

The Supreme Court of South Carolina

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

v.

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

Appellate Case No. 2011-203086

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this
appeal is hereby certified for review by the South Carolina Supreme Court.

Upon receipt of this order, the Court of Appeals is hereby directed to forward
the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

December 28, 2012

cc:

Ruskin C. Foster, Sr.

Ginger D. Goforth

Perry D. Boulter

Bradley Davis Hewett

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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November 08, 2012

Mr. Ruskin C. Foster, Sr.
PO Box 8113
Columbia SC 29202

Mr. Bradley Davis Hewett
PO Box 8113
Columbia SC 29202-8113

Re: Hoftiezer, James v. Hicklin, D. Mark
Appellate Case No. 2011-203086

Dear Counsel:

Upon reviewing your record on appeal the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The number of pages in a record on appeal may not exceed 500 per volume.

Very truly yours,

Jenny A. Kitchings
CLERK

cc: Ginger D. Goforth
Perry D. Boulter



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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October 16, 2012

Mr. Ruskin C. Foster, Sr.
Mr. Bradley Davis Hewett PO Box 8113
Columbia SC 29202

Ms. Ginger D. Goforth
Mr. Perry D. Boulrier
PO Box 1897
Spartanburg SC 29304

Re: Hoftiezer, James v. Hicklin, D. Mark
Appellate Case No. 2011-203086

Dear Counsel:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street,

Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: [cc]



Columbia Office
500 Taylor Street
Columbia, SC 29201

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Fax 803.252.7145

Mailing Address
PO Box 8113
Columbia, SC 29202

September 24, 2012

The Honorable Tonya Gee
S.C. Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

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SEP 24 2012

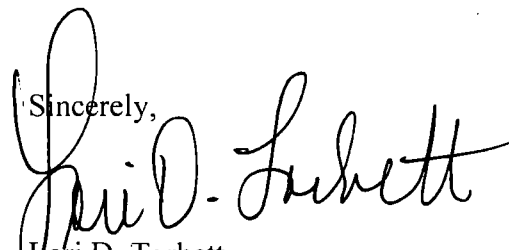
SC Court of Appeals

RE: Hoftiezer v. Hicklin, et al.
Court of Appeals File No: 2011203086
C/A No: 09-CP-42-5373

Dear Ms. Gee:

Please find enclosed for filing an original and seven copies of the Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal and Proof of Service. If you would kindly file the original and return clocked copies to my courier, it would be greatly appreciated. If you need anything further, please contact my office.

With kindest regards, I remain

Sincerely,

Lori D. Torbett
Paralegal to Ruskin C. Foster

RCF/ldt
cc: Perry Boulter, Esquire

OFFICES IN:

Columbia, Myrtle Beach and Winnsboro, South Carolina
www.mklawgroup.com

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

RECEIVED

SEP 24 2012

SC Court of Appeals

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 REPLY BRIEF

Respectfully submitted,
MIKE KELLY LAW GROUP, LLC

By:

Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

September 24th, 2012

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- b. Respondents' assertions in their initial brief regarding Appellant's efforts to determine the status of Respondent SRHSD are untrue.
- c. Respondent SRHSD does have control over the manner in which its information is published on the Secretary of State website as it has the express responsibility to keep the Secretary of State informed of any updated information.
- d. The Personal Representative of Decedent Martha Hoftiezer is not charged with any knowledge that Decedent may have had, if any, concerning the employment relationship between Respondents.

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REPLY ARGUMENT

I. RESPONDENTS' BRIEF IS LADEN WITH FACTUAL INACCURACIES AND MISSTATEMENTS OF THE LAW.

- a. In accordance with Hooper, Appellant was not required to pull Respondent SRHSD's filings with the Secretary of State and was entitled to rely on the erroneous content of the website as allowed to exist over several years by Respondent SRHSD.

The South Carolina Supreme Court's holding in Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009), does not require litigants to actually pull the original filings for business entities maintained with the Secretary of State though Respondents emphasize in their brief to the Court that Appellant should have taken such extreme measures. Rather, the Court in Hooper simply held that Hooper was entitled to rely on the public records and to exercise due diligence.

Though Respondents seem certain that Appellant was required to request and review actual filings with the Secretary of State to exercise due diligence in this matter, such extreme measures are not required and would be contrary to the Court's holding in Hooper. Comparable to the defendant's conduct in Hooper, the alternative means that Respondents insist were necessary of Appellant to actually request the filings with the Secretary of State were caused by Respondent SRHSD's own failure to comply with its responsibility to inform the Secretary of State of any updated information. Respondent SRHSD was directly complicit *for years* in its inaccurate and misleading status as broadcast on the Secretary of State website. Disturbingly enough and as outlined in Hooper, Respondents have engaged in the exact conduct as the nursing home in Hooper by failing to properly

update its information as contained on the Secretary of State website even at the time of this filing.

b. Respondents' assertions regarding Appellant's efforts to determine the status of Respondent SRHSD are untrue.

Respondents contend in their initial brief that "Appellant's sole effort to determine the status of SRHS consisted of running an internet search and reviewing the document summary page for SRHS on the Secretary of State's website." Initial Brief of Respondents, pg. 6. This is not true.

Appellant's review of the Secretary of State website was just one means by which Appellant attempted to determine the status of Respondent SRHSD. Appellant reviewed the website of the South Carolina Board of Medical Examiners which provided the contact information for Respondent Hicklin for what appeared to be a private family practice. Respondent Hicklin failed to include any contact information for Respondent SRHSD or otherwise represent to the Board of Medical Examiners or the general public that he was employed by Respondent SRHSD on the posting.

Appellant also scoured the medical records that were provided pursuant to a pre-suit records request in an effort to determine the status of Respondents. Nowhere in the records produced pre-suit does it reveal that Respondent Hicklin or Respondent THWC are employed by or affiliated with Respondent SRHSD. Respondents have failed to offer any explanation for their failure to produce *all of the records* following a proper request for the same prior to litigation in this matter. Appellant properly presented this issue to the lower court for consideration and Respondent has yet to offer an explanation as to why Appellant

received hundreds of pages of additional medical records only after suit was filed. As discussed in Appellant's initial brief, the records that contained the headings of both Respondent THWC and Respondent SRHSD were not produced by Respondents prior to suit being filed. With minor exceptions, virtually all medical records of a person contain pages with a hospital's logo because laboratory tests, etc. are generated by the hospital and sent to the physician ordering the test, whether the physician is part of a private practice or not. The existence of a few such documents does not put a person on notice of whether a physician is employed by such hospital.

Counsel for Respondents was present at the hearing in this matter before the trial court wherein Appellant's counsel set forth over several pages in the transcript the measures he took to determine the status of Respondents which entail more than only looking at the Secretary of State website. Oddly enough and despite arguing this vehemently to the lower court, Respondents' insist on declaring in their initial brief that the sole measure employed by Appellant to determine Respondents' business status consisted of a review of a single website. Respondents' representation to the court that Appellant's counsel merely glanced at a website posting to determine the status of Respondents is disingenuous and a misrepresentation to the court.

- c. **Respondent SRHSD does have control over the manner in which its information is published on the Secretary of State website as it has the express responsibility to keep the Secretary of State informed of any updated information.**

Respondents are distraught over Appellant's alleged failure to exercise due diligence in requesting Respondents' actual filings with the Secretary of State

yet seemingly gloss over the provision on the Secretary of State website that provides "...it is the responsibility of the business entity to inform the Secretary of State of any updated information." [South Carolina Secretary of State Website Posting of SRHSD]. Respondent SRHSD ignores the principle that it bears the onus of informing the Secretary of State of any updated information, which would extend to inaccuracies allowed to exist for years on the Secretary of State website.

The repeated references to eleemosynary amendments could have been easily rectified by Respondent SRHSD but were permitted to remain likely in an effort to continuously mislead the public as to Respondent SRHSD's status. Even to this day, there are 4 separate codes on Respondent SRHSD's corporation history records which identify Respondent SRHSD with that of an eleemosynary entity.

Respondents represent to this court in their brief that Appellant claims that "SRHS failed to have accurate information **on file** with the Secretary of State." Initial Brief of Respondents, pg. 6 (emphasis added). This is not true. Appellant never states in his initial brief that Respondent SRHSD failed to have accurate information **on file** with the Secretary of State. Rather, Appellant's position is that Respondent SRHSD failed to correct the erroneous information that was broadcast to the public over a protracted period of time regardless of what was actually on file at the Secretary of State's office. The general public and the Appellant rely on the website listing provided by the Secretary of State which depends on businesses such as Respondent SRHSD to notify it of updated information.

Respondent SRHSD had the means and responsibility to contact the Secretary of State and correct the inaccurate information that was listed about it on the public records broadcast on the Secretary of State website. Respondent SRHSD failed to adhere to its responsibility to inform the Secretary of State of the correct information and failed to this very day to take measures to correct this inaccurate and misleading information.

d. The Personal Representative of the Estate of Martha Hoftiezer is not charged with any knowledge that Decedent may have had, if any, of the employment relationship between Respondents.

Respondents have failed to cite any law that would impute any knowledge that Decedent Martha Hoftiezer may have had regarding the employment relationship between Respondents to her son, the Personal Representative. Any assumption by Respondents that Martha Hoftiezer may have had such knowledge from her tenure as a patient of Respondents or through signage, letterhead, or business cards is speculative and irrelevant. The determination by the court as to any knowledge Appellant may have had of the employment relationship between Respondents is viewed through the scope of what the Personal Representative and his counsel knew or should have known concerning these issues.

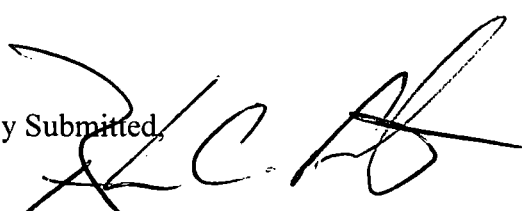
The lower court erred by referencing any knowledge that Decedent may have had regarding the affiliation between Respondents. Any such knowledge by Decedent is irrelevant and the Personal Representative is the individual charged with maintaining this action and adhering to the statute of limitations or benefiting from principles of estoppel flowing from Respondents' wrongdoing. The Personal Representative was given a fraction of the records that legally should

have been produced by Respondents prior to suit being filed and were produced much later. The initial records, which were only 40 pages as compared to the 240 pages produced by Respondent following suit, did not contain any identifiers that Respondent Hicklin and Respondent THWC were employed by or a member of Respondent SRHSD.

Lastly, an affiliation between a hospital and a physician does not equate to an employment relationship as viewed by a reasonable person not privy to contractual details. While many physicians may have **privileges** at a facility and thereby be “affiliated” with such facility, such affiliation does not confirm that one is employed by the other. In this matter, even if the Personal Representative was aware of some affiliation between Respondents from letterhead or signage, these materials do not verify ownership or employment status. Respondents seem to represent to the court that knowledge of an “affiliation” is tantamount to knowledge of Respondents’ respective business status and employment relationship. This is not the case and regardless of the dissemination of any materials referencing an “affiliation” between Respondents or knowledge that the Decedent may have had of the status and employment relationship of Respondents, the Appellant and his counsel did not possess this knowledge and were misled by Respondents as to their status and employment relationship.

CONCLUSION

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

Respectfully Submitted, 

By: _____

Ruskin C. Foster

Brad D. Hewett

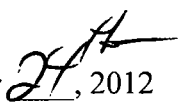
Mike Kelly Law Group, LLC

Post Office Box 8113

Columbia, South Carolina 29202

(803) 726-0123

Attorneys for Appellant

September , 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SEP 24 2012

SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, III, Circuit Court Judge

Case No.: 2009-CP-42-5373

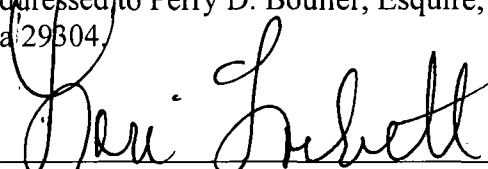
James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer.
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and Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg
Regional Healthcare System .
.....Respondents.

PROOF OF SERVICE

I, the undersigned Paralegal with Mike Kelly Law Group, LLC, counsel for James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer, Appellant certify that I have served the Appellant's Amended Motion to Extend Time to file a Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal on counsel by depositing a copy of it in the United States mail, postage prepaid, on September 24, 2012 addressed to Perry D. Boulter, Esquire, Post Office Box 1897, Spartanburg, South Carolina 29304.


Lori Torbett, Paralegal

The South Carolina Court of Appeals

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

Appellate Case No. 2011-203086

The Honorable J. Mark Hayes, II
Spartanburg County
Trial Court Case No. 2009CP4205373

ORDER

The time for serving and filing the appellant's initial reply brief is hereby extended
until September 24, 2012.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc: Ruskin C. Foster, Sr.
Ginger D. Goforth
Perry D. Boulter
Bradley Davis Hewett

FILED
8-24-12 *mt*

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

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AUG 24 2012
SC Court of Appeals

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 AMENDED MOTION TO EXTEND TIME TO FILE REPLY TO
RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant requests an extension of time to file a Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal. Appellant would request the deadline to file the Reply to be September 24, 2012. Respondent consented to an extension of time. This motion is not interposed for delay and will not prejudice Respondent.

18
8/16
9/24

Appellant therefore respectfully requests that the Court grant his motion for an extension of time to file his Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal, making such filing due on or before September 24, 2012.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:



Ruskin C. Foster
Brad D. Hewett
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

August , 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

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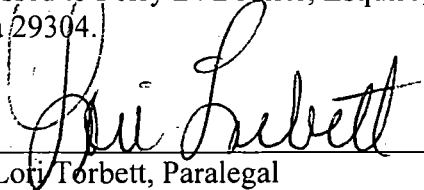
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and Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg
Regional Healthcare System .

.....Respondents.

PROOF OF SERVICE

I, the undersigned Paralegal with Mike Kelly Law Group, LLC, counsel for James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer, Appellant certify that I have served the Appellant's Amended Motion to Extend Time to file a Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal on counsel by depositing a copy of it in the United States mail, postage prepaid, on August 24, 2012 addressed to Perry D. Boulier, Esquire, Post Office Box 1897, Spartanburg, South Carolina 29304.


Lori Torbett, Paralegal

SC Court of Appeals
AUG 24 2012
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Mailing Address
PO Box 8113
Columbia, SC 29202

August 24, 2012

The Honorable Tonya Gee
S.C. Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

SC Court of Appeals
AUG 24 2012
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RE: Hoftiezer v. Hicklin, et al.
Court of Appeals File No: 2011203086
C/A No: 09-CP-42-5373

Dear Ms. Gee:

Please find enclosed for filing an original and seven copies of the Appellant's Amended Motion to Extend Time to file a Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal and Proof of Service. Counsel for Respondent has consented to this extension. If you would kindly file the original and return clocked copies to my courier, it would be greatly appreciated. If you need anything further, please contact my office.

With kindest regards, I remain

Sincerely,

Lori D. Torbett
Paralegal to Ruskin C. Foster

RCF/ldt
cc: Perry Boulter, Esquire

THE STATE OF SOUTH CAROLINA
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Regional Healthcare System Respondents.

**APPELLANT'S MOTION TO EXTEND TIME TO FILE REPLY TO RESPONDENT'S
INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN RECORD
ON APPEAL**

Appellant requests an extension of time to file a Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal. The current filing deadline is August 24, 2012. Appellant requires a thirty day extension of time in order to fully and adequately prepare his Reply. This motion is not interposed for delay and will not prejudice Respondent.

8-6
9-5

Appellant therefore respectfully requests that the Court grant his motion for a 30 day extension of time to file his Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal, making such filing due on or before September 24, 2012.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:



Ruskin C. Foster
Brad D. Hewett
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

August 20th, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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J. Mark Hayes, III, Circuit Court Judge

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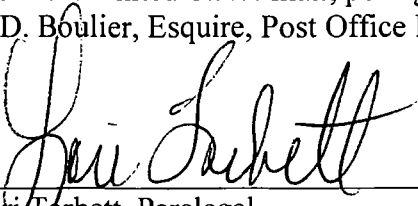
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Lori Torbett, Paralegal



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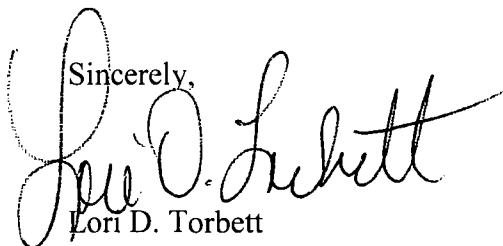
AUG 20 2012

SC Court of Appeals

Dear Ms. Gee:

Please find enclosed for filing an original and four copies of the Appellant's Motion to Extend Time to file a Reply to Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal and Proof of Service along with the applicable \$25.00 filing fee check. Counsel for Respondent has consented to this extension. If you would kindly file the original and return clocked copies to my courier, it would be greatly appreciated. If you need anything further, please contact my office.

With kindest regards, I remain

Sincerely,

Lori D. Torbett
Paralegal to Ruskin C. Foster

RCF/ldt
cc: Perry Boulter, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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August 15, 2012

Mr. Ruskin C. Foster, Sr.
Mr. Bradley Davis Hewett
PO Box 8113
Columbia SC 29202

Ms. Ginger D. Goforth
Mr. Perry D. Boulier
PO Box 1897
Spartanburg SC 29304

Re: Hoftiezer, James v. Hicklin, D. Mark
Appellate Case No. 2011-203086

Dear Counsel:

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We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy

CLERK

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg Regional Healthcare
System Respondents.

DESIGNATION OF MATTER TO BE INCLUDED IN
THE RECORD ON APPEAL

Respondents propose the following be included in the Record on Appeal:

1. October 19, 2011 Order Granting Summary Judgment
2. September 28, 2011 Form 4 Order
3. February 24, 2011 Amended Consent Scheduling Order
4. February 10, 2009 Notice of Intent to File Suit
5. October 1, 2009 Summons and Complaint
6. November 17, 2009 Answer
7. November 30, 2009 Reply to Answer
8. November 10, 2010 Amended Reply to Answer
9. April 15, 2011 Motion for Summary Judgment
10. November 15, 2011 Notice of Appeal
11. September 1, 2011 Hearing Transcript

12. Exhibits to Memorandum in Support of Defendants' Motion for Summary Judgment
13. Exhibit 2, Plaintiff's Memorandum Opposing Summary Judgment
14. Affidavit of Mark Hicklin
15. Supplemental Affidavit of Bryan McCain
16. Deposition of Edwin Haskell, pp. 11, 12, 18, 22-27, and Exhibits 2, 3, 4, 5, 6, 7, 8
17. Deposition of Mark Hicklin, p. 62
18. Deposition of Bryan McCain, pp. 32-44

I certify that this designation contains no matter which is irrelevant to this appeal.

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Attorneys for Respondents

July 26, 2012

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.

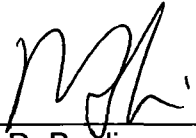
D. Mark Hicklin, M.D., Drs. Taylor, Hicklin, Westmoreland and Coley, P.A., and
Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg Regional Healthcare
System Respondents.

PROOF OF SERVICE

I certify that I have served Plaintiff's Initial Brief and Designation of Matter to be Included
in Record on Appeal on the following party by depositing a copy of it in the United States Mail,
postage prepaid, on July 26, 2012, addressed to the attorney of record listed below:

Ruskin C. Foster, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
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JUL 30 2012
SC Court of Appeals



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July 26, 2012

The Honorable Jenny Abbott Kitchings
Clerk of the S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Hoftiezer v. Hicklin, et al
C.A. No. 2009-CP-42-5373
Our File No. 10756

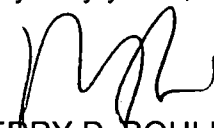
Dear Ms. Kitchings:

Enclosed please find for filing the original and one copy of Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal and Proof of Service. Please return a filed copy of the Motion in the enclosed self-addressed, stamped envelope. By copy of this letter, we are serving Appellant's counsel with a copy of these pleadings.

Thank you for your cooperation and assistance in this matter.

With kindest regards, I am

Very truly yours,



PERRY D. BOULIER

/rr

Enclosures

c: Ruskin C. Foster, Esq. (w/enclosures)

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JUL 30 2012

SC Court of Appeals

STATE OF SOUTH CAROLINA
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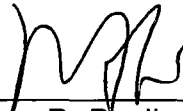
James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer
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D. Mark Hicklin, M.D., Drs. Taylor, Hicklin, Westmoreland and Coley, P.A., and
Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg Regional Healthcare
System Respondents.

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. The trial court properly found that the two year statute of limitations in the South Carolina Tort Claims Act applied to Appellant's claims, that Appellant did not timely file suit, and that Appellant was not entitled to equitable tolling of the statute of limitations.
2. The trial court did not err in finding that the medical practice of Taylor, Hicklin, Westmoreland, and Coley, P.A. was wholly owned by Spartanburg Regional Healthcare Systems, that Dr. Hicklin was an employee of Spartanburg Regional Healthcare Systems, and that both the practice and the individual physician were subject to the liability limitations of the South Carolina Tort Claims Act.
3. The trial court properly found that Respondents were not equitably estopped from asserting the applicable statute of limitations.

STATEMENT OF THE CASE

James Hoftiezer ("Appellant") filed his Notice of Intent to File Suit on February 10, 2009, against Respondents D. Mark Hicklin, M.D., ("Dr. Hicklin"), and Drs. Taylor, Hicklin, Westmoreland and Coley, P.A., ("THWC") alleging medical negligence. (February 10, 2009 Notice of Intent to File Suit). The claims in this matter arise out of care and treatment provided to Martha Hoftiezer on July 31, 2006.

On October 1, 2009, Appellant filed survival and wrongful death actions against Respondents, including Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg Regional Healthcare System ("SRHS"). Respondents timely answered on November 17, 2009, raising relevant defenses, including those available under the South Carolina Tort Claims Act. (November 17, 2009 Answer). On November 30, 2009, Appellant served a Reply to Answer raising the issue of equitable estoppel. (November 30, 2009 Reply to Answer). On November 10, 2010, Appellant served an Amended Reply to

Answer raising the issue of equitable tolling. (November 10, 2010 Amended Reply to Answer).

On February 24, 2011, the parties entered into an Amended Consent Scheduling Order limiting discovery to the threshold issue of whether Appellant timely commenced this action. The Order required all discovery to be completed by April 1, and required Respondents to file their Motion for Summary Judgment on the statute of limitations issue no later than April 15, 2011. (February 24, 2011 Amended Consent Scheduling Order) (October 19, 2011 Order Granting Summary Judgment, p. 2).

Respondents filed a Motion for Summary Judgment on April 15, 2011. (April 15, 2011 Motion for Summary Judgment). The Honorable J. Mark Hayes, II heard arguments on the motion on September 1, 2011. (September 1, 2011 Hearing Transcript). On September 28, 2011, Judge Hayes issued a Form 4 Order granting summary judgment in Respondents' favor. (September 28, 2011 Form 4 Order). The formal order granting summary judgment in Respondents' favor was filed on October 19, 2011. (October 19, 2011 Order Granting Summary Judgment). This appeal followed. (November 15, 2011 Notice of Appeal).

FACTS

Since August 11, 1994, and at all times relevant to Martha Sue Hoftiezer's care, Dr. Hicklin was employed by SRHS, and TWHC was a wholly owned medical practice of SRHS. Dr. Hicklin was compensated and provided benefits by SRHS. (Affidavit of Mark Hicklin, M.D. ¶¶ 2-4 and Exhibits "A" and "B" thereto). SRHS leased office space for the practice, and provided all of the equipment used in the practice. (Affidavit of Mark Hicklin, M.D. ¶¶ 5-6).

At the time of Dr. Hicklin's treatment of Ms. Hoftiezer on July 31, 2006, his business cards - and the practice group's envelopes and letterhead - reflected the SRHS affiliation. These items bore the title "Regional Physician Network" in the SRHS color scheme, and also included the language "In affiliation with Spartanburg Regional Healthcare System." (Affidavit of Mark Hicklin, M.D. ¶ 7 and Exhibits "C", "D", and "E" thereto). Further, Dr. Hicklin's office, then located at 391 E. Henry Street in Spartanburg, South Carolina, displayed the SRHS color scheme and used SRHS signage to reflect its affiliation. (Affidavit of Mark Hicklin, M.D. ¶¶ 8-9 and Exhibit "F" thereto).

Martha Sue Hoftiezer was a patient of Dr. Hicklin, TWHC, and SRHS for many years. On July 31, 2006, she complained of chest discomfort during an appointment with Dr. Hicklin. On August 4, 2006, she went into cardiac arrest and died.

Appellant filed a Notice of Intent to File Suit in this action on February 10, 2009, two and one half years after the incident giving rise to this medical negligence claim. Appellant was operating under a two year statute of limitations pursuant to the South Carolina Tort Claims Act. This limitations period expired no later than August 4, 2008. Appellant instituted this action some six months too late.

The parties agreed to conduct discovery solely on the statute of limitations issue, and to have the trial judge rule on this issue prior to conducting discovery on any alleged liability. The trial judge granted Respondents' Motion for Summary Judgment on three grounds: (1) SRHS is a political subdivision of the State of South Carolina and is entitled to the protections of the Tort Claims Act, (2) Appellant could not maintain independent actions against Dr. Hicklin or TWHC because of their formal relationship with SRHS, and (3) SRHS was not equitably estopped from raising the applicable two year statute of

limitations, nor was the statute of limitations equitably tolled. Based on the evidence properly before, and considered by, the lower court, the trial judge correctly granted Respondents' Motion for Summary Judgment.

ARGUMENT

- I. The trial court properly found that the two year statute of limitations in the South Carolina Tort Claims Act applied to Appellant's claims, that Appellant did not timely file suit, and that Appellant was not entitled to equitable tolling of the statute of limitations.

Under the South Carolina Tort Claims Act, any tort action brought against a governmental entity "is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered." S.C. Code Ann. § 15-78-110. Appellant does not dispute that SRHS is a governmental entity subject to the two year statute of limitations. (September 1, 2011 Hearing Transcript, p. 25). Neither does Appellant dispute that Dr. Hicklin was an employee of SRHS, or that TWHC was wholly owned by SRHS at the time his claim arose. (September 1, 2011 Hearing Transcript, pp. 26-28). Appellant complains only that he did not know this information, that he had no way of finding it out, and that the two year statute of limitations should thus be equitably tolled. For the reasons that follow, Appellant's claims on this issue are without merit.

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of the statute of limitations. Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008). It is reserved for extraordinary circumstances. American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009); see, e.g., Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct. App. 2011) (finding grounds for equitable tolling of the time period for wife to make a claim for alimony where evidence showed that husband physically abused,

terrorized, and threatened wife if she made such a claim); cf. Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011) (declining to apply equitable tolling in a worker's compensation context where the plaintiff's attorney committed a costly mistake that deprived the plaintiff of benefits, then continued to represent the plaintiff in his worker's compensation appeal).

Appellant relies almost exclusively on the court's decision in Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). In fact, Hooper supports the lower court's ruling in this case. The court in Hooper reiterated that equitable tolling is a discretionary, judicially created mechanism for tolling a statute of limitations where justice demands it, such as when a litigant has been prevented from filing suit because of an extraordinary event beyond his or her control. The party claiming equitable tolling bears the burden of establishing a compelling basis to justify its use. Id. at 32-33 (citations omitted). The court acknowledged that there is no exclusive list of factors to consider, and that the decision to apply equitable tolling rests in the discretion of the trial court. The court also admonished that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." Id. at 33.

In Hooper, the plaintiff filed suit prior to the expiration of the statute of limitations. However, the defendant had listed a nonexistent agent for service of process in its Secretary of State filings. The plaintiff made numerous attempts to serve the listed agent, but was ultimately unable to obtain proper service until one week past the time to accomplish service. The court held that equitable tolling applied because the defendant had failed to comply with state law by listing a valid agent for service of process. This failure had directly caused the plaintiff's inability to properly obtain service. In applying

equitable tolling to the plaintiff's claim, the court noted the diligent and comprehensive measures the plaintiff had taken to ensure timely service.^{1 2}

The evidence in this case stands in stark contrast to Hooper. Appellant argues several grossly inadequate grounds to support his claim that he is entitled to equitable tolling. First and foremost, he claims that SRHS failed to have accurate information on file with the Secretary of State. This is not true. Appellant's sole effort to determine the status of SRHS consisted of running an internet search and reviewing the document summary page for SRHS on the Secretary of State's website.

That website contains the following conspicuous disclaimer on every search and result page:

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

(Exhibit B, Memorandum in Support of Defendants' Motion for Summary Judgment).

¹ Appellant, notably, has presented evidence of no efforts beyond a cursory review of an online Secretary of State filing summary for SRHS that was not prepared or maintained by SRHS.

² Appellant also relies on a nonbinding trial court order in the case of Shaver v. Orangeburg Surgical Assocs., P.A., 2007-CP-38-0553 (October 22, 2007). There, a private medical practice was purchased by a government hospital. The medical practice, however, changed no signs or stationary, and did not update its information with the Secretary of State to reflect the change in status.

In addition to the express warning to internet users that information on the website may be stale or otherwise unreliable, users are directed to specific forms and instructions on how to request copies - plain or certified - of an entity's actual filings.

SRHS is certainly responsible for the content of the documents it submits, but it has absolutely no control over the manner in which the Secretary of State's office enters and codes its website updates. SRHS can only submit valid documents and information to the Secretary of State, which it did. Two of the codes in the updates on the SRHS search page used the terms "nonprofit" and "eleemosynary." Instead of requesting copies of the SRHS filings, Appellant simply presumed that these codes meant that SRHS was a charitable institution, that a three year statute of limitations applied, and therefore looked no further. Appellant failed to exercise due diligence.

If Appellant had read the SHRS filings, instead of relying on the shorthand website codes that were not prepared by SRHS, he would have found documents that explicitly state that SRHS is a government entity protected by the Tort Claims Act. Specifically, SRHS was created by the adoption of Ordinance No. 557 by the Spartanburg County Council on April 10, 1995, and the filing of a Certificate of Incorporation on May 1, 1995. (Exhibits A and C, Memorandum in Support of Defendant's Motion for Summary Judgment). Ordinance No. 557 expressly provides that SRHS is a political subdivision, and that one of the express purposes of the Ordinance is to ensure that SRHS is protected by the Tort Claims Act. Because SRHS is a health services district under the definitions of the Tort Claims Act, any actions brought against it or its employees are subject to the provisions and limitations of the Act, including the limitations of actions provisions. S.C. Code Ann. § 15-78-30(d), (h), and (j); S.C. Code Ann. § 44-7-2010. The information

Appellant claims that SRHS "concealed" was readily available and accessible to any member of the public. Unfortunately, Appellant failed to heed the disclaimer on the Secretary of State's website and chose not to obtain these documents.

Appellant relies upon a few lines of deposition testimony from Edwin Haskell - the attorney for Spartanburg County at the time of the Secretary of State filings - arguing that they establish deception on the part of SRHS. Specifically, Mr. Haskell agreed that the notation on the Secretary of State's website containing the words "nonprofit" and "eleemosynary" could be interpreted to mean "charitable." What Appellant ignores, however, is Mr. Haskell's direct testimony that SRHS has absolutely nothing to do with these notations. Mr. Haskell testified that "Anything that we submitted we've never made reference to eleemosynary amendment because it's our position it's a public hospital corporation, it's not an eleemosynary corporation." (Deposition of Edwin Haskell 11). Further, Mr. Haskell testified that nowhere in the documents filed with the Secretary of State on behalf of SRHS was there any reference to SRHS as an eleemosynary organization or to an "eleemosynary amendment." (Deposition of Edwin Haskell 12).

For example, the Articles of Amendment filed by SRHS on January 16, 2002 are noted by the Secretary of State's website as "Eleemosynary Amendment/Nonprofit Amendment." However, this document in the first paragraph identifies SRHS as "a public hospital corporation." (Deposition of Edwin Haskell 18 and Exhibit 6 thereto). All Appellant had to do was look at the filing. He did not.

Mr. Haskell testified that the creation of SRHS was authorized by Ordinance No. 557 and the corporation was created by a Certificate of Incorporation filed on May 1, 1995. According to Mr. Haskell, one of the purposes of this incorporation was to make SRHS a

government entity protected by the South Carolina Tort Claims Act. He testified that SRHS “took particular pains to do so, and it references it being a body politic and a political subdivision, and it references Title 15, Chapter 78, which is, of course, the Tort Claims Act. That was put in there to remove all doubt that it was in fact a governmental entity subject to the Tort Claims Act when we created the District.” (Deposition of Edwin Haskell pp. 22-23 and Exhibits 3 and 4 thereto). The Secretary of State’s notation on this filing, incidentally, was “PUBLIC CORP.” None of the documents filed by SRHS since 1995 in any way changed the legal status or nature of SRHS as a public hospital corporation. (Deposition of Edwin Haskell pp. 24-27 and Exhibits 2, 5, 6, 7, and 8 thereto).

Appellant also makes a vague argument that information available on the South Carolina Medical Board website concerning Dr. Hicklin is misleading. His argument on this point consists of the following: “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.” Respondents are frankly unsure how this bit of information is relevant to the equitable tolling argument, but certainly there is nothing misleading about listing valid physical contact information for a medical practice. Further, it would be inequitable - as in the case of the Secretary of State website - to hold Respondents liable for the manner in which an independent agency formats its own online listings.

Appellant next claims that he was misled about the true nature of SRHS’s corporate status because he was provided with an incomplete copy of Martha Hoftiezer’s medical record in 2006. This tenuous argument must fail for two reasons. First, Appellant raised this argument for the first time in a memorandum of law he provided to Respondents’

counsel on the day of the summary judgment hearing. He did not serve a timely affidavit, or any affidavit for that matter, to support his arguments on this claim. (Hearing Transcript, p. 65). Second, even if Appellant had timely served a proper affidavit, this argument is nullified by the fact that James Hoftiezer signed a form to request Martha Hoftiezer's records which bore the SRHS logo, and clearly demonstrated the affiliation between SRHS, Dr. Hicklin, and THWC. This form was actually introduced into evidence by Appellant at the motion hearing. (Exhibit 2, Plaintiff's Memorandum Opposing Summary Judgment) (September 1, 2011 Hearing Transcript, pp. 15-17, 63).

SRHS's status is further bolstered by the evidence of record. At the time of Martha Hoftiezer's treatment, THWC displayed a sign at its office in the color scheme of SRHS that indicated THWC was part of SRHS's Regional Physicians Network. (Affidavit of Mark Hicklin, M.D. ¶¶ 8, 9). Business cards, letterhead, and envelopes of THWC bore the same color scheme and indicated the same affiliation. (Affidavit of Mark Hicklin ¶ 7). In September of 2004, Martha Hoftiezer received a tax-offset letter from SRHS, on SRHS letterhead, indicating it was owed for treatment provided to Martha Hoftiezer by Dr. Hicklin and THWC. (Supplemental Affidavit of Bryan McCain, ¶ ¶ 4, 5).

Appellant made much at the summary judgment hearing of photographs he submitted to establish the lack of notice of THWC's affiliation with SRHS. In his brief, he argues that THWC's signage did not contain any indication that it was a group of physicians employed by SRHS. The photographs on which Appellant relies, however, were taken of THWC's current office location on Heywood Avenue. At the time of Ms. Hoftiezer's treatment in 2006, THWC was located at 391 E. Henry Street. The

photographs of this office in the record establish that THWC was a part of SRHS and that patients were put on notice of this affiliation in a number of ways.

Appellant makes a brief, vague argument that “a general internet search” does not properly disclose THWC’s affiliation with SRHS. As Judge Hayes noted, and Appellant agreed, an organization is not responsible for information listed on various internet sites that compile information about companies.³ (Hearing Transcript, p. 56). In addition, all of the “internet information” - handed up at the hearing without the benefit of an affidavit - was obtained years after Ms. Hoftiezer’s treatment. Further, in agreeing with Judge Hayes that Respondents did not have a duty to monitor this kind of general information on the internet, Appellant has abandoned this argument.

A limitations period is intended to run against those who are neglectful of their rights, and who fail to exercise reasonable diligence to enforce their rights. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672, 679 (2000). The record is overwhelmingly clear that Respondents’ corporate status was evident to any reasonably diligent person. The order granting summary judgment in Respondents’ favor must therefore stand.

II. The trial court did not err in finding that the medical practice of Taylor, Hicklin, Westmoreland, and Coley, P.A. was wholly owned by Spartanburg Regional Healthcare Systems, that Dr. Hicklin was an employee of Spartanburg Regional Healthcare Systems, and that both the practice and the individual physician were subject to the liability limitations of the South Carolina Tort Claims Act.

Appellant urges the court to hold that THWC should be precluded from claiming the benefit of the Tort Claims Act’s two year statute of limitations because it held itself out as

³ At the hearing, Appellant referenced such sites as “ask.com” and “answers.com”.

a private general partnership. He also argues that equitable tolling should be applied to THWC even if SRHS actually owns THWC and employees the individual physicians.

However, at the motion hearing, Judge Hayes pointedly asked Appellant's counsel: "Then, would you agree that your argument of equitable tolling and equitable estoppel really only applies to Spartanburg Regional and not to Dr. Hicklin and the Hicklin, Westmoreland, Coley and this – that it only applies just to Spartanburg Regional?" Counsel replied: "I would absolutely agree with that, Your Honor." Appellant's counsel qualified this only with the statement that he would maintain an argument that Dr. Hicklin received money from a nongovernmental source. (September 1, 2011 Hearing Transcript, pp. 26-27). Appellant's counsel also admitted that he was not actually concerned about whether Dr. Hicklin was an employee of SRHS because if he named him individually, and he was an employee, he would only need to later substitute the hospital for the doctor. (September 1, 2011 Hearing Transcript, pp. 52-53).

Respondents therefore submit that Appellant has conceded any argument seeking to apply equitable tolling (or equitable estoppel) to Dr. Hicklin or THWC. Even if he had not done so, as noted above, there is abundant evidence in the record to support the trial judge's finding that Respondents were all subject to the Tort Claims Act, and that Appellant had notice of the Respondents' status.

Appellant also argues that Dr. Hicklin, if a governmental employee, nonetheless lost the protections of the Tort Claims Act because he reported income from an entity called Regional Healthplus, LLC. In his brief, Appellant argued that Dr. Hicklin's testimony showed that he accepts payments from a nongovernmental entity. This is (1) false, and (2) not the standard of the statute.

The Tort Claims Act is clear on the narrow circumstances of this exception. It provides, in pertinent part, that the Act does not limit the liability of a physician "with respect to any action or claim brought hereunder which involved services for which the physician . . . 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.

The record plainly reflects that at the time of Ms. Hoftiezer's treatment, Dr. Hicklin was an employee of SRHS and paid solely by SRHS. (Affidavit of Mark Hicklin, M.D. ¶ 4 and Exhibit "B" thereto). Appellant questioned Dr. Hicklin about a Form K-1 reflecting income from an entity called Regional HealthPlus ("RPH"). RPH is an organization in which Dr. Hicklin invested, like any other business investment. He owns shares in the company and - like any other investor, physician or not - receives an annual distribution, which is reflected on a Form K-1. (Deposition of Mark Hicklin, M.D. p. 62).

Further, Mid McCain, SRHS Director of Operations for Regional Physician Network, testified that RHP is an entity that contracts with insurance carriers and physicians, both public and private. It requires a percentage withhold for administrative costs and for quality. At the end of the year, if the group or physician meets its quality goals, the quality portion of the withhold is returned. Mr. McCain testified that, because THWC is owned by SRHS, that portion comes directly to SRHS, not to Dr. Hicklin. Any distribution to Dr. Hicklin directly from RPH would be based solely on his status as an RPH shareholder, not on his service to patients. (Deposition of Mid McCain pp.32-44).

This testimony, however, is irrelevant because Appellant admitted at the summary judgment hearing that Dr. Hicklin did not provide any service to Ms. Hoftiezer outside of his employment with SRHS. Appellant essentially conceded that the reported income at issue was unrelated to Martha Hoftiezer's treatment. The following colloquy occurred at the summary judgment hearing on September 1, 2011:

Judge Hayes: "But there is no allegation, if I understand – and, again, I read very quickly – but there's no allegation, as I understand it, that – of the – allegations that are in the complaint that any of those services that might have been provided, by the doctor to the Plaintiff, that they were done outside of [Dr. Hicklin's] work with Regional."

Counsel: "There – there are none. And we don't allege that, Your Honor."

(September 1, 2011 Hearing Transcript, pp. 27-28).

Therefore, even assuming that RHP was a practice plan as defined by the Tort Claims Act, for which there is no evidence in the record, there is absolutely no connection between the treatment at issue and any fees Dr. Hicklin received from Regional Healthplus. Because there is no evidence of record that Dr. Hicklin or THWC took any action to conceal their employment and/or corporate status, the trial judge's ruling must stand.

III. The trial court properly found that Respondents were not equitably estopped from asserting the applicable statute of limitations.

A party asserting equitable estoppel must prove intentional concealment. Specifically, it must show that the party it seeks to estop (1) engaged in conduct which amounts to a false representation, or which was calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which the party subsequently

attempts to assert, (2) intended for the plaintiff to act on this conduct, and (3) had actual or constructive knowledge of the true facts. Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007). A party asserting equitable estoppel against a government entity must further prove that it (1) lacked knowledge and the means of knowledge of the truth as to the facts in question, (2) justifiably relied on the government's conduct, and (3) suffered a prejudicial change in position. American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009).

In American Legion, the plaintiffs paid hospitality taxes on their bingo operation for five years on the erroneous advice of a county employee. The county then notified the plaintiffs of the error, and informed them they could stop paying the fees. In reversing the lower court's application of equitable estoppel, the court of appeals noted that citizens are presumed to know the law, and must also exercise reasonable care to protect their interests. It further held that "[e]stoppel will not lie against a governmental entity when a government employee gives erroneous information in contradiction of statute." Id. at 185 (citations omitted). This holding, which denied estoppel to individuals with a far stronger set of facts, patently prohibits Appellant's claim. The American Legion plaintiffs relied upon information obtained directly from a government entity, and not just a website summary. Still, the court held them to the standards required of all citizens - knowledge of the law and the exercise of reasonable care.

Appellant was likewise charged with these duties, and failed to uphold them. Appellant relied upon notations on the Secretary of State's website despite a prominent disclaimer. He failed to look at the actual documents filed by SRHS, which plainly reflected its corporate status. Appellant's counsel argued below that the first thing his office does

is go to the Secretary of State's website "to see what - you know, if the hospital is involved, to see what type of corporation they are and - and that sort of thing, which we did in this case." (Hearing Transcript, pp. 32-33). Assuming Appellant could ignore the website disclaimer, fail to request documents, and rely solely on the Secretary of State's web notations, the first filing notation "PUBLIC CORP", clearly indicates that SRHS is a public corporation. (Deposition of Edwin Haskell Exhibit 2). Appellant therefore failed in his duty to exercise reasonable care to follow up on this information.

The record does not support an equitable estoppel claim. Appellant can point to no concealment, intentional or otherwise, on Respondents' part. At most, Appellant complains that internet listings - which Respondents did not draft and over which they had no control - reflected potentially misleading information. There is no evidence in the record even tending to support a claim that Respondents intended to deceive Appellant. To the contrary, SRHS filed valid documents with the Secretary of State, accessible by any member of the public upon request, detailing the nature of its status as a public corporation and a government entity covered by the provisions of the South Carolina Tort Claims Act.

Appellant states on the one hand that he is not asserting any equitable tolling or estoppel claim against Dr. Hicklin and THWC, then argues that they should be estopped from claiming governmental status. The record, again, shows that their status was open and evident based on signage, stationary, and billing correspondence.

Neither can Appellant prove the three elements related to his own conduct. He clearly had access to information that accurately reflected Respondents' status and affiliations. That he chose to ignore information and failed to diligently pursue his rights is no fault of Respondents. At the time treatment was rendered, and at the time the records

were requested, a reasonable person would have been on notice that Dr. Hicklin and THWC were affiliated with SRHS.

CONCLUSION

The trial judge properly granted summary judgment in favor of Respondents because Appellant failed to file suit or otherwise act to toll the Tort Claims Act's two year statute of limitations. Appellant filed suit six months too late because he failed to exercise due diligence under the circumstances. Respondents did nothing, through negligence or design, to induce Appellant's delay. Neither the doctrine of equitable tolling or equitable estoppel apply. The trial judge's order must therefore be affirmed.

Respectfully submitted,

HOLCOMBE BOMAR, P.A.



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Attorneys for Respondents

July 26, 2012



The South Carolina Court of Appeals

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June 29, 2012

Mr. Ruskin C. Foster, Sr.
PO Box 8113
Columbia SC 29202

Re: Hoftiezer, James v. Hicklin, D. Mark
Appellate Case No. 2011-203086

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding your motion in the above case.

Please be advised that the respondent's initial brief and designation of matter must be served and filed within 30 days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Ginger D. Goforth
Perry D. Boulter

The South Carolina Court of Appeals

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

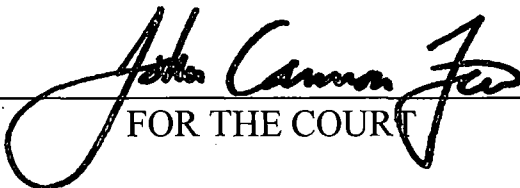
v.

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.

Appellate Case No. 2011-203086

ORDER

Appellant's consent motion to amend his Initial Brief and Designation of Matter is granted.


FOR THE COURT

Columbia, South Carolina

cc:

Ruskin C. Foster, Sr.

Ginger D. Goforth

Perry D. Boulier

FILED
6-29-12 LST

64334

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

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Respondents

SC Court of Appeals

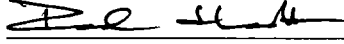
**CONSENT MOTION TO AMEND APPELLANT'S INITIAL BRIEF
AND DESIGNATION OF MATTER**

Pursuant to South Carolina Appellate Court Rule 240, Appellant moves this Honorable Court to amend the initial brief and designation of matter previously filed by Appellant. At the request of Respondents, Appellant has agreed to remove certain material from the designation of matter which will alter the substance of the initial brief. Appellant requests leave from this Court to file such amended brief and amended designation of matter, copies of which are attached hereto. Appellant further requests that the Court hold the current filing deadlines in abeyance

during the pendency of this Motion. Counsel for Respondents has consented to these amendments.

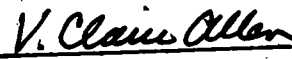
Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By: 
Ruskin C. Foster
Brad D. Hewett
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

May 21, 2012

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: 
(Clerk) (Deputy Clerk)

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

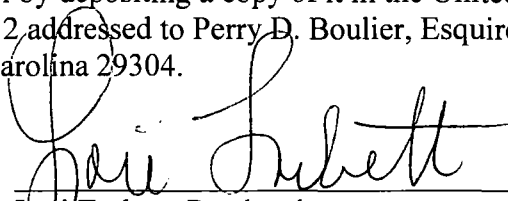
James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer.
.....Appellant,

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.

PROOF OF SERVICE

I, the undersigned Paralegal with Mike Kelly Law Group, LLC, counsel for James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer, Appellant certify that I have served the Consent Motion to Amend Appellant's Initial Brief and Designation of Matter on counsel by depositing a copy of it in the United States mail, postage prepaid, on May 21, 2012, addressed to Perry D. Boulter, Esquire, Post Office Box 1897, Spartanburg, South Carolina 29304.


Lori Torbett, Paralegal



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May 21, 2012

The Honorable Tonya Gee
S.C. Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

RE: Hoftiezer v. Hicklin, et al.
Court of Appeals File No: 2011203086
C/A No: 09-CP-42-5373

Dear Ms. Gee:

Please find attached a Consent Motion to Amend Appellant's Initial Brief and Designation of Matter with Proof of Service and the applicable \$25.00 filing fee. If you would kindly file the original and return the clocked copies in the envelope enclosed, it would be greatly appreciated. If you need anything further, please contact my office.

With kindest regards, I remain

Sincerely,

Lori D. Torbett
Paralegal to Ruskin C. Foster

RCF/ldt
cc: Perry Boulter, Esquire

OFFICES IN:

Columbia, Myrtle Beach and Winnsboro, South Carolina
www.mklawgroup.com

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
Appellate Tracking Number:

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 DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

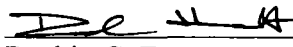
The Appellant designates the following materials to be included in the Record on Appeal
with regard to his Initial Appellant's Brief:

1. Notice of Intent to File Suit;
2. Complaint;
3. September 1, 2011 Hearing Transcript;
4. Form 4 Order of September 28, 2011;
5. Order of October 19, 2011;

6. Notice of Appeal;
7. South Carolina Board of Medical Examiners Website Posting;
8. South Carolina Secretary of State Website Posting of SRHSD;
9. Shaver Order of October 22, 2007;
10. THWC Forms, Medical Records, Laboratory Results, Estimation of Benefits, Photographs of Signage;
11. Deposition of Edwin Haskell, III, pp. 20-21;
12. Internet Advertising of Dr. Hicklin and THWC;
13. Supplement to Schedule E for Dr. Hicklin 2007 Income Tax Return;
14. Deposition of Dr. Mark Hicklin, pp. 61-62, 77-79.

I certify that this designation does not include any matter that is irrelevant to the issues on appeal.

Respectfully submitted,

By: 
Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
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Attorneys for Appellant

May 21, 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

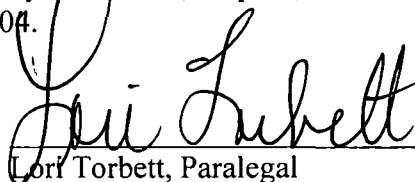
James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer.
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v.

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and Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg
Regional Healthcare System .
.....Respondents.

PROOF OF SERVICE

I, the undersigned Paralegal with Mike Kelly Law Group, LLC, counsel for James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer, Appellant certify that I have served the Appellant's Amended Initial Brief and Designation of Matter on counsel by depositing a copy of it in the United States mail, postage prepaid, on May 21, 2012 addressed to Perry D. Boulter, Esquire, Post Office Box 1897, Spartanburg, South Carolina 29304.


Lori Torbett, Paralegal

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JUN 05 2012

SC Court of Appeals

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

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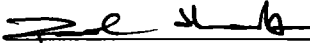
James Hoftiezer, as Personal Representative
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D. Mark Hicklin, M.D., Drs. Taylor, Hicklin, Westmoreland and
Coley, P.A., and Spartanburg Regional Health Services District, Inc.,
d/b/a Spartanburg Regional Healthcare System.....Respondents.

BRIEF OF APPELLANT

Respectfully submitted,

By: 
Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
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May 21, 2012

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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. [Notice of Intent to File Suit]. 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. [Complaint]. 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. [September 1, 2011 Hearing Transcript]. 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. [Form 4 Order]. 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. [Form 4 Order]. 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. [Order of October 19, 2011]. Appellant filed a timely Notice of Appeal on November 15, 2011. [Notice of Appeal].

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 Health 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. [South Carolina Board of Medical Examiners Website]. 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. [South Carolina Secretary of State Website Posting of SRHSD]. 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, THWC 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, TWHC'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). [Shaver Order of October 22, 2007]. 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 hospital's 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. [THWC Forms, Medical Records, EOB's, Photographs of Signage].

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.

[Deposition of Edwin Haskell, III – pp. 20-21]. 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 THWC’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 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. [Internet Advertising of Dr. Hicklin and THWC]. 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. [Supplement to Schedule E for Dr. Hicklin 2007 Income Tax Return]. 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. Boulter (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?

[Deposition of Dr. Mark Hicklin, pp. 61-62, 77-79].

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; Zabinski v. Bright Acres Assoc., 346 S.C. 580, 589 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." [South Carolina Secretary of State Website Posting of SRHSD]. *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

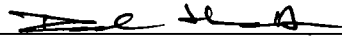
no reasonable way of knowing that THWC was part of SRHSD or that SRHSD employed THWC physicians. Appellant was not afforded reasonable notice that SRHSD was a governmental entity considering the contrary filing with the Secretary of State.

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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May 21, 2012



The South Carolina Court of Appeals

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May 16, 2012

Mr. Perry D. Boulter
PO Box 1897
Spartanburg SC 29304

Re: Hoftiezer, James v. Hicklin, D. Mark
Appellate Case No. 2011-203086

Dear Counsel:

The following order has been endorsed on your respondents' motion to extend time to file initial brief and designation of matter to be included in the record on appeal in the above matter.

"Granted.

By s/ V. Claire Allen, Deputy Clerk

May 16, 2012."

Please be advised the respondents' initial brief and designation of matter must be served and filed no later than May 22, 2012.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Ruskin C. Foster, Sr.
Ginger D. Goforth

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

RECEIVED
APR 20 2012
SC Court of Appeals

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.

**RESPONDENTS' MOTION TO EXTEND TIME TO FILE INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

Respondents request an extension of time to file their Initial Brief and Designation of Matter to Be Included in the Record on Appeal. Respondents' counsel has a medical malpractice trial that begins on April 23, 2012. Preparation for this trial has been very time consuming, and Respondents require and request an additional 30 day extension of time to adequately prepare their brief. This motion is not interposed for delay, and will not prejudice Appellant. Respondents request that the current deadlines be held in abeyance pending the Court's ruling on this motion.

201
4/22/12
5/22/12

HOLCOMBE BOMAR, P.A.

Ginger D. Goforth

Perry D. Boulter
Ginger D. Goforth
Post Office Drawer 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Respondents

April 19, 2012

Other Counsel of Record:

Ruskin C. Foster, Esq.
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, South Carolina 29201

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: V. Claire Allen
(Clerk) (Deputy Clerk)

FILED

5-16-12

UHF

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,

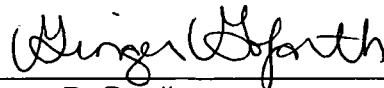
v.

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.

PROOF OF SERVICE

I certify that I have served the Motion to Extend Time to File Initial Brief and Designation of Matter to be Included in Record on Appeal on the following party by depositing a copy of it in the United States Mail, postage prepaid, on April 19, 2012, addressed to the attorney of record listed below:

Ruskin C. Foster, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201



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Ginger D. Goforth
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William U. Gunn
Koger M. Bradford
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William B. Darwin, Jr.
Robert M. Barrett
Ginger D. Goforth
W. McElhane White
A. Todd Darwin
J. Hayes Walsh
Nathaniel P. Mark
Joshua T. Thompson
Kyle T. Clelland

Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

April 19, 2012

The Honorable Tanya Gee
Clerk of the S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Hoftiezer v. Hicklin, et al
C.A. No. 2009-CP-42-5373
Our File No. 10756

Dear Ms. Gee:

Enclosed please find for filing an original and seven copies of the Motion to Extend Time to File Initial Brief and Designation of Matter to be Included in Record on Appeal and Proof of Service, along with our firm's check in the amount of \$25.00 for applicable filing fees. Please return a filed copy of the Motion in the enclosed self-addressed, stamped envelope.

Thank you for your cooperation and assistance in this matter.

Sincerely,

GINGER D. GOFORTH

/rr

Enclosures

c: Ruskin C. Foster, Esq. (w/enclosures)

RECEIVED
APR 20 2012
SC COURT of Appeals

The South Carolina Court of Appeals

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

The Honorable J. Mark Hayes, II
Spartanburg County
Trial Court Case No. 2009-CP-42-05373

ORDER

For good cause having been shown, the time for the Respondents' Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until April 22, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY


CLERK

Columbia, South Carolina

cc: Ruskin C. Foster, Esquire
Brad D. Hewett, Esquire
Perry D. Boulter, Esquire
Ginger D. Goforth, Esquire

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

MAR 16 2012

J. Mark Hayes, III, Circuit Court Judge

SC Court of Appeals

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.

**MOTION TO EXTEND TIME TO FILE INITIAL BRIEF AND
DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

Respondents request a 30 day extension of time to file their Initial Brief and
Designation of Matter to Be Included in the Record on Appeal. The current filing deadline
is March 22, 2012. ^{Resp}Appellants require a thirty day extension of time in order to fully and
adequately prepare their brief and record. This motion is not interposed for delay, and will
not prejudice ^{Appel}Respondent.

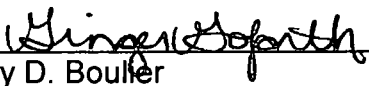
^{Res}Appellants therefore respectfully request that the Court grant their motion for a 30
day extension of time to file their Initial Brief and Designation of Matter to be Included in
the Record on Appeal, making such filings due on or before April 22, 2012.

3/22/12

4/22/12

187

HOLCOMBE BOMAR, P.A.


Perry D. Bouler
Ginger D. Goforth
Post Office Drawer 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Respondents

March 15, 2012

Other Counsel of Record:

Ruskin C. Foster, Esq.
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, South Carolina 29201

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

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MAR 16 2012

SC Court of Appeals

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

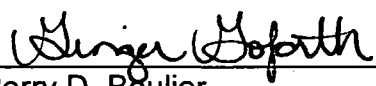
v.

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.

PROOF OF SERVICE

I certify that I have served the Motion to Extend Time to File Initial Brief and Designation
of Matter to be Included in Record on Appeal on the following party by depositing a copy of it in
the United States Mail, postage prepaid, on March 15, 2012, addressed to the attorney of
record listed below:

Ruskin C. Foster, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201


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Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

March 15, 2012

The Honorable Tanya Gee
Clerk of the S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Hoftiezer v. Hicklin, et al
C.A. No. 2009-CP-42-5373
Our File No. 10756

Dear Ms. Gee:

Enclosed please find for filing an original and seven copies of the Motion to Extend Time to File Initial Brief and Designation of Matter to be Included in Record on Appeal and Proof of Service, along with our firm's check in the amount of \$25.00 for applicable filing fees. Please return a filed copy of the Motion in the enclosed self-addressed, stamped envelope.

Thank you for your cooperation and assistance in this matter.

Sincerely,

GINGER D. GOFORTH

/rr

Enclosures

c: Ruskin C. Foster, Esq. (w/enclosures)

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MAR 16 2012

SC Court of Appeals



Columbia Office
500 Taylor Street
Columbia, SC 29201

Mailing Address
PO Box 8113
Columbia, SC 29202

Telephone 803.726.0123
Toll-Free 866.692.0123
Fax 803.252.7145

March 5, 2012

The Honorable Tonya Gee
S.C. Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

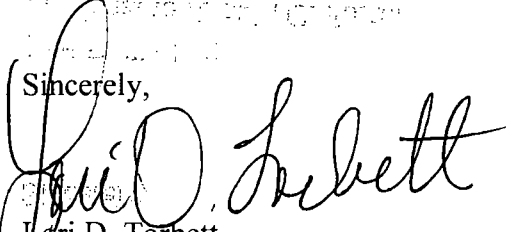
RE: Hoftiezer v. Hicklin, et al.
Court of Appeals File No: 2011203086
C/A No: 09-CP-42-5373

Dear Ms. Gee:

Please find attached a Proof of Service reflecting that Mr. Boulrier was served with the Designation of Matter on February 21, 2012. If you need anything further, please contact my office.

With kindest regards, I remain

Sincerely,



Lori D. Torbett
Paralegal to Ruskin C. Foster

RCF/ldt

cc: Perry Boulrier, Esquire

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SC Court of Appeals

OFFICES IN:

Columbia, Myrtle Beach and Winnsboro, South Carolina
www.mklawgroup.com

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,

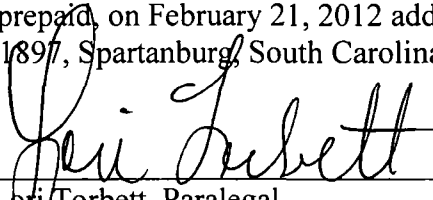
v.

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.

PROOF OF SERVICE

I, the undersigned Paralegal with Mike Kelly Law Group, LLC, counsel for James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer, Appellant certify that I have served the Designation of Matter on counsel by depositing a copy of it in the United States mail, postage prepaid, on February 21, 2012 addressed to Perry D. Boulter, Esquire, Post Office Box 1897, Spartanburg, South Carolina 29304.


Lori Torbett, Paralegal

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MAR 08 2012
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 1, 2012

Ruskin C. Foster, Esquire
Brad D. Hewett, Esquire
Mike Kelly Law Group, LLC
P.O. Box 8113
Columbia, SC 29202

Re: Hoftiezer, James v. Hicklin, D. Mark
2011203086

Dear Counsel:

We have received the Appellant's Initial Brief and Designation of Matter in the above case. Within ten days of the date of this letter, please provide a proof of service for the Designation of Matter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Perry D. Boulter, Esquire
Ginger D. Goforth, Esquire

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
Appellate Tracking Number:

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 DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

The Appellant designates the following materials to be included in the Record on Appeal
with regard to his Initial Appellant's Brief:

1. Notice of Intent to File Suit;
2. Complaint;
3. September 1, 2011 Hearing Transcript;
4. Form 4 Order of September 28, 2011;
5. Motion to Reconsider of October 12, 2011

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SC Court of Appeals

6. Affidavit of James Hoftiezer;
7. Order of October 19, 2011;
8. Motion to Reconsider of November 15, 2011;
9. Notice of Appeal;
10. South Carolina Board of Medical Examiners Website Posting;
11. South Carolina Secretary of State Website Posting of SRHSD;
12. Shaver Order of October 22, 2007;
13. THWC Forms, Medical Records, Laboratory Results, Estimation of Benefits, Photographs of Signage;
14. Deposition of Edwin Haskell, III, pp. 20-21;
15. Internet Advertising of Dr. Hicklin and THWC;
16. Supplement to Schedule E for Dr. Hicklin 2007 Income Tax Return;
17. Deposition of Dr. Mark Hicklin, pp. 61-62, 77-79.
18. December 30, 2011 Secretary of State Website Posting;

I certify that this designation does not include any matter that is irrelevant to the issues on appeal.

Respectfully submitted,

By:



Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

February 21, 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
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v.

D. Mark Hicklin, M.D., Drs. Taylor, Hicklin, Westmoreland and
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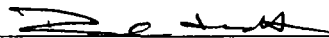
PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 21st day of February 2012, served copies of the Appellant's 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 Boulter, Esquire, Holcombe Bomar, P.A., 100 Dunbar Street, Suite 200, Spartanburg, SC 29306.

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FEB 21 2012

SC Court of Appeals

BY: 
Ruskin C. Foster
Brad D. Hewett
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(803) 726-0123
Attorneys for Appellant

February 21, 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

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SC Court of Appeals

James Hoftiezer, as Personal Representative
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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.

BRIEF OF APPELLANT

Respectfully submitted,

By:



Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

February 21, 2012

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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. [Notice of Intent to File Suit]. 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. [Complaint]. 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. [September 1, 2011 Hearing Transcript]. 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. [Form 4 Order]. Judge Hayes stated in the Form 4 Order that the Secretary of State documents could be read as misleading. Appellant filed a timely Motion to Reconsider on October 12, 2011. [Motion to Reconsider].

In his Motion to Reconsider, Appellant provided that the court erred by finding Respondents committed no wrongdoing and by applying any knowledge the Decedent may have had of the Respondents' affiliation to the Appellant. Appellant submitted an affidavit of the Personal Representative confirming that he did not know that TWHC was affiliated with SRHSD. [Affidavit of James Hoftiezer]. Appellant further provided 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). Appellant also requested that the trial court address his 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.

Prior to the trial court's ruling on the Motion to Reconsider, it signed an Order Granting Defendants' Motion for Summary Judgment. [Order of October 19, 2011]. Appellant renewed his Motion to Reconsider on November 15, 2011. [November 15, 2011 Motion to Reconsider]. Appellant filed a timely Notice of Appeal on November 15, 2011. [Notice of Appeal].

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 Health 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. [South Carolina Board of Medical Examiners Website]. 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. [South Carolina Secretary of State Website Posting of SRHSD]. 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, THWC 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 served an affiliate of the defendant; however, the statute of limitations had expired one month prior.

The 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). [Shaver Order of October 22, 2007]. 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 hospital's 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.

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

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 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. [THWC Forms, Medical Records, EOB's, Photographs of Signage].
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.

[Deposition of Edwin Haskell, III – pp. 20-21]. 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 THWC'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 producing 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 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. [Internet Advertising of Dr. Hicklin and THWC]. 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. [Supplement to Schedule E for Dr. Hicklin 2007 Income Tax Return]. 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. Boulter (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?

[Deposition of Dr. Mark Hicklin, pp. 61-62, 77-79].

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; Zabinski 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.” [South Carolina Secretary of State Website Posting of SRHSD]. *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.* [December 31, 2011 Secretary of State Website Posting]. 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

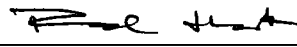
of equitable estoppel are present and Respondents should be equitably estopped from claiming the two year statute of limitations as a defense.

CONCLUSION

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

Respectfully Submitted,

By:



Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123

February 21, 2012



Columbia Office
500 Taylor Street
Columbia, SC 29201

Mailing Address
PO Box 8113
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Telephone 803.726.0123
Toll-Free 866.692.0123
Fax 803.252.7145

November 28, 2011

Pamela S. Faucette
Court Reporter
40 Somerset Drive
Spartanburg, SC 29301-6543

RECEIVED

NOV 29 2011

SC Court of Appeals

Re: Hoftiezer v. Hicklin
C/A No: 09-CP-42-5373
Court of Appeals File No: 2011203086

Dear Ms. Faucette:

Please be advised that you were the court reporter for the Motion for Summary Judgment in the above-referenced matter which was held before the Honorable J. Mark Hayes, II in Spartanburg County Court of Commons Pleas on September 1, 2011. We have filed a Notice of Appeal and therefore, request a copy of the transcript of the hearing from you. If you have any further questions or need a deposit from our firm for a copy of the transcript, please let me know.

By copy of this letter to the Clerk of Court to the South Carolina Court of Appeals and the Office of Court Administration, we are advising them of our request.

With kindest regards, I remain

Yours very truly,

Ruskin C. Foster

RCF/ldt

cc: The Honorable Tanya A. Gee
Office of Court Administration
Perry Boulter, Esquire

OFFICES IN:

Columbia, Myrtle Beach and Winnsboro, South Carolina
www.mklawgroup.com



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 23, 2012

Ruskin C. Foster, Esquire
Brad D. Hewett, Esquire
Mike Kelly Law Group, LLC
P.O. Box 8113
Columbia, SC 29202

Re: Hoftiezer, James v. Hicklin, D. Mark
2011203086

Dear Counsel:

The following Order has been endorsed on your Motion to Stay and Remand in the above entitled case on appeal.

"Denied.

s/ Jasper M. Cureton A.J.

January 23, 2012."

Please be advised the Appellant's Initial Brief and Designation of Matter must be served and filed no later than February 27, 2012.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc: Perry D. Boulter, Esquire
Ginger D. Goforth, Esquire

The South Carolina Court of Appeals

James Hoftiezer, as Personal
Representative for the Estate of Martha
Sue Hoftiezer,

Appellant,

v.

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

Respondents.

The Honorable J. Mark Hayes, II
Spartanburg County
Trial Court Case No. 2009-CP-42-05373

ORDER

For good cause having been shown, the time for Appellant's Initial Brief and Designation of Matter to be served and filed in the above entitled matter is hereby extended until February 27, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc: Ruskin C. Foster, Esquire
Brad D. Hewett, Esquire
Perry D. Boulter, Esquire
Ginger D. Goforth, Esquire

FILED
1-17-12 *4*



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December 28, 2011

The Honorable Tonya Gee
S.C. Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RECEIVED

DEC 30 2011

SC Court of Appeals

RE: Hoftiezer v. Hicklin, et al.
Court of Appeals File No: 2011203086
C/A No: 09-CP-42-5373

Dear Ms. Gee:

I represent the Appellant in this case. My office received the trial transcript from the court reporter via e-mail on December 27, 2011, and by my calculation, our Appellant's Initial Brief and our Designation of Matter are due for service and filing on Thursday, January 26, 2012. By this letter, I am respectfully requesting a thirty-day extension until February 25, 2012 to file and serve our Appellant's Initial Brief and our Designation of Matter.

I am enclosing my firm's check in the amount of \$25.00 (Twenty-Five and no/100 Dollars) for the motions filing fee.

Please let me know if this letter is not sufficient for the Court's consideration of this request and if a formal motion is required. We have spoken with Perry Boulter, Esquire, counsel for Respondent and he has consented to our request for an extension. I am providing a copy of this letter by mail to all counsel of record.

Sincerely,

Ruskin C. Foster

RCF/ldt

cc: Perry Boulter, Esquire

OFFICES IN:

Columbia, Myrtle Beach and Winnsboro, South Carolina
www.mklawgroup.com

12/27/11 1st
1/26/12
2/28/12

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
DEC 16 2011

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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.

**RESPONDENT'S RETURN OPPOSING
APPELLANT'S MOTION TO STAY AND REMAND**

Appellant has moved the Court of Appeals to stay this appeal, remand jurisdiction to the Circuit Court, and direct Judge Mark Hayes to rule on Appellant's October 12, 2011 Motion to Alter or Amend Judgment and/or Motion for Reconsideration. Respondents submit that the requested relief is legally and procedurally unavailable, and that Appellant's motion must be denied.

In the action below, Respondents successfully moved for an order granting summary judgment in their favor. On September 28, 2011, Judge Hayes issued a Form 4 order granting this relief. The Form 4 did not include a Statement of Judgment by the Court. Instead, Judge Hayes checked the box "See attached order. (Formal order to

follow).” Judge Hayes also specifically noted on the Form 4: “The Court requests the defendant’s attorney to prepare an order fully addressing the statute of limitation issues.” See Exhibit 1.

On October 12, 2011 - before the final order was filed - Appellant filed a Motion to Alter or Amend Judgment and/or Motion for Reconsideration pursuant to Rule 59(e), SCRCP with respect to the interlocutory September 28, 2011 Form 4 order. This motion was untimely because there was no final order in place at that time. Until the order was written, finalized, adopted, and entered by Judge Hayes, he had complete discretion to change his mind and alter his ruling. Therefore, the October 12 motion contesting the “findings” of the Form 4 did not contest the court’s actual order and final ruling.

At the court’s direction, counsel for Respondents timely submitted a formal order several pages in length that comprehensively covered all findings of fact and conclusions of law related to the statute of limitations and tolling issues, as requested by Judge Hayes. Judge Hayes signed this order and it was formally entered on October 19, 2011. See Exhibit 2. Appellant thereafter had ten days following receipt of the October 19 order to file a Rule 59(e) motion challenging the final order. Appellant waited until November 15, 2011 before filing a Rule 59(e) motion with respect to the October 19, 2011 order.¹

Appellant argues that Rule 59(e) is “silent” as to whether a Form 4 order requiring a more formal or detailed order tolls the 10 day period to file a motion under that rule. Basic case law answers this question.

¹ Appellant’s Motion to Remand only seeks to have the circuit court address Appellant’s October 12, 2011 Rule 59(e) motion and makes no reference to the second Rule 59(e) motion.

A form order leaving something further to be done is not a final order. In Culbertson v. Clemens, 322 S.C. 20, 23, 471 S.E.2d 163 (1996), the court held that “[a]ny judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” Id. at 164. In Cheap-o’s Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 650, 567 S.E.2d 514, 518 (Ct. App. 2002), the court held that while a Form 4 order can be a final order, it is not a final order if the circuit court specifies - as Judge Hayes did - that a more formal order will be filed and/or directing that a final order be prepared by counsel. Id. at 607. Even Rule 58, SCRPC provides that “the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, **and after review and approval by the court**, the clerk shall promptly enter it.” Rule 58(a)(2), SCRPC (emphasis added).

There is nothing vague, misleading, or otherwise “silent” about the type of order subject to a Rule 59(e) motion. Appellant simply did not file a timely motion.

Further, Judge Hayes no longer had jurisdiction to hear Appellant’s November 15, 2011 Rule 59(e) motion. A trial judge loses jurisdiction over a case when the time to file posttrial motions has elapsed. In Rutland v. Holler, Dennis, Corbett, Ormond & Garner, the Court of Appeals directly addressed the effect of a form order followed by a formal order on the jurisdiction of the circuit court. In that case, the judge filed a form order on August 9, 2004 granting the defendant’s motion to dismiss. The form order indicated that a formal order would follow. The judge issued the formal order on December 7, 2004. The court held that the circuit court retained jurisdiction only until the time for posttrial motions had

elapsed - 10 days following the December 7, 2004 order. Rutland v. Holler, Dennis, Corbett, Ormond & Garner, 371 S.C. 91, 637 S.E.2d 316, 319 (Ct. App. 2006). See also Ex Parte Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004)(holding that a trial court loses jurisdiction over a case when the time to file posttrial motions has elapsed). Here, Judge Hayes issued his formal order on October 19, 2011. His jurisdiction over this case therefore ended ten days after Appellant received written notice that the order had been entered. Appellant's November 15, 2011 Rule 59(e) motion was untimely and the trial court was without jurisdiction to hear it. Appellant makes no contention that this motion was filed on a timely basis.

Appellant's reliance on Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986) and Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) is misplaced. Appellant cites Elam for the proposition that the October 12, 2011 posttrial motion tolled the time to file an appeal. In Elam, however, the court held that "[a] **timely** posttrial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion." Id. at 15, 602 S.E.2d at 775 (emphasis added). The October 12, 2011 motion, as noted above, was premature and untimely and did not address the trial court's final order on the summary judgment motion. Appellant's November 15, 2011 Rule 59(e) motion was untimely because it was filed more than 10 days after receipt of written notice of the trial court's final order.

Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986) merely stands for the proposition that the service and filing of a notice of appeal before, or simultaneous with, the filing of timely posttrial motions does not deprive the lower court of jurisdiction to hear

the timely filed posttrial motion. Again, however, the operative term is "timely." Because Appellant did not timely file a proper Rule 59(e) motion, there is no post-trial motion pending before the circuit court, and Appellant is not entitled to have this appeal dismissed for the purpose of the circuit court's ruling on any such motion.

Respondents therefore respectfully submit that the Court of Appeals must deny Appellant's Motion to Stay and Remand because there is no timely filed Rule 59(e) motion pending in the circuit court, and jurisdiction to address the October 19, 2011 order now lies solely in the Court of Appeals.

HOLCOMBE BOMAR, P.A.

By: Ginger D. Goforth
Perry D. Boulier
Ginger D. Goforth
Post Office Drawer 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Respondents

December 14, 2011

EXHIBIT 1

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL
CASE

COUNTY OF **Spartanburg**
IN THE COURT OF COMMON PLEAS

CASE NO. **2009-CP-42-5373**

James Hoftiezer, as personal representative

Dr. Mark Hicklin, et al.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE

BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

This matter was before the Court on the defendant's motion for summary judgment.

Based on the arguments presented, a review of the case law, and documents in the file, the motion is granted as to Hicklin, and THWC Pa. The plaintiff's argument of tolling the statute of limitations does not change the substance of the Tort Claims Act.

As to SRHSD, the Court believes it too is entitled to a grant of summary judgment. The secretary of state documents do not justify the application of estoppel or equitable tolling of the statute of limitations. The secretary of state documents can be read as misleading since they do contain the term "eleemosynary." The disclaimer, however, also informs the reader that anyone who relies on these documents "does so at his own risk". Also, the cases offered by the plaintiff all seem to have a common thread, that it was the party against whom estoppel was being used that had committed some affirmative wrong-doing, such as failing to name a registered agent or moving without any known forwarding address. There is no allegation that SRHSD caused the error on the secretary of state's web page. Even in the case that was before Circuit Judge Williams, there appear to be facts very different than here, as it relates to the efforts of SRHSD and the doctor's group to show to the public that they were all part of the SRHSD (applying a reasonable man standard.....the Court cannot find that the standard of review is the reasonable attorney). From

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CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 28 PM 2:07
M. HOPE BEAN, CLERK

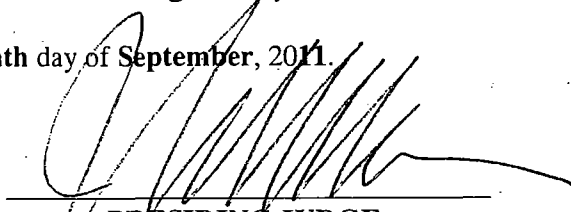
the information provided to this Court, the only reasonable conclusion is that in the present case, the affiliation with SRHSD was on signs, letterheads, billings, etc., at the times the deceased was a patient of the doctors. Thus, the evidence seems clear that at the time treatment was rendered, Ms. Hoftiezer would have known her doctors were affiliated with SRHSD unlike Mr. Shaver in Judge Williams' case. Also, it appears the affiliation with SRHSD would have been known when certain medical records were requested by the personal representative. Again, unlike the case before Judge Williams, this Court cannot locate sufficient information from which it can infer wrongful conduct on the part of SRHSD or the doctors.

The Court requests the defendant's attorney to prepare an order fully addressing the statute of limitation issues.

The Court commends the attorneys for the excellent briefing and arguments.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at **Spartanburg**, South Carolina, this **twenty-eighth** day of **September**, 20**11**.


PRESIDING JUDGE

This judgment was entered on the 28 day of Sept 20 11, and a copy mailed first class this 28 day of Sept, 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

Perry D. Boulier
(864) 594-5304

ATTORNEY(S) FOR PLAINTIFF

Ruskin C. Foster
(803) 726-0123

ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT

M. HOPE BLACKLEY

2011 SEP 28 PM 2:07

CLERK OF COURT
SPARTANBURG COUNTY

EXHIBIT 2

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

JAMES HOFTIEZER, as Personal)
Representative for the Estate of)
Martha Sue Hoftiezer,)

Plaintiff,)

vs.)

D. MARK HICKLIN, M.D.,)
DRS. TAYLOR, HICKLIN,)
WESTMORELAND AND COLEY, P.A.,)
and SPARTANBURG REGIONAL)
HEALTH SERVICES DISTRICT, INC.,)
db/a Spartanburg Regional)
Healthcare System,)

Defendants.)

ORDER GRANTING DEFENDANTS'
MOTION FOR
SUMMARY JUDGMENT

C.A. Number: 2009-CP-42-5373

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 OCT 19 AM 4:50
M. HOFF BLAKEY

FACTS

Plaintiff's decedent, Martha Sue Hoftiezer, saw Defendant D. Mark Hicklin, M.D. ("Dr. Hicklin") on July 31, 2006 for treatment in his office. On August 4, 2006, Ms. Hoftiezer went into cardiac arrest and died. Plaintiff brings this action for damages, claiming negligence on the part of Defendants in the care and treatment of Ms. Hoftiezer. Plaintiff initiated this action by the filing of a Notice of Intent to File Suit on February 26, 2009. Plaintiff filed his Summons and Complaint on October 1, 2009.

Defendants contend that Defendant Spartanburg Regional Health Services District, Inc. ("SRHS") is a political subdivision of the State of South Carolina and entitled to the protection of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-



10, et seq. (the "Tort Claims Act"). Defendants further contend that Dr. Hicklin was an employee of SRHS and that Defendant Drs. Taylor, Hicklin, Westmoreland and Coley, P.A. (and its predecessor and successor designations) ("THWC") was owned by SRHS at all times referenced in the Plaintiff's Complaint. As a result, Defendants argue that Dr. Hicklin and THWC cannot be sued individually in this matter and that Plaintiff's suit should be dismissed for failure to commence this action within two years as is required by the Tort Claims Act.

The parties have conducted discovery related to the application of the Tort Claims Act and issues related to the statute of limitations issue pursuant to a Consent Scheduling Order entered by this Court. The matter is now before the Court on Defendants' Motion for Summary Judgment. This motion was heard by the Court on September 1, 2011. For the reasons set forth, the Court grants Defendants' Motion for Summary Judgment.

FILED
CLERK OF COURT
CHESAPEAKE COUNTY
2011 OCT 19 AM 11:50
MAHOLLE BEAUCHAMP

STANDARDS OF LAW

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Rule 56(c), SCRPC. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003).



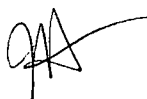
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues before the Court can be summarized as follows: 1) Can Plaintiff maintain a separate action against Dr. Hicklin and/or TWHC?, and 2) Is SRHS equitably estopped from asserting the Tort Claims Act's two year statute of limitations or was the statute of limitations equitably tolled in this action?

1. SRHS is a political subdivision of the State of South Carolina and is entitled to the protections of the Tort Claims Act.

The Tort Claims Act provides the exclusive remedy "for any tort committed by a governmental entity, its employees, or its agents." S.C. Code Ann. § 15-78-20(b). The term "governmental entity" includes political subdivisions of the State. S.C. Code Ann. § 15-78-30(d). "Political Subdivision" expressly includes a "governmental health care facility" "which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance," tax-exempt, and does not accrue net income for the benefit of an individual or non-governmental entity. S.C. Code Ann. § 15-78-30(h), (j). County or municipal governments may form regional health services districts by enactment of the local governing body(s). S.C. Code Ann. § 44-7-2010, et seq.

Based upon the evidence presented by the parties, the Court finds that SRHS was created by the adoption of Ordinance No. 557 by Spartanburg County Council on April 10, 1995 and the filing of a Certificate of Incorporation with the Secretary of State's office on May 1, 1995. Ordinance No. 557 expressly provides that SRHS is a political



subdivision of the State and is subject to the Tort Claims Act. Nothing has been enacted, amended, or filed altering SRHS's status as a governmental entity subject to the Tort Claims Act. Because SRHS was formed pursuant to the above-cited statutes, the Court finds that SRHS is a political subdivision of the State of South Carolina and is entitled to the protections of the Tort Claims Act.

2. Plaintiff cannot maintain independent actions against Dr. Hicklin or THWC because of their affiliation with SRHS.

As stated above, the Court finds that SRHS is a governmental entity entitled to the protection of the Tort Claims Act. The Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a). An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable for his actions individually or independently from his governmental employer. S.C. Code Ann. § 15-78-70. The governmental entity must be substituted as the sole Defendant for all allegations concerning alleged wrongdoing of its employees. S.C. Code Ann. § 15-78-70(c).

Based upon the evidence presented by the parties, the Court finds that THWC has been wholly-owned by SRHS since August 11, 1994. THWC was not a separate legal entity engaged in the practice of medicine nor did it provide any medical care to Plaintiff's decedent on the date of the care and treatment at issue in this case. Likewise, the Court finds that Dr. Hicklin has been an employee of SRHS since August 11, 1994. Plaintiff argues that even if Dr. Hicklin was an employee of SRHS, he is not entitled to the protections of the Tort Claims Act because he reported income from a non-

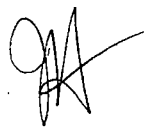


governmental source. See S.C. Code Ann. § 15-78-30(c). The Court finds that Plaintiff's contention, even if true, is without merit because Plaintiff admitted that the reported income is not in any way related to the services provided to Ms. Hoftiezer at issue in this case. The undisputed evidence in this case shows that Dr. Hicklin was acting within the course and scope of his employment with SRHS at the time of the care and treatment at issue.

Because THWC was owned by SRHS and Dr. Hicklin was an employee of SRHS at all times relevant to this case, the Court finds that THWC and Dr. Hicklin are entitled to the protections of the Tort Claims Act. As such, THWC and Dr. Hicklin cannot be held liable individually or independently from SRHS, and Defendants' motion for summary judgment is granted as to THWC and Dr. Hicklin. Accordingly, pursuant to Section 15-78-70 of the Tort Claims Act, SRHS should be the sole Defendant in this case.

3. SRHS is not equitably estopped from the application of the two-year statute of limitations nor is the two-year statute of limitations equitably tolled in this case.

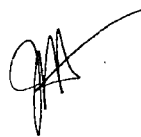
Because SRHS is entitled to the protection of the Tort Claims Act, any action brought against it must be commenced within two years. S.C. Code Ann. § 15-78-110. Plaintiff admits that by filing his Notice of Intent to File Suit on February 26, 2009, he failed to commence his action within two years. However, Plaintiff makes numerous arguments that SRHS should be equitably estopped from asserting the two-year statute of limitations or the two-year statute of limitations should be equitably tolled. Plaintiff argues: (1) the South Carolina Secretary of State's website codes SRHS as a "non profit"



organization and codes certain filings of SRHS as "eleemosynary" filings; (2) the South Carolina Medical Board's website does not indicate that Dr. Hicklin is an employee of SRHS or that THWC is owned by SRHS; (3) the medical records produced pre-litigation were deficient compared to those produced during litigation; (4) THWC's signage at its office did not state it was owned by SRHS; and (5) THWC held itself out as a private, for profit, general partnership.

Based upon the evidence presented by the parties, the Court finds Plaintiff's arguments unpersuasive. The Secretary of State's website listing for SRHS could be read as misleading because it contains the terms "non profit" and "eleemosynary." However, the disclaimer found on the website also informs the reader that one who relies on the website information "does so at his own risk." If Plaintiff had requested the actual documents on file with the Secretary of State concerning SRHS, it would have been evident that SRHS is a governmental entity subject to the Tort Claims Act. As noted above, the documents filed by SRHS with the Secretary of State expressly establish its status as a political subdivision of the State of South Carolina and a governmental entity. SRHS is not responsible for the manner in which the Secretary of State maintains its website, and the documents filed by SRHS are public documents available to Plaintiff or his counsel.

Likewise, the mere fact that the South Carolina Medical Board's website does not note Dr. Hicklin's employment status with SRHS is of no import to the issues before the Court. Plaintiff's argument would deprive SRHS of the protection of the Tort Claims Act



for reasons entirely out of SRHS' control. Equitable estoppel should not be applied under these facts.

In American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E. 2d 181 (Ct. App. 2009), the Court held that equitable tolling should be rarely applied and noted that it is reserved for "extraordinary circumstances". Id. at 582. American Legion discussed Hooper v. Ebenezer Senior Servs. and Rehab. Ctr., 377 S.C. 217, 659 S.E. 2d 213 (Ct. App. 2008) which Plaintiff cites in this case. American Legion noted that Hooper also required extraordinary circumstances for the application of equitable tolling and further noted that if the statutory deadline for filing has passed, the Plaintiff needs to show that he was "induced or tricked by the defendant's misconduct into allowing the filing deadline to pass." Id. At 583. The Court went on to note that Hooper also required a showing of due diligence by the Plaintiff. Id. With regard to the conduct of the defendant that justifies the application of equitable tolling, the Court stated: "It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation." (emphasis supplied). Id.

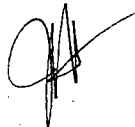
With regard to equitable estoppel against a governmental entity such as SRHS, American Legion held that three elements must be shown: 1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; 2) justifiable reliance on the government's conduct; and 3) a prejudicial change in position. Id. at 584. The Court



further noted: "Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." Id. In American Legion, the Court found that equitable estoppel would not lie against a governmental entity even though the governmental entity's employee provided the plaintiff with erroneous information in contradiction to the statute at issue in that case. Id.

Likewise, the Court notes that the cases offered by Plaintiff in support of its estoppel and tolling arguments all have a common thread in that the party against whom estoppel was being used had committed some affirmative wrong-doing, such as failing to name a registered agent or moving without any known forwarding address. While Hooper holds that fraud or misrepresentation by the defendant is not required for equitable tolling to apply, it plainly held that when a plaintiff misses the statutory deadline, the plaintiff must show that he was induced or tricked by the defendant's misconduct into missing the statute of limitations. In essence, the estopped party is held responsible for action or inaction on its part that caused some detrimental reliance by the other party.

Applying the principles outlined in American Legion and Hooper, the Court finds that the facts of this case do not warrant the application of either equitable tolling or equitable estoppel. From the information provided to the Court by the parties, the Court finds that Dr. Hicklin and THWC's affiliation with SRHS was on signs, letterheads, business cards, and billing correspondence at the time the decedent was a patient of Dr. Hicklin and THWC at issue in this matter. Plaintiff argued that SRHS failed to provide



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complete medical records when Plaintiff initially requested the records in 2006. Nonetheless, the form that Plaintiff executed in 2006 to obtain records from Dr. Hicklin's office bore the SRHS logo and clearly suggested the affiliation between SRHS and Dr. Hicklin. Thus, the evidence is clear that at the time treatment was rendered to the decedent, a reasonable person would have or should have known that Dr. Hicklin and THWC were affiliated with SRHS.

With regard to the information on the Secretary of State's website, this court is guided by the holding in American Legion. Certainly, if equitable estoppel would not lie in a case where a governmental entity disseminated erroneous information about a statute, it cannot lie where the Secretary of State's website erroneously classified SRHS as a charitable entity. This is particularly true given the disclaimer found on the website and the availability of the documents actually filed by SRHS concerning its legal status.

While having no precedential effect on this Court, Plaintiff also argued strongly in support of his argument the reasoning set forth in the Circuit Court Order entered in Shaver v. Hill, et al., C/A No. 07-CP-38-553 (Ct. Common Pleas, 1st Judicial Circuit, October 18, 2007). However, even in that matter, there appear to be facts very distinguishable from those present in this matter as it relates to the efforts of SRHS, Dr. Hicklin, and THWC to demonstrate to the public that Dr. Hicklin was an employee of SRHS and THWC was wholly-owned by SRHS.

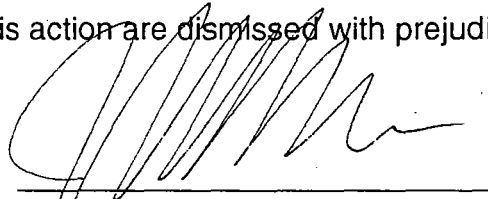


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The Court thus finds that under the facts present in this case, the application of equitable estoppel or equitable tolling is not warranted and the Tort Claims Act's two-year statute of limitations should be applied.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is granted and that Plaintiff's Complaint and this action are dismissed with prejudice.

IT IS SO ORDERED.

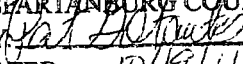


J. Mark Hayes II, Judge
Seventh Judicial Circuit

October 19, 2011
Spartanburg, South Carolina

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BY  D.C.
DATED 10/19/11

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,

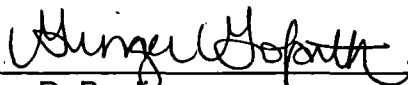
v.

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.

PROOF OF SERVICE

I certify that I have served the Memorandum Opposing Plaintiff's Motion to Stay and
Remand on the following party by depositing a copy of it in the United States Mail, postage
prepaid, on December 14, 2011, addressed to the attorney of record listed below:

Ruskin C. Foster, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201



Perry D. Boulier
Ginger D. Goforth
Holcombe Bomar, P.A.
P.O. Box 1897
Spartanburg, South Carolina 29304
(864) 594-5300



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William U. Gunn
Koger M. Bradford
Perry D. Boulter
William B. Darwin, Jr.
Robert M. Barrett
Ginger D. Goforth
W. McElhaney White
A. Todd Darwin
J. Hayes Walsh
Nathaniel P. Mark
Joshua T. Thompson
Kyle T. Clelland

Stacey Campbell Davis
Special Counsel

Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

December 13, 2011

RECEIVED

DEC 16 2011

SC Court of Appeals

The Honorable Tanya Gee
Clerk of the S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Hoftiezer v. Hicklin, et al
C.A. No. 2009-CP-42-5373
Our File No. 10756

Dear Ms. Gee:

Enclosed please find for filing an original and seven copies of a Memorandum Opposing Appellant's Motion to Stay and Remand and Proof of Service. Please return a filed copy of the Memorandum in the enclosed postage paid return envelope.

Thank you in advance for your cooperation, and please do not hesitate to contact with me any questions.

Sincerely,

GINGER D. GOFORTH

/rr

Enclosures

c: Ruskin C. Foster, Esq. (w/enclosures)

Denied.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jasper M. Curston A.J.

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, III, Circuit Court Judge

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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.

MOTION TO STAY AND REMAND

The Appellant moves that this appeal be stayed and jurisdiction remanded to the Circuit Court with the direction that the Appellant's Motion to Alter or Amend Judgment and/or Motion for Reconsideration, which was timely served on October 12, 2011, be heard and decided by Circuit Judge J. Mark Hayes, III. The grounds for this motion are set forth in more detail in the supporting memorandum filed herewith. In accordance with Rule 224(b), SCACR, the Appellant requests that all time limits be held in abeyance while this motion remains pending.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:



Ruskin C. Foster

Brad D. Hewett

500 Taylor Street

Post Office Box 8113

Columbia, South Carolina 29202

(803) 726-0123

Attorneys for Appellant

December 5th, 2011

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.

MEMORANDUM IN SUPPORT OF MOTION TO STAY AND REMAND

The Appellant moves that this appeal be stayed and jurisdiction remanded to the Circuit Court with the direction that the Appellant's Motion to Alter or Amend Judgment and/or Motion for Reconsideration, which was timely served on October 12, 2011, be heard and decided by Circuit Court Judge J. Mark Hayes, III.

After receiving the Order Granting Defendants' Motion for Summary Judgment issued by Judge Hayes, counsel for Appellant filed and served a Rule 59(e) motion on October 12, 2011,

which was timely under Rule 59(e).¹ Judge Hayes later signed a separate Order Granting Defendants' Motion for Summary Judgment on October 19, 2011, which was prepared by Counsel for Defendants. Counsel for Appellant did not renew its Rule 59(e) motion as this had been previously filed and served on the belief that Judge Hayes's preliminary order was the operative document pursuant to Rule 59(e) in contrast to SCACR 203(b)(1) regarding the time to serve the notice of appeal for a formal order as 203(b)(1) explicitly provides that the time begins after written notice of entry of a formal order.

The dilemma is that Rule 59(e) mandates a motion to alter or amend a judgment "shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e) is silent as to whether a more formal or detailed order to come at a later date tolls the time period as Rule 203(b)(1), SCACR does. Accordingly, if a motion under Rule 59(e) is not served within 10 days of any order an argument could be made that it would be untimely. Because it would be jurisdictional on appeal, the court below theoretically would not be the deciding body to determine whether the 59(e) motion was timely filed and thus when an appeal therefrom would be timely.

Consequently, and in abundance of caution and to preserve its right to appeal, Appellant filed a Notice of Appeal. In the case of *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986), the Supreme Court explained that "a Notice of Appeal filed on the same day as post-trial motions does not deprive the trial court of jurisdiction to hear the motions." 349 S.E.2d at 341. In the event that a Notice of Appeal is filed subsequent to a Rule 59 motion, which is what occurred in the present case, the Supreme Court set forth the following procedure:

¹ A copy of the Motion to Alter or Amend Judgment and/or Motion for Reconsideration is attached hereto as an exhibit.

IT IS ORDERED that in the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of this Court in writing. *Upon receipt of such notice, the appeal shall be dismissed without prejudice.* Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed.

349 S.E.2d at 341-342 (Emphasis added). Thus, under such circumstances, the Supreme Court – using mandatory language – required that the appeal is to be dismissed without prejudice.² This same procedure was later reaffirmed in *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), where the Supreme Court described the holding from *Hudson* as follows: “when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature.” 602 S.E.2d at 778, n.2.

Therefore, in accordance with the dictates of *Hudson* and *Elam*, the Appellant respectfully places this Court on notice that a Rule 59(e) motion remains pending in the lower court. Appellant therefore requests that this Court stay the pending appeal to allow for the adjudication of the Rule 59(e) motion still pending in the Circuit Court. While *Hudson* and other cases do provide that the Circuit Court does not lose jurisdiction upon the filing of a Notice of Appeal under these specific circumstances,³ it remains a common misconception that is not the case given Rule 205, SCACR. Consequently, Appellant requests that the Court issue a remand order directing that jurisdiction lies in the Circuit Court and further directing the Circuit Court to adjudicate the pending Rule 59(e) motion.

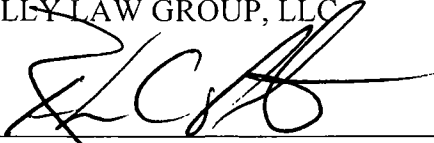
² This same procedure and result are described by Chief Justice Jean Toal in her treatise on appellate practice. See, Toal, *Appellate Practice in South Carolina*, 2d ed., p. 120.

³ See also, *Shumpert v. Time Ins. Co.*, 329 S.C. 605, 496 S.E.2d 653, 658, n. 5 (Ct. App. 1998) (“The court may consider a timely post-trial motion even if a notice of appeal has been filed”).

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:



Ruskin C. Foster

Brad D. Hewett

500 Taylor Street

Post Office Box 8113

Columbia, South Carolina 29202

(803) 726-0123

Attorneys for Appellant

December , 2011

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE (X) COURT OF COMMON PLEAS
() FAMILY COURT

James Hofstetzer, as Personal Representative)
For the Estate of Martha Sue Hofstetzer,)
(X) Plaintiff,)
)

Case No. 2009-CP-42-5373

vs.)
Dr. Mark Hicklin, et al.)
)

**MOTION INFORMATION FORM
AND COVER SHEET**

() Defendants,)

Check box above indicating submitting party ()

Name, SC Bar No. and Address of Plaintiff=s attorney:

Ruskin C. Foster, Esquire

500 Taylor Street

Columbia, SC 29201

telephone: 726-0123

email:

fax: 252-7145

other:

Name, SC Bar No. and Address of Defendant=s attorney:

telephone:

email:

fax:

other:

(X) MOTION HEARING REQUESTED (attached written motion and complete SECTIONS I AND III)

() FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Judgment and/or for Reconsideration

Estimated Time Needed:

Court Reporter Needed: Yes/No

SECTION II: Motion Type

() Written order attached

() Form Motion C

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff/Defendant

Date submitted

SECTION III: Motion Fee

(X) PAID B AMOUNT \$25.00

() EXEMPT:

(check reason)

() Rule to Show Cause in Child or Spousal Support

() Domestic Abuse or Abuse and Neglect

() Indigent Status () State Agency v. Indigent Party

() Sexually Violent Predator Act () Post-Conviction Relief

() Motion for Stay in Bankruptcy

() Motion for Publication () Motion for Execution (Rule 69, SCRPC)

() Proposed order submitted at request of the court; or
reduced to writing from motion made in open court per judge=s instructions

Name of Court Reporter:

() Other: Filing Amended Complaint within 30 days

JUDGE=S SECTION

() Motion Fee to be paid upon filing of the attached order

() Other

Judge

Code:

Date:

CLERK=S VERIFICATION

DATE FILED

Collected by:

(Print Name)

() MOTION FEE COLLECTED: _____

() CONTESTED B AMOUNT DUE: _____

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FEE PAID

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

James Hoftiezer, as Personal Representative
for the Estate of Martha Sue Hoftiezer,

Plaintiff,

vs.

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,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-42-5373

NOTICE OF MOTION AND MOTION TO
ALTER OR AMEND JUDGMENT AND/OR
MOTION FOR RECONSIDERATION
PURSUANT TO SOUTH CAROLINA RULE
OF CIVIL PROCEDURE 59(E)

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TO: THE HONORABLE J. MARK HAYES, III

PERRY D. BOULIER., ESQUIRE, COUNSEL FOR DEFENDANTS.

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for Plaintiff will move before the Honorable J. Mark Hayes, III at such time and place as may be set by the Court, for an Order, pursuant to Rules 59(e), *SCRCP*, altering, amending, and/or reconsidering the Order granting summary judgment to Defendants. The Order was entered on September 28, 2011. Counsel for Plaintiff received the Order on October 4, 2011.

Plaintiff's motion is based upon the following grounds:

1. The Court erred by finding there was no wrongdoing by Defendants and by applying any knowledge the Decedent may have had of Defendant SRHSD's affiliation with Defendant Hicklin against the Plaintiff. The Court indicated that "the evidence seems clear that at the time treatment was rendered, Ms. Hoftiezer would have known her doctors were affiliated with SRHSD...." See Form 4 Order, September 28, 2011. It is irrelevant what the Decedent knew regarding any affiliation between Defendant SRHSD and Defendant Hicklin. James

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Hoftiezer is the son of Decedent and Personal Representative of the Estate of Martha Hoftiezer and is the individual charged with maintaining this action. As detailed in the Affidavit, James Hoftiezer was a patient of Defendant Hicklin's practice nearly twenty years ago, at a time that it was a private entity and not affiliated with or owned by Defendant SRHSD. See Affidavit of James Hoftiezer. Further, James Hoftiezer never had the opportunity to discuss any affiliation with his mother prior to her death that would have put him on notice of the same.

James Hoftiezer was a patient of Dr. Westmoreland (now a partner of Defendant Hicklin) approximately twenty (20) years ago. At that time, Defendant Hicklin's practice was not owned by Defendant SRHSD. Consequently, any knowledge that Plaintiff may have had of Defendant Hicklin's organizational status, coupled with the misleading Secretary of State listing and Defendants' malfeasance in the production of medical records, would have led a reasonable person to believe that it was still a private practice. The Affidavit of James Hoftiezer should alleviate the Court's concern of any knowledge he may have had of Defendant Hicklin's association with Defendant SRHSD and also emphasize the Defendants' misconduct in the pre-suit production of medical records.

As set forth in Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009), Plaintiff does not have to establish affirmative acts of wrongdoing by Defendants to justify the Court equitably tolling the statute of limitations. Rather, Hooper stands for the principle that equitable tolling should be employed "...when the interests of justice compel its use." Id., 386 S.C. at 117, 687 S.E.2d at 33. The facts of the case at bar are even more compelling than those that warranted equitable tolling in Hooper. Plaintiff has detailed numerous accounts of misconduct by Defendants that would justify equitable tolling and would cause Plaintiff to rely to his detriment. It is simply irrelevant whether the misgivings by

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Defendants were intentional or affirmative. The Court has ruled that the information for Defendant SRHSD on the Secretary of State's website was misleading.

Further, and as emphasized by Plaintiff's Memorandum and in arguments before the Court, Defendant did not produce any medical records prior to the initiation of suit that would have served to put Plaintiff on notice of the affiliation between Defendant SRHSD and Defendant Hicklin. Defendants' production of the records prior to the institution of suit were woefully incomplete. In fact, it appears that Defendants intentionally withheld any records that would have contained references to Defendant SRHSD or any material that would have put Plaintiff on notice of the affiliation.

Defendants produced only a modicum of the actual medical records to the Plaintiff prior to the litigation, despite being presented with a proper request. Not only was this an affirmative fraudulent wrongdoing, but it also was a violation of federal and state law regarding a patient's right to her medical records.¹ The records that Defendant actually produced prior to litigation did not reveal any affiliation between Defendant Hicklin and Defendant SRHSD. This in and of itself is misconduct by Defendants justifying equitable estoppel and equitable tolling, in addition to the misconduct in properly reporting to the Secretary of State.

The misconduct by Defendants will be examined under the exact same parameters as those used by the Supreme Court in Hooper. In fact, the parallels between the two cases are nearly undistinguishable. Plaintiff was not afforded the opportunity to inspect the complete set of medical records before filing suit as these were improperly withheld. In Hooper, the Supreme Court specifically held that the plaintiff was "entitled to rely on the public records." Id., 386 S.C. at 118, 687 S.E.2d at 34.

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

Accordingly, and after a careful review of Hooper and the blatant misconduct by the Defendants, whether affirmative or unintentional, Plaintiff respectfully requests that this court alter or amend its current Order to deny summary judgment and equitably estop the Defendants from profiting off of its own misgivings by claiming refuge under the statute of limitations or equitably toll the same. The interests of justice warrant the Court equitably tolling the statute of limitations in this matter so that a jury can properly decide this case on its merits.

2. In its Order granting Summary Judgment, the Court has not addressed the fact that the Defendants engaged in affirmative wrongdoing by failing to accurately update and/or correct information promulgated by the South Carolina Secretary of State – exactly the situation the our Supreme Court addressed in Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.E.2d 29 (2009). In Hooper, the Court equitably tolled the statute of limitations because the defendant failed to properly list its registered agent for service. In this matter, there were multiple acts of wrongdoing by Defendants as Defendant SRHSD clearly allowed itself to be incorrectly listed as an eleemosynary organization with the South Carolina Secretary of State and Defendant Hicklin did not properly produce the entirety of the medical records. However, it is clear that Plaintiff is entitled to rely upon the information broadcast by the Secretary of State website as set forth in Hooper. Even after the deposition of the attorney for Spartanburg County where it was pointed out that Defendant SRHSD was listed as an eleemosynary, Defendant SRHSD still had not changed its listing with the Secretary of State *and has not changed it to this day*.

Moreover, it is likely that other healthcare facilities will engage in this type of wrongdoing regarding their organizational status and then claim it as an innocent mistake much to the chagrin of the injured party. Further troubling is that claimants have a very limited

avenue, if any, to ascertain what the healthcare facility's proper organizational status may be for purposes of determining the statute of limitations applicable to that entity.

The Court admitted that the Secretary of State's website is misleading which is a direct result of Defendant SRHSD failing to keep its information accurate and updated as required by the Secretary of State. The Plaintiff argued to the Court and emphasized in his memorandum that this wrongdoing was caused directly by Defendant SRHSD's error and omissions. In fact, The Secretary of State's website directly provides that "...it is the responsibility of the business entity to inform the Secretary of State of any updated information." See, <http://www.scsos.com>. This is the exact scenario that the Supreme Court addressed in Hooper. Though the error in this matter is dissimilar in nature, it is still the very type of behavior that the Court in Hooper found warranted equitable estoppel. The Defendants' silence on this issue and error by purposeful omission had the direct effect of deceiving the Plaintiff and warrants estoppel.

Defendant SRHSD's errant listing with the Secretary of State as an eleemosynary organization actively misled the public and Plaintiff. 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. 367 S.C. 559, 561, 626 S.E.2d 884, 885.

Similar to Hooper and Shaver v. Orangeburg Surgical Associates, P.A., 2007-CP-38-0553 (October 22, 2007), Plaintiff Hofstiezer was prohibited from effectuating proper service within the statute of limitations prescribed by the S.C. Tort Claims Act due to Defendants' 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 the Plaintiff is supported by the

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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.

See Exhibit 3 - Deposition of Edwin C. Haskell, III - pp. 20-21. 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 the Defendant SRHSD on the Secretary of State's website and its alleged affiliation with Defendant Hicklin.

Accordingly, and because Defendants engaged in affirmative wrongdoing [though Plaintiff is not required under Hooper to establish this] by supplying incorrect information to the Secretary of State or failing to monitor or correct what it admits is incorrect information regarding its organization status and refusing to properly produce the medical records prior to litigation, Plaintiff respectfully requests this Court alter or amend its current Order and deny summary judgment and find that the statute of limitations is equitably tolled and/or Defendants are equitably estopped from relying upon the statute of limitations as a defense.

3. The Order Granting Defendant's Motion for Summary Judgment has not addressed each of the grounds for denial set forth in the Plaintiff's memorandum and arguments

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in opposition to summary judgment. The Court failed to address the fact that Defendant Hicklin elicited payments from a non-governmental source precluding it from protection under the South Carolina Tort Claims Act.

Defendant Hicklin, as a partner of Defendant 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.

As evidenced by the attached schedule to Defendant Dr. Hicklin's 2007 income tax return, he accepted payments from Regional Healthplus, LLC. *See Exhibit 8 – Supplement to Schedule E for 2007 Income Tax Return.* 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. Boulter (counsel for Defendants):

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

See Deposition of Dr. Mark Hicklin, pp. Edwin C. Haskell, III – pp. 61-62, 77-79.

As evidenced by Defendant Hicklin and his counsel’s own testimony, Defendant Hicklin accepts payments from a non-governmental entity. It is a fair inference that Defendant Hicklin’s

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treatment of Decedent Hoftiezer contributed to any revenue he received from Regional HealthPlus, LLC. By definition, the S.C. Tort Claims Act does not operate to 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 Decedent Hoftiezer. Accordingly, and even assuming *arguendo*, that Dr. Hicklin could be considered an employee of Defendant SRHSD and that Defendant THWC, 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.

Accordingly, and because Defendants accepted payments from a non-governmental source, Defendant Hicklin is precluded from protection under the S.C. Tort Claims Act and Plaintiff respectfully requests this Court alter or amend its current Order granting summary judgment to Defendants.

4. In any event, S.C. Code Ann. § 62-3-109 affords Plaintiff an additional 8 months to file a cause of action arising out of Decedent Martha Hoftiezer's death. §62-3-109 provides the following: "[t]he running of any statute of limitations on a cause of action belonging to a decedent which had not been barred as of the date of his death is suspended during the *eight months following the decedent's death but resumes thereafter unless otherwise tolled.*" (Emphasis supplied). Decedent died on 8/4/2006 and Plaintiff filed suit on February 10, 2009 – 2 years and 6 months after the date of death. Pursuant to §62-3-109, Plaintiff had 2 years and 8 months to file a cause of action on behalf of the decedent's estate. See, Medlin v. South Carolina Farm Bureau Mut. Ins. Co., 325 S.C. 195, 480 S.E.2d 739 (1997).

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Consequently, Plaintiff respectfully requests that this Court alter or amend its current Order to deny summary judgment on the grounds of the statute of limitations as suit was timely filed on behalf of the decedent's estate pursuant to S.C. Code Ann. §62-3-109.

CONCLUSION

The Court's Order granting summary judgment in this matter will likely spawn years of appellate litigation. The Plaintiff respectfully requests that the Court examine the facts and misconduct of Defendants under the purview of Hooper and alter or amend its current Order granting summary judgment to the Defendants so as to allow a jury to determine the merits of the case and its outcome. The Plaintiff's motion is based upon the pleadings filed in this case, the arguments of counsel, the rules of court, the hearing record, affidavits, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment previously filed with this court, and such other evidence as may be acceptable to the court at the time of the hearing.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY:


Ruskin C. Foster
Brad Hewett
500 Taylor Street
Post Office Box 8113
Columbia, SC 29202
803/726-0123
Attorneys for Plaintiff

Columbia, South Carolina

October 12th, 2011

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M. HOPE BLACKLER

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

Civil Action No.: 2009-CP-42-5373

James Hoftiezer, as Personal)
Representative for the Estate of Martha)
Sue Hoftiezer,)

Plaintiff,)

vs.)

Affidavit of James Hoftiezer, as Personal
Representative of the Estate of Martha
Sue Hoftiezer

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,)

Defendants.)

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SPARTANBURG COUNTY
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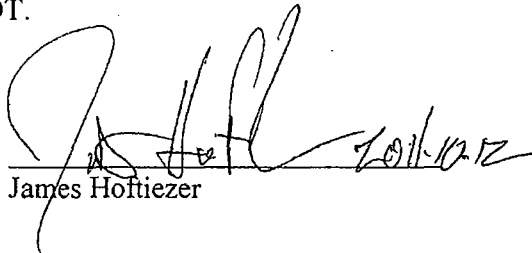
PERSONALLY APPEARED BEFORE ME, James Hoftiezer, as Personal Representative of the Estate of Martha Sue Hoftiezer, who after being duly sworn, deposed and says the following:

1. I am a citizen and resident of Spartanburg County, State of South Carolina.
2. I am the Personal Representative of the Estate of Martha Sue Hoftiezer's estate, Martha Sue Hoftiezer's son and Plaintiff in the above-referenced matter.
3. I used to be a patient of Dr. Westmoreland until approximately 1992 and all of my knowledge pertaining to this practice was that it was a private family physician's office.
4. I, as Personal Representative of the Estate of Martha Sue Hoftiezer, requested the entire medical chart of Martha Sue Hoftiezer from the offices of Drs. Taylor, Hicklin, Westmoreland & Coley.
5. My mother, if she knew, never informed me that Dr. Mark Hicklin or his practice was affiliated with Spartanburg Regional Health Services District.
6. I requested the records from Drs. Taylor Hicklin Westmoreland and Coley while they were moving offices.
7. I do not recall seeing anything that would have indicated to me that Drs. Taylor Hicklin, Westmoreland and Coley were affiliated with Spartanburg Regional Health Services

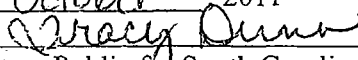
District.

8. I was not provided the entire medical chart of Martha Sue Hofstiezer and never received any material that would lead me to believe or acquire the knowledge that Dr. Mark Hicklin and/or Drs. Taylor, Hicklin, Westmoreland & Coley were ever affiliated with Spartanburg Regional Health Services District.

FURTHER AFFIANT SAYETH NOT.


James Hofstiezer

SWORN before me this 12 day
of October 2011


Notary Public for South Carolina

My Commission expires: 3-2-2016

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2009-CP-42-5373

James Hoftiezer, as Personal)
Representative for the Estate of Martha)
Sue Hoftiezer,)
)
Plaintiff,)

vs.)

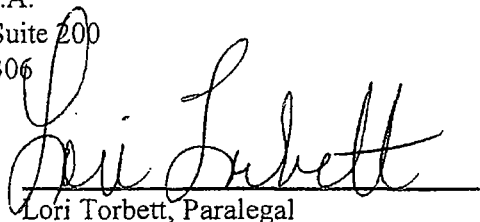
CERTIFICATE OF SERVICE

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,)
)
Defendants.)

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SPARTANBURG COUNTY
2011 OCT 12 PM 2:43
M. HOPE BLACKLEY

I, Lori Torbett, of Mike Kelly Law Group, LLC, do hereby certify that a copy of Plaintiff's Notice of Motion and Motion to Alter or Amend Judgment and/or Motion for Reconsideration Pursuant to South Carolina Rule of Civil Procedure 59(E) was served on the Defendants, by e-mail and U.S. mail this the 12th day of October, 2011, addressed as follows:

Perry D. Boulter, Esquire
Holcombe Bomar, P.A.
100 Dunbar Street, Suite 200
Spartanburg, SC 29306


Lori Torbett, Paralegal

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

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DEC 05 2011

SC Court of Appeals

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.

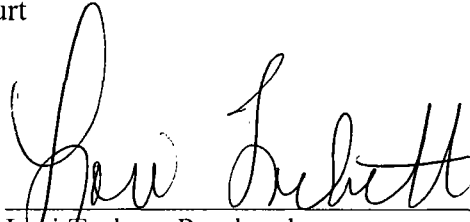
PROOF OF SERVICE

I, the undersigned Paralegal with Mike Kelly Law Group, LLC, counsel for James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer, Appellant certify that I have served the Motion to Stay and Remand on counsel by depositing a copy of it in the United States mail, postage prepaid, on the below shown date, addressed to all counsel of records at the addresses shown below:

Perry D. Boulier, Esquire
Post Office Box 1897
Spartanburg, South Carolina 29304
COUNSEL FOR 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

The Honorable M Hope Blackley
Spartanburg County Clerk of Court
180 Magnolia Street
Spartanburg, SC 29304-3483



Lori Torbett, Paralegal

December 5, 2011



Columbia Office
500 Taylor Street
Columbia, SC 29201

Telephone 803.726.0123
Toll-Free 866.692.0123
Fax 803.252.7145

Mailing Address
PO Box 8113
Columbia, SC 29202

December 5, 2010

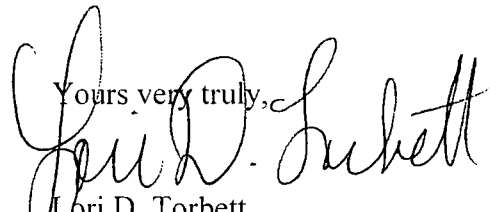
The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Hoftiezer v. Hicklin, et al.
Court of Appeals File No: 2011203086
C/A No: 09-CP-42-5373

Dear Ms. Gee:

Please find attached for filing an original and six copies of the Motion to Stay and Remand as well as our Proof of Service and \$25.00 filing fee. If you would kindly return the clocked copies to our courier, it would be greatly appreciated. Please advise if there is anything further you need from me in regards to this matter.

With kindest regards, I remain

Yours very truly,

Lori D. Torbett
Paralegal to Ruskin C. Foster

/ldt

Enclosures

cc: Perry Boulrier, Esquire
The Honorable M. Hope Blackley

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DEC 05 2011
SC Court of Appeals

OFFICES IN:

Columbia, Myrtle Beach and Winnsboro, South Carolina
www.mklawgroup.com



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 21, 2011

Ruskin C. Foster, Esquire
Brad D. Hewett, Esquire
Mike Kelly Law Group, LLC
P.O. Box 8113
Columbia, SC 29202

Re: Hoftiezer, James v. Hicklin, D. Mark
2011203086

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
Tanya A. Gee
CLERK

TAG/laf

cc: Perry D. Boulter, Esquire
The Honorable M. Hope Blackey

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

NOV 15 2011

J. Mark Hayes, III, Circuit Court Judge

SC Court of Appeals

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.

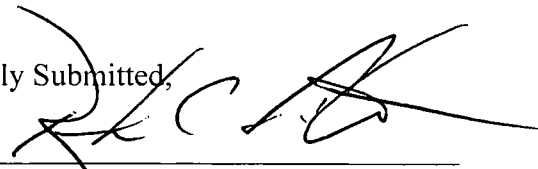
NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Plaintiff James Hoftiezer, as Personal Representative for the Estate of Martha Hoftiezer ("Appellant") hereby appeals the orders of the Honorable J. Mark Hayes, III dated September 28, 2011 and October 19, 2011, granting summary judgment on behalf of Respondents.

Copies of the orders granting summary judgment on behalf of Respondents are attached hereto and incorporated herein as Exhibit A and Exhibit B.

Respectfully Submitted,

By:



Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123

Attorneys for Appellant

November 15th, 2011

Other Counsel of Record:

Perry D. Boulter, Esq.
Holcombe Bomar, PA
P.O. Box 1897
Spartanburg, SC 29304

cc: The Honorable Hope Blackley

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

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SC Court of Appeals

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

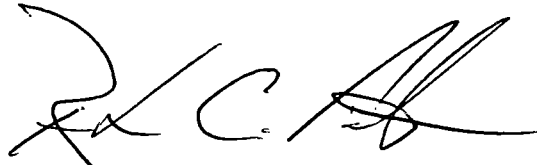
v.

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.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on 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 by depositing a copy of it in the United States Mail, postage prepaid, on November 15, 2011, addressed to their attorney of record, Perry D. Boulier, Post Office Box 1897, Spartanburg, South Carolina 29304.

By:



Ruskin C. Foster
Brad D. Hewett
Mike Kelly Law Group, LLC
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorneys for Appellant

November 5th, 2011

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL
CASE

CASE NO. 2009-CP-42-5373

James Hoftiezer, as personal representative

Dr. Mark Hicklin, et al.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE**

BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

This matter was before the Court on the defendant's motion for summary judgment.

Based on the arguments presented, a review of the case law, and documents in the file, the motion is granted as to Hicklin, and THWC Pa. The plaintiff's argument of tolling the statute of limitations does not change the substance of the Tort Claims Act.

As to SRHSD, the Court believes it too is entitled to a grant of summary judgment. The secretary of state documents do not justify the application of estoppel or equitable tolling of the statute of limitations. The secretary of state documents can be read as misleading since they do contain the term "eleemosynary." The disclaimer, however, also informs the reader that anyone who relies on these documents "does so at his own risk". Also, the cases offered by the plaintiff all seem to have a common thread, that it was the party against whom estoppel was being used that had committed some affirmative wrong-doing, such as failing to name a registered agent or moving without any known forwarding address. There is no allegation that SRHSD caused the error on the secretary of state's web page. Even in the case that was before Circuit Judge Williams, there appear to be facts very different than here, as it relates to the efforts of SRHSD and the doctor's group to show to the public that they were all part of the SRHSD (applying a reasonable man standard.....the Court cannot find that the standard of review is the reasonable attorney). From

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M. HOPE BEECHER

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EXHIBIT
A

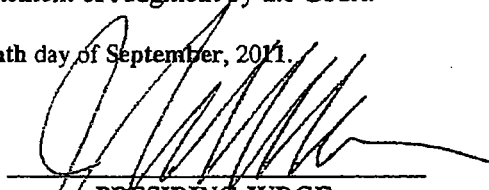
the information provided to this Court, the only reasonable conclusion is that in the present case, the affiliation with SRHSD was on signs, letterheads, billings, etc., at the times the deceased was a patient of the doctors. Thus, the evidence seems clear that at the time treatment was rendered, Ms. Hoftiezer would have known her doctors were affiliated with SRHSD unlike Mr. Shaver in Judge Williams' case. Also, it appears the affiliation with SRHSD would have been known when certain medical records were requested by the personal representative. Again, unlike the case before Judge Williams, this Court cannot locate sufficient information from which it can infer wrongful conduct on the part of SRHSD or the doctors.

The Court requests the defendant's attorney to prepare an order fully addressing the statute of limitation issues.

The Court commends the attorneys for the excellent briefing and arguments.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at Spartanburg, South Carolina, this twenty-eighth day of September, 2011.


PRESIDING JUDGE

This judgment was entered on the 28 day of Sept 20 11, and a copy mailed first class this 28 day of Sept, 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

Perry D. Boulter
(864) 594-5304
ATTORNEY(S) FOR PLAINTIFF

Ruskin C. Foster
(803) 726-0123
ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT

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SPARTANBURG COUNTY
2011 SEP 28 PM 2:07
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

JAMES HOFTIEZER, as Personal
Representative for the Estate of
Martha Sue Hoftiezer,

Plaintiff,

vs.

D. MARK HICKLIN, M.D.,
DRS. TAYLOR, HICKLIN,
WESTMORELAND AND COLEY, P.A.,
and SPARTANBURG REGIONAL
HEALTH SERVICES DISTRICT, INC.,
db/a Spartanburg Regional
Healthcare System,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION FOR
SUMMARY JUDGMENT

C.A. Number: 2009-CP-42-5373

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SPARTANBURG COUNTY
2011 OCT 19 AM 4:50
M. HOFTIEZER
BLACKLEY

FACTS

Plaintiff's decedent, Martha Sue Hoftiezer, saw Defendant D. Mark Hicklin, M.D. ("Dr. Hicklin") on July 31, 2006 for treatment in his office. On August 4, 2006, Ms. Hoftiezer went into cardiac arrest and died. Plaintiff brings this action for damages, claiming negligence on the part of Defendants in the care and treatment of Ms. Hoftiezer. Plaintiff initiated this action by the filing of a Notice of Intent to File Suit on February 26, 2009. Plaintiff filed his Summons and Complaint on October 1, 2009.

Defendants contend that Defendant Spartanburg Regional Health Services District, Inc. ("SRHS") is a political subdivision of the State of South Carolina and entitled to the protection of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-

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10, et seq. (the "Tort Claims Act"). Defendants further contend that Dr. Hicklin was an employee of SRHS and that Defendant Drs. Taylor, Hicklin, Westmoreland and Coley, P.A. (and its predecessor and successor designations) ("THWC") was owned by SRHS at all times referenced in the Plaintiff's Complaint. As a result, Defendants argue that Dr. Hicklin and THWC cannot be sued individually in this matter and that Plaintiff's suit should be dismissed for failure to commence this action within two years as is required by the Tort Claims Act.

The parties have conducted discovery related to the application of the Tort Claims Act and issues related to the statute of limitations issue pursuant to a Consent Scheduling Order entered by this Court. The matter is now before the Court on Defendants' Motion for Summary Judgment. This motion was heard by the Court on September 1, 2011. For the reasons set forth, the Court grants Defendants' Motion for Summary Judgment.

STANDARDS OF LAW

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003).



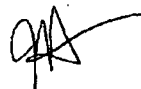
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues before the Court can be summarized as follows: 1) Can Plaintiff maintain a separate action against Dr. Hicklin and/or TWHC?, and 2) Is SRHS equitably estopped from asserting the Tort Claims Act's two year statute of limitations or was the statute of limitations equitably tolled in this action?

- 1. SRHS is a political subdivision of the State of South Carolina and is entitled to the protections of the Tort Claims Act.**

The Tort Claims Act provides the exclusive remedy "for any tort committed by a governmental entity, its employees, or its agents." S.C. Code Ann. § 15-78-20(b). The term "governmental entity" includes political subdivisions of the State. S.C. Code Ann. § 15-78-30(d). "Political Subdivision" expressly includes a "governmental health care facility" "which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance," tax-exempt, and does not accrue net income for the benefit of an individual or non-governmental entity. S.C. Code Ann. § 15-78-30(h), (j). County or municipal governments may form regional health services districts by enactment of the local governing body(s). S.C. Code Ann. § 44-7-2010, et seq.

Based upon the evidence presented by the parties, the Court finds that SRHS was created by the adoption of Ordinance No. 557 by Spartanburg County Council on April 10, 1995 and the filing of a Certificate of Incorporation with the Secretary of State's office on May 1, 1995. Ordinance No. 557 expressly provides that SRHS is a political



subdivision of the State and is subject to the Tort Claims Act. Nothing has been enacted, amended, or filed altering SRHS's status as a governmental entity subject to the Tort Claims Act. Because SRHS was formed pursuant to the above-cited statutes, the Court finds that SRHS is a political subdivision of the State of South Carolina and is entitled to the protections of the Tort Claims Act.

2. Plaintiff cannot maintain independent actions against Dr. Hicklin or THWC because of their affiliation with SRHS.

As stated above, the Court finds that SRHS is a governmental entity entitled to the protection of the Tort Claims Act. The Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a). An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable for his actions individually or independently from his governmental employer. S.C. Code Ann. § 15-78-70. The governmental entity must be substituted as the sole Defendant for all allegations concerning alleged wrongdoing of its employees. S.C. Code Ann. § 15-78-70(c).

Based upon the evidence presented by the parties, the Court finds that THWC has been wholly-owned by SRHS since August 11, 1994. THWC was not a separate legal entity engaged in the practice of medicine nor did it provide any medical care to Plaintiff's decedent on the date of the care and treatment at issue in this case. Likewise, the Court finds that Dr. Hicklin has been an employee of SRHS since August 11, 1994. Plaintiff argues that even if Dr. Hicklin was an employee of SRHS, he is not entitled to the protections of the Tort Claims Act because he reported income from a non-



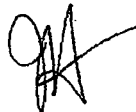
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governmental source. See S.C. Code Ann. § 15-78-30(c). The Court finds that Plaintiff's contention, even if true, is without merit because Plaintiff admitted that the reported income is not in any way related to the services provided to Ms. Hoftiezer at issue in this case. The undisputed evidence in this case shows that Dr. Hicklin was acting within the course and scope of his employment with SRHS at the time of the care and treatment at issue.

Because THWC was owned by SRHS and Dr. Hicklin was an employee of SRHS at all times relevant to this case, the Court finds that THWC and Dr. Hicklin are entitled to the protections of the Tort Claims Act. As such, THWC and Dr. Hicklin cannot be held liable individually or independently from SRHS, and Defendants' motion for summary judgment is granted as to THWC and Dr. Hicklin. Accordingly, pursuant to Section 15-78-70 of the Tort Claims Act, SRHS should be the sole Defendant in this case.

3. **SRHS is not equitably estopped from the application of the two-year statute of limitations nor is the two-year statute of limitations equitably tolled in this case.**

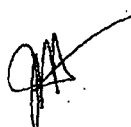
Because SRHS is entitled to the protection of the Tort Claims Act, any action brought against it must be commenced within two years. S.C. Code Ann. § 15-78-110. Plaintiff admits that by filing his Notice of Intent to File Suit on February 26, 2009, he failed to commence his action within two years. However, Plaintiff makes numerous arguments that SRHS should be equitably estopped from asserting the two-year statute of limitations or the two-year statute of limitations should be equitably tolled. Plaintiff argues: (1) the South Carolina Secretary of State's website codes SRHS as a "non profit"



organization and codes certain filings of SRHS as "eleemosynary" filings; (2) the South Carolina Medical Board's website does not indicate that Dr. Hicklin is an employee of SRHS or that THWC is owned by SRHS; (3) the medical records produced pre-litigation were deficient compared to those produced during litigation; (4) THWC's signage at its office did not state it was owned by SRHS; and (5) THWC held itself out as a private, for profit, general partnership.

Based upon the evidence presented by the parties, the Court finds Plaintiff's arguments unpersuasive. The Secretary of State's website listing for SRHS could be read as misleading because it contains the terms "non profit" and "eleemosynary." However, the disclaimer found on the website also informs the reader that one who relies on the website information "does so at his own risk." If Plaintiff had requested the actual documents on file with the Secretary of State concerning SRHS, it would have been evident that SRHS is a governmental entity subject to the Tort Claims Act. As noted above, the documents filed by SRHS with the Secretary of State expressly establish its status as a political subdivision of the State of South Carolina and a governmental entity. SRHS is not responsible for the manner in which the Secretary of State maintains its website, and the documents filed by SRHS are public documents available to Plaintiff or his counsel.

Likewise, the mere fact that the South Carolina Medical Board's website does not note Dr. Hicklin's employment status with SRHS is of no import to the issues before the Court. Plaintiff's argument would deprive SRHS of the protection of the Tort Claims Act

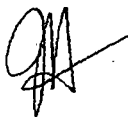


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for reasons entirely out of SRHS' control. Equitable estoppel should not be applied under these facts.

In American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E. 2d 181 (Ct. App. 2009), the Court held that equitable tolling should be rarely applied and noted that it is reserved for "extraordinary circumstances". Id. at 582. American Legion discussed Hooper v. Ebenezer Senior Servs. and Rehab. Ctr., 377 S.C. 217, 659 S.E. 2d 213 (Ct. App. 2008) which Plaintiff cites in this case. American Legion noted that Hooper also required extraordinary circumstances for the application of equitable tolling and further noted that if the statutory deadline for filing has passed, the Plaintiff needs to show that he was "induced or tricked by the defendant's misconduct into allowing the filing deadline to pass." Id. At 583. The Court went on to note that Hooper also required a showing of due diligence by the Plaintiff. Id. With regard to the conduct of the defendant that justifies the application of equitable tolling, the Court stated: "It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation." (emphasis supplied). Id.

With regard to equitable estoppel against a governmental entity such as SRHS, American Legion held that three elements must be shown: 1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; 2) justifiable reliance on the government's conduct; and 3) a prejudicial change in position. Id. at 584. The Court



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further noted: "Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." Id. In American Legion, the Court found that equitable estoppel would not lie against a governmental entity even though the governmental entity's employee provided the plaintiff with erroneous information in contradiction to the statute at issue in that case. Id.

Likewise, the Court notes that the cases offered by Plaintiff in support of its estoppel and tolling arguments all have a common thread in that the party against whom estoppel was being used had committed some affirmative wrong-doing, such as failing to name a registered agent or moving without any known forwarding address. While Hooper holds that fraud or misrepresentation by the defendant is not required for equitable tolling to apply, it plainly held that when a plaintiff misses the statutory deadline, the plaintiff must show that he was induced or tricked by the defendant's misconduct into missing the statute of limitations. In essence, the estopped party is held responsible for action or inaction on its part that caused some detrimental reliance by the other party.

Applying the principles outlined in American Legion and Hooper, the Court finds that the facts of this case do not warrant the application of either equitable tolling or equitable estoppel. From the information provided to the Court by the parties, the Court finds that Dr. Hicklin and THWC's affiliation with SRHS was on signs, letterheads, business cards, and billing correspondence at the time the decedent was a patient of Dr. Hicklin and THWC at issue in this matter. Plaintiff argued that SRHS failed to provide



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complete medical records when Plaintiff initially requested the records in 2006. Nonetheless, the form that Plaintiff executed in 2006 to obtain records from Dr. Hicklin's office bore the SRHS logo and clearly suggested the affiliation between SRHS and Dr. Hicklin. Thus, the evidence is clear that at the time treatment was rendered to the decedent, a reasonable person would have or should have known that Dr. Hicklin and THWC were affiliated with SRHS.

With regard to the information on the Secretary of State's website, this court is guided by the holding in American Legion. Certainly, if equitable estoppel would not lie in a case where a governmental entity disseminated erroneous information about a statute, it cannot lie where the Secretary of State's website erroneously classified SRHS as a charitable entity. This is particularly true given the disclaimer found on the website and the availability of the documents actually filed by SRHS concerning its legal status.

While having no precedential effect on this Court, Plaintiff also argued strongly in support of his argument the reasoning set forth in the Circuit Court Order entered in Shaver v. Hill, et al., C/A No. 07-CP-38-553 (Ct. Common Pleas, 1st Judicial Circuit, October 18, 2007). However, even in that matter, there appear to be facts very distinguishable from those present in this matter as it relates to the efforts of SRHS, Dr. Hicklin, and THWC to demonstrate to the public that Dr. Hicklin was an employee of SRHS and THWC was wholly-owned by SRHS.

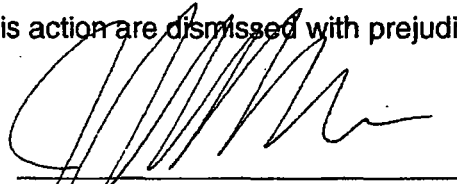


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The Court thus finds that under the facts present in this case, the application of equitable estoppel or equitable tolling is not warranted and the Tort Claims Act's two-year statute of limitations should be applied.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is granted and that Plaintiff's Complaint and this action are dismissed with prejudice.

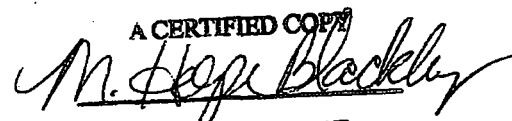
IT IS SO ORDERED.



J. Mark Hayes II, Judge
Seventh Judicial Circuit

October 19, 2011
Spartanburg, South Carolina

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BY Pat H. Hays D.C.
DATED 10/19/11