THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2018-NI-02-0003

Appellate Case No.: 2019-000803

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

v.

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

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

APPELLANTS' INITIAL REPLY BRIEF
(ADDRESSING THE RESPONSE BRIEFS OF ALL THREE RESPONDENTS)

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INTRODUCTION

Appellants Fonda and Andre Patrick submit this Reply Brief to address the three Response Briefs submitted by Respondents. Appellants offer this Reply Brief in support of their arguments seeking reversal of the trial court order that dismissed their Notice of Intent to File Suit based upon a mistaken belief that, even for good cause shown, no court has the power to allow the time for service of process to take place more than 120 days after the statute of limitations has run. In the pages below, Appellants address a few issues from Respondents' Briefs that require clarification and/or correction.

I. *Issue Preservation*

Respondents assert that the issue of equitable tolling is not preserved, yet Respondents also acknowledge that "the Patricks very briefly mentioned equitable tolling in their memorandum in opposition to Respondents' motions to dismiss." (Br. of Respondent Aiken Reg. at pp. 9-10; Br. of Respondent Bryan at pp. 9-10; Br. of Respondent Chase by Adoption). While there is no requirement that the discussion of a matter be extensive or of any particular length in order for an issue to be preserved, it is inaccurate for Respondents to characterize Appellants' prior argument about equitable tolling as having been very brief. An entire section of *Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss* was devoted to the issue of equitable tolling and spanned nearly two pages. (ROA ___, Pls.' Memo in Opp. to Defs' Motion to Dismiss, p. 11-12). Further, the issue was addressed at length in *Plaintiffs' Motion for Reconsideration*, (ROA ___, Pls.' Mot. for Recon.) and in denying the motion, Judge Kelly made no mention that the issue of equitable tolling was, for some reason, not previously before him. Respondents' claim that the issue of equitable tolling was not before the Circuit Court and not preserved for review is baseless and should be given no weight.

II. Judge McLeod's Knowledge that Service Had Not Yet Been Accomplished

Respondents assert that "it was not made clear during the motion hearing on September 24, 2018 that the NOI had not been served." (Br. of Respondent Aiken Reg. at p. 8; Br. of Respondent Bryan at p. 8; Br. of Respondent Chase by Adoption). This is incorrect. At the hearing before Judge McLeod, Appellant Fonda Patrick candidly told the Court that her prior attorney, who had been relieved as counsel, "just filed the intent **without any of the people that are on the suit receiving any notification of it.**" (ROA ___, Hearing Trans. of Sept. 24, 2018, p. 4:10-14). Later in the hearing, Judge McLeod stated that he wanted to "review this file" before making a ruling on the request for additional time, and, undoubtedly, the file would have been absent any certificates of service at that time. (ROA __, Hearing Trans. of Sept. 24, 2018, p. 6:5-7). Thus, there is no reason to believe that, at the time the extension was granted, the Circuit Court was somehow unaware the Defendants/Respondents had not been served, for Appellants openly brought this issue to the Court's attention and this fact was clear in the Court's review of the file.

III. *Power to Enlarge Time Pursuant to the Rules of Civil Procedure*

Much like the basis of Judge Kelly's Order essentially overruling Judge McLeod's prior Order, Respondents argue that the time for service of process under Rule 3, SCRCP, establishes "*a firm deadline, which no court has the power to extend.*" (Resp. Br. at 5-6). This statement not only overlooks equitable tolling, but wholly ignores Rule 6(b), SCRCP, which, by its plain language provides that "time may be extended by [...] the court for good cause shown" and endows the Circuit Court with the power and discretion to extend the time for service of process.

Respondents never specifically address why they contend Rule 6(b) would somehow be inapplicable to Rule 3. Instead, Respondents focus on how Rule 3 uses the word "must" when discussing the time for service of process. This is a red herring, for plenty of the provisions

within our Rules of Court use the terms "must" or "shall" but are, nonetheless, subject to expansions of time and for which extensions are routinely granted. For example, Rule 12, SCRCP, provides that a "defendant ***shall*** serve his answer within 30 days after the service of the complaint upon him," and that a "party served with a pleading stating a cross-claim against him ***shall*** serve an answer thereto within 30 days after the service upon him." Nonetheless, extensions to file answers are commonly granted by our trial courts. Looking at our Appellate Court Rules, Rule 210, SCACR, provides that an "appellant ***must*** file with the clerk of the appellate court fifteen (15) copies of the Record on Appeal no later than the date his brief(s) are due under Rule 211," but this Honorable Court routinely grants extensions of time for compliance to be accomplished. Thus, the fact that Rule 6(b) uses the term "must" does not nullify or somehow invalidate the fact that Rule 3 grants the circuit court the power to extend the time for service of process, in addition to many other things that "must" or "shall" be done within a specified number of days.

Addressing the Appellants' reference to other states that have found trial courts to have the power to extend the time for service of process, Respondents mention that these other states have different rules of civil procedure that specifically address extensions of time for service. To this point, Appellants would note that so too do our Federal Rules of Civil Procedure, for Rule 4(m) provides that "if the plaintiff shows good cause for the failure [to serve], the court must extend the time for service for an appropriate period." However, just because the language within the rules is not precisely identical or the matter at issue is contained in what has been numbered "Rule 4" instead "Rule 6," does not equate to notion that the Court should not look to other jurisdictions for guidance. *See* In re Broome, 356 S.C. 302, 317, 589 S.E.2d 188, 196 (2003) ("Because there is no South Carolina case on point, this Court has looked to cases from other

states for guidance."); Gardner v. Newsome Chevrolet–Buick, Inc., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."). Appellants present other states' findings that trial courts are vested with the ability to extend the time for service of process (when good cause is shown), simply to demonstrate how "enlargement" under Rule 6(b), SCRCP, is applicable to the time to effectuate service just like it is to the time limitations set forth in any other rule of Civil Procedure (with the exception of the four "carve outs" specifically noted at the end of Rule 6(b)).

IV. ***Tolling Versus Extensions***

The necessity that the circuit courts be endowed with the power, when justice so requires, to lengthen the time for service of process is highlighted in Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 388 S.C. 108, 687 S.E.2d 29 (2009). On February 6, 2006, which was approximately three and half months before the statute of limitations would run, Mrs. Hooper filed an action against Ebenezer, the nursing home where her late husband had lived, alleging negligent treatment. Hooper's counsel made several attempts to effect service upon Ebenezer but, largely as a result of Ebenezer having not accurately listed its registered agent with the Secretary of State, service was not effected until June 15, 2006, which was both after the running of the statute of limitations and more than 120 days after filing of the summons and complaint. Ebenezer moved to dismiss the action on the basis of service having been accomplished neither before expiration of the three-year statute of limitations nor within 120 days of filing the summons and complaint. Hooper argued that the statute of limitations should be "equitably tolled for the delay in service" and thus allow the case to proceed. Id. at 32, 687 S.E.2d 29 at 114. The trial court rejected this argument, but the Supreme Court reversed.

In explaining how equity can operate to prevent tardy service of process from resulting in dismissal of a case, the Hooper court noted that "[e]quitable tolling is a nonstatutory tolling theory which suspends a limitations period." Id. at 32, 687 S.E.2d 29 at 115 (*citing* Ocana v. Am. Furniture Co., 135 N.M. 539, 91 P.3d 58, 66 (2004)), and that equitable tolling is judicially created and "stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Id. (*citing* Rodriguez v. Superior Court, 176 Cal. App. 4th 1461, 98 Cal. Rptr.3d 728 (2009)). The Court recited a host of cases and circumstances from other jurisdictions where equitable tolling had been applied and stated: "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. at 33, 687 S.E.2d 29 at 116-17 (*citing* Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006)). The Supreme Court determined that the statute of limitations should be tolled in order for the tardy service of process to be considered effective and, therefore, to allow the case to proceed on its merits. Although the summons and complaint were filed before the statute of limitations ran, the Court still used tolling of the statute of limitations as the mechanism for permitting the tardy service of process. Appellants would submit that in situations where the court determines that equity dictates that a case should not be dismissed because of a failure to timely effectuate service, whether a court applies equity to toll the statute of limitations or toll the time for service of process amounts to a distinction without a difference. Tolling the statute of limitations or the time for service both stem from the same equitable theories and factual reason and either would allow for an otherwise tardy service of process to be considered effectively accomplished within the time limitations.

In Hooper, the plaintiff's failure to timely effectuate service was later forgiven, whereas, in the case before this Court, the Appellants requested permission to effectuate service of process beyond 120 days. The difference is in the timing of when relief was sought – in other words, serving late and then seek forgiveness, versus seeking permission to serve after 120 days has passed. As a matter of judicial policy, if "begging forgiveness" can be acceptable, "asking permission" should not be viewed as categorically ineffective. Thus, whether the term "equitable tolling" is used to allow a case to proceed when service is not accomplished within the requisite amount of time or, prior to serving the defendant, a plaintiff seeks an "extension" to proceed with service of process that would be beyond 120 days from filing, should not, in and of itself, be determinative as to whether the case is permitted to proceed on its merits.[1]

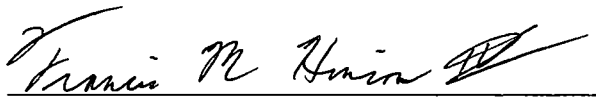
CONCLUSION

For these reasons and for those set forth in Appellants' Initial Brief, Appellants respectfully request reversal of the trial court order and that the case be remanded to continue on its merits. Should the Court of Appeals determine there to be uncertainty as to whether Judge McLeod intended to apply equitable tolling doctrines to extend the time to accomplish service, given that matters of equity should not be disturbed unless there is a clear showing of an abuse of discretion, Morgan v. State Farm Mutual Ins. Co., 229 S.C. 44, 91 S.E.2d 723 (1956) (applying

[1] At times, the distinction between "equitable tolling" and an "extension" seems, at times, to be a matter of semantics, as demonstrated in an order from the Federal District Court in Snyder v. Roberts, 2006 WL 22181 (D.S.C. 2006) (C. Currie, District Court Judge). In Snyder, which involved state law claims pursued in federal court and thus applied state law pertaining to commencement of an action, the plaintiff had failed to serve the summons and complaint within 120 days. Due to a delay in the clerk's office regarding the issuance of the summons, the District Court applied equitable tolling to permit the tardy service, but nonetheless, the order often talked about an "extension" of time to serve, stating such things as, "trial courts have the inherent authority to extend the time for service under the state court's commencement rules" and "the burden of establishing an adequate basis for any such extension and the reasonableness of the actual extension requested rests on the Plaintiffs." Id.

the abuse of discretion standard in reviewing the trial court's decision concerning whether to grant an extension of time to answer a complaint), Appellants ask that the case be remanded to Judge McLeod a determination/clarification of his Order from September 28, 2018.

Respectfully submitted,



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November 20, 2019

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R. Keith Kelly, Circuit Court Judge

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PROOF OF SERVICE

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

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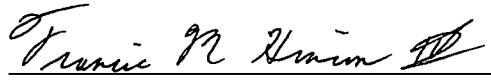

November 20, 2020

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November 20, 2019

VIA HAND DELIVERY
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Re: Fonda E. Patrick and Andre Patrick v. Gasnel, E. Bryan, M.D., individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; Frank Y. Chase, M.D., individually and as agent and/or employee of Aiken Regional Medical Centers, LLC; and Aiken Regional Medical Centers, LLC
Civil Action No: 2018-NI-02-00003
Appellant Case No.: 2019-000803
Our File No: 87195-53767

Dear Ms. Kitchings,

Enclosed, please find the original and one copy of the Appellants Fonda E. Patrick and Andre Patrick's Reply Brief, which is offered in reply to all three Respondent's Response Briefs, the last of which was served on November 11, 2019. I would respectfully request that you file the original and date-stamp the enclosed copy to be returned with my runner.

I would note that the content of Reply Brief does not bring about anything additional that needs to be added in Designation of Matter to be Included in the Record on Appeal, and thus no addition designation of matter is being presented at this time. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

Francis M. "Brink" Hinson, IV

Enclosures (as noted above)

cc: James D. Nance, Esq.
Kenneth Norman Shaw, Esq. / J. Ben Alexander, Esq.
Hutson S. Davis, Esq. / S. Harrison Williams, Esq.