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-NI-02-00003
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 Centers, LLC; Frank Y. Chase, M.D., individually and as agent and/or employee of Aiken Regional Medical Centers, LLC; Jonathan H. Anderson, individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; and Aiken Regional Medical Centers, LLC, Defendants

Of which 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 Centers, LLC; and Aiken Regional Medical Centers, LLC are Respondents.

RESPONDENTS' RESPONSE TO APPELLANTS' PETITION FOR REHEARING

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
J. Ben Alexander (SC Bar 15323)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com
balexander@hsblawfirm.com

Attorneys for Respondent
Aiken Regional Medical Centers, LLC

JOHNSON & DAVIS, PA

Hutson S. Davis, Jr. (SC Bar #1597)
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Buster@jd-pa.com

Attorney for Respondent
Frank Y. Chase, MD

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann (SC Bar #13030)
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
andrew@ldlawsc.com

Attorney for Respondent
Gasnel E. Bryan, M.D.

Per the Court's request, Respondent Aiken Regional Medical Center, LLC, jointly and on behalf of Respondents Gasnel E Bryan, M.D. and Frank Y. Chase, M.D., hereby responds to Appellants' Petition for Rehearing as follows:

The first argument within Appellants' Petition for Rehearing merely reasserts an argument that was thoroughly briefed and orally argued to this Court. Respondents contend this Court did not overlook or misconstrue that argument. With their second argument, Appellants are inappropriately attempting to make an argument for the first time in a petition for rehearing. Respondents will more fully respond to each argument in turn.

I. THIS COURT CORRECTLY FOUND JUDGE MCLEOD'S ORDER DID NOT TOLL THE STATUTE OF LIMITATIONS.

Appellants continue to argue Judge McLeod's order implicitly extended the time for serving the NOI; however, as this Court correctly noted, nothing within Judge McLeod's order gave any indication he intended to extend the time for serving the NOI, or that he intended to equitably toll the statute of limitations. While the Patricks may have very briefly mentioned to Judge McLeod that the NOI had been filed just before the expiration of the statute of limitations, the record is void of any further discussion in regards to the statute of limitations. The Patricks never requested additional time to serve the NOI, nor did they ask Judge McLeod to toll the statute of limitations. The issue simply was not before Judge McLeod, and there is no indication he even considered it.

Appellants contend Judge McLeod had to have intended to extend the deadline for service, or otherwise, he intended to issue a ruling that served no purpose. Appellants' argument is based upon their incorrect assertion that Judge McLeod had to have known the defendants had not been served. Again, as this Court points out, there is no indication Judge McLeod knew the defendants

had not been served. The Patricks merely told him that their prior attorney had not served the NOI. There was simply no discussion about whether the Patricks may have served Defendants in the months since their attorney withdrew as counsel. As this Respondent noted in its Final Brief, the only reasonable conclusion that can be drawn from the record is Judge McLeod believed Defendants had been served; otherwise, he would not have based his order in part on "the lack of a motion to dismiss from the Defendants and lack of objection from the Defendants." (Sept. 28, 2018 Order, p. 2, R. at 005).

While this Court's Opinion may not have addressed every detail of Appellants' argument, it clearly understood and took into consideration the argument in correctly holding that Judge McLeod's order did not extend the time for service.

II. JUDGE KELLY WAS NEVER ASKED TO CONSIDER EQUITABLY TOLLING THE STATUTE OF LIMITATIONS.

In their Petition for Rehearing, Appellants make the novel argument that Judge Kelly abused his discretion by not even considering extending the service deadline himself. It is well established that a party cannot make an argument for the first time on appeal, much less during a petition for rehearing. *See Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001) (holding preserving issues for appellate review to be a fundamental component of appellate practice, while refusing to consider appellant's new argument when deciding whether to grant a petition for rehearing). At no point in time prior to this Petition have Appellants argued Judge Kelly was asked, but refused to consider extending the time for service. Rather, their argument has always been Judge Kelly should have interpreted Judge McLeod's order as having already granted the extension.

As noted in Respondent's Final Brief, Appellants very briefly discussed the doctrine of equitable tolling in their Memorandum in Opposition to Defendants' Motion to Dismiss; however,

they did so entirely in the context of arguing that Judge McLeod's order had already tolled the statute of limitations. That is abundantly clear from their first sentence in the "Equitable Tolling" section, which states, "[t]o the extent that Judge McLeod's order effectively served to equitably toll the time to supplement the NOI with an affidavit of merit and to serve the Defendants, such a decision was entirely within his discretion." (R. at 113).

After Judge Kelly issued his order granting Defendants' motion to dismiss, the Patricks responded by filing a motion to reconsider which focused on the equitable tolling argument; however, they once again argued Judge McLeod had already equitably tolled the statute of limitations, and Judge Kelly had erred by not affirming that order. Again, their own words make that abundantly clear when they say, "Plaintiffs would respectfully show the court that the issue has already been decided and ruled upon by Judge McLeod." (R. at 137).

On appeal, Appellants continued to argue Judge Kelly erred in refusing to find that Judge McLeod had already extended the time for service. Prior to this Petition, Appellants had not once suggested that Judge Kelly had abused his discretion by refusing to consider whether he himself should have granted an extension. As a result, this Court should not consider this new argument as a basis for granting a rehearing. *Kennedy*, *supra*.

Notwithstanding the improperness of the argument, the argument is also meritless, because Judge Kelly was never specifically asked to consider equitably tolling the statute of limitations. He was merely asked to affirm that Judge McLeod had already done so.

Appellants contend in their Petition they reminded Judge Kelly "that he, like Judge McLeod had the power to extend the time for service of process;" however, that is a very liberal interpretation of what was actually said during the hearing. The actual statement was, "Your Honor, kicking the Patricks' case at this point after all they have been through, they've been

working their best to bring this medical malpractice case and that would not be just results and the Court, both Judge McLeod and Your Honor have the power to keep this case moving and we're ready to move it." That statement came immediately after counsel for the Patricks made a confusing argument about how the court could equitably extend S.C. Code § 15-79-125's one hundred and twenty-day deadline for mediating a case, and how Judge McLeod had taken that into consideration when he granted the Patricks forty-five more days to file an affidavit of merit. (R. at 060). After Judge Kelly pointed out that counsel was referring to a different 120-day deadline, counsel responded by saying he recognized that, but he was merely pointing out how courts have equitable power and how he believed Judge McLeod used that power to grant Plaintiffs more time to serve the NOI. (R at 061-062). When put into context with everything that was said during the hearing, along with the arguments made in Plaintiffs' memorandum in opposition to the motion to dismiss, it is hard to interpret that statement as anything other than simply a request for Judge Kelly to affirm Plaintiffs' interpretation of Judge McLeod's order.

Nevertheless, to the extent anything presented to Judge Kelly should have been interpreted as a specific request for him to consider equitably tolling the statute of limitations, his Form 4 order denying Plaintiffs' motion for reconsideration should also be interpreted as prima facie evidence that he used his discretion in denying that request. The order states, "[a]fter careful consideration of Plaintiff's arguments…" (R. at 12). Therefore, on its face, the order makes clear that before issuing his ruling, Judge Kelly carefully considered all of Plaintiffs' arguments, including the equitable tolling argument.

However, to the extent he was required to use his discretion, and to the extent Judge Kelly may have erred by not providing a more detailed analysis for why he did not equitably toll the statute of limitations, it was a harmless error, as the reasons were abundantly clear. Equitable

tolling should be used sparingly and only after the party claiming the statute of limitations should be tolled establishes facts sufficient to justify the use of the doctrine. *Hooper v. Ebenezer Sr. Services and Rehab Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32 (equitable tolling may be used in cases where a litigant failed to commence the action within the applicable statute of limitations because of an "**extraordinary**" event beyond his or her control). As argued in more detail in Respondent's Final Brief, neither Judge McLeod nor Judge Kelly was presented with facts so extraordinary as to support an equitable tolling in this case.

CONCLUSION

Appellants' Petition for Rehearing did not identify arguments that were either misconstrued or overlooked by this Court. Rather, Appellants merely repeated their primary argument, which they had already made numerous times before, and then they proceeded to make a second argument, which could not have been misconstrued or overlooked, because it had never been made before. Wherefore, for the reasons stated herein, this Court should deny Appellants' petition for rehearing.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/Kenneth N. Shaw
Kenneth N. Shaw (SC Bar 77859)
J. Ben Alexander (SC Bar 15323)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com
balexander@hsblawfirm.com

Attorney for Respondent
Aiken Regional Medical Centers, LLC

JOHNSON & DAVIS, PA

s/Hutson S. Davis, Jr.
Hutson S. Davis, Jr. (SC Bar #1597)
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Buster@jd-pa.com

Attorney for Respondent
Frank Y. Chase, MD

LINDEMANN LAW FIRM, P.A.

s/ Andrew F. Lindemann
Andrew F. Lindemann (SC Bar #13030)
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
andrew@ldlawsc.com

Attorney for Respondent
Gasnel E. Bryan, M.D.

Dated: February 7, 2023

THE STATE OF SOUTH CAROLINA
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APPEAL FROM AIKEN COUNTY
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R. Keith Kelly, Circuit Court Judge

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

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PROOF OF SERVICE

This is to certify that the foregoing RESPONDENTS' RESPONSE TO APPELLANTS' PETITION FOR REHEARING was served in the above-referenced case by electronic mail on this 7th day of February, 2023, addressed as follows:

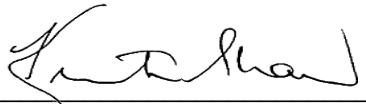
Francis M. Hinson, IV
HHP Law Group, LLC
924 Gervais Street
Columbia, SC 29201
brink@hhplawgroup.com
Attorney for Appellants

Hutson S. Davis, Jr.
Johnson & Davis, PA
10 Pinckney Colony Road
Suite 200
Bluffton, SC 29909
buster@jd-pa.com
Attorney for Respondent Frank Y. Chase, MD

Andrew F. Lindemann
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
andrew@ldlawsc.com
Attorney for Respondent Gasnel E. Bryan, MD

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



Kenneth N. Shaw (SC Bar 77859)
J. Ben Alexander (SC Bar 15323)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com
balexander@hsblawfirm.com

Attorneys for Respondent
Aiken Regional Medical Centers, LLC

Dated: February 7, 2023

HAYNSWORTH SINKLER BOYD

HAYNSWORTH SINKLER BOYD, P.A.
ONE NORTH MAIN STREET, 2ND FLOOR
P.O. BOX 2048 (29602)
GREENVILLE, SOUTH CAROLINA 29601
MAIN 864.240.3200
FAX 864.240.3300
www.hsblawfirm.com

KENNETH N. SHAW
DIRECT 864.240.4541
kshaw@hsblawfirm.com

February 7, 2023

Via Electronic Mail

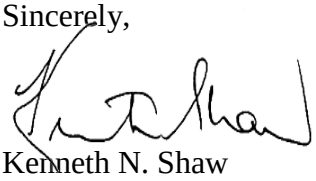
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Fonda E. Patrick and Andre Patrick, Appellants v. Centers, LLC; 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 Centers, LLC; and Aiken Regional Medical Centers, LLC
Appellate Case No.: 2019-000803
Case No.: 2018-NI-02-00003
HSB File No.: 33074.0018

Dear Ms. Kitchings:

Please find enclosed for filing Respondents' Response to Appellants' Petition for Rehearing along with our Proof of Service. Please feel free to contact me should you have any questions or concerns.

Sincerely,



Kenneth N. Shaw

Enclosures

HAYNSWORTH
SINKLER BOYD

cc: Francis M. Hinson, IV
HHP Law Group, LLC
924 Gervais Street
Columbia, SC 29201
brink@hhplawgroup.com

Hutson S. Davis, Jr.
Johnson & Davis, PA
10 Pinckney Colony Road
Suite 200
Bluffton, SC 29909
buster@jd-pa.com

Andrew F. Lindemann
5 Calendar Court, Suite 202
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andrew@ldlawsc.com