must only specify "one negligent act." S.C. Code Ann. § 15-36-100(C)(1). Respondents make these arguments while asking the Court to conduct a wide-ranging inquiry into discovery responses, medical records, and subpoenaed documents (e.g. Resp'ts Br at 4, 16) despite the legislature's direction that Respondents' motion is for "failure to state a claim" that must be limited to the Complaint, challenged affidavit, and its attachments. S.C. Code Ann. §15-36-100(E). In both its procedural and substantive flaws, Respondents' approach would demand at the Notice of Intent to File Suit ("NOI") stage what no medical malpractice plaintiff could reasonably be expected to provide. Since Respondents' position is not just unreasonable but also contrary to the governing statutes, it should be rejected, and the circuit court's order dismissing Appellants' claims should be reversed.

1. Appellants' arguments do not raise "new issues" but rather disputes that were an active part of the circuit court proceedings.

Respondents contend Appellants' Brief raised a "new theory" with two components (Resp'ts Br. at 10). This allegedly "new" theory first posits that nurse practitioners like Morton have a dual role that consists of both nursing duties and medical acts with the former governed by

the same nursing standard of care that would apply to any other nurse performing nursing tasks. Id. Second, Respondents claim surprise at Appellants' assertion that RN High "was qualified to render opinions on the standard of care owed by NP Morton as a 'nurse.'" Id.

Both of these issues were active parts of the circuit court proceedings. Morton's dual role of performing nursing functions and limited medical acts was the source of Appellants' counsel's argument to the circuit court that Respondents' motion to dismiss relied on "fictitious" or "false" labels that failed to adequately account for how emergency room care is actually provided. (Hearing Tr. 50:15-51:18). Moreover, Morton's dual role is written in to the very statute the parties discussed in the circuit court (e.g. Defs. Mem. in Supp. of Mot. to Dismiss at 4) and that Respondents cite in their brief here. (Resp'ts Br. at 2 n. 2) (citing S.C. Code Ann. 40-33-20(40))[1]. While it is true a nurse practitioner is authorized to perform limited, designated medical acts, he/she remains primarily a registered nurse with all that nursing duties that term includes. S.C. Code Ann. § 40-33-20(40) ("Nurse Practitioner or NP means "a registered nurse . . ."). The circuit court then used this statute in support of its ruling. (Order at 6, 7). Accordingly, this issue was adequately considered by the circuit court and properly included in Appellants' briefing here.

Similarly, it is not a "new theory" for Appellants to argue RN High was qualified to offer nursing standard of care opinions. Appellants consistently argued RN High is qualified to offer opinions on all the standard of care violations identified in his affidavit including the nursing failures to perform repeat blood pressure and pain checks. E.g. Plas.' Mem. in Opp. to Defs.' Mot. to Dismiss at 5 (arguing RN High "is extensively qualified to offer expert testimony opinions as to the appropriate care and treatment that Mr. Williford should have received while in the

[1] Respondents label this statute as S.C. Code Ann. § 44-33-20(40) but that appears to be a scrivener's error as the text cited comes from S.C. Code Ann. § 40-33-20(40).

emergency department . . ."). Respondents' counsel knew this was an issue during circuit court proceedings and even admitted RN High's nursing qualifications. (Hearing Tr. at 22:11-13) ("He is qualified to standard of care on a nurse. A nurse is fine, I have got no problem with that.").

Moreover, Respondents' counsel specifically acknowledged to the circuit court the parties' dispute over whether the alleged misconduct in Appellants' NOI concerned "nurse practitioner functions, not a nurse function." (Hearing Tr. at 21:14-15). Respondents' counsel argued the misconduct at issue here were strictly medical acts but admitted Appellants denied that assertion. (Hearing Tr. at 21:15). Also notable is Respondents' counsel's evaluation of that dispute. Whatever the parties' position on its merits, Respondent's counsel told the circuit court that this was a dispute that should not be decided on its motion to dismiss. (Hearing Tr. at 21:15-16) ("And they can deny that, that is fine, we can handle that on another day").

In sum, both components of the allegedly "new theory" discussed in Appellants' first issue on appeal were thoroughly discussed and considered by the circuit court. Both components were even acknowledged as issues by Respondents' counsel in his circuit court arguments. Under South Carolina law, issue preservation rules will not be interpreted to "create a trap for the unwary." <u>Clark v. Aiken Cnty. Gov't</u>, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005) (citing <u>Elam v. S.C. Dep't of Transp.</u>, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004)). An issue is preserved so long as Appellants' position is "reasonable clear" from their circuit court arguments. <u>Lindsay v. Lindsay</u>, 328 S.C. 329, 339, 491 S.E.2d 583, 589 (Ct. App. 1997) (citing <u>Ramage v. Ramage</u>, 283 S.C. 239, 322 S.E.2d 22 (Ct. App. 1984)). As the citations above show, whether Morton's alleged misconduct included nursing errors and whether RN High was qualified to opine on nursing errors were actively litigated by the parties and actively considered by the circuit court. Respondents'

preservation arguments are misplaced, and Appellants' first issue on appeal should be addressed on its merits.

2. RN High's affidavit meets all statutory requirements when alleging Morton's nursing errors.

Beyond its misguided preservation concerns, Respondents argue RN High's affidavit is insufficient on its merits to allege nursing errors by Morton. (Resp'ts Br. 11-13). However, Respondents grossly overstate the statutory requirements for an expert affidavit and disregard South Carolina Supreme Court precedent defining these requirements. Then Respondents contend that the nursing errors RN High ascribes to Morton are in reality medical acts. (Resp'ts Br. at 15-16). But, Respondents offer zero authority for that conclusion which is rejected by South Carolina statute.

There are only two statutory requirements for the substance of an expert affidavit. S.C. Code Ann. § 15-36-100(B). The affidavit must specify (1) "at least one negligent action claimed to exist"; and (2) "the factual basis for each claim." Id. RN High's affidavit meets both. The first requirement was previously defined in Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012). An affidavit properly alleges "at least one negligent action" simply by stating any single "breach of the standard of care." Id. RN High's affidavit states multiple "specific breaches of the standard of care" by listing seven negligent acts and omissions occurring during the emergency room care provided to Mr. Williford. (RN High Aff. ¶ 4). Respondents argue these assertions are insufficient because RN High referenced Morton along with other tortfeasors ("employees of AnMed Health and/or private practices staffing the AnMed Health Emergency Department") rather than identifying him by name. (Resp'ts Br. at 11-12).

Nothing in 15-36-100(B) bars reference to similarly-situated joint tortfeasors by category rather than by name. In fact, Grier warned against parsing the NOI and expert affidavit statutes for

requirements the legislature chose not to explicitly impose. 397 S.C. at 539, 725 S.E.2d at 697 (rejecting hospital's argument that NOI statute included unstated requirements through "implicit legislative intent"). Since these statutes are in derogation of common law, they must be strictly construed. Id. at 538, 725 S.E.2d at 697 ("section 15-36-100 cannot extend any further than what the General Assembly clearly intended"). Plus, it is notable that Respondents do not deny Morton falls within the categorical description RN High used to describe the tortfeasors. In other words, Respondents do not contest that the "private practices staffing the AnMed Health Emergency Department" include Respondents—i.e. AEA and Morton. Thus, Respondents' argument amounts to little more than a complaint that Morton's name was not included in paragraph 4 of RN High's affidavit. In addition to asserting requirements the statute does not impose, Respondents wrongly ask the Court to elevate the form of an affidavit over its substance. RN High's affidavit in its current verbiage meets the statutory duty to specify a negligent act.

Respondents then boldly claim RN High's affidavit shows "absolute disregard" for the requirement of a "factual basis for each claim." (Resp'ts Br. at 12). On this point, Respondents simply misrepresent RN High's affidavit which reads in part:

> The factual basis for my opinion about the breaches of the standard of care by agents, and/or employees of AnMed Health and/or private practices staffing the AnMed Health Emergency Department at this time are the medical records of Douglas Williford.

(RN High Aff. ¶ 6). As Grier recognized, the "factual basis" requirement demands only "a basis for [the expert's] opinion regarding breach" of the standard of care. 397 S.C. at 538 n. 1, 725 S.E.2d at 697 n. 1. Paragraph 6 of RN High's affidavit identifies Mr. Williford's medical records as the factual basis for his breach opinions. He even offers more specifics in paragraph 3 by identifying the three sets of medical records he reviewed when forming his opinions. (RN High Aff. ¶ 3). Respondents cannot credibly claim a medical record review is an insufficient basis for

an expert to find the breach element of a medical negligence claim. See Ellis v. Oliver, 323 S.C. 121, 129-30, 473 S.E.2d 793, 797 (1996) ("in forming opinions about a patient, medical experts routinely rely on the patient's medical records"). Additionally, to the extent Respondents are suggesting an expert affidavit just must be more detailed, the Court should note the legislature's warning against demanding too much so soon in the litigation process. RN High was required to provide a "factual basis for each claim" but only "based on the available evidence" before the suit has been filed and before even the first discovery request has been made. S.C. Code Ann. § 15-36-100(B). RN High's affidavit meets that requirement and demanding more contravenes the legislature's stated intent.

Finally, Respondents argue Morton's alleged nursing errors really ought to be classified as negligent medical acts. (Resp'ts Br. at 15-16). When RN High criticizes Morton for "[f]ailure to do repeat vital[]" sign checks and "[f]ailure to do repeat pain" scale assessments (RN High Aff. ¶ 4), Respondents argue, these are criticisms of "medical treatment planning" rather than nursing functions. (Resp'ts Br. at 15). Respondents cite nothing in support of that conclusion, and South Carolina law does not support it. "[A]ssessing" and "analyzing a patient's health status, "proscribing nursing interventions," and "implementing" those interventions are all included within South Carolina's definition for the "[p]ractice of registered nursing." S.C. Code Ann. § 40-33-20(48)(a)-(e). Taking vital signs certainly does not rise to the level of a medical act as even unlicensed nursing assistances are permitted by law to complete this task. S.C. Code Ann. § 40-33-42(B)(5).

Thus, RN High's affidavit meets both statutory requirements when alleging Morton failed to properly monitor Mr. Williford's vital signs and pain level. Respondents' objections to these allegations disregard the holding in Grier, overlook South Carolina law on the scope of nursing

authority, and would impose requirements on expert affidavits that would be unreasonable to expect at the NOI stage of any medical malpractice case.

3. RN High meets the definition of "expert witness" for all of the standard of care violations identified in his affidavit.

In ruling RN High did not qualify as an "expert witness" for purposes of drafting a pre-suit affidavit, the circuit court improperly applied multiple statutes. (Order at 5-6).

A medical malpractice plaintiff must file with his NOI "an affidavit of an expert witness." S.C. Code Ann. § 15-79-125(A). Section 15-79-125(A) expressly adopts the expert affidavit requirements from section 15-36-100 including the definition of "expert witness" in section 15-36-100(A). That definition provides multiple methods for an affiant to qualify as an "expert witness." S.C. Code Ann. § 15-36-100(A)(1)-(3). One method focuses on the affiant's board certification, knowledge, and experience "in the area or practice in which the opinion is to be given." S.C. Code Ann. § 15-36-100(A)(1)-(2). The other method is intentionally drafted more broadly to focus on alternative ways an affiant may acquire the required "expert" qualifications. S.C. Code Ann. § 15-36-100(A)(3). Even without board certification and experience in the area or practice in which the opinion is to be given, an affiant qualifies as an "expert witness" if he "has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both." Id.

The circuit court focused on the first method when evaluating RN High's qualifications, finding he was not an "expert witness" because he is "not licensed, board certified nor does he work within the same discipline (nursing vs. medicine) as NP Morton." (Order at 5).[2] Appellants'

[2] The circuit court also deemed RN High's affidavit "illegal," an assertion that appears based on the notion that signing the affidavit constitutes the "practice of medicine." (Order at 5) (citing S.C.

counsel specifically asked the circuit court to consider RN High's qualifications under the section 15-36-100(A)(3) method. (Hearing Tr. at 47). RN High can meet the requirements of that method for all of the standard of care violations identified in his affidavit even if he does not have a medical degree and even if he does not actively perform the procedures his opinions discuss.

By its plain language, section 15-36-100(A)(3) allows an expert to be qualified by "study, experience, or both." Since this language is stated in the disjunctive sense, the legislature intended to allow for expert qualification based on experience alone, a combination of experience and study, or study alone. When interpreting the similar language in Rule 702, SCRE (i.e. "knowledge, skill, experience, training, or education"), this court has held that education without experience or certification can be enough to qualify an individual as an expert. Cartee v. Lesley, 286 S.C. 249, 258-59, 333 S.E.2d 341, 346 (Ct. App. 1985) (finding expert's opinion was not objectionable simply because it was based on expert's study of a book rather than the expert's experience). Cartee relied on a Georgia appellate court opinion ruling that "[e]xpert opinion is admissible even where in reaching his opinion the expert derived all his knowledge on the subject from reading medical authorities." Miller v. Travelers Ins. Co., 141 S.E.2d 223, 225 (Ga. App. 1965).[3] Thus, the Court

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Code Ann. § 40-47-20(36)(h)). As Appellants' pointed out in their initial brief, the statute in question does not apply to nurses and, therefore, RN High's affidavit is not the "practice of medicine" and is not "illegal." (Appellants' Br. at 17). Respondents offer nothing in their brief to defend the circuit court's ruling on this point.

[3] See also Sharp v. 251st Street Landfill, Inc., 925 P.2d 546, 551 (Okla. 1996) (reading the state's Rule 702 to make "quite clear" that "actual hands-on experience in a particular field is not necessary for one to be qualified as an expert in the field, but study alone can be sufficient"); Seaboard Air Line R. Co. v. Lake Region Packing Ass'n, 211 So.2d 25, 31 (Fla. App. 1968) ("it is generally recognized that one may qualify to express an opinion as a skilled or expert witness by virtue of study of authoritative sources even without practical experience"); Fenias v. Reichenstein, 11 A.2d 10, 12 (N.J. 1940) ("a person may be qualified to testify as an expert either by study without practice or by practice without study").

should reject Respondents' contention that RN High is unqualified unless his practice includes the procedures on which he offers opinions. (Resp'ts Br. at 13-14).

RN High's education meets the "study" requirement to qualify as an "expert witness" under section 15-36-100(A)(3). RN High's education is not limited to just a nursing degree. He also holds a master's degree in public health and a master's degree in healthcare professional education. (RN High CV at 1). This education was sufficient to qualify RN High to offer all of the opinions stated in his affidavit. RN High's experience only further enhances his qualifications under section 15-36-100(A)(3). For nearly fifteen years, he has served as "Trauma Resuscitation Manager" for Vanderbilt University Medical Center, a Level I trauma center. Id. In that capacity, RN High oversees "intake and resuscitation" of thousands of Level I trauma patients. Id. He also conducts quality assurance reviews in addition to his teaching functions. Id. Those teaching functions cover "a multitude of disciplines" including "*all* issues relating to trauma care." Id. at 2 (emphasis added).

In sum, the circuit court erred in finding board certification, licensure, or experience in the field were required to qualify as an expert witness. (Order at 5). RN High's education alone represents the "study" necessary to qualify under section 15-36-100(A)(3) to offer opinions on all standard of care violations asserted against Respondents in his affidavit. His experience as a trauma manager and educator on trauma issues further enhanced RN High's qualifications and further demonstrates the circuit court's error in ruling he was unqualified.

4. Respondents overlook the procedural and substantive limitations of their motion "for failure to state a claim."

Respondents' Brief consistently asks the Court to construe the Complaint in their favor (Resp'ts Br. at 14 (citing Compl. ¶ 37)), resolve the parties' factual dispute, and consider documents well outside of the Complaint and its attachments. (Resp'ts Br. at 17). All of these

requests go well beyond the scope of inquiry for the limited motion the legislature authorized by statute.

The circuit court dismissed Appellants' claims in response to Respondent's motion to dismiss authorized by section 15-36-100(E) to challenge an expert affidavit. (Order at 9-10; Resp'ts Br. at 6). Any such motion is limited to arguments that a claimant's proposed expert affidavit is "defective" and must be treated as a request to "dismiss[] for failure to state a claim." S.C. Code Ann. § 15-36-100(E); see also S.C. Code Ann. § 15-36-100(C)(1) (stating that a complaint lacking the required affidavit is "subject to dismissal for failure to state a claim").

"Failure to state a claim" is a legal term of art referring to the motion governed by Rule 12(b)(6). See Fed. R. Civ. P. 12(b)(6) (authorizing a defending party to assert by motion a defense based on an alleged "failure to state a claim upon which relief can be granted"). Rule 12(b)(6), SCRCP recognizes the same motion using very similar language—i.e. "failure to state facts sufficient to constitute a cause of action." Despite the slight variation in language from the federal rule, South Carolina courts routinely refer to a Rule 12(b)(6), SCRCP motion as a motion for "failure to state a claim." E.g. Brazell v. Windsor, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

By describing the motion authorized by section 15-36-100(E) in Rule 12(b)(6) terms, the legislature unambiguously intended to bound the motion by rules and limitations governing Rule 12(b)(6) motions. The primary rule governing these motions limits the documents a court may consider to the pleading the moving party seeks to dismiss and the documents attached to it. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) ("the trial court must base its ruling solely on allegations set forth in the complaint."); McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997) (limiting consideration to allegations "on the face of the complaint").

That rule was violated here. The circuit court should have determined the sufficiency of Appellant's Complaint and RN High's affidavit solely from the Complaint, the affidavit, and the affidavit's exhibit (i.e. RN High's curriculum vitae). Instead, the circuit court cited discovery responses (Order at 3), unspecified portions of Mr. Williford's medical records (Order at 7), and documents obtained via subpoena from Vanderbilt University Medical Center. (Order at 4 ¶ 8; at 5 n. 1). Respondents also stray from the permissible documents in their brief. Respondents rely on a portion of Mr. Williford's emergency room chart to incorrectly conclude Morton performed no nursing functions when caring for Mr. Williford. (Resp'ts Br. at 16). Respondents then vaguely claim "the record" shows Morton was not part of AnMed's medical staff (Resp'ts Br. at 16) but point to no portion of the Complaint, RN High's affidavit, or his CV that support that assertion.

Respondents also fail to heed other crucial rules on motions for failure to state a claim. For example, in ruling on such a motion, a court must construe complaint allegations liberally in the plaintiff's favor. Turner v. Daniels, 404 S.C. 430, 431 n. 1, 746 S.E.2d 40, 41 n. 1 (2013). Respondents ask the Court to do the opposite. In support of their misguided preservation argument, Respondents ask the Court to interpret Complaint paragraph 37 contrary to its plain language and in Respondents' favor. (Resp'ts Br. at 14). Respondents claim this paragraph is solely directed to Mr. Williford's diagnosis and discharge but its plain language also alleges "Nurse Morton" was wrong in not "rechecking [Mr. Williford's] blood pressure" (Compl. ¶ 37), a direct match for the criticism of Morton's nursing functions identified in RN High's affidavit. (High Aff. ¶ 4). Even if this language were ambiguous, a court would be required to interpret it in the light most favorable to Appellants.

Additionally, granting a motion to dismiss for failure to state a claim is improper where further factual development is needed. Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426

S.E.2d 304, 306 (1993); Jensen v. S.C. Dep't of Soc. Servs., 297 S.C. 323, 334, 37 S.E.2d 102, 108 (Ct. App. 1988). Respondents' brief shows the parties dispute whether Morton's actions during Mr. Williford's emergency room visit included nursing functions. But, Respondents then ask the Court to resolve that dispute on their procedural motion. Resp'ts Br. at 16 (arguing allegations that Morton performed nursing functions "are unsupported factually"). That is not a proper argument in support of a motion to dismiss for failure to state a claim as courts are required to accept all complaint allegations as true. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011). Moreover, Morton's precise action during Mr. Williford's emergency room visit is a factual dispute that has not been explored in any substantive sense. Neither Morton nor any of the other treatment providers have been deposed. A full discovery process would be required before a court would have the record needed to rule on this matter.

The circuit court's citations and Respondents' references are not just technically improper, they grant Respondents an unwarranted and unpermitted substantive advantage. Respondents' motion tests only the sufficiency of RN High's affidavit, a document which by law must be submitted before even the Complaint is filed (S.C. Code Ann. § 15-79-125(A)) and before Appellants were permitted to pursue any information in discovery. S.C. Code Ann. § 15-79-125(B). For Respondents to be permitted to reach beyond the Complaint/affidavit and to argue its merits position on a disputed factual matter based on documents solely within its control presents a skewed picture of crucial details that Appellants have not had a chance to investigate or rebut. The legislature's purpose for describing section 15-36-100(E) challenges as motions to dismiss for "failure to state a claim" was to limit the scope of the inquiry to the Complaint/affidavit alone. A more probing inquiry of an expert's qualifications and resolution of the parties' merits-based

factual disputes is available later in the litigation process[4] when the record is sufficiently developed to fully present those issues for a court's resolution.

5. Respondents propose an unreasonable interpretation of the expert affidavit "amendment" provision at odds with the legislature's intent.

Once Respondents belatedly raised their misguided challenged to RN High's substantial qualifications, Appellants acted quickly to amend their expert affidavit offering through emergency medicine physician Dr. Michael Chansky. (M. Chansky Aff.). Unable to mount a challenge to Dr. Chansky's qualifications, Respondents instead argue his assertions of negligence do not count as the "amendment" authorized by statute. Respondents' interpretation of "amendment" errs because it is inconsistent with both the plain meaning of the word and persuasive authority addressing a similar situation. More broadly, Respondents' reading of the term cannot stand because it undermines the very function of the "amendment" process the legislature deemed important enough to include in the statute.

When a defending party challenges an expert affidavit in a professional negligence suit, "the plaintiff may cure the alleged defect by amendment." S.C. Code Ann. § 15-36-100(E). Respondents ask the Court to interpret "amendment" to "require[] the same expert witness correcting an error in the first affidavit." (Resp'ts Br. at 23). However, the dictionary definitions cited by both sides do not support such a restrictive reading. See (Appellants' Br. at 14; Resp'ts Br. at 22). Respondents argue Dr. Chansky's affidavit is not an "amendment" because it is "new." (Resp'ts Br. at 17, 22). But even Respondents admit newness is not at odds with "amendment" as they later acknowledge the term includes "addition[s]" along with deletions and corrections.

[4] For example, the admissibility of expert testimony may be challenged under Rule 702, SCRE and the reliability principles articulated in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Whether a plaintiff's factual disputes are "genuine[ly]" disputed may be challenged in a motion for summary judgment after a period of adequate discovery. Rule 56(c), (f), SCRCP.

Resp'ts Br. at 22 (citing Black's Law Dictionary (11th ed. 2019)). Respondents also point to no case law that reads "amendment" so narrowly in the context of pre-filing requirements for professional negligence claims. When addressing a similar argument, 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." (Appellants' Br. at 15 n. 5) (citing Wesely v. Flor, 806 N.W.2d 36, 44 (Minn. 2011)).

Respondents' restrictive reading would also hollow out the "amendment" provision and undermine the remedial process the legislature intended to provide for plaintiffs. Respondents are very direct in stating their view that the "amendment" provision should never be permitted to apply to challenges to an expert affidavit like the one raised here. In Respondents' view, once a defendant objects to an expert affidavit on qualification grounds, the "amendment" provision is effectively rendered moot because the current affiant is allegedly unqualified and any filing by a different affiant could not count as an amendment. (Resp'ts Br. at 23) (arguing "Nurse High cannot file an amendment in this case" to cure qualification challenge "because he is not qualified"). That view effectively removes an entire class of objections from the amendment provision's reach. And, since the affiant's qualifications is one of the very few statutory requirements for an expert affidavit, Respondents' view would dramatically narrow a remedial provision the legislature deemed sufficiently important to write into section 15-36-100(E). Such a dramatic result that allows a defendant to avoid addressing an opponent's claims on their merits should be reached only if the statutory text unambiguously demands it. That is not the case here.[5]

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[5] Beyond the parties' dispute over the definition of "amendment," Respondents argue Appellants cannot utilize the amendment provision because Dr. Chansky's affidavit does not address a "defect" in RN High's affidavit. (Resp'ts Br. at 23). That assertion is inconsistent with the very motion Respondents filed. Respondents admit (Resp'ts Br. at 6) the basis for the motion underlying this appeal is section 15-36-100(E), which only authorizes a motion to dismiss when an expert's

In short, the Court should reject Respondents' proposed restriction on section 15-36-100(E)'s "amendment" provision as inconsistent with the statute's language and the legislature's intent. Therefore, even if RN High's affidavit was defective, Dr. Chansky's affidavit was an effective amendment, and Respondents' motion to dismiss should have been denied.

6. The circuit court erred in dismissing Appellants' claims "with prejudice" based on a statute of limitations argument Respondents expressly stated was not at issue.

The first sentence of Respondents' final argument notes the circuit court dismissed Appellants' claims with prejudice after finding the statute of limitations was not tolled. (Resp'ts Br. at 24). What Respondents fail to explain is how this finding was proper given that it was made after their counsel explicitly asked the circuit court to not even consider the tolling question. (Hearing Tr. at 24) ("we are not bringing up the tolling of the statute of limitations" and "it is not an issue today"). The truth is that, while Respondents accuse Appellants of unfair "machinations" (Resp'ts Br. at 28), it was Respondents who told the circuit court to look past the tolling dispute and then wrote a ruling on tolling into the proposed order anyway.

Now Respondents argue that, even if the "with prejudice" dismissal was in error, it was ultimately harmless. (Resp'ts Br. at 27). This argument misses several important points. For one, Respondents are asking the Court to disregard a basic motion practice rule. If Respondents wanted a dismissal with prejudice, it was their duty to ask for it. Rule 7(b)(1), SCRCP (requiring moving party to "set forth the relief or order sought" in its motion). This is not a pro forma requirement. Knowing what relief its opponent seeks guides the responding party's preparation of a response.

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affidavit is "allegedly defective" and requires the movant to "allege[], with specificity . . . that the affidavit is defective." Thus, Respondents had to allege RN High's affidavit had a "defect" in order to seek dismissal in the first instance. Plus, Respondents' argument is based on the notion that RN High's affidavit is not "defective" because it is "illegal." As discussed above, Respondents' "illegality" argument lacks merit because it misreads the plain language of S.C. Code Ann. § 40-47-20(36)(h). Supra at 7-8 n. 2.

Appellants' counsel did not make a full showing in support of their tolling argument at the circuit court hearing because Respondents' counsel had already taken that issue off the table. Plus, applying the timing limitations for a NOI and expert affidavit must consider the equities of each case. E.g. S.C. Code Ann. § 15-36-100(E) (allowing courts to extend deadline for amended expert affidavit as "justice requires"). Even considered more broadly, no tolling analysis is complete without considering equitable factors. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009).

Here, the equities demand Respondents account for their delay in raising an objection to RN High's affidavit. The affidavit was included in Appellants' NOI filed on November 5, 2020. Respondents received the affidavit on January 7, 2021 (Aff. of Service for Morton and AEA), nearly one month before they claim the statute of limitations elapsed on Appellants' claims (February 3, 2021). Yet, Respondents waited more than three months before raising any objection. (Defs.' Mot. to Dismiss, dated Apr. 13, 2021). By footnote only, Respondents argue the statute tied their hands and that they could not have raised their concerns during the NOI process. (Resp'ts Br. at 28). However, Respondents never address the collection of South Carolina cases that have recognized motions to dismiss filed at the NOI stage of a medical malpractice case. (Appellants' Br. at 17 n. 6) (citing Eades v. Palmetto Cardiovascular & Thoracic, P.A., 422 S.C. 196, 199, 810 S.E.2d 848, 849 (2018); Ranucci v. Crain, 409 S.C. 493, 498, 763 S.E.2d 189, 191 (2014); Ross v. Waccamaw Community Hospital, 404 S.C. 56, 62, 744 S.E.2d 547, 550 (2013)).

Respondents also fail to recognize an important point about the statute they cite. Section 15-36-100(E) does speak of a motion to challenge an expert affidavit by reference to the movant's "initial responsive pleading." However, section 15-36-100 governs *all* forms of professional negligence claims for professions ranging from attorneys to architects to land surveyors. S.C. Code

Ann. § 15-36-100(G). For suits against all non-medical professionals, no NOI is required. (S.C. Code Ann. § 15-79-125(A) (limiting NOIs to "medical malpractice" claims). A defendant's answer is the first available moment when the defendant could raise a challenge. That is why section 15-36-100(E) does not specifically reference a motion to dismiss during the NOI process. But, the legislature's intent is still clear. The challenge is to come ***at the first available opportunity***. Since Eades, Ranucci, and Crain have recognized a motion to dismiss was available to Respondents during the NOI process, they erred by sitting on their objection and delaying their motion until after the statute of limitations allegedly elapsed. Respondents should not be rewarded for this conduct by receiving a dismissal with prejudice.

Lastly, there is no support in the record for Respondents' assertion that Appellants "knowingly submit[ted] an improper expert affidavit." (Resp'ts Br. at 27). RN High's affidavit met all statutory requirements for the reasons stated above. He had acquired by study and experience substantial knowledge on emergency care for trauma patients through his multiple graduate degrees and role as "Trauma Resuscitation Manager" in a major metropolitan hospital. At the very least, his nursing degree qualified RN High to offer opinions on Morton's failure to perform routine nursing functions like collecting Mr. Williford's vital signs and checking his pain level. Even if Appellants had wrongly evaluated RN High's qualifications—which is denied—they then moved swiftly to amend their affidavit with opinions from an eminently qualified emergency room physician.

CONCLUSION

Based on the arguments above and those in their earlier brief, Appellants respectfully request the Court reverse the circuit court's order dismissing Appellants' claims with prejudice. Appellants' NOI and expert affidavit met all requirements imposed by section 15-79-125 and 15-

36-100. Alternatively, Appellants correctly executed an "amendment" to RN High's affidavit as permitted by section 15-36-100(E). At the very least, the circuit court erred in dismissing Appellants' claims with prejudice because the circuit court ruled on a tolling dispute Respondents assured it was not part of the underlying motion.

Respectfully submitted,

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