FORM 18
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-001110
Opinion No. 2022-UP-397 (S.C. Ct. App. Filed November 2, 2022)
Lower Court Case Number: 2019-CP-42-02092

Luther Harris, Donna Harris, and Bobby E. Leopard,

Petitioners,

v.

Perry Wendell Barbour and Southland Transportation Co.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Donald L. Smith (SC Bar#6699)
2722 West Whitner Street
Anderson, SC 29626
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioners

Other Counsel of Record:
David L. Moore, Jr. (4050)
P O Box 1509
Greenville SC 29602
Telephone: 864-552-4625
DMoore@turnerpadget.com
Attorneys for Respondents

CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruledon by the Court of Appeals on December 12, 2022. (App., p. 277)

QUESTIONS PRESENTED

I. Whether the Court of Appeals properly disposed of and sent the remittitur to the Lower Court.

II. Whether the Court of Appeals' decision in affirming the Lower Court's dismissal of the complaint based on affirmative defenses runs in conflict with the South Carolina Supreme Court's ruling in *Unison Insurance vs Hawkins*.

III. Whether the Court of Appeals' decision to affirm the Lower Court's order conflicts with established principles of justice.

IV. Whether the Court of Appeals' decision to affirm the Lower Court's refusal to apply the doctrine of equitable tolling to Petitioners' case runs in conflict with the South Carolina Supreme Court's ruling in *Hooper v. Ebenezer*.

STATEMENT OF FACTS

On June 10, 2016, Petitioners were traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic which resulted from a motor vehicle accident further south on 85 in the County of Spartanburg, State of South Carolina. (App., p. 26). Barbour, driving a truck owned by Southland, was also traveling southbound on U.S. 85 at that time. (App., p. 26). Without a warning, Barbour's truck smashed into the rear of Petitioners' vehicle. (App., p. 26). The impact was such that all four (4) occupants were knocked out and found by the trooper in the grass outside the vehicle. (App., p. 26). As a result of Defendants' negligence, gross negligence, and reckless acts, Petitioners sustained injuries that necessitated medical attention. Petitioners filed this action for damages for the injuries they sustained as a result of the wreck. (App., p. 26).

Petitioners filed their complaint on June 7, 2019, three (3) days before the running of the three-year statute of limitations for personal injury. S.C. Code §15-3-530(5). (App., p. 24). Pursuant to South Carolina Rules on Civil Procedure, Plaintiff had 120 days after filing their complaint to serve process on the Defendants, or until October 5, 2019.

On June 7, 2019, Petitioners sent a demand letter to Sentry. (App., p. 166-174). A modified demand letter was sent to Sentry on June 9, 2019. Sentry looked through the demand and found issues. In several instances, Sentry required Petitioners to send a copy of Petitioners' medical records and bills, allegedly for being illegible. (App., p. 157-165).

On June 13th and 14th, the carrier for the Defendants contacted counsel due to illegible aspects of the demand. Based on a lack of correspondence, it was believed that the demand was complete, and the carrier was evaluating the individual claims.

On July 23, 2019, counsel left a phone message for the Sentry claims adjustor and inquired about the prospect of getting offers for the claims. The adjuster apologized for the delay in

responding to the demand. He said the delay was based on the illegible documents that were addressed in the middle of June; and, the fact that upper management had been "out of the office". Despite the fact the carrier had the demand for greater than five (5) weeks, he "hoped to get an answer out on both individual claims the following week.

Discussion between the adjuster and counsel continued for the next couple of days regarding the facts of the incident. Based on some clarity issues with the facts, counsel said that he would depose the investigating trooper to clear up the understanding of the facts (if the case was in fact litigated). (App., p. 164).

The following morning, July 25, 2019, the adjuster asked whether he should have defense counsel file an answer to the Complaint. (App., p. 164). The reply was that there had been no service, and there had been no offers. The adjuster understood and said he would be in touch the next week.

On August 8, 2019 (or two weeks later), Petitioners received the offers from Sentry. (App., p. 176). Contrary to Sentry's declaration that it was following up on its offer to resolve the claims, there was no such prior offer. It was believed that the offers were unacceptable. A discussion between Petitioners and counsel confirmed this fact.

When it became apparent that Sentry would not accede to Petitioners' demands, Petitioners served their previously filed Summons and Complaint. Petitioners had to exert efforts to locate the Defendants since both provided addresses in the Accident Report that was apparently no longer operational. Additionally, Petitioners discovered that Southland had long forfeited its standing in South Carolina.

On October 4, 2019, Petitioners served their Summons and Complaint on Southland by mailing a copy of same to the Secretary of State, pursuant to South Carolina Code Ann § 15-9-245

(App., p. 149); and by mailing a copy to Mr. RJ Cummings, who is the registered agent of service for Southland Transportation Company in North Carolina. (App., p. 147).

On the same date, Petitioners served Barbour, by certified mail, in his last known address: 130 Valentine Court, Martinsville, VA 24112. (App., p. 178-180). Petitioners also served Barbour at another address: 272 Mary Hunter Dr., Bassett, VA 24055. (App., pp. 178-180). Both services by certified mail were returned to the sender.

Plaintiff thereafter served Barbour a copy of the processes, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV). Pursuant to § 15-9-370, if a foreign (or a non-resident) driver utilizes the roads of South Carolina, he or she agrees to allow the SCDMV to accept service in his/her stead. Thus, Mr. Barbour was served at that juncture. Ironically, when the SCDMV attempted to notice Mr. Barbour that it accepted service on a lawsuit against him, it was returned to the sender. (App., p. 151-153).

On November 8, 2019, Respondent Southland, represented by Alan G. Jones, Esquire, filed an Answer and Motion to Dismiss, arguing that Petitioners failed to properly and timely file their summons and complaint within the required time under Rule 3 of the South Carolina Rules of Civil Procedure (SCRCP). (App., p. 41; p. 44). Petitioners opposed the motion. (App., p.43).

On November 26, 2019, the Spartanburg court found Respondent Barbour in default (App., p. 81); and issued an Order of Reference to the Master-in-Equity. (App., p. 21-22).

On December 23, 2019, Respondent Barbour moved to dismiss the Complaint based on Rule 12(b)(1), (2), (4) and (5). (App., p. 56). He alleged Petitioners failed to properly and timely serve the Summons and Complaint. On January 7, 2020, Petitioners opposed said Motion, stating Respondent Barbour waived this defense by failing to file an Answer or any responsive pleading within thirty (30) days prescribed by law. (App., p. 65-70).

On January 8, 2020, Respondent Barbour moved to vacate the Order of Reference to Masters-in-Equity, while Petitioners moved for entry of default upon Respondent Barbour. (App., p. 77). On January 17, 2020, the court issued a form for ruling the matter was not properly referred to Masters in equity and ordered to remand the case to the Circuit Court as pleadings contained demands for a jury trial which were not waived. (App., p. 14-19).

On February 24, 2020, Petitioners filed an addendum to their opposition to Respondents' Motion to Dismiss, challenging Respondents' failure to file a joint answer and invoke defense of lack of retention of counsel. (App., p. 83). On February 25, 2020, Petitioners filed a second addendum invoking tolling of statute of limitations on causes of action against out-of-state defendants under South Carolina code annotated sections 15-5- 30. (App., p. 86).

On March 10, 2020, the court denied the motion to dismiss based on Rule 12 (b)(1) of SCRCP but granted the same based on Rule 12(b)(2), (4), and (5). (App., p. 9). Petitioners moved for reconsideration of the Order on March 20, 2020. (App., p. 94).

On April 6, 2020, Respondent Barbour filed his opposition to the motion for reconsideration alleging there was no case at all since there was no proper and timely service of complaint. (App., p. 90). He further contends since there was no viable case, the rule on defenses and tolling of statutes of limitations may not apply.

On April 10, 2020, Petitioners filed their response to the opposition to motion for reconsideration, citing a case where the court granted relief to Plaintiff despite failure to timely serve a defendant. (App., p. 98).

On May 5, 2020, Respondents filed their supplemental brief in opposition to the motion for reconsideration, reiterating their contention there was no default on their part. (App., p. 103). Petitioners submitted a reply to the supplemental brief insisting the cases cited by Respondents

were inapposite. (App., p. 124).

On July 14, 2020, the court issued its challenged form 4/order, denying Petitioners Motion for the Reconsideration. (App., p. 6-7). Petitioners perfected their Appeal on August 3, 2020. (App., p. 141).

ARGUMENTS

I.

THE COURT OF APPEALS PREMATURELY SENT THE REMITTITUR TO THE LOWER COURT, WHICH PREVENTED THE PETITIONERS FROM HAVING THEIR REHEARING HEARD.

The Petitioners filed a motion to allow late filing of their petition for rehearing on November 18, 2022, and the petition for rehearing on November 21, 2022. (App., p. 265-275). They submitted a check amounting to $50.00 as a filing fee. (App., p. 264).

On November 22, 2022, the Court of Appeals issued a letter of deficiency stating that the required filing fee had not been submitted. (App., p. 276). Due to the vagueness of the deficiency letter and the fact that Petitioners submitted a $50.00 check, they did not realize the deficiency pertained to the petition.

It was not until the Petitioners received a letter on December 12, 2022, that they discovered that payment had never been received by the court for the petition. On the same day, December 12, 2022, the Court of Appeals sent the remittitur to the Lower Court. (App., p. 279). The Petitioners learned on December 12, 2022, that the remittitur had been sent.

Petitioners argue that the Court of Appeals sent the remittitur prematurely, violating the amended Rule 221(b) of SCACR. According to the rule, if a petition for rehearing is received before the remittitur is sent, the remittitur should not be sent until the court has had the opportunity to consider the petition. However, in this case, the Court of Appeals sent the remittitur on the same

day they disposed of the petition for rehearing, without allowing any time for the Petitioners to present their arguments.

This premature sending of the remittitur deprived the Petitioners of their right to have their petition for rehearing considered by the court. It effectively denied them the opportunity to present additional arguments or seek further review of the decision. By disregarding the rule's requirement to hold off on sending the remittitur until the petition for rehearing is addressed, the Court of Appeals infringed upon the Petitioners' due process rights.

II.

THE COURT OF APPEALS' DECISION TO AFFIRM LOWER COURT'S DISMISSAL OF THE COMPLAINT BASED ON AFFIRMATIVE DEFENSES CONTRADICTED THE SOUTH CAROLINA SUPREME COURT RULING IN THE CASE OF *UNISON INSURANCE VS HAWKINS.*

Petitioners will assert that the Court of Appeals contradicted a previous ruling of the South Carolina Supreme Court, specifically in the case of Unisun Insurance v. Hawkins, 342 S.C. 537 (S.C. 2000). In *Unisun*, the Supreme Court affirmed that a violation of Rule 12(h)(1) is fatal to affirmative defenses. The court cited the case of *Garner v. Houck*, where it held that a party, who fails to properly raise the defense of insufficient service of process under Rule 12, waives any issues or defenses regarding service, including a statute of limitations defense. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993).

However, in the present case, the Court of Appeals affirmed the Lower Court's dismissal of the complaint, despite the fact that the Respondent failed to raise the defense of insufficient service of process under Rule 12. This contradicts the precedent set by the South Carolina Supreme Court in *Unisun* and *Garner*. The Court of Appeals should have followed the established principle that a failure to properly raise such a defense, results in a waiver of any related defenses, including a statute of limitations defense.

By disregarding this precedent, the Court of Appeals not only erred in its decision but also created an inconsistency within the South Carolina judicial system. This contradiction undermines the integrity of the legal system and warrants a review of the Court of Appeals' decision in this case.

III.

THE COURT OF APPEALS' DECISION TO AFFIRM THE LOWER COURT'S ORDER CONFLICTS WITH ESTABLISHED PRINCIPLES OF JUSTICE.

South Carolina Courts, and courts in general, have sought to allow litigants to have their day in court. As stated in *Herbert,* courts have long adhered to the "sound public policy of deciding cases on their merits."

> As a result, we have long adhered to "the sound public policy of deciding cases on their merits," Herbert v. Saffell, 877 F.2d 267, 269 (4th Cir. 1989) (quotation omitted); Davis v. Williams, 588 F.2d 69, 70 (4th Cir. 1978); Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974), and not "depriving . . . part[ies] of [their] `fair day in court.'" Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 504 (4th Cir. 1977) (quoting Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957) (Clark, J.)), cert. denied, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978). This policy of deciding cases on their merits is so strong that, when a plaintiff has committed a procedural error, we will allow a district court to impose on him the "harsh sanction" of prejudicial dismissal, Herbert, 877 F.2d at 269; Chandler Leasing Corp. v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982), only in the "extreme cases," McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976); 9 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure: Civil § 2369, at 193 (1971), where the plaintiff has shown "a clear record of delay" or has engaged in "contumacious conduct." Dove v. CODESCO, 569 F.2d 807, 810 (4th Cir. 1978).

Choice Hotels v. Goodwin Boone, 11 F.3d 469 (4th Cir. 1993)

While both parties to this case have committed procedural infractions, the Lower Court and in effect, the Court of Appeals, applied different standards for the parties. The Lower Court allowed Respondent Barbour's motion to dismiss as well as affirmative defenses (of insufficiency of process and insufficiency of service of process) despite him clearly being in default and failing

to raise the affirmative defenses in a pleading or motion within the statutory period of time. In the same breath, the Lower Court refused to recognize (a) Petitioners had substantially complied with the rules on service of process; and (b) that in affirming the Lower Court's refusal to allow the extension of time to perfect the service of processes upon the Respondents, the Court of Appeals' decision runs in conflict with established law.

A. Petitioners substantially complied with the laws on rules of service of process.

Rule 4(d)(3), of the South Carolina Rules of Civil Procedure governs the laws on service of processes for corporations. It provides:

> Service and corporations may be effective weighted by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by Statute to receive service and the statute so requires, by also mailing a copy to the defendant.

In compliance with this Rule, Petitioners mailed a copy of the summons and complaint by certified mail return receipt upon Respondent Southland's registered agent of service in its Boonville, North Carolina office. Petitioners also affected service upon Respondent corporation by and through the South Carolina Secretary of State on October 4, 2019. However, the Post Office did not forward the mail until October 7, 2019, two days beyond the 120-days for service of processes (i.e., October 7, 2019, was the last day of the 120-day reglementary period.). Had the Post Office forwarded the mail on Friday, October 4, 2019, when it was deposited, the Secretary of State would have received the Summons and Complaint on Monday, October 7, 2019, and the service would have been timely.

Petitioners also argue that Respondent Barbour was served according to South Carolina law. Under Rule 4 of the SCRCP, an individual may be served processes by delivering a copy of the summons and complaint to him personally, by leaving copies thereof at his dwelling house or

useful place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process. Rule 4(d) SCRCP. Service may also be accomplished through the sheriff, his deputy or mail, by commercial delivery or registered mail, return receipt requested and delivery restricted to the addressee. Rule 4(d)(8) SCRCP.

The Petitioners made three attempts to serve Respondent Barbour. Initially, they sent the documents via certified mail to his last known address at 130 Valentine Court, Martinsville, Virginia 24112, on October 4, 2019, within the 120-day time limit for serving legal documents. However, the mail was returned to the sender. In their second attempt, the Petitioners sent a copy of the documents to 272 Mary Hunt Dr. Bassett, VA 24055, again using certified mail, but this was also returned to the sender. After these two unsuccessful attempts, the Petitioners served Mr. Barbour through the South Carolina Department of Motor Vehicles (SCDMV) in accordance with §15-9-370.

The Lower Court unjustly ignored the Petitioners' diligent efforts to comply with the law, while also dismissing Respondents' wrongful act of providing false information. Furthermore, the court failed to take into account that the delay in service was a result of inadvertence or negligence on the part of the post office, which should not have unfairly disadvantaged the Petitioners. This decision was in conflict with the ruling in the case of *Brown v. Marriot International* which provided,

> The plaintiff's failure to properly serve the Defendant was based on the mistake of the process server. In addition, the Defendant t has not shown prejudice resulting from granting the plaintiff an extension of time to serve the defendant. The plaintiff has offered a good faith and reasonable basis for failing to timely serve the Defendant and dismissing the case would be an unfair result based on the lack of prejudice to the defendant. The Court holds that good cause exists to extend the time for service.

Brown v. Marriott International, Inc., Civil Action No. 2:04-2378-CWH (D.S.C. Mar. 7, 2007)

B. South Carolina courts have allowed service of processes beyond the 120-day time period, provided there is a showing of good cause for the delay in service.

In various jurisdictions, courts have applied a much lenient approach on the 120-day time period to serve processes, allowing Petitioners to serve Summons and Complaint filed beyond the period upon showing of good faith and reasonable efforts of service on the part of the Petitioners.

In South Carolina, courts have had an occasion to extend the time to effect service of processes beyond the statutory period. In the case of *Clyburn v. Champagne*, the Court recognized the "good cause" standard for extension of time to perfect the service of processes. It stated:

> To grant an extension of time for service for good cause the court must find that the plaintiff has made "reasonable and diligent efforts to effect service" within the time period prescribed by law. Courts typically find good cause to extend the Rule 4(m) time limit where "external factors [ ] stifle a plaintiff's due diligence' in effecting service." McCollum v. Genco Infrastructure Solutions, No. 10-210, 2010 WL 5100495,*2(E.D. Va. Dec. 7, 2010, (quoting T ampersand S Rentals v. United States, 164 F.R.D. 422, 425 (N.D. W.Va. 1996). In general, good cause is found to exist only when some outside factor, rather than inadvertence or negligence, prevented service. Lepone-Dempsey v. Carroll County Comm'rs, 476 F.3d 1277 (11th Cir. 2007).

Clyburn v. Champagne, et al., 6:2010cv01925.

There is no doubt as to Petitioners' efforts in attempting to serve both Respondents with the summons and complaint. Petitioners made extensive inquiries after Respondent Barbour did not accept service at his last known address. Petitioners acted diligently and made reasonable efforts to effectuate service.

The circumstances of this case demonstrate that the Petitioners were proactive in asserting their rights. Rather than simply waiting passively, the Petitioners diligently pursued a settlement with Southland's insurance company, which unfortunately caused delays in the negotiation process. It was only after the Petitioners became aware of Sentry's deliberate delaying tactics that

they made the decision to serve the Summons and Complaint upon the Respondents. The Petitioners acted in good faith, relying on the ongoing negotiations, which prevented them from serving the necessary legal documents at an earlier stage.

Finally, the case of *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc*, the Fourth Circuit held:

> When the process gives the Defendant actual notice of the pendency of the action, the rules, in general, are entitled to a liberal construction. When there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process. But the rules are there to be followed, and plain requirements for the means of effecting service of process may not be ignored.

Armco, Inc. v. Penrod-Stuffer Bldg., Sys, Inc., 733 F2d 1087, 1089 (4th Cir. 1984).

The Petitioners argue that Respondent Southland either knew or should have known about the pending legal action against it as early as June 7, 2019. This awareness arose when the Petitioners submitted their demand letter to Respondent Southland's agent, Sentry, along with a copy of the Summons and Complaint. In an email exchange on June 13, 2019, Sentry acknowledged the receipt of the letter and legal documents. As a result, Respondent Southland had both imputed and actual notice of the Complaint.

Additionally, since counsel representing Respondent Southland entered an appearance for Respondent Barbour, the same imputed and actual knowledge of the lawsuit should have been attributed to him.

IV.

THE COURT OF APPEALS' DECISION TO NOT APPLY THE DOCTRINE OF EQUITABLE TOLLING TO PETITIONERS' CASE RUN IN CONFLICT WITH SOUTH CAROLINA SUPREME COURT RULING IN *HOOPER V. EBENEZER.*

The principle of equitable tolling serves the purpose of ensuring justice is served by preventing unjust technical forfeitures that would otherwise prevent a trial on the merits. This was established in the case of Hooper v. Ebenezer Sr. Services& Rehabilitation Center, 386 S.C. 108

(S.C. 2009). The *Hooper* court ruled, "[w]here a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.'" *Hooper* citing Rodriguez v. Superior Court, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009).

In the case of *Hooper*, the plaintiff, who acted as the personal representative of a patient's estate, filed a wrongful death lawsuit against the Defendant nursing home. The patient had been admitted to the nursing home in February 2003, developed severe decubitus ulcers, was subsequently hospitalized in April 2003, and passed away in May 2003. Although the complaint was filed in February 2006 within the applicable statute of limitations, the service of the complaint was not completed until June 2006, exceeding both the three-year statute of limitations under S.C. Code Ann. § 15-3-530 and the 120-day time period specified in S.C. R. Civ. P. 3(a)(2). *Hooper, supra.*

The attorney representing the estate initially attempted to serve the nursing home's designated agent at the address provided to the Secretary of State but was unsuccessful. Subsequently, the attorney made efforts to locate a personal address for the agent. Additionally, the attorney reached out to the sheriff's department multiple times and was informed that service was being attempted. Despite these efforts, the agent could not be located for proper service.

In response, the Defendant in the *Hooper* case argued that the plaintiff's action should be dismissed because alternative methods of service, such as publication or service upon the Secretary of State, should have been pursued. However, the Court emphasized that these alternative methods of service should only be considered after the party has exercised reasonable and diligent efforts to effect service on the individual or agent. *Ibid.*

In the present case, the Petitioners made multiple attempts to serve the Respondents before

the expiration of the 120-day deadline outlined in SCRCP 3(a)(2). On June 7, 2019, the Petitioners filed a Summons and Complaint and made an attempt to serve both Respondents on October 4, 2019, using Certified Mail. Additionally, the Petitioners provided a copy of the filed Summons and Complaint, along with a demand letter, to Sentry, the insurance adjuster for Respondent Southland, on June 7, 2019. Sentry acknowledged the receipt of the demand letter and Complaint and even inquired if the Respondent Southland seek the assistance of a legal counsel.

In both *Hooper* and the present case, the defendants failed to provide accurate addresses. Respondent Southland had already lost its standing in South Carolina, and Respondent Barbour used a different address. When a Defendant relocates, it poses difficulties for the plaintiff to locate them, resulting in prejudice. Although there are no specific guidelines on locating a defendant, the plaintiff is expected to make reasonable and diligent efforts to find and serve them before resorting to service by publication. In this case, the Petitioners made multiple attempts to serve Respondent Barbour, including certified mail to two addresses associated with his name and through the SCDMV. They also made efforts to serve Respondent Southland through certified mail to its registered agent of service and through the Office of the Secretary of State.

While there are no directly analogous cases to the present circumstances, *Hooper* clarified that the court's equitable power is not confined to rigid rules. Equitable tolling exists to promote practicality and fairness. The Petitioners argue that they diligently and reasonably carried out their efforts to serve the Respondents correctly in this case. They further assert that the Respondents would not be taken by surprise or prejudiced in this situation.

While the doctrine of equitable tolling typically applies when a litigant is unable to file a lawsuit due to extraordinary circumstances beyond their control, its application has expanded to various contexts with different criteria. *Ibid.* In the *Hooper* case, it was applied to the statute of

limitations, while in *Gittens v. Equifax*, it was applied to the service of process. Gittens v. Equifax, 3:16-cv-00228-FDW-DSC (November 5, 2019).

In the case of *Gittens v. Equifax*, the complaint was dismissed without prejudice due to the plaintiff's failure to properly serve the process to the appropriate individuals as required by Rule 4 of the N.C. Rules on Civil Procedures. *Ibid.* The court applied the doctrine of equitable tolling in this case, recognizing that there may be circumstances where technical deficiencies in the service of process should not automatically result in the dismissal of the complaint. *Ibid.*

In light of the unique circumstances presented in *Gittens,* the Court granted a tolling of the statute of limitations for a period of thirty days starting from the issuance of the District Court's Order. *Ibid.* This decision was made because dismissing the case would prevent the plaintiff from re-filing his claims, as the statute of limitations had already expired. The Court directed the plaintiff to initiate a new legal action, reasserting the claims from the previous action, no later than December 5, 2019. *Ibid.*

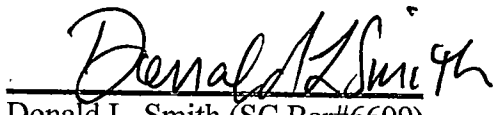
Petitioners would argue that due to the peculiar circumstances in this case, the doctrine of equitable tolling should have been applied in this case.

CONCLUSION

Given the significant conflict arising from the disparate decisions made by the Court of Appeals in this case compared to previous rulings of the Supreme Court, the Petitioners request this Court grant their Petition for Writ of Certiorari and exercise its discretionary power to review the case. Such a review would allow this Court to address the conflict, clarify the law, and provide guidance to Lower Courts, ensuring consistency and fairness in the administration of justice. As an alternative request, following the precedent set in the Gittens case, the Petitioners pray for this

Court to remand the case to the Lower Court and grant an extension of time to re-file the Complaint.

Respectfully submitted by:



Donald L. Smith (SC Bar#6699)
2722 W. Whitner St.
Anderson, SC 29626
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Petitioner

Anderson, South Carolina
May 30, 2023.