

**EXHIBIT 'A'**

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Fonda E Patrick and Andre Patrick,

Plaintiffs,

v.

Gasnel E. Bryan, M.D., Individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; Frank Y. Chase, M.D., Individually and as agent and/or employee of Aiken Regional Medical Center, LLC; Jonathan H. Anderson, M.D., Individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; and Aiken Regional Medical Centers, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2018-NI-02-00003

*Order Granting Defendants' Motions to Dismiss Plaintiffs' NOI*

**RECEIVED**  
MAY 13 2019  
SC Court of Appeals

This matter came before the Court on March 5, 2019 upon Defendants' motions to dismiss Plaintiffs' Notice of Intent ("NOI") pursuant to Rules 3 and 12(b)(2)(5)&(6) of the South Carolina Rules of Civil Procedure on the basis that Plaintiffs' claims were barred by the applicable statute of limitations. Having listened to oral arguments and reviewed the submissions of the parties, for the reasons more fully set forth below, I hereby grant Defendants' motions and dismiss this case with prejudice.

**RELEVANT FACTS AND PROCDURAL HISTORY**

This is a medical malpractice action. Plaintiffs filed their NOI on January 22, 2018; however, as discussed in more detail below, Plaintiffs did not serve the NOI upon the defendants until November 2018.

In their NOI, Plaintiffs alleged they were injured as a result of a surgical procedure and

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subsequent medical care provided by Defendants on or about January 30, 2015; however, Plaintiffs did not contemporaneously file an affidavit of an expert witness as required by S.C. Code § 15-79-125. Rather, Plaintiffs alleged they had reason to believe the statute of limitations was going to expire within ten days of the filing of the NOI; therefore, they stated they would file an expert affidavit within 45 days as allowed under S.C. Code § 15-36-100(C)(1). As a result, they had until March 8, 2018, to file an expert affidavit.

Shortly after filing the NOI, on February 14, 2018, H. Edward Smith, with consent of Plaintiffs, sought to be relieved as counsel (*see* Feb. 14, 2018 Consent Order). At the time Mr. Smith was relieved as counsel, the NOI had not been served on Defendants, Plaintiffs still had not filed an expert affidavit, and an extension of time to file an expert affidavit had not been requested.

On June 27, 2018, more than five months after they initially filed their NOI, Plaintiffs, at that point acting *pro se*, filed a motion for an extension of time to file an affidavit of an expert witness. Plaintiffs' motion was heard on September 24, 2018. As of the hearing date, the NOI still had not been served upon Defendants, nor were Defendants given any notice of Plaintiffs' motion. Following the hearing, the Court granted Plaintiffs a 45-day extension to file an expert affidavit (*see* September 28, 2018 Order).

On November 7, 2018, Plaintiffs, having recently obtained new counsel, filed a Supplement to Notice of Intent to Sue ("Supplement"), which included an expert affidavit. About a week later, Plaintiffs served the Supplement, the September 28, 2018, Order, and the NOI upon Defendants. That was the first time any of the Defendants had been served with any of the filings in this action, and constituted the first notice Defendants had of this action.

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### LEGAL ANALYSIS

The applicable statute of limitations in this case is three years. S.C. Code § 15-3-545. Filing a NOI tolls the applicable statute of limitations; however, that is subject to the NOI being served upon all defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure. S.C. § 15-79-125. Under the Rules, a summons and complaint must be served within the statute of limitations or within 120 days of filing. Rule 3, SCRPC; *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012).

Plaintiffs filed their NOI on January 22, 2018. Plaintiffs have not disputed that the statute of limitations began to run at the time of, or within a couple weeks of, the surgery performed by Dr. Bryan on January 30, 2015; therefore, pursuant to S.C. Code § 15-3-545, Plaintiffs filed the NOI just before the statute of limitations was set to expire. However, once they filed the NOI, they were then required to properly serve it within 120 days of the filing as dictated by Rule 3, SCRPC, which meant Plaintiffs had until May 22, 2018, to complete service or the statute of limitations would begin to run again.

Unfortunately, Rule 3 mandates a firm deadline for commencing an action within the applicable statute of limitations, which no court has the jurisdiction to extend. *See Mims, supra*. Therefore, contrary to Plaintiffs' contention, while the Court's September 28, 2018, Order may have provided Plaintiffs additional time to file an expert affidavit, it did not extend the deadline for completing service. When Plaintiffs failed to serve their NOI by May 22, 2018, their claims immediately became barred by the applicable statute of limitations.

WHEREFORE, for the reasons stated herein, Plaintiffs failed to commence this action within the applicable statute of limitations and Defendants Bryan, Chase, and Aiken Regional

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Medical Center<sup>1</sup> are all entitled to a dismissal as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this action is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

**\*\*JUDGE'S SIGNATURE PAGE TO FOLLOW\*\***

ELECTRONICALLY FILED - 2019 Apr 15 10:38 AM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

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<sup>1</sup> Plaintiffs previously stipulated to the dismissal Jonathan H. Anderson, M.D. on March 4, 2019.

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**Aiken Common Pleas**

**Case Caption:** Fonda E Patrick , plaintiff, et al VS Gasnel E Bryan , defendant, et al  
**Case Number:** 2018NI0200003  
**Type:** Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165