THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, III, Circuit Court Judge

Case No.: 2009-CP-42-5373

James Hoftiezer, as Personal Representative
for the Estate of Martha Hoftiezer.....Appellant,

v.

D. Mark Hicklin, M.D., Drs. Taylor, Hicklin, Westmoreland and
Coley, P.A., and Spartanburg Regional Health Services District, Inc.,
d/b/a Spartanburg Regional Healthcare System.....Respondents.

APPELLANT'S FINAL BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

Table of Authorities....4

Statement of Issues on Appeal....6

Statement of the Case....6

Statement of the Facts....8

Standard of Review....10

Arguments....

I. THE STATUTE OF LIMITATIONS SHOULD BE EQUITABLY TOLLED BECAUSE OF RESPONDENTS' MISLEADING REPRESENTATIONS AND PURPOSEFUL OMISSIONS EVIDENCED BY THE WEBSITE OF THE SOUTH CAROLINA SECRETARY OF STATE, THE WEBSITE OF THE SOUTH CAROLINA MEDICAL BOARD, THE SIGNAGE ON RESPONDENTS' BUILDING, FAILURE TO PROPERLY PRODUCE MEDICAL RECORDS AND RESPONDENTS' INTERNET ADVERTISING....11

a. Respondents' misrepresentations, including the errant listing on the Secretary of State website, actively misled the Appellant and thwarted Appellant from effectuating service within the two year statute of limitations....17

b. Respondents' failure to properly produce medical records prior to litigation actively misled Appellant's efforts to effectuate service and identify Respondents D. Mark Hicklin, M.D. and Drs. Taylor, Hicklin, Westmoreland and Coley, P.A. as a part of Respondent Spartanburg Regional Health Services District, Inc....21

II. RESPONDENT TAYLOR, HICKLIN, WESTMORELAND AND COLEY APPEAR TO BE A PRIVATE, UNINCORPORATED GENERAL PARTNERSHIP AND NOT SUBJECT TO THE SOUTH CAROLINA TORT CLAIMS ACT AS IT EXPECTED AND RECEIVED PAYMENT FROM A NON-GOVERNMENTAL SOURCE AND IS NOT PROTECTED BY THE SOUTH CAROLINA TORT CLAIMS ACT....22

a. Respondent Taylor, Hicklin, Westmoreland and Coley appeared to be a private, general partnership and is not subject to the South Carolina Tort Claims Act 23
b. Respondent Taylor, Hicklin, Westmoreland and Coley received payment by a non-governmental entity, thus precluding it from protection under the South Carolina Tort Claims Act 24

III. IF EQUITABLE TOLLING DOES NOT PRECLUDE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, RESPONDENTS ARE NONETHELESS ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE BASED UPON THE DOCTRINE OF EQUITABLE ESTOPPEL 27

Conclusion 30

TABLE OF AUTHORITIES

CASES

Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979).....28

Atlas Food Sys. V. Crane Nat'l vendors, 319 S.C. 556, 462 S.E.2d 858 (1995)...27

Bd. Of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790 (1980).....15

Byars v. Cherokee County, 237 S.C. 548, 118 S.E.2d 324 (1961).....29

David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1, (2006).....11

Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.,
286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985).....27

Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).....10

Halbersberg v. Berry, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (Ct. App. 1990).....23

Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009).....11

Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006).....12

Hedgepath v. Am. Tel. and Tel. Co., 348 S.C. 340,
559 S.E.2d 327 (Ct. App. 2002).....27, 28

Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108,
687 S.E.2d 29 (2009).....6, 7, 12, 13, 14, 15, 17, 18, 21

Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356,
563 S.E.2d 331 (2002).....10

McMillan v. Oconee Mem'l Hosp., Inc. ,367 S.C. 559, 626 S.E.2d 884 (2006)...18

Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004).....23

Oblachinski v. Reynolds, 391 S.C. 557, 706 S.E.2d 844 (2011).....10

Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).....11

Ridgill v. Clarendon County, 192 S.C. 321, 6 S.E.2d 766 (1939).....28

Rodriguez v. Superior Court, 176 Cal. App. 4th 1461,

98 Cal. Rptr. 3d 728 (Cal. Ct. App. 2009).....12

Schriber v. Anonymous, 848 N.E.2d 1061 (Ind. 2006).....13

Shaver v. Orangeburg Surgical Associates, P.A., 2007-CP-38-0553 (October 22, 2007).....14, 15, 17, 18, 21

S. Dev. Land & Golf Co. Ltd. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 728 (1993).....28

Welch v. Edisto Realty Co., 170 S.C. 31, 169 S.E. 667 (1933).....28

Wyman v. Davis, 223 S.C. 172, 174, 74 S.E.2d 694, 698 (1953).....23

Zabinkski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001).....27

RULES

Rule 56(c), SCRCP.....11

Rule 201, SCACR.....10

STATUTES

S.C. Code Ann. § 15-3-545 (2005).....19, 21

S.C. Code Ann. § 15-78-30 (2005).....24

S.C. Code Ann. § 15-78-110 (2005).....21, 31

S.C. Code Ann. § 33-41-210 (2006).....23

S.C. Code Ann. § 33-56-180 (2006).....19

OTHER AUTHORITIES

54 C.J.S. Limitations of Actions § 115 (2005).....12

51 Am. Jur. 2d Limitation of Actions § 169 (2000).....12

Black's Law Dictionary, (9th ed. 2009).....18

STATEMENT OF ISSUES ON APPEAL

I. IN ACCORDANCE WITH THE SOUTH CAROLINA SUPREME COURT RULING OF HOOPER V. EBENEZER SENIOR SERVS. & REHAB CTR., SHOULD THE STATUTE OF LIMITATIONS BE EQUITABLY TOLLED WHEN RESPONDENTS AUTHORED MISLEADING REPRESENTATIONS AND ENGAGED IN PURPOSEFUL OMISSIONS SIGNIFIED BY THE SOUTH CAROLINA SECRETARY OF STATE WEBSITE, THE SOUTH CAROLINA MEDICAL BOARD WEBSITE, RESPONDENTS' BUILDING SIGNAGE, RESPONDENTS' INTERNET ADVERTISING, AND RESPONDENTS' FAILURE TO PROPERLY PRODUCE MEDICAL RECORDS?

II. IS RESPONDENT TAYLOR, HICKLIN, WESTMORELAND AND COLEY A PRIVATE, UNINCORPORATED GENERAL PARTERSHIP NOT SUBJECT TO OR PROTECTED BY THE SOUTH CAROLINA TORT CLAIMS ACT AS A RESULT OF EXPECTING OR RECEIVING PAYMENT FROM A NON-GOVERNMENTAL SOURCE?

III. IF EQUITABLE TOLLING DOES NOT PRECLUDE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, SHOULD RESPONDENTS BE EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE?

STATEMENT OF THE CASE

This case arose from medical treatment received by Martha Sue Hoftiezer from Dr. Mark Hicklin in 2006. On February 26, 2009, Appellant filed a Notice of Intent to File Suit, naming only Dr. Hicklin and Drs. Taylor, Hicklin, Westmoreland, and Coley ("THWC") as Defendants. [R. p. 15.] After, being informed by Dr. Hicklin's counsel that he was an employee of Spartanburg Regional Health Service District, Appellant subsequently filed his Complaint on October 1, 2009, naming Spartanburg Regional health Services District, Inc., d/b/a Spartanburg Regional Healthcare System ("SRHSD") as an additional Defendant. [R. pp. 31-39.] Thereafter, Respondents filed a Motion for Summary

Judgment on the grounds that (1) SRHSD is a public hospital corporation and political subdivision of the State of South Carolina governed by the S.C. Tort Claims Act, (2) that TWHC is a fully owned party of SRHSD and that (3) Appellant did not commence the action within two years pursuant to the S.C. Tort Claims Act.

The Honorable J. Mark Hayes, II heard this motion on September 1, 2011. [R. pp. 112-189.] After hearing the parties' arguments, Judge Hayes issued a Form 4 Order on September 28, 2011 granting Respondents' Motion for Summary Judgment, finding that SRHSD did not commit any wrongdoing and that Decedent Hoftiezer should have known that Dr. Hicklin and TWHC were affiliated with SRHSD. [R. pp. 3-4.] Judge Hayes stated in the Form 4 Order that the Secretary of State documents could be read as misleading.

In his Order, Judge Hayes held that Decedent would have known her doctors were affiliated SRHSD or that Decedent's Personal Representative would have known of the affiliation when requesting medical records of the Decedent. [R. p. 4.] Appellant asserted to the trial court that equitable tolling and/or equitable estoppel was appropriate given Respondents' conduct and applying the framework of Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). The trial court did not address Appellant's argument that Respondents Dr. Hicklin and THWC elicited payments from a non-governmental source precluding it from protection under the South Carolina Tort Claims Act.

The trial court signed an Order Granting Defendants' Motion for Summary Judgment. [R. pp. 5-14.] Appellant filed a timely Notice of Appeal on November 15, 2011. [R. pp. 91-106.]

STATEMENT OF THE FACTS

On July 31, 2006, Martha Sue Hoftiezer presented to her family physician, Defendant Dr. Mark Hicklin, M.D., complaining of chest discomfort. Dr. Hicklin prescribed Mrs. Hoftiezer 10 mgs of Steripred and assured her that her chest pain was not cardiac related. Dr. Hicklin expressly assured Ms. Hoftiezer and documented that the complaints were not cardiac related. Based on this assurance, Mrs. Hoftiezer left his office and resumed her daily routine. However four days later Mrs. Hoftiezer went into cardiac arrest and died on August 04, 2006.

Appellant filed a Notice of Intent to File Suit on February 26, 2009, naming only Dr. Hicklin and THWC as Defendants. After being informed by Dr. Hicklin's counsel that he was an employee of Spartanburg Regional Heath Service District, Inc., Appellant subsequently filed his Complaint on October 1, 2009, naming SRHSD as an additional Defendant.

At the time Mrs. Hoftiezer presented to Dr. Hicklin on July 31, 2006, Dr. Hicklin was treating her at the office of THWC, a seemingly private family practice. James Hoftiezer is the Personal Representative of his mother's estate and after her death obtained his mother's medical records from THWC. The extent of medical records that Mr. Hoftiezer received from THWC is a stark contrast to the records produced once suit ensued. Whereas Mr. Hoftiezer

received less than forty (40) pages of medical records upon his individual request and prior to litigation, Appellant's counsel received three volumes of medical records following discovery requests to counsel for Respondents amounting to over two hundred forty (240) of post-suit medical records.

When Appellant's counsel was preparing the case for filing and service, they researched Dr. Hicklin's practice status and a search of the South Carolina Board of Medical Examiners showed Dr. Hicklin's address and phone number as being listed as the identical address and phone number of THWC. [R. p. 531.] Appellant's counsel had previously researched the Secretary of State's website for another matter (also filed in Spartanburg County with one of the defendants being SRHSD), which revealed SRHSD to be an eleemosynary corporation. [R. pp. 532-533]. Whether Dr. Hicklin was an employee of SRHSD was inconsequential based on the seemingly charitable status of SRHSD. As aforementioned, the records provided to Martha Hoftiezer's son prior to the institution of suit were woefully incomplete as was later shown by counsel for Respondents producing ***all the records***. Mr. Hoftiezer had properly requested a complete set of the medical records pertaining to his mother's treatment. The records provided to Mr. Hoftiezer do not give a reasonable person reason to believe that SRHSD employed Dr. Hicklin and THWC.

Appellant's counsel did not miscalculate or forget the date upon which the statute of limitations would expire in this case. Rather, Appellant's counsel calendered the date for three years instead of two years based on the public information disseminated or maintained by Respondents. In fact, Appellant's

counsel had already secured experts well before the expiration of two years and would have filed suit prior to the operative date had Respondents properly identified themselves or properly produced medical records.

Although Respondents claim SRHSD owns the THWC family practice, TWHC appears to have held itself out to be a general partnership under South Carolina law for years prior to this litigation. Respondent SRHSD has continuously identified itself as a non-profit eleemosynary corporation through the South Carolina Secretary of State, representing its status as a charitable organization and continues to do so to this very day.

STANDARD OF REVIEW

This is an appeal from a judgment against Appellant in the trial court, pursuant to Rule 201 of the South Carolina Rules of Appellate Practice, based on the trial judge's grant of Respondents' motion for summary judgment.

"When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court." Oblachinski v. Reynolds, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011) (citing Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." Id. (citing Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn

from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

"On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

I. THE STATUTE OF LIMITATIONS SHOULD BE EQUITABLY TOLLED BECAUSE OF RESPONDENTS' MISREPRESENTATIONS AND PURPOSEFUL OMISSIONS EVIDENCED BY THE SOUTH CAROLINA SECRETARY OF STATE WEBSITE POSTING, THE SOUTH CAROLINA MEDICAL BOARD WEBSITE POSTING, THE SIGNAGE ON RESPONDENTS' BUILDING, RESPONDENTS' FAILURE TO PROPERLY PRODUCE MEDICAL RECORDS AND RESPONDENTS' INTERNET ADVERTISING.

The statute of limitations should be equitably tolled based on Appellant's justifiable reliance upon the representations of Respondents TWHC and SRHSD on the websites of the South Carolina Medical Board and South Carolina Secretary of State, the format of the medical records produced pre-litigation, THWC's signage, and South Carolina's strong judicial policy that cases be decided on the merits. South Carolina law provides for tolling of the applicable limitations period by statute and also "[i]n order to serve the ends of justice where

technical forfeitures would ***unjustifiably prevent a trial on the merits***, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009), citing 54 C.J.S. Limitations of Actions § 115 (2005) (emphasis supplied). "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." Hooper, 386 S.C. at 115, 687 S.E.2d at 32, (quoting Ocana v. Am. Furniture Co., 135 N.M. 539, 91 P.3d 58, 66 (N.M. 2004)). Equitable tolling, "refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." 51 Am. Jur. 2d Limitation of Actions § 169 (2000). "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." Id.

"Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Hooper, 386 S.C. at 115, 687 S.E.2d at 32, (citing Rodriguez v. Superior Court, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Cal. Ct. App. 2009)). The Hooper court provided:

> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.

Id. 386 S.C. at 116-117, 687 S.E.2d at 33, (citing Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006)).

In Hooper, the court held that equitable tolling of the statute of limitations was appropriate when the defendant failed to properly list its registered agent for service with the Secretary of State, thus resulting in delayed service of process by the plaintiff. In Hooper, the statute of limitations for the plaintiff's wrongful death claim expired on May 15, 2006. Prior to the running of the statute, the plaintiff's attorney was unable to effectuate proper service of process. The attorney searched the website for the South Carolina Secretary of State and found that the defendant was listed as a business in good standing with a registered agent located in Columbia, South Carolina. However, the Richland County Sheriff's Department was unable to serve the agent because he moved to an unknown address. After hiring a private investigator and attempting to serve the defendant twice more, the plaintiff was still unsuccessful. On June 15, 2006, the plaintiff's attorney in Hooper served an affiliate of the defendant; however, the statute of limitations had expired one month prior.

The Hooper court held in favor of the plaintiff, ***ruling that the plaintiff was entitled to rely upon the public records*** and that the defendant's failure to name a viable registered agent with the South Carolina Secretary of State as required by state law thwarted her repeated attempts to effect service. The court agreed with the plaintiff that, under the circumstances, it would be inequitable for the defendant to benefit from its conduct by obtaining a complete dismissal of her claims.

The court sought guidance from other jurisdictions in reaching its decision in Hooper. For example, in Schriber v. Anonymous, a widow brought medical

malpractice and wrongful death claims arising out of the death of her husband. Schriber v. Anonymous 848 N.E.2d 1061 (Ind. 2006). The widow was unable to timely effectuate service because the defendant, a healthcare facility, did not follow state law in regards to the proper filing of its business designation and the conspicuous posting of its license in public view. Although the Indiana Supreme Court decided the case on another basis, the court noted that the proper procedure should have been for the court to judicially toll the expiration of the applicable limitations period for the time that the defendant's actions hindered the plaintiff's discovery of the proper entity name and thus delayed her attempt to effect service. Id., 848 N.E.2d at 1063-64.

In applying the Indiana Supreme Court's observations, our court held that, "Ebenezer's failure to properly list its registered agent for service with the Secretary of State as required by state law hindered Hooper's pursuit of Service." Hooper 386 S.C. at 117-118, 687 S.E.2d at 33-34. Furthermore, "Hooper was entitled to rely on the public records and she diligently pursued service on what turned out to be a nonexistent agent. Thus, it is not equitable that Ebenezer be the beneficiary of the drastic consequences of dismissal." Id. Finally, the court recognized that public policy and the interests of justice weigh heavily in favor of allowing the plaintiff's claim to proceed. "The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law." Id.

Though of no precedential value, an Order from Shaver v. Orangeburg Surgical Assoc., P.A., is persuasive and bolsters the assessment of the Court in

Hooper. Shaver v. Orangeburg Surgical Assoc., P.A., 2007-CP-38-0553 (October 22, 2007). [R. pp. 522-530.] The court in Shaver addressed the issue of equitable tolling which was premised on very similar facts to the case at hand. In Shaver, the Circuit Court of Orangeburg County granted the plaintiff's request for equitable tolling of the two year statute of limitations for governmental entities. The defendant hospital had purchased the surgical practice of several local doctors yet (1) failed to change any signs at the entrance of the surgical practice to inform patients of the hospitals ownership interest, (2) continued to use the stationary of the old surgical practice, and (3) continued to promulgate the surgical practices previous information on the S.C. Secretary of State website, which allowed the appearance to a reasonable person that the surgical practice remained a separate entity. Judge Williams found that the hospital's conduct created a false representation and that the plaintiff had reasonably relied on such representations.

The case at bar is analogous to the circumstances addressed in Hooper and Shaver. In this matter, Respondents engaged in a pattern of misconduct that prevented Appellant from discovering essential information bearing on this claim, despite exercising reasonable diligence. "Defendants may not, by tactics of evasion, prevent the plaintiff from litigating the merits of a claim, even though on its face the claim is time-barred." Bd. of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790 (1980). Respondents' tactics of evasion are detailed below:

1. SRHSD failed, whether purposefully or by gross inattention, to accurately list itself as a governmental entity on the Secretary of State

Website. Instead, SRHSD announced itself to the public as an eleemosynary organization. This listing relegates SRHSD, for the purposes of the statute of limitations in this matter and in the eyes of a reasonable person, to a charitable organization. SRHSD's own counsel admitted in deposition testimony that its status could be confusing to those accessing the Secretary of State's website. Accordingly, Appellant reasonably relied on SRHSD's status as a charitable organization, affording a three year statute of limitations.

2. Respondents produced only a modicum of the actual medical records to Appellant prior to litigation, despite being presented with a proper request. Not only was this a semblance of fraud, but it also was a violation of federal and state law regarding a patient's right to her medical records.[1] Tellingly, the records that Respondents actually produced prior to litigation did not reveal any connection to or any employment relationship between THWC and SRHSD.
3. Respondent THWC's signage on its building and stationary produced to Appellant did not contain any indication that it was a group of physicians employed by SRHSD.
4. There is nothing on the Medical Board website that alerts the public that SRHSD employs Dr. Hicklin or THWC.
5. The entrance doors to Respondent THWC's offices reveal no identifying measures that place Appellant on notice of any connection

[1] See S.C. Code Ann. § 44-115-10, et seq. and Health Insurance Portability and Accountability Act of 1996.

to a governmental agency, namely SRHSD. Interestingly, other offices in that complex do have their name and SRHSD's name on the door. THWC's Past Medical History forms, front doorway signage, side doorway signage, blood work, Plaintiff's LabCorp laboratory results and Blue Cross-Blue Shield's EOB's all show reference to THWC as a separate, distinct and self-owned business entity. [R. pp. 534-545.]

6. THWC's actual and perceived status to the public as a private, general partnership.

a. Respondents' misrepresentations, including the errant listing on the Secretary of State website, actively misled Appellant and thwarted Appellant from effectuating service within the two year statute of limitations.

In this matter, it would be inequitable for Respondents THWC and SRHSD to benefit from their misleading conduct by obtaining a complete dismissal of Appellant's claims. Appellant had no way of knowing that (1) Dr. Hicklin was an employee of SRHSD, (2) that THWC was employed by SRHSD or (3) SRHSD was a governmental entity with a two year statute of limitation under the S.C. Tort Claims Act because its information on the Secretary of State's website was misleading and inaccurate. Respondents' conduct in this matter is analogous to the defendants' conduct in Hooper and Shaver.

Respondent SRHSD's errant listing with the Secretary of State as an eleemosynary organization actively misled the public and Appellant and continues to mislead anyone accessing the website. Eleemosynary is defined as "of, relating to, or assisted by charity." Black's Law Dictionary, (9th ed. 2009).

In McMillan v. Oconee Mem'l Hosp., Inc., our court provided that the subject hospital was a "private eleemosynary (charitable) hospital" suggesting that the words can be used interchangeably and are equivalent. McMillan v. Oconee Mem'l Hosp., Inc. 367 S.C. 559, 561, 626 S.E.2d 884, 885 (2006).

Similar to Hooper and Shaver, Appellant was prohibited from effectuating proper service within the statute of limitations prescribed by the S.C. Tort Claims Act due to Respondent SRHSD's failure to ensure it was listed accurately as a government entity with the South Carolina Secretary of State. The resulting confusion endured by Appellant is supported by the deposition testimony of Edwin C. Haskell, III, Esquire, who serves as attorney for Spartanburg County. Mr. Haskell addressed the notations on the Secretary of State website as follows:

Q: And I think we're all in agreement here, eleemosynary means charitable, does it not?

A: That's one of the definitions, yes.

Q: Isn't that the primary usage that you've seen in corporate law?

A: Usually that's a generally accepted meaning, yes, I agree with you.

Q: Okay. And I believe you agree with me that if you combine nonprofit with eleemosynary, eleemosynary, eleemosynary, eleemosynary there is certainly a distinct possibility of interpreting, of a reasonable person interpreting this document as being a charitable organization?

A: That's one of the interpretations I believe could be made.

[R. pp. 211-212.] Mr. Haskell's testimony provides further support for equitably tolling the statute of limitations because of the unclear and facially confusing

business status that appears for SRHSD on the Secretary of State's website and its alleged affiliation with THWC.

As an eleemosynary and therefore charitable organization, the proper statute of limitations is three years. S.C. Code Ann. §33-56-180 (2006) directly addresses the limitation of liability for charitable organizations:

> A person sustaining an injury or dying by reason of the tortious act of commission or omission of an employee of a charitable organization, when the employee is acting within the scope of his employment, may recover in an action brought against the charitable organization only the actual damages he sustains in an amount not exceeding the limitations on liability imposed in the South Carolina Tort Claims Act in Chapter 78 of Title 15 . . . .

While it is clear that the cap on damages found in the SCTCA is applicable to charitable organizations, it is also very clear that the legislature did not intend to abrogate the three year statute of limitations that applies for medical malpractice actions against non-governmental agencies. S.C. Code Ann. § 15-3-545 (2005). Accordingly, and pursuant to legislative intent, the statute of limitations for charitable organizations is three years.

Respondents' information with both the Medical Board and Secretary of State, which they were responsible for submitting and accurately maintaining, misled Appellant. The address and telephone number listed with the South Carolina Board of Medical Examiners for Dr. Hicklin and THWC is consistent with the contact information for the private family practice. Several other items of evidence support Appellant's reasonable pre-suit conclusion that THWC was a private unincorporated general partnership and not subject to the S.C. Tort Claims Act, including, but not limited to: (1) Martha Hoftiezer's partial medical records

that were given to her son as a "complete" set of records; (2) LLR's Medical Board Website; (3) Secretary of State Website on SRHSD; (4) lab results obtained on behalf of Martha Hoftiezer from Lab Corps in 2004 and 2005; (5) photographs of the entrances and/or exits to TWHC's practice located at 120 Heywood Avenue, Suite 200, Spartanburg, South Carolina; and (6) Blue Cross/Blue Shield Explanation of Benefits statements. Both the partial medical records and Medical Board Website clearly reference to THWC in its individual and seemingly private capacity, with no inclusion or mention of employment with SRHSD. These items clearly reasonably infer a private entity instead of the governmental structure now asserted by Respondents.

The entrance doors to THWC's offices reveal no identifying measures that would place Appellant on notice of any connection to a governmental agency, namely SRHSD. None of the above referenced items represent to anyone, much less Appellant as the son of a deceased patient or his counsel, a business status that would put a reasonable person on notice of any governmental affiliation implicating the S.C. Tort Claims Act. THWC's prescription forms, front doorway signage, side doorway signage, phone prescription sheets, patient information sheets, and Martha Hoftiezer's LabCorp laboratory results all reference THWC as a separate, distinct and self-owned business entity.

Despite diligent research, Appellant's counsel had no reasonable way of knowing that Dr. Hicklin and THWC were part of SRHSD and was not afforded reasonable notice that SRHSD was a governmental entity considering the contrary filing with the Secretary of State. SRHSD's listing or failure to correct the listing

as an eleemosynary organization was blatantly misleading in light of its present state as a governmental entity.

Whether SRHSD intended this misrepresentation is irrelevant. SRHSD most certainly possessed actual knowledge of the true facts regarding its status. However, Appellant did not know the true facts, nor could Appellant have acquired the true facts through reasonable due diligence. Appellant's counsel relied to his detriment by filing the lawsuit to comply with the three year statute of limitations found in S.C. Code Ann. §15-3-545 (2005) instead of the two year statute of limitations found in the Tort Claims Act at S.C. Code Ann. §15-78-110 (2005). As such, all of the factors of equitable tolling are present and applying the framework set forth by Hooper and Shaver to the facts of this matter, Respondents' motion for summary judgment should have been denied and the statute of limitations should be equitably tolled.

b. Respondents' failure to properly produce medical records prior to litigation actively misled Appellant's efforts to effectuate service and identify THWC as a part of SRHSD.

Further indicia of equitable tolling and/or equitable estoppel exists on the face of medical records THWC supplied to Mr. Hoftiezer prior to litigation. Prior to filing suit, James Hoftiezer received less than forty (40) pages of medical records for his mother's medical treatment pursuant to a request for the same. None of the medical records that THWC provided contained a heading, letterhead, or identifier that SRHSD owned THWC. Rather, the medical records only referenced THWC's practice. THWC produced only a fraction of the records pertaining to Martha Hoftiezer's care prior to suit being filed. After

Appellant initiated suit, Respondents' counsel produced more than two hundred forty (240) pages of medical records pertaining to Martha Hoftiezer's treatment.

Only after receiving the appropriate records did Appellant have access to any records that signified that THWC may have some association with SRHSD. Even after THWC produced the proper records, only a handful of the records identify both SRHSD and THWC. Regardless, based on Appellant's research of the Secretary of State's website, the identifiers were of no import since SRHSD appeared as charitable anyway and thus subject to a three year statute of limitations.

Appellant is disturbed at the number of records that THWC withheld prior to suit being filed, specifically those records that contained headings of both THWC and SRHSD. Respondents should not be allowed to benefit from this reprehensible conduct. In conjunction with any impropriety associated with the production and format of medical records in this matter, the Court should equitably toll the 2 year statute of limitations asserted by THWC and SRHSD as a result of the improper listing on the Secretary of State's website. As such, Respondents' motion for summary judgment should have been denied and the statute of limitations should be equitably tolled.

II. RESPONDENT TAYLOR, HICKLIN, WESTMORELAND AND COLEY APPEAR TO BE A PRIVATE, UNINCORPORATED GENERAL PARTNERSHIP AND NOT SUBJECT TO THE SOUTH CAROLINA TORT CLAIMS ACT AS IT EXPECTED AND RECEIVED PAYMENT FROM A NON-GOVERNMENTAL SOURCE AND IS NOT PROTECTED BY THE S.C. TORT CLAIMS ACT.

a. Respondent Taylor, Hicklin, Westmoreland and Coley appeared to be a private, general partnership and is not subject to the South Carolina Tort Claims Act.

THWC has continuously appeared to hold itself out as a general partnership and is precluded from claiming a two year statute of limitations pursuant to the S.C. Tort Claims Act. THWC and SRHSD maintain that SRHSD wholly owns SRHSD. A general partnership is "an association of two or more persons to carry on as co-owners a business for profit . . . ." S.C. Code Ann. § 33-41-210 (2006).

> Where the parties to a contract, by their acts, conduct, or agreement show that they intended to combine their property, labor, skill and experience, or some of these elements on one side, and some on the other, to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred, such parties are partners.

Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004); (see Wyman v. Davis, 223 S.C. 172, 174, 74 S.E.2d 694, 698 (1953); Halbersberg v. Berry, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (Ct. App. 1990).

THWC held itself out to the public as three physicians engaged in the business of practicing medicine for profit. A general internet search points to multiple listings of THWC which would not reflect any limited liability status or governmental affiliation. [R. pp. 546-575.] For purposes of the statute of limitations, Respondents' contentions that THWC is a part of the overall consortium that forms SRHSD cannot stand given the evidence, viewed through the eyes of a reasonable person, which militates that THWC's practice is, from all appearances, a private, general partnership. As such, equitable tolling of the

statute of limitations is appropriate even if SRHSD actually owns THWC and employs THWC physicians.

All of the above mentioned coupled with the absence of any specific business filings for THWC clearly infer that THWC was, and reasonably appears to remain, a separate private practice which would otherwise constitute a general partnership under South Carolina law. Accordingly, the two year statute of limitations under the S.C. Tort Claims Act should be equitably tolled as THWC appeared to be a private, unincorporated general partnership.

b. THWC received payment by a non-governmental entity, thus precluding it from protection under the S.C. Tort Claims Act.

Dr. Hicklin, as a partner of THWC, reported income from a Regional Healthplus, LLC – a source other than a governmental entity. The S.C. Tort Claims Act provides, in part:

> [T]he provisions of this section shall in no way limit or modify the liability of a licensed physician or dentist, acting within the scope of his profession, with respect to any action or claim brought hereunder which involved services for which the physician or dentist was paid, should have been paid, or expected to be paid at the time of the rendering of the services from any source other than the salary appropriated by the governmental entity or fees received from any practice plan authorized by the employer whether or not the practice plan is incorporated and registered with the Secretary of State.

S.C. Code Ann. § 15-78-30 (2005).

As evidenced by the attached schedule to Dr. Hicklin's 2007 income tax return, he accepted payments from Regional Healthplus, LLC. [R. p. 576.] Dr. Hicklin testified that he receives income from Regional Healthplus, LLC, which

appears to be a quasi-insurance company that is dependent upon the number of patients that he treats:

Q: Do you see the Regional Health Plus, LLC, on there?

A: I do.

Q: Now, to me this indicates that you received a K-1 from them. Is that correct? Or does your wife?

A: No. It would be to me. I received income from Regional HealthPlus.

*****

Q: Now, can you tell me – we have the – and I'm certain on your copy it's blacked out too, the amount that you were paid by Regional HealthPlus, LLC, but could you tell me what that is and what they paid you for?

A: My understanding is that Regional HealthPlus is basically like an insurance company, and when it was formulated, local doctors had the opportunity to invest in it, and I did that, and so I own shares in that company, and there's a distribution annually. That's what that represents.

*****

Q: Just one more thing on that HealthPlus. Do you get money every year from HealthPlus?

A: Yes.

Q: Is it the same amount every year?

A: No, it's variable.

Q: Variable amounts?

A: Uh-huh.

Q: Until we talk to your accountant, you're not exactly sure how they base it or what it's for or –

A: Well, it is based on how many patients that I take care of that are under that plan and how the overall plan performs. I believe those are the determinants. So it varies every year.

*****

Q: Well, the South Carolina Code refers to a practice plan, and I just wondered if you had a practice plan in effect in 2006.

Mr. Boulier (counsel for Defendants):

Let me say, Russ, in fair – I'm not aware of any practice plan that existed for Dr. Hicklin's group as defined by Section 15-78-70. Fair enough?

[R. pp. 190-194.]

As evidenced by Dr. Hicklin and his counsel's own testimony, Dr. Hicklin accepts payments from a non-governmental entity. It is a fair inference that Dr. Hicklin's treatment of Martha Hoftiezer contributed to any revenue he received from Regional HealthPlus, LLC. By definition, the S.C. Tort Claims Act does not limit or modify any liability that Dr. Hicklin may have as a result of this claim. From the clear interpretation of Dr. Hicklin's testimony, he receives payments from a non-governmental entity dependent upon how many patients he takes care of – including Martha Hoftiezer. Accordingly, he cannot assert any provision of the S.C. Tort Claims Act as a measure to limit or modify his liability from this claim. Consequently, a three year statute of limitation applies to Dr. Hicklin as a result of his relationship with Regional HealthPlus, LLC.

III. IF EQUITABLE TOLLING DOES NOT PRECLUDE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, RESPONDENTS ARE NONETHELESS ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE BASED UPON THE DOCTRINE OF EQUITABLE ESTOPPEL.

Equitable estoppel precludes SRHSD from asserting the two year statute of limitations proscribed in the South Carolina Tort Claims Act. The elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts; Zabinkski v. Bright Acres Assoc., 346 S.C. 580, 589 553 S.E.2d 110, 114 (2001).

The essential elements of estoppel as related to the party claiming estoppel are: (1) lack of knowledge and means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. Id. Application of equitable estoppel does not require an intentional misrepresentation. It is sufficient if the plaintiff reasonably relied upon the words or conduct of the defendant in allowing the limitations period to expire. Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218-19, 332 S.E.2d 555, 561 (Ct. App. 1985) (overruled on other grounds by Atlas Food Sys. V. Crane Nat'l vendors, 319 S.C. 556, 462 S.E.2d 858 (1995)).

In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if its conduct or representation induced the plaintiff to delay in filing suit. Hedgepath v. Am. Tel. and Tel. Co., 348 S.C. 340, 559

S.E.2d 327 (Ct. App. 2002). Silence may give rise to estoppel where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. S. Dev. Land & Golf Co. Ltd. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 728 (1993); Ridgill v. Clarendon County, 192 S.C. 321, 6 S.E.2d 766 (1939). Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel. Id. (citing Welch v. Edisto Realty Co., 170 S.C. 31, 169 S.E. 667 (1933)). Whether the defendant's actions lulled the plaintiff into "a false sense of security" is usually a question of fact, and therefore properly left to a jury's determination. Hedgepath 348 S.C. at 361, 559 S.E.2d at 339.

As the court in Hedgepath found in addressing equitable estoppel by silence, a duty to speak or disclose may be found in three distinct scenarios:

> (1) where it arises from a preexisting definite fiduciary relation between the parties;
>
> (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; and
>
> (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id.

A governmental body is not immune from the application of the doctrine of estoppel where its officers or agents act within the proper scope of their authority. Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S.E.2d 716 (1979). This

rule has been applied to the actions of county officials. Byars v. Cherokee County, 237 S.C. 548, 118 S.E.2d 324 (1961).

Appellant relied on Respondents to comply with federal and state law in responding to a proper request for medical records. As discussed in the aforementioned paragraphs, Respondents withheld hundreds of pages of medical records prior to suit being filed. Additionally, Respondents claim that they were subject to the S.C. Tort Claims Act, and would assert that they had no obligation to update and ensure the accuracy of their identifying information with the Secretary of State. Such an assertion is in error and goes against common sense notions of justice, South Carolina jurisprudence and the website itself as it provides that "it is the responsibility of the business entity to inform the Secretary of State of any updated information." [R. pp. 532-533.] ***Even more disturbing is that Respondent SRHSD has still not corrected the incorrect listing of an eleemosynary, non-profit entity and is continuing its charade of advocating itself as something that it is not.*** Whether Respondents' failure to update or clarify this information was intentional or not, it clearly amounted to the concealment of material information and a misrepresentation of the truth. Respondent SRHSD continues to mislead the public about its status to this very day despite this litigation and the clear mandates of the South Carolina Secretary of State.

As detailed in the paragraphs above, Respondents' information with both the Medical Board and Secretary of State, which they were responsible for submitting accurately, misled Appellant. Despite diligent research, Appellant had

no reasonable way of knowing that THWC was part of SRHSD or that SRHSD employed THWC physicians. Appellant was not afforded reasonable notice that SRHSD was a governmental entity considering the contrary filing with the Secretary of State.

Whether SRHSD intended this misrepresentation is irrelevant, though it appears that this was a purposeful act considering its continued failure to update its information. SRHSD most certainly possessed actual knowledge of the true facts regarding its status. However, Appellant did not know the true facts, nor could Appellant have acquired the true facts through reasonable due diligence. Appellant's counsel relied to his detriment by filing the lawsuit to comply with the three year statute of limitations found in South Carolina Code Ann. §15-3-345 instead of the two year statute of limitations found in the Tort Claims Act at South Carolina Code Ann. §15-78-110. There is no legal prejudice to Respondents in that no witnesses have died, the records are still available, etc., in short, there can be no argument by Respondents that the claim is "stale" for any reason. In fact the claim was filed prior to the expiration of three years. As such, all of the factors of equitable estoppel are present and Respondents should be equitably estopped from claiming the two year statute of limitations as a defense.

CONCLUSION

For the reasons stated herein, the Court should reverse the trial court's rulings.

Respectfully Submitted,

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November 8th, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, III, Circuit Court Judge

Case No.: 2009-CP-42-5373

James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer. .....Appellant,

v.

D. Mark Hicklin, M.D., Drs. Taylor, Hicklin, Westmoreland and Coley, P.A., and Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg Regional Healthcare System .....Respondents.

CERTIFICATION OF COUNSEL

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Brief complies with all requirements pursuant to 211(b) of the SCACR.

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 8th day of Nov 2012, served copies of the Appellant's Final Brief upon counsel of record for the Respondents by causing them to be deposited in the United States mail, first class postage paid, addressed to Perry Boulier, Esquire, Holcombe Bomar, P.A., 100 Dunbar Street, Suite 200, Spartanburg, SC 29306.

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