

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 Donnis Henderson as the Personal)
 Representative of the Estate of Charles)
 Michael Henderson,)
)
) *Plaintiff,*)
)
 vs.)
)
 Spartanburg Health Services District, Inc.,)
 James L. Peters, William Terence Joyce, III,)
 Luther Person and David Edward Pelino)
 individually and as agents and servants of)
 Upstate Carolina Radiology, P.A., Apella)
 Health Management, Inc., by and through its)
 agents and servants.)
)
)
) *Defendants.*)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH CIRCUIT

C.A. No. 2024-CP-42-00427

RECEIVED
May 21 2025
SC Court of Appeals

**AMENDED ORDER GRANTING
DEFENDANT APELLA HEALTH
MANAGEMENT, INC.’S MOTION TO
DISMISS**

A hearing as to a Motion to Dismiss filed by Defendant Apella Health Management, Inc. (“Apella”) was conducted via WebEx by this Court on March 5, 2025. Everett “Hope” Garner, counsel for the Plaintiff, was present at the hearing and presented oral arguments in opposition to the Motion to Dismiss. Walker Barnes, counsel for Apella, was present at the hearing and presented oral arguments in favor of the Motion to Dismiss.

Apella originally filed its Motion to Dismiss on March 29, 2024. With the consent of all parties and this Court, a hearing as to this Motion was continued on multiple occasions. Apella filed a Memorandum in Support of its Motion to Dismiss on March 4, 2025. Plaintiff filed a Memorandum in Opposition to the Motion to Dismiss on March 5, 2025.

At the hearing, both parties aver dismissal will not affect Plaintiff’s ability to recover. Having considered the averment, reviewed the submissions by counsel, hearing all arguments advanced, and based on the below findings of fact and law, this Court hereby **GRANTS** Apella’s Motion to Dismiss and **ORDERS** that all causes of action as to Apella be dismissed with prejudice.

Plaintiff's claims against other defendants to this action are not addressed in this Order and remain pending before this Court.

BACKGROUND

On August 14, 2023, Plaintiff filed a Notice of Intent to File Suit under Civil Action No. 2023-NI-42-00028 ("2023 NOI"), alleging medical negligence against a single defendant, Spartanburg Regional Health Services District, Inc. ("SRHS"). The 2023 NOI neither identified nor included Apella as a named party. The 2023 NOI was never served upon Apella. The 2023 NOI did not identify any alleged negligent act or omission on the part of an Apella employee. Apella was never invited to nor participated in a pre-suit mediation in that action.

On February 1, 2024, Plaintiff filed a Complaint against SRHS under Civil Action No. 2024-CP-42-00427 ("2024 Complaint"). On February 26, 2024, Plaintiff filed an Amended Complaint naming Apella as a new defendant in this matter ("2024 Amended Complaint"). Apella was served with the 2024 Amended Complaint via certified mail on February 29, 2024.

Plaintiff alleges in the 2024 Amended Complaint that Apella "supplied medical providers who rendered treatment to Plaintiff Decedent." Plaintiff further alleges that "Defendants . . . deviated from generally accepted standards of practice in the diagnosis, care and treatment of Plaintiff Decedent in one of the following particulars." Plaintiff alleges that all Defendants to the 2024 Amended Complaint breached the standard of care in the following identical ways:

- a. In failing to timely diagnose and address the worsening small bowel obstruction shown on the x-ray performed on March 21, 2021;
- b. In failing minimally to order, perform, or recommend a CT scan to assess Plaintiff's small bowel obstruction; . . .
- e. In employing improper procedures including but not limited to the inappropriate administration of medications in the treatment of Plaintiff; [and]
- f. In failing to render proper and appropriate medical treatment and follow up care under the prevailing circumstances.

Id.

Plaintiff specifically alleged in the 2024 Amended Complaint that Apella “fail[ed] to properly advise, assist, or otherwise facilitate proper medical care under the circumstances specified herein.” The 2024 Amended Complaint states that it incorporates by reference the expert affidavit from the 2023 NOI. The expert affidavit from the 2023 NOI contains no allegations against Apella. The Amended Complaint did not contain any allegation claiming that based on “the date of filing and, because of [] time constraints. . .an affidavit of an expert could not be prepared.” S.C. Code § 15-36-100(C)(1).

Subsequent to filing her 2024 Amended Complaint naming Apella as a defendant, Plaintiff filed a Notice of Intent to File Suit (“2024 NOI”) identifying Apella on March 8, 2024 under Civil Action No.: 2024-NI-42-00007. No expert affidavit was filed contemporaneously with the 2024 NOI. The 2024 NOI also did not contain any allegation claiming that based on “the date of filing and, because of [] time constraints. . .an affidavit of an expert could not be prepared.” S.C. Code § 15-36-100(C)(1).

Apella filed the present Motion to Dismiss on March 28, 2024. On April 11, 2024, Plaintiff filed an Expert Affidavit (under the 2024 NOI case number) specifically alleging that agents, servants, and employees of Apella breached the standard of care:

- a. In failing to communicate and coordinate proper follow-up between radiologists and surgeons to insure Plaintiff’s worsening health issues were addressed properly; [and]
- b. In failing to adhere to proper procedures to effect appropriate treatment of the Plaintiff of the dire and critical circumstances there prevailing.

No such affidavit has been filed under the present civil action number under which Apella was named in the 2024 Amended Complaint. Neither the 2024 NOI nor the subsequently filed expert affidavit have ever been served on Apella.

Plaintiff does not oppose the above-listed factual timeline or background.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Plaintiff's Pleadings Establish That She is Alleging a Medical Malpractice Action

This Court finds that Plaintiff's pleadings establish that she is alleging a medical malpractice action. Plaintiff alleges in her 2024 Amended Complaint that Apella "supplied medical providers who rendered treatment to Plaintiff Decedent." Further, Plaintiff alleges in her 2024 Amended Complaint that Apella "deviated from generally accepted standards of practice in the diagnosis, care and treatment of Plaintiff Decedent . . . [by] failing to properly advise, assist, or otherwise facilitate proper medical care under the circumstances specified [in the 2024 Amended Complaint]."

This Court also finds that Plaintiff demonstrated her intent to file a medical malpractice claim against Apella by alleging in her 2024 Amended Complaint that she had filed the 2024 NOI, expert affidavit, and Answers to standard Interrogatories "to comply with S.C. Code Ann. §§ 15-79-125, 15-70-100, and 15-36-100." This Court finds that Plaintiff further demonstrated her intent to file a medical malpractice claim against Apella by filing the 2024 NOI.

Based on Plaintiff's pleadings in this matter, this Court finds that Plaintiff alleges a claim sounding in medical malpractice against Apella.

B. Plaintiff's Complaint Must Be Dismissed for Failure to Comply with the Requirements of S.C. Code Ann. § 15-79-125.

As this Court finds that Plaintiff has filed a medical malpractice action, she is held to the requirements of S.C. Code Ann. § 15-79-125 and § 15-36-100. This Court finds that Plaintiff failed to file an NOI against Apella prior to filing a Complaint against Apella as required by S.C. Code Ann. §15-79-125. The 2024 Amended Complaint naming Apella was filed on February 26, 2024. However, the 2024 NOI naming Apella was not filed until March 8, 2024. This Court finds that when Plaintiff filed her 2024 NOI, it was not accompanied by an expert affidavit. Furthermore, the

2024 NOI was never served on Apella. This Court finds that the only expert affidavit making allegations against Apella under either this civil action number or the 2024 NOI civil action number was filed on April 11, 2024: subsequent to the filing of the 2024 Amended Complaint, subsequent to the filing of the 2024 NOI, and as discussed below, subsequent to the running of the statute of limitations in this matter.

This Court finds that due to Plaintiff's non-compliance with the pre-suit requirements of S.C. Code Ann. §15-79-125, Apella never had the opportunity for pre-suit discovery and no pre-suit mediation involving Apella ever took place.

C. Plaintiff Failed to Comply with the Expert Affidavit Requirements of S.C. Code Ann. § 15-36-100(B).

This Court finds that in addition to failing to comply with the pre-suit requirements specific to medical malpractice cases under §15-79-125, Plaintiff also failed to comply with the expert affidavit requirements for professional negligence cases contained in S. C. Code Ann. §15-36-100. This code section requires that contemporaneously with filing a NOI or a Complaint, a Plaintiff must file an affidavit of an expert witness specifying 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). This Court finds that in the present action, Plaintiff failed to file an expert affidavit contemporaneously with her 2024 Amended Complaint naming Apella, and under this civil action number has never filed an expert affidavit. This Court also finds that Plaintiff failed to file an expert affidavit contemporaneously with her subsequently filed 2024 NOI and did not file such an affidavit under that case number until over a month after she filed her NOI.

This Court finds that neither Plaintiff's 2024 Amended Complaint naming Apella nor the 2024 NOI naming Apella were filed within ten days of the statute of limitations for Plaintiff's claims – on or about March 21, 2024. Therefore, this Court finds that the permissible forty-five-

day extension under S.C. Code Ann. § 15-36-100 to Plaintiff's time in which to file an expert affidavit is inapplicable. Even if it were applicable, this Court finds that Plaintiff failed to allege that she needed additional time to file an expert affidavit as part of the 2024 Amended Complaint or the 2024 NOI - thereby failing to comply with § 15-36-100. Rather, this Court finds that the 2024 Amended Complaint incorporated an expert affidavit inapplicable to Apella, and the 2024 NOI erroneously stated that an expert affidavit was attached. This Court finds that based on the subsequently-filed April 11, 2024 date of the expert affidavit alleging negligence against Apella, it is evident that no affidavit alleging negligence on the part of Apella had been finalized by the date of either Plaintiff's 2024 Amended Complaint naming Apella or the 2024 NOI naming Apella.

S.C. Code Ann. § 15-36-100(C)(1) mandates that if an affidavit is not filed contemporaneously, or within the limited extension, "the complaint is subject to dismissal for failure to state a claim." This Court finds that because Plaintiff did not contemporaneously file an expert affidavit with either the 2024 Amended Complaint or the 2024 NOI and did not request more time to do so under S.C. Code Ann. §15-36-100(C)(1), her action must be dismissed.

D. The 2024 Amended Complaint Establishes the Date on or about When Plaintiff's Alleged Injury Occurred.

This Court finds that in addition to establishing the nature of her claim, Plaintiff's 2024 Amended Complaint establishes when the alleged injury occurred. Plaintiff states that alleged "injuries [were] inflicted on Plaintiff Decedent on March 20, 2021, and subsequent thereto were the direct and proximate result of the negligence, recklessness, and carelessness of Defendants." As the decedent passed away on March 22, 2021, there was a narrow two-day window on or about during which the alleged harm could have occurred.

E. Dismissal of Plaintiff's Claims Against Apella Must Be with Prejudice.

Pursuant to S. C. Code Ann. § 15-36-100(F), once dismissed, Plaintiff's action "is not subject to renewal." § 15-36-100(F) states that "if the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation" unless specific requirements are met. S.C. Code Ann. § 15-36-100(F). To defeat dismissal with prejudice, a Plaintiff must show "that the plaintiff had the requisite affidavit within the time required . . . and the failure to file the affidavit is the result of a mistake." *Id.* This Court finds that the notarized date of the 2024 expert affidavit (April 11, 2024), filed subsequent to the filing of the 2024 NOI, is incontrovertible evidence that Plaintiff did not have it within the applicable statute of limitations.

Therefore, this Court finds that Plaintiff's 2024 Amended Complaint against Apella must be dismissed, and pursuant to S.C. Code Ann. § 15-36-100(F), the action "is not subject to renewal."

CONCLUSION

For the reasons set forth herein, Apella's Motion to Dismiss is hereby **GRANTED** and this matter is **DISMISSED WITH PREJUDICE AS TO APELLA ONLY**.

IT IS SO ORDERED.

[Judge McCoy's Electronic Signature to Follow]



Spartanburg Common Pleas

Case Caption: Donnis Henderson As The Personal Representative Of The Estat VS
Spartanburg Health Services District, Inc. , defendant, et al
Case Number: 2024CP4200427
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764