

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

Jul 20 2020

SC Court of Appeals

The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2019-002009

Jane Doe

Appellant,

v.

Oconee Memorial Hospital, Greenville Health System, Upstate Affiliate Organization,
Kevin Docyk, M.D., Mary Beth Hendricks

Respondents.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

ARGUMENT.....2

I. Appellant Was Actively Engaging in Discovery When Respondents’ Motion for Summary Judgment Was Granted Prematurely.....2

II. Appellant’s Medical Malpractice Claims Relate Back to Appellant’s Initial Complaint.....4

III. Appellant’s Claims Are Not Barred by the Doctrines of Res Judicata and/or Collateral Estoppel.....6

CONCLUSION.....8

TABLE OF AUTHORITIES

CASES

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) -----5

Hardee v. Bio-Medical Applications of S.C., Inc. 370 S.C. 511, 636 S.E.2d 629 (S.C. 2006)
-----7

Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 368 S.C. 108, 687 S.E.2d 29 (S.C. 2009)
-----4

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (SC 1999) -----6

S.C. Pub. Interest Found. v. Greenville County, 401 S.C. 377, 737 S.E.2d 502 (2013)----6

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997)-----5

State v. Hawes, 411 S.C. 188, 767 S.E.2d 707 (2015)-----5

Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377 (1995) -----5

RULES

Rule 15(c), SCRCP ----- 4,5

Rule 15(a), SCRCP -----4

REPLY BRIEF OF RESPONDENTS

REPLY ARGUMENTS

Appellant hereby responds to the arguments set forth in Respondents' initial brief as follows and would argue that for those reasons, as well as those set forth more fully in Appellant's initial brief, the Court should grant Appellant's appeal and reverse the circuit court's October 31, 2019 Order granting summary judgment to Respondents.

I. **Appellant Was Actively Engaging in Discovery When Respondents' Motion for Summary Judgment Was Granted Prematurely.**

Respondents argue that the lower court properly granted their motion for summary judgment on grounds that Appellant's claims were barred by the applicable statute of limitations, which argument Appellant disputes for all those reasons set forth in greater detail in her initial brief. In support thereof, Respondents further argue that the lower court's grant of summary judgment was not prematurely granted without Appellant having been afforded a full and fair opportunity for discovery, and that Appellant's argument to the contrary is disingenuous because Appellant allegedly never sought any discovery on the statute of limitations issue or otherwise. That argument is without merit and seeks to overlook Appellant's express attempts at seeking discovery from Respondents prior to the hearing on their motion for summary judgment.

As a first matter, and despite Respondents' argument to the contrary, Appellant had sought discovery from Respondents, and was continuing to seek discovery from Respondents, at the time Respondents' motion for summary judgment was heard by the circuit court on September 23, 2019. At that time, Appellant had two separate lawsuits pending against Respondents – (1) the instant action for medical malpractice and (2) a separate action alleging causes of action for breach of contract and bailment – and actions were often taken by the parties concurrently in both cases for the sake of efficiency. In fact, and by way of example, Respondents' December 21, 2018 motion to dismiss, which originally raised the issues ultimately addressed in their converted motion for

summary judgment, was filed by Respondent at the same time in both actions under cover of the same document. Similarly, Appellant served her initial discovery requests to Respondents, including interrogatories, requests for production and requests for admission, on January 17, 2019. While Appellant did not send two copies of the requests under the captions of both of then-pending actions, the discovery requests were relevant to both actions and were diligently pursued by Appellant prior to the hearing on Respondents' converted motion for summary judgment in both actions. Regardless, Respondents did not provide full responses to those requests prior to the September 23, 2019 hearing and, instead, argued that they should not be required to engage in any discovery until after their motion for summary judgment in both actions was ruled upon. Accordingly, it is Respondents' contention that Appellant never attempted to conduct any discovery that is disingenuous.

Additionally, and despite Respondent's argument to the contrary, Appellant did not have a full and fair opportunity to conduct full discovery specifically on the statute of limitations issue prior to the September 23, 2019 hearing on Respondents' motion for summary judgment. As noted above, and at the time of that hearing, Respondents had failed to provide complete responses to Appellant's initial discovery requests and were arguing they should not be required to engage in discovery until after the Court's hearing on their motion for summary judgment. Given that Respondents were already refusing to answer Appellant's initial discovery requests, Appellant most certainly did not have a full and fair opportunity to seek additional discovery on Respondents' claim that they were a "governmental entity" under the South Carolina Tort Claims Act, a claim not even raised until after Plaintiff served her first discovery requests on Respondents back in January of 2019. Accordingly, Appellant did not have a full and fair opportunity to serve additional discovery requests regarding the true status of Respondents and whether or not the South

Carolina Tort Claims Act and its two-year statute of limitations was applicable to this matter prior to entry of the circuit court's Order.

II. Appellant's Claims Relate Back to Appellant's Initial Complaint.

Respondents next argue that summary judgment was properly granted on Appellant's medical malpractice claims as time-barred, even in light of Appellant's argument that said claims relate back to her previous complaint pursuant to Rule 15(c) of the South Carolina Rules of Civil Procedure, because Rule 15(c) does not apply under the procedural facts of this case. Specifically, Respondents argue that Rule 15(c) only applies to amended complaints and that Plaintiff's medical malpractice claims were brought by way of a wholly new action and not by way of an amended complaint. Regardless, Appellant asserts that equitable principles require that Plaintiff's complaint in the instant action be treated as an amended complaint, especially in light of the fact that Plaintiff had filed a motion to amend her complaint in the previously dismissed action to allege additional claims against Respondents, which motion the circuit court refused to address and/or rule on prior to dismissal of that entire previous action. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 368 S.C. 108, 687 S.E.2d 29 (S.C. 2009) ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies...").

As noted in Appellant's initial brief, and prior to the hearing on Respondents' motion to dismiss Appellant's prior December 5, 2017 action, Appellant filed a motion to amend her complaint, pursuant to Rule 15(a), to allege additional causes of action against Respondents. However, the circuit court heard no argument on Appellant's motion to amend and completely failed to rule on the motion prior to dismissing that entire action. Had the circuit court properly addressed Appellant's motion to amend in the previous action and allowed her to submit a proposed amended complaint with additional claims, as the interests of justice freely support and appear to mandate,

the claims at issue in the pending action could have been included in the prior action and would not have been subject to an argument that they were time-barred by the applicable statute of limitations. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962) (explaining that Rule 15(a)'s "freely given" provision as a "mandate" that "is to be heeded"). However, the circuit court never even considered Appellant's motion to amend, which failure was an abuse of the court's discretion under Rule 15. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). This failure should not work to the direct and substantial prejudice of Appellant.

While the circuit court failed to rule on Appellant's motion to amend in the previous action, it did note in the order dismissing that action that such dismissal was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." In light of the circuit court's erroneous refusal to address Appellant's motion to amend her complaint in the previous action to allege such "future claims," the claims at issue should relate back to the original action pursuant to Rule 15(c). Those claims "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings," and, as such, the new action "relate back to the date of the original pleading." Rule 15(c), SCRPC. No new information was required to assert those claims and Respondents were fully aware of the facts and the asserted claims. Therefore, under the principles espoused by Rule 15(c), the claims at issue relate back to the date of the original pleading that was filed within the statute of limitations. See *Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations).

III. Appellant's Claims Are Not Barred by the Doctrines of Res Judicata and/or Collateral Estoppel.

Finally, and addressing the circuit court's refusal to address said argument in its Order

granting their motion for summary judgment, Respondents argue that Appellant's medical malpractice claims, even if not time-barred, are barred by the doctrines of res judicata and/or collateral estoppel. Specifically, Respondents argue that Appellant's medical malpractice claims are essentially the same claims previously dismissed in Appellant's previous action - negligence, gross negligence, negligent supervision and intentional infliction of emotional distress – brought under the same facts at issue in the instant action. In support of its motion to dismiss that previous action, grant of which is currently also on appeal, Respondents argued that all of Appellant's claims were essentially an attempt at seeking civil liability for spoliation of evidence, a claim Respondents argued is not recognized in South Carolina. Respondents now argue that Appellant's medical malpractice claims are simply an attempt at re-litigating that same issue and should, therefore, have also been held barred by the doctrines of res judicata and/or collateral estoppel. That argument must also fail for the reasons set forth below.

First, Plaintiff's claims for medical malpractice are not barred under the doctrines of res judicata and/or collateral estoppel because they are not the same claims adjudicated in the previous action. The doctrine of res judicata bars a party from bringing claims against a defendant when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those same parties and was actually already adjudicated in the previous action. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (SC 1999). The fundamental purpose of the doctrine of res judicata is “to ensure no one should be twice sued for the same cause of action.” *S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (2013) (emphasis added). To establish that claims are barred under the doctrine of res judicata, a defendant must prove the following: “(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Id.* Such a

showing cannot be made in this action because Appellant's claims in this action are not the same as were adjudicated in the previous action. Specifically, the claims dismissed by way of the previous action - negligence, gross negligence, negligent supervision and intentional infliction of emotional distress – sought to address Respondents' common law failure to properly collect, preserve and protect medical evidence from Appellant as part of a sexual assault forensic examination. Those claims are wholly different in nature from Appellant's medical malpractice claims in the instant action, which seek to address Respondents' failure to provide appropriate medical treatment and care to Appellant. While Respondents argue there is no real distinction between Appellant's medical malpractice claims and the claims in the previous action, and that "(c)alling it 'medical malpractice' instead of 'negligence'" does not justify a finding that the claims are different, South Carolina law specifically recognizes the distinct nature of medical malpractice claims, noting that "a medical malpractice action is instituted by a patient and is predicated upon a physician's deviation from accepted standards of professional care in treating that patient" and that "(n)ot every cause of action against a medical provider...is an action for medical malpractice." *Hardee v. Bio-Medical Applications of S.C., Inc.* 370 S.C. 511, 515, 636 S.E.2d 629, 631 (S.C. 2006).


Additionally, and as noted above, the circuit court's July 9, 2018 Order, dismissing Plaintiff's previous action against Respondents, does not bar and appears to even contemplate Appellant's claims in the instant action. There, the circuit court expressly noted that its dismissal of the claims in that previous action was being granted "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." As plead in Appellant's Complaint and her preceding Notice of Intent in the instant action, and as previously argued to the circuit court, Appellant's claims for medical malpractice are new and

distinct from those claims alleged in the previous action, including negligence, gross negligence, negligent supervision and intentional infliction of emotional distress. The mere fact that Appellant's medical malpractice claims are based on the same underlying facts as the claims alleged against Respondents in the previously dismissed action does not make them the same causes of action and/or seeking adjudication of the same issues raised in the previous action as required for application of the doctrines of res judicata and/or collateral estoppel.

CONCLUSION

For all of the reasons set forth above, as well as those already set forth more fully in Appellant's Initial Brief, Appellant respectfully requests that this Court grant Appellant's appeal in this matter and reverse the circuit court's October 31, 2019 Order granting summary judgment to Respondents on Appellant's claims.

Respectfully submitted,


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The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2019-002009

Jane Doe

Appellant,

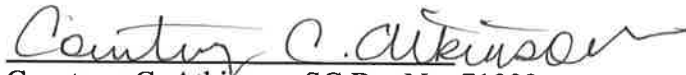
v.

Oconee Memorial Hospital, Greenville Health System, Upstate Affiliate Organization,
Kevin Docyk, M.D., Mary Beth Hendricks

Respondents.

PROOF OF SERVICE

I certify that I have submitted for filing the Appellant's Reply Brief to the South Carolina Court of Appeals via email to ctappfilings@sccourts.org on July 20, 2020. I further certify that I have emailed the Appellant's Reply Brief to the Respondents' attorney by way of counsel's AIS email address at kshaw@hsblawfirm.com, as well as by depositing a copy of it in the U.S. Mail, postage prepaid, address to Kenneth N. Shaw, Haynsworth Sinkler Boyd, P.A. at Post Office Box 2048, Greenville, SC 29602.



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SC Court of Appeals

VIA ELECTRONIC MAIL

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**Re: Jane Doe vs. Oconee Memorial Hospital, et al.
Appellate Case No.: 2019-002009**

Dear Ms. Kitchings:

Enclosed please find the Appellant's Reply Brief and Proof of Service for filing in the above-referenced case.

Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,



Courtney C. Atkinson
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CCA/ezv

Enclosure

cc: Kenneth N. Shaw, Esq.