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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2018-CP-02-0003

Appellate Case No.: 2019-000803

Fonda E. Patrick and Andre Patrick.....Appellants,

v.

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

APPELLANTS' PETITION FOR REHEARING

Appellants Fonda E. Patrick and Andre Patrick submit this Petition for Rehearing in accordance with Rule 221 of the South Carolina Appellate Court Rules. On January 18, 2023, the Court issued an Opinion affirming the trial court's decision to dismiss Appellants' medical malpractice action. In doing so, this Court or misconstrued and/or overlooked the following arguments asserted by the Appellant.

I. JUDGE MCLEOD'S ORDER CAN ONLY BE INTERPRETED TO TOLL THE APPLICABLE DEADLINE TO SERVE THE DEFENDANTS WITH THE NOTICE OF INTENT (NOI).

In affirming the trial court's dismissal of Appellants' claims, the Court of Appeals stated that Judge McLeod's Order granting of an extension of time to file an Affidavit of

Merit to accompany their Notice of Intent (NOI), categorically, could not be interpreted to implicitly also have granted an extension of time to serve the Defendants. In support of this decision, the Court states that at the hearing before Judge McLeod, Appellants “did not clarify that they had never served the NOI upon the Defendants” and seemingly concludes that Judge McLeod did not know that the Defendants had not been served and thus could not have intended to extend the time to accomplish service. This finding overlooks the clear meaning of the statements Appellants made to Judge McLeod, as well as the undisputed procedural posture that existed at the time Judge McLeod issued an extension. As discussed herein, the record and procedural posture demonstrated that Judge McLeod must (or at least could) have intended to extend the time for service. At a minimum, there is a question as to whether Judge McLeod intended to extend of all deadlines, and thus the question about the meaning/interpretation of his ruling should have been submitted to him for clarification.

At the hearing conducted on September 24, 2018, Appellant Fonda Patrick informed Judge McLeod:

My understanding was that I had filed suit but once I got with Mr. Smith again, he had not filed anything. He had just filed the intent without any of the people that are on the suit receiving any notification of it.

(Trans. of Hearing on Sept. 24, 2018, ROA, at 036, ll. 10-14). Simply put, there no other reasonable interpretation of this statement than to conclude that Appellants clarified to Judge McLeod the NOI had not been served upon the Defendants. While Appellant Fonda Patrick may have used the term “notification” and not “service of process,” this is a distinction without a difference, as the implication is the same – the Defendants were not yet aware of the NOI. “The principal object of service of process is to give notice to the defendant corporation of the proceedings against it.” Mull v. Ridgeland Realty, LLC 387

S.C. 479, 486, 693 S.E.2d 27, 30 (Ct.App. 2010) (*quoting* Burris Chemical, Inc. v. Daniel Const. Co., 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968)). “Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. *Id.* (*quoting* Roche v. Young Bros., Inc. of Florence, 318S.C. 207, 209, 456 S.E.2d 897, 899 1995). Therefore, because the Appellants expressly testified to Judge McLeod that the Defendants had no notice of the NOI, it confirms that the Defendants had not been served, as the principal object of said service of process is to provide the Defendants with notice of the claims.

While acknowledging that one circuit court judge cannot overrule another, the Appellate Court stated that there was nothing indicating that Judge McLeod intended to grant an extension of time to serve the Defendants. However, to make such a determination is to presume that Judge McLeod issued an order that he knew would be utterly pointless.

There is no dispute that at the time Judge McLeod’s granted the Appellants a 45-day extension to file their Affidavit of Merit, the 120-day deadline to serve the NOI on the Defendants had also passed. The underlying record shows that Judge McLeod took the matter under advisement to review the record prior to issuing his ruling. (ROA p. 037, l. 4-9). Given Appellant Fonda Patrick’s candor to the trial court about none of the Defendants “receiving any notification” of the NOI, coupled with the fact that Judge McLeod took the matter under advisement to “review this file” (ROA, p. 038, ll. 5-6), the record demonstrates that, at the time he issued his order granting an extension, Judge McLeod was aware that the Defendants had not been served and that the deadline for service of process had passed.

The Court of Appeals also mentions that “there was no discussion regarding the

expiration of the statute of limitations in the Patricks’ written motion for an extension.”

This is erroneous, as Appellants’ motion to the trial court, seeking an extension, stated:

Attorney Smith undertook representation but waited until the brink of the running of the statute of limitations, until January 22, 2018, to file a Notice of Intent to File Suit and did so without an affidavit of merit from an expert (the statute of limitations likely ran on or about January 30, 2018).

(Motion for Extension, ROA at 64) Thus, it is inaccurate for the Court to state that there had not been any discussion regarding the statute of limitations. Again, the record plainly demonstrates that that Judge McLeod was aware of the issue with statute of limitations and that the time for service of process needed to be extended if an extension for the time to file an affidavit was to have any efficacy.

Most respectfully, the Court cannot come to the conclusion that Judge McLeod categorically and unquestionably did not intend for his 45-day extension to apply to the service of the NOI on Defendants. First, the statement by the Appellants that the Defendants did not have notice of the NOI is *prima facie* evidence that, prior to issuing his order, Judge McLeod was aware of service of process had not yet occurred. Secondly, Judge McLeod’s statement, at the conclusion of September 24th hearing, that he was taking the matter under advisement to review the file is evidence that he was aware that the deadline to accomplish service of process had run and that, if the 45-day extension on the time to file an affidavit of merit was to have any meaning, the extension would also have to apply to the time for service.

Because, at the time he issued his ruling, Judge McLeod was aware both that the time for service had run and that Defendants had not yet been served, there are only two conclusions can be drawn – either (1) Judge McLeod intended to extend the applicable

deadline for service of the NOI on Defendants along with the deadline to file the Affidavit of Merit; or, (2) rather illogically, he intended to issue a ruling that was, in effect, a nullity with no purpose. An Order only permitting an extension of time to file the Affidavit of Merit, while not simultaneously permitting an extension of time to serve the Defendants, would result in the ultimate dismissal of the claims and would only serve to allow the Appellants to proverbially “reshuffle the deck chairs on the Titanic.” If Judge McLeod did not intend to extend a deadline that would unquestionably be fatal to bringing the claim, he would have simply denied the motion for an extension. As this was not the case, and as the Court has acknowledged, “one circuit court judge cannot overrule the order of another,” and Judge Kelly should not have dismissed the underlying claims and should have sent the matter to Judge McLeod for clarification on his earlier ruling.

II. THIS COURT MUST ADDRESS THE ARGUMENT THAT THE TRIAL COURT ABUSED ITS DISCRETION BY CONCLUDING IT DID NOT HAVE THE AUTHORITY TO EXTEND THE TIME FOR SERVICE OF PROCESS OF THE NOTICE OF INTENT.

In the event the Court still concludes that there is no ambiguity as to whether Judge McLeod’s Order extended the time for the Appellants to serve the Respondents with the NOI, the Court must address Judge Kelly’s decision to grant the Respondent’s Motion to Dismiss on the mistaken belief that he did not have the discretion to do so.

At the hearing conducted on March 5, 2019, Appellants’ counsel asserted that Judge McLeod had already granted an extension but reminded Judge Kelley, that he, like Judge McLeod, had the power to extend the time for service of process and, for this reason, should deny the motion to dismiss. (Trans. of Hearing on March 5, 2019, ROA, at 061, ll. 5-7). Based on a mistaken belief that the trial court did not have the power to extend the time for

service of process, Judge Kelley did not exercise the discretion with which he was empowered to use and dismissed Appellants' claims. As discussed below, this failure to undertake to use discretion to decide whether an extension for service should be allowed (because Judge Kelley believed, incorrectly, that he did not have the power to extend the time to accomplish service of process) was an error of law.

“A failure to exercise discretion amounts to an abuse of that discretion.” Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). “When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.” Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); *See also* Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990) (“It is equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.”).

As our Supreme Court recently stated:

[N]o court is entitled to the deference associated with the discretion standard of review until that court has earned deference by fulfilling the responsibility of exercising its discretion according to law [...]

The exercise of discretion is not to simply make a decision. The exercise of discretion requires first that the trial court recognize it has the responsibility of discretion. The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances.

Morris v. BB&T Corp., Op. No. 28131 (S.C. Sup. Ct. filed Jan. 25, 2023) (Howard Adv. Sh. No. 4 at 14-15) (internal citations omitted).

Judge Kelly's Order specifically states that “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.” (Order of Judge Kelly, p. 3, ROA at 009). This is simply incorrect and reveals that the trial court improperly failed to exercise its discretion. The statement demonstrates that Judge Kelley did not recognize that he had the ability and responsibility of exercising discretion. In other words, because Judge Kelley incorrectly thought the deadline was one that the trial court could not extend, no discretion was used to determine if the time for service should be extended.

“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.” Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003). “In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” S.C. State Ports Auth. V. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (*citing* TNS Mills, Inc. v. South Carolina Dep’t of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)). “A statute should not be construed by concentrating on an isolated phrase. *Id.* (*citing* Laurens County School Districts 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992)). “In construing a Rule of Civil Procedure, a rule’s language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass’n of S.C. v. AT&T Communications of Southern States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004) (applying the rule of construction to a statutory provision.). Rule 3(a)(2), SCRPC states that “actual service must be accomplished not later than one hundred twenty days after filing.”

However, Rule 6(b), SCRPC also clearly states:

Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, **the time may be extended by** written agreement of counsel for an additional period not exceeding the original time

provided in these rules, **or the court for cause shown may at any time in its discretion** (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended or **(2) upon motion made after the expiration of the specified period, for good cause shown**, permit the act to be done. The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order. (*emphasis added*)

Rule 6(b) clearly states there are four instances under the Rules of Civil Procedure where the Court does not have discretion to extend the time for certain actions. These instances are the time for taking any action under rules 50(b), 52(b), 59, and 60(b). It does not include Rule 3(a).

As mentioned in Appellants' Final Brief, South Carolina recognizes the maxim "*expression unius est exclusion alterius*," or, more plainly, "the expression of one thing implies the exclusion of another." See Hughes v. W. Carolina Reg'l Sewer Auth., 386 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2010). If a Court did not have the discretion to extend the time period under Rule 3(a), it would have been expressly included in Rule 6(b) along with the other four exceptions. The expression of the deadlines for which the trial court does not have the power to extend implies that it does have the power to extend all the other deadlines, which would include the deadline to accomplish service of process.

In addition, if the Court is required to interpret the Rules of Civil Procedure as it would a statutory provision, Rule 3(a) must not be read in isolation, but must be read as a whole and construed together with the other Rules of Civil Procedure." See S.C. State Ports Auth. v. Jasper County, 368 S.C. at 398, 629 S.E.2d at 629. In this instance, Rule 3(a) and Rule 6(b) are not only a part of the same framework, i.e. the South Carolina Rules of Civil Procedure, but they are a part of the same subsection of the Rules of Civil Procedure, both

being found under Subsection II in the table of contents. Clearly, both of these Rules were intended to be read in conjunction with each other.

If therefore, the time for service under Rule 3(a) may be extended by a circuit court for good cause shown pursuant to the unambiguous language of Rule 6(b), the trial judge is required to exercise some level of discretion in determining whether or not to grant an extension. Failure to exercise such discretion is by its very nature an abuse of discretion and an error of law.

Judge Kelly's Order unequivocally states he did not use any discretion denying an extension of the 120-day deadline for service and in dismissing Appellant's claims – he unequivocally stated that he believed he did not have any discretion in whether or not to do so. As such, the Order should be reversed and remanded, with direction for Judge Kelley to use his discretion and determine whether there is good cause for the deadline for service of process to be extended.

For these reasons, Appellants respectfully request the Court grant their Petition for Rehearing and reconsider the Opinion of January 18, 2023.

January 30, 2023

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, counsel for Appellants, does hereby certify that, on the date indicated below, all counsel of record in this action were served with a copy of **APPELLANTS' PETITION FOR REHEARING** by depositing same in the United States Mail, first-class postage pre-paid, to the following addresses:

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Respectfully submitted,

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January 30, 2023

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RE: Fonda E. Patrick and Andre Patrick v. Gasnel E. Bryan, MD,
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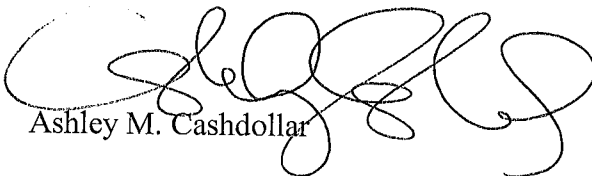
Dear Clerk,

Enclosed for filing in connection with the above-referenced matter are the following documents:

1. Appellants' Petition for Rehearing
2. Proof of Service

I hope that the following is sufficient for filing. Please let our office know if there is an accompanying filing fee and/or if any additional information or documentation are needed.

Kindest regards,



Ashley M. Cashdollar

cc: Andrew F. Lindemann, Esquire
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