

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 12, 2014 Session

**ERIC JOHNSON, INDIVIDUALLY AND AS NEXT OF KIN FOR THE DECEDENT,
JANA LANELL JOHNSON ET AL. v. PARKWEST MEDICAL CENTER**

**Appeal from the Circuit Court for Knox County
No. 3-207-10 Deborah C. Stevens, Judge**

No. E2013-01228-COA-R3-CV-FILED-JULY 31, 2014

Eric Johnson, acting individually and as next of kin of the decedent, Jana Lanell Johnson, and the Estate of Jana Lanelle Johnson (“Plaintiffs”), filed the instant action on April 27, 2010, regarding Ms. Johnson’s death. The action alleged health care liability claims pursuant to Tennessee Code Annotated § 29-26-115, as well as other claims, including ordinary negligence and intentional infliction of emotional distress. An agreed order granting partial summary judgment to Parkwest Medical Center (“Parkwest”) was entered with regard to Plaintiffs’ non-medical claims. Parkwest subsequently filed a motion to dismiss, alleging that Plaintiffs failed to comply with all of the requirements of Tennessee Code Annotated § 29-26-121 regarding the health care liability claim. Upon hearing, the trial court granted the motion. Plaintiffs filed additional motions regarding newly discovered evidence, including a motion seeking to set aside the prior order granting partial summary judgment or to amend the complaint, a motion to amend the certificate of good faith, and a motion seeking sanctions. The trial court denied Plaintiffs’ motion seeking to set aside the prior order granting partial summary judgment or to amend the complaint, as well as Plaintiffs’ motion to amend the certificate of good faith. The trial court failed to rule on Plaintiffs’ motion seeking sanctions. Plaintiffs have appealed to this Court. We affirm the trial court’s dismissal of Plaintiffs’ health care liability claim based on Plaintiffs’ failure to substantially comply with the requirements of Tennessee Code Annotated § 29-26-121. We vacate the trial court’s rulings with regard to Plaintiffs’ motions to amend and motion to set aside the partial summary judgment order. We remand for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part, Vacated in Part; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., C.J., and D. MICHAEL SWINEY, J., joined.

Dail R. Cantrell, Clinton, Tennessee, for the appellants, Eric Johnson and the Estate of Jana Lanelle Johnson.

F. Michael Fitzpatrick and Rachel Park Hurt, Knoxville, Tennessee, for the appellee, Parkwest Medical Center.

OPINION

I. Factual and Procedural Background

Eric Johnson is the surviving spouse of Jana Lanelle Johnson (“Decedent”), who died on April 4, 2008, at age forty-six. At approximately 4:00 a.m. on that date, Decedent awoke with severe chest, groin, and leg pain. Mr. Johnson called an ambulance, and Decedent was transported to Parkwest, arriving at approximately 6:00 a.m.¹

Decedent was examined by Dr. Rodd Daigle at approximately 6:15 a.m. Dr. Daigle ordered blood work and a chest x-ray. The chest x-ray was completed at 6:30 a.m., and the results were digitally transmitted to Dr. Daigle for his review. Between 6:30 and 6:40 a.m., Dr. Daigle reviewed the x-ray and examined Decedent a second time. As Dr. Daigle concluded that Decedent might be suffering from a pulmonary embolism, he ordered a STAT² CT scan with IV contrast in order to (1) rule out an aortic dissection and (2) confirm the existence and location of a pulmonary embolism.

Dr. Daigle testified that he handed the order for the CT scan to the unit clerk between 6:40 and 6:45 a.m. The unit clerk, whose responsibilities were described as “secretarial,” was responsible for inputting this order into the computer system. Pursuant to established hospital procedure, the order would then be transmitted to the medical imaging department,

¹Plaintiffs’ claims were adjudicated based upon motions to dismiss, requiring us to accept Plaintiffs’ factual allegations as true, and/or for summary judgment, requiring us to accept Plaintiffs’ evidence as true. *See Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013)(summary judgment); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)(motion to dismiss).

²“STAT” is an abbreviation for the Latin word “statim,” which means “immediately.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2228 (3d ed. 1993).

which would transport Decedent for the ordered CT scan.

An employee shift change occurred at 6:45 a.m., which allegedly resulted in Dr. Daigle's order for a CT scan not being entered into the computer until 7:16 a.m. Decedent was taken to the medical imaging department at 7:20 a.m. but while she was waiting, Dr. Daigle's order was inexplicably cancelled. When Dr. Daigle inquired about the Decedent's CT scan, the nurse charged with Decedent's care, Christina Wolfe, informed Dr. Daigle that Decedent's IV had "blown" and that Decedent was insisting that a nurse by the name of Sandy Irons be brought in to restart the IV in order to perform the CT scan. Nurse Wolfe testified that she paged Sandy Irons at 7:56 a.m., but that Ms. Irons did not respond. At 8:28 a.m., Decedent fell into severe distress, and she died at 8:44 a.m. The cause of her death was a pulmonary embolism.

Following Decedent's death, Mr. Johnson met with representatives of Parkwest and requested a copy of her medical records. As a result, Mr. Johnson was provided forty-three pages of records. Mr. Johnson initially filed suit against Parkwest, Dr. Daigle, Nurse Wolfe, and Charge Nurse David May on June 26, 2008. That action was nonsuited in early November 2009.

Plaintiffs filed the instant action on April 27, 2010. This action originally named Parkwest, Dr. Daigle, and Nurse Wolfe ("Defendants") as co-defendants.³ Prior to filing the complaint, on November 30, 2009, Plaintiffs' counsel sent the newly required statutory pre-suit notice to Defendants, pursuant to Tennessee Code Annotated § 29-26-121. Plaintiffs' counsel asserts that he also sent a HIPAA-compliant medical authorization with the notice, but Defendants deny that they received any such document. The complaint alleged a health care liability⁴ claim as well as claims of, *inter alia*, ordinary negligence, fraud, misrepresentation, and intentional infliction of emotional distress.

When the case at bar was filed, Plaintiffs failed to attach any of the notice documents to the complaint as required by Tennessee Code Annotated § 29-26-121, including a copy of the notice letter containing all required information, the HIPAA-compliant medical authorization sent with the notice letter, a certificate of mailing from the U.S. Postal Service, and an affidavit of the mailing party. Further, Plaintiffs did not include a statement in their complaint that they had complied with the requirements of Tennessee Code Annotated § 29-

³Dr. Daigle and Nurse Wolfe were later dismissed as defendants in this action.

⁴In 2012, the Tennessee General Assembly amended Tennessee Code Annotated §§ 29-26-115 to -122 to replace each occurrence of the phrase "medical malpractice" with "health care liability."

26-121. In addition, Plaintiffs' counsel filed the certificate of good faith as required by Tennessee Code Annotated § 29-26-122 but did not disclose the number of prior violations of that section because, as he asserts, he had no prior violations.

Parkwest and Dr. Daigle filed motions for summary judgment. Dr. Daigle also filed a motion to dismiss. An agreed order was entered that granted Dr. Daigle's motion to dismiss. A subsequent agreed order was entered granting partial summary judgment as to all claims asserted against Parkwest except the medical malpractice claim. This order was not certified as a final order pursuant to Tennessee Rule of Civil Procedure 54.02.

Parkwest subsequently filed a motion to dismiss, asserting that Plaintiffs had failed to comply with the requirements of Tennessee Code Annotated §§ 29-26-121 and -122. Regarding Plaintiffs' written response, Plaintiffs' counsel stated that it was his usual practice to send a HIPAA-compliant medical authorization with the notice letter, although he could not recall specifically whether such authorization had been sent in this action due to the passage of time.

As pre-trial discovery continued, Plaintiffs deposed a Parkwest employee who mentioned that there were hospital computer entries that might not necessarily be included in the written medical records. Plaintiffs thereupon filed a motion seeking to amend their complaint and set aside the partial summary judgment granted to Parkwest. In support, Plaintiffs alleged that upon receipt of these additional records, they learned that certain statements and entries made by Nurse Wolfe appeared to be false. Plaintiffs also sought sanctions pursuant to Tennessee Rule of Civil Procedure 34A.02. An additional motion filed by Plaintiffs sought to amend the certificate of good faith previously filed to disclose the number of prior violations as "zero."

A hearing on the motions was conducted on May 10, 2013. The trial court denied Plaintiffs' motion seeking to amend the complaint or set aside the partial summary judgment granted to Parkwest, reasoning that the motion was filed untimely pursuant to Tennessee Rule of Civil Procedure 60. The court also denied Plaintiffs' motion to amend the certificate of good faith. The trial court granted Parkwest's motion to dismiss, finding that Plaintiffs had failed to comply with the mandatory provisions of Tennessee Code Annotated §§ 29-26-121(b) and -122(d)(4). The trial court dismissed all claims initiated against Parkwest. Plaintiffs have appealed these rulings to this Court. The trial court did not rule on Plaintiffs' motion seeking sanctions.

II. Issues Presented

Plaintiffs present the following issues for our review, which we have restated slightly:

1. Whether the trial court erred in dismissing Plaintiffs' health care liability claim for failure to comply with the requirements of Tennessee Code Annotated §§ 29-26-121 and -122.
2. Whether the trial court erred in denying Plaintiffs' motion to set aside the order granting partial summary judgment.
3. Whether the trial court erred in failing to address Plaintiffs' motion for sanctions prior to dismissing the complaint.
4. Whether the trial court erred in denying Plaintiffs' motion to amend the complaint and the motion to amend the certificate of good faith.

III. Standard of Review

As our Supreme Court has explained:

The proper way for a defendant to challenge a complaint's compliance with Tennessee Code Annotated section 29-26-121 and Tennessee Code Annotated section 29-26-122 is to file a Tennessee Rule of Procedure 12.02 motion to dismiss. In the motion, the defendant should state how the plaintiff has failed to comply with the statutory requirements by referencing specific omissions in the complaint and/or by submitting affidavits or other proof. Once the defendant makes a properly supported motion under this rule, the burden shifts to the plaintiff to show either that it complied with the statutes or that it had extraordinary cause for failing to do so. Based on the complaint and any other relevant evidence submitted by the parties, the trial court must determine whether the plaintiff has complied with the statutes. If the trial court determines that the plaintiff has not complied with the statutes, then the trial court may consider whether the plaintiff has demonstrated extraordinary cause for its noncompliance. If the defendant prevails and the complaint is dismissed, the plaintiff is entitled to an appeal of right under Tennessee Rule of Appellate Procedure 3 using the standards of review in Tennessee Rule of Appellate Procedure 13.

Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 307-308 (Tenn. 2012) (internal citations omitted).

IV. Pre-Suit Notice Requirements

Tennessee Code Annotated § 29-26-121 provides, in pertinent part:

(a)(1) Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;

(C) The name and address of the attorney sending the notice, if applicable;

(D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

(3) The requirement of service of written notice prior to suit is deemed satisfied if, within the statutes of limitations and statutes of repose applicable to the provider, one of the following occurs, as established by the specified proof of service, which shall be filed with the complaint:

(A) Personal delivery of the notice to the health care provider or an identified individual whose job function includes receptionist for deliveries to the provider or for arrival of the provider's patients at the provider's current practice location. Delivery must be established by an affidavit stating that the notice was personally delivered and the identity of the individual to whom

the notice was delivered; or

(B) Mailing of the notice:

(i) To an individual health care provider at both the address listed for the provider on the Tennessee department of health web site and the provider's current business address, if different from the address maintained by the Tennessee department of health; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient; or

(ii) To a health care provider that is a corporation or other business entity at both the address for the agent for service of process, and the provider's current business address, if different from that of the agent for service of process; provided, that, if the mailings are returned undelivered from both addresses, then, within five (5) business days after receipt of the second undelivered letter, the notice shall be mailed in the specified manner to the provider's office or business address at the location where the provider last provided a medical service to the patient.

(4) Compliance with subdivision (a)(3)(B) shall be demonstrated by filing a certificate of mailing from the United States postal service stamped with the date of mailing and an affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested. A copy of the notice sent shall be attached to the affidavit. It is not necessary that the addressee of the notice sign or return the return receipt card that accompanies a letter sent by certified mail for service to be effective.

(b) If a complaint is filed in any court alleging a claim for health care liability,

the pleadings shall state whether each party has complied with subsection (a) and shall provide the documentation specified in subdivision (a)(2). The court may require additional evidence of compliance to determine if the provisions of this section have been met. The court has discretion to excuse compliance with this section only for extraordinary cause shown.

(c) When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider. Personal service is effective on the date of that service. Service by mail is effective on the first day that service by mail is made in compliance with subdivision (a)(2)(B). In no event shall this section operate to shorten or otherwise extend the statutes of limitations or repose applicable to any action asserting a claim for health care liability, nor shall more than one (1) extension be applicable to any provider. Once a complaint is filed alleging a claim for health care liability, the notice provisions of this section shall not apply to any person or entity that is made a party to the action thereafter by amendment to the pleadings as a result of a defendant's alleging comparative fault.

Our Supreme Court has recently explained that substantial compliance is the proper standard with regard to the requirements for the contents of the pre-suit notice. *See Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, __ S.W.3d __, No. M2012-02270-SC-R11-CV, 2014 WL 1632183 at *6-7 (Tenn. Apr. 24, 2014). As explained in *Thurmond*:

In *Myers*, we declared that the “essence” of the pre-suit notice statute is to notify potential defendants “of a [health care liability] claim before suit is filed.” 382 S.W.3d at 309 (stating that section 29-26-121(a) is “to give prospective defendants notice of a forthcoming lawsuit”). Thus, we concluded that the section 29-26-121(a) requirement of pre-suit notice is “fundamental,” “mandatory,” and “not subject to satisfaction by substantial compliance.” *Id.* at 309, 310. Because no pre-suit notice of any kind had been given or even attempted in *Myers*, we did not decide whether the statutory “requirements as to the content of the notice . . . may be satisfied by substantial compliance.” *Id.* at 311.

We answered that question in *Stevens*, where the plaintiff attempted to comply with the pre-suit notice requirement but failed to provide a “HIPAA compliant medical authorization permitting the provider receiving the notice to obtain

complete medical records from each other provider being sent a notice.” 418 S.W.3d at 552 (quoting Tenn. Code Ann. § 29-26-121(a)(2)(E)). We explained that the pre-suit notice content requirements of Tennessee Code Annotated section 29-26-121(a)(2)(A)-(E) serve distinct but related purposes. *Id.* at 554. We held that where strict compliance with “a particular statutory provision is essential to avoid prejudicing an opposing litigant,” then the statutory provision will be deemed mandatory and strict compliance required. *Id.* at 555. After considering the purposes served by the HIPAA-compliant medical authorization, we concluded that a plaintiff cannot satisfy this content requirement merely by providing potential defendants with actual notice of a potential claim. *Id.* However, we stopped short of interpreting the statute as demanding strict compliance. *Id.* Rather, we held that “[n]on-substantive errors and omissions” and “[a] plaintiff’s less-than-perfect compliance” with [subsection] 29-26-121(a)(2)(E) will “not derail a healthcare liability claim” so long as the medical authorization provided is “sufficient to enable defendants to obtain and review a plaintiff’s relevant medical records.” *Id.* Thus, we held that “a plaintiff must substantially comply, rather than strictly comply, with the requirement[] of [subsection] 29-26-121(a)(2)(E).” *Id.*

Myers and *Stevens* thus instruct that: (1) providing potential defendants pre-suit notice of health care liability claims is the “essence” and “fundamental” purpose of the pre-suit notice requirement, *Myers*, 382 S.W.3d at 309; and (2) unless strict compliance with a notice content requirement “is essential to avoid prejudicing an opposing litigant,” substantial compliance with a content requirement will suffice, *Stevens*, 418 S.W.3d at 555.

Thurmond, ___ S.W.3d at ___, 2014 WL 1632183 at *6-7 (Tenn. Apr. 24, 2014).

In this case, Mr. Johnson did not list the addresses of the providers in the notice letter, as required by Tennessee Code Annotated § 29-26-121(a)(2)(D). Mr. Johnson also failed to state in the complaint that he had complied with the notice requirements contained in Tennessee Code Annotated § 29-26-121(a). He further failed to attach any of the documentation specified in Tennessee Code Annotated § 29-26-121(a)(2). *See* Tenn. Code Ann. § 29-26-121(b). Finally, Mr. Johnson did not file the required proof of service, consisting of “a certificate of mailing from the United States postal service stamped with the date of mailing and an affidavit of the party mailing the notice establishing that the specified notice was timely mailed by certified mail, return receipt requested.” *See* Tenn. Code Ann. § 29-26-121(a)(4). These facts are demonstrated by the pleadings and are undisputed.

Further, Mr. Johnson was not able to establish that he sent a HIPAA-compliant

medical authorization with the notice, as required by Tennessee Code Annotated § 29-26-121(a)(2)(E). Pursuant to the directive of *Myers*, Parkwest filed a motion to dismiss and asserted the lack of a HIPAA-compliant medical authorization as one of the bases for its motion. *See* 382 S.W.3d at 308. Mr. Johnson filed a response accompanied by affidavits from his attorney and his attorney's assistant, which stated that it was their usual practice to send a HIPAA-compliant medical authorization along with the notice letter. The affidavit of Mr. Johnson's attorney also states, however, that due to the passage of time, he was unable to specifically recall any details regarding what was sent in this case, and that he was also unable to locate the authorization in his file. Further, as stated above, none of the required documentation was filed with the complaint. Pursuant to *Myers*, it is clear that Mr. Johnson had the burden of establishing that he sent the required HIPAA-compliant medical authorization with the notice. *See* 382 S.W.3d at 308. Mr. Johnson was unable to demonstrate that fact in this case. Without an appropriate HIPAA-compliant medical authorization, Parkwest could not appropriately utilize those records to mount a defense, even if the records were already in Parkwest's possession. *See Roberts v. Prill*, No. E2013-02202-COA-R3-CV, 2014 WL 2921930 at *6 (Tenn. Ct. App. June 26, 2014); *see also Stevens v. Hickman Cmty. Health Care Serv., Inc.*, 418 S.W.3d 547, 560 (Tenn. 2013).

For all of the foregoing reasons, we conclude that Mr. Johnson did not substantially comply with the requirements of Tennessee Code Annotated § 29-26-121. *See Stevens*, 418 S.W.3d at 560. We also conclude that Mr. Johnson did not demonstrate extraordinary cause for his noncompliance, as the trial court properly found. *See Myers*, 382 S.W.3d at 311 (holding that "extraordinary cause" should be defined as "exceptional" or "remarkable" and might include "illness of the plaintiff's lawyer, a death in that lawyer's immediate family, [or] illness or death of the plaintiff's expert in the days before the filing became necessary."). We therefore affirm the trial court's dismissal of Mr. Johnson's health care liability claims without prejudice. *See Stevens*, 418 S.W.3d at 560; *Roberts*, 2014 WL 2921930 at *6. In so holding, we note that any further health care liability claims by Mr. Johnson will be time-barred. *Id.* We also determine that any issue regarding the propriety of the certificate of good faith filed by Mr. Johnson or the trial court's denial of Mr. Johnson's motion to amend such certificate is pretermitted as moot.

V. Denial of Motion to Set Aside Partial Summary Judgment Order

Plaintiffs assert that the trial court erred in failing to set aside the agreed order granting partial summary judgment to Parkwest on Plaintiffs' claims not sounding in health care liability, based on their late-discovered evidence that certain medical records were allegedly concealed and/or falsified. The parties agree that the trial court denied Plaintiffs' motion to set aside the prior order based on the trial court's determination that the motion would fall within the parameters of either Tennessee Rule of Civil Procedure 60.02(1) or (2),

both of which are subject to a one-year limitation. Because more than one year had elapsed since the entry of that order, the trial court reasoned that the motion was time-barred.

At the outset, we note that the order granting partial summary judgment was not certified as final pursuant to Tennessee Rule of Civil Procedure 54. Therefore, Tennessee Rule of Civil Procedure 60 would not apply because Rule 60, by its express terms, only applies to final judgments. An order that adjudicates some claims but reserves other pending claims is not a final judgment. *See* Tenn. R. Civ. P. 54.02; *Hankins v. Chevco, Inc.*, 90 S.W.3d 254, 257 (Tenn. Ct. App. 2002). As our Supreme Court has explained:

Pursuant to Tennessee Rule of Civil Procedure 54, “any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.” Tenn. R. Civ. P. 54.02; *see also* Tenn. R. App. P. 3(a) (“[A]ny order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.”).

Thus, motions seeking relief from a trial court’s decision adjudicating fewer than all the claims, rights, and liabilities of all the parties, should be filed pursuant to Rule 54.02.

Discover Bank v. Morgan, 363 S.W.3d 479, 488 (Tenn. 2012).

In this case, the order granting partial summary judgment to Parkwest adjudicated “fewer than all the claims, rights, and liabilities of the parties.” *Id.* As such, Plaintiffs’ motion seeking to set aside the order could only be addressed pursuant to Tennessee Rule of Civil Procedure 54.02, which states that any such order is subject to revision at any time prior to entry of an order disposing of all claims. *Id.* We conclude that the trial court erred in imposing the time limitation found in Tennessee Rule of Civil Procedure 60.02. We therefore vacate the trial court’s judgment on this issue and remand for a determination by the trial court regarding whether Plaintiffs have demonstrated sufficient grounds to set aside the order granting partial summary judgment to Parkwest on the non-medical claims.

VI. Motion for Sanctions

Plaintiffs argue that the trial court erred in failing to address their motion for sanctions pursuant to Tennessee Rule of Civil Procedure 34A.02. Rule 34A.02 states that “sanctions

may be imposed upon a party . . . who discards, destroys, mutilates, alters, or conceals evidence.” Plaintiffs filed this motion close in time to the filing of their motion to amend and their motion seeking to set aside the partial summary judgment, all based on their late discovery of hospital computer entries that were not previously included with Decedent’s medical records. The trial court did not address the motion for sanctions before dismissing Plaintiffs’ claims. Plaintiffs contend that the trial court erred in failing to do so.

Because this case is being remanded for consideration of Plaintiffs’ motion to set aside the order granting partial summary judgment, and also because the trial court did not rule on the motion for sanctions in the first instance, we conclude that it is appropriate to remand with respect to the issue of sanctions as well. *See Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976) (“This is a court of appeals and errors, and we are limited in authority to the adjudication of issues that are presented and decided in the trial courts”); *see also Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000) (“As a general matter, appellate courts will decline to consider issues . . . that were not raised and considered in the trial court.”); *Hayes v. Gentry*, 03A01-9303-CH-00120, 1993 WL 191999 at *2 (Tenn. Ct. App. June 8, 1993) (“[S]ince this issue was not adjudicated in the trial court, we cannot consider it on appeal.”). This issue is more properly addressed by the trial court upon remand.

VII. Motion to Amend Complaint

Finally, Plaintiffs argue that the trial court erred in denying their motion to amend the complaint to allege simple negligence against Parkwest due to the unit clerk’s alleged failure to timely enter the doctor’s order for a CT scan into the computer. The trial court ruled:

the Motion to Amend Complaint or in the Alternative to Set Aside a Portion of the Order Granting Partial Summary Judgment to Parkwest Medical Center was not well taken and should be denied on the basis that Plaintiff’s Motion was filed pursuant to either Rule 60.02(1) or (2) and therefore Plaintiff’s Motion was time-barred by the one year limitation set forth in Rule 60.02.

It would appear that the trial court did not properly analyze Plaintiffs’ motion seeking to amend the complaint pursuant to Tennessee Rule of Civil Procedure 15. Rule 15 provides:

A party may amend the party’s pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted at any time within fifteen (15) days after it is served. Otherwise a party may amend the party’s pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely

given when justice so requires.

As our Supreme Court has elucidated:

The grant or denial of a motion to amend a pleading is discretionary with the trial court. Generally, trial courts must give the proponent of a motion to amend a full chance to be heard on the motion and must consider the motion in light of the amendment policy embodied in Rule 15.01 of the Tennessee Rules of Civil Procedure that amendments must be freely allowed; and, in the event the motion to amend is denied, the trial court must give a reasoned explanation for its action. Although permission to amend should be liberally granted, the decision “will not be reversed unless abuse of discretion has been shown.” *Welch v. Thuan*, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994). Factors the trial court should consider when deciding whether to allow amendments include “[u]ndue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment.” *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979).

Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 374 (Tenn. 2007) (other internal citations omitted).

In this case, the trial court did not consider the proposed amendment in light of the policy considerations embodied in Tennessee Rule of Civil Procedure 15 or the appropriate factors, as listed above. Also, this issue is inextricably entwined with the Plaintiffs’ motion seeking to set aside the partial summary judgment granted to Parkwest inasmuch as it deals with Plaintiffs’ claim of simple negligence. For these reasons, we vacate the trial court’s denial of Plaintiffs’ motion to amend and remand for reconsideration by the trial court, utilizing the appropriate analysis.

VIII. Conclusion

For the foregoing reasons, we affirm the trial court’s ruling dismissing Plaintiffs’ health care liability claim due to lack of substantial compliance with the notice requirements contained in Tennessee Code Annotated § 29-26-121. We vacate the trial court’s judgment regarding Plaintiffs’ motion to set aside the partial summary judgment granted to Parkwest, and we remand for a determination by the trial court regarding whether Plaintiffs have shown sufficient grounds to set aside the partial summary judgment order regarding the non-medical claims. We also vacate the trial court’s denial of Plaintiffs’ motion to amend the complaint

to allege simple negligence and remand for reconsideration of this issue by the trial court, utilizing the appropriate analysis. On remand, the trial court shall also consider and rule upon Plaintiffs' motion seeking sanctions pursuant to Tennessee Rule of Civil Procedure 34A.02. Costs on appeal are assessed equally, one half to the defendant, Parkwest Medical Center, and one half collectively to the Plaintiffs, Eric Johnson, acting individually and as next of kin of Decedent, and the Estate of Jana Lanelle Johnson.

THOMAS R. FRIERSON, II, JUDGE