

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

RECEIVED
DEC 05 2019
SC Court of Appeals

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.

RECORD ON APPEAL

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Attorneys for Respondent ARMC, LLC

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STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Civil Action No.: 2018NI0200003

Fonda E. Patrick and)
Andre Patrick,)
Plaintiffs,)

CONSENT ORDER
(Release of Counsel)

vs.)
Gasnel E. Bryan, M.D., Individually and as)
an agent and/or employee of Aiken)
Regional Medical Centers, L.L.C.; Frank)
Y. Chase, M.D., Individually and as an)
agent and/or employee of Aiken Regional)
Medical Centers, L.L.C.; Jonathan H.)
Anderson, M.D., Individually and as an)
agent and/or employee of Aiken Regional)
Medical Centers, L.L.C.; and Aiken)
Regional Medical Centers, L.L.C.,)
Defendants.)

WHEREAS, as shown by the signature set forth herein below, the Plaintiff hereby consents to H. Edward Smith being relieved as attorney in the above captioned case and that he be released from any duty, obligation or responsibility to take any further action in the case.

NOW THEREFORE, by and with such consent set forth herein:

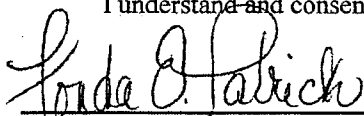
IT IS ORDERED that H. Edward Smith is released as counsel in this case and shall be relieved of any requirement to take any further action in the case.

AND IT IS SO ORDERED

_____, 2018.
_____, South Carolina

Presiding Judge 2nd Judicial Circuit

I understand and consent to the foregoing Order.

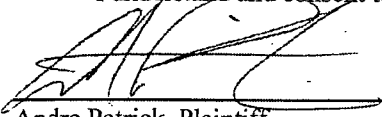


Fonda E. Patrick, Plaintiff

2-13, 2018.

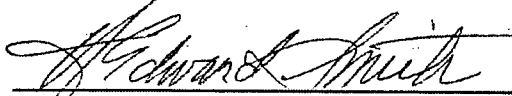
Date

I understand and consent to the foregoing Order.


Andre Patrick, Plaintiff

2/13, 2018.
Date

I consent to the provisions of the foregoing Order.


H. Edward Smith, Attorney for Plaintiff

2-13, 2018.
Date

Until further notice, the Court may contact the Plaintiff at:

Fonda E. Patrick
P.O. Box 274
Blackville, South Carolina 29817
803.634.3922
fonda.ephriam@gmail.com



Aiken Common Pleas

Case Caption: Fonda E Patrick , plaintiff, et al VS Gasnel E Bryan , defendant, et al
Case Number: 2018NI0200003
Type: Order/Consent Order

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2018-02-14 16:43:19 page 3 of 3

ELECTRONICALLY FILED - 2018 Feb 14 4:45 PM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CA#: 2018-NI-02-00003
	)	
Fonda E. Patrick and Andre	)	
Patrick,	)	
Plaintiffs,	)	
	)	
v.	)	ORDER
	)	
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 an agent and/or	)	
employee of Aiken Regional Medical	)	
Centers, LLC; Jonathan H. Anderson, M.D.,	)	
Individually and as an agent and/or	)	
employee of Aiken Regional Medical	)	
Centers, LLC; and Aiken Regional Medical	)	
Centers, LLC,	)	
Defendants.	)	
	)	

This matter came before the court upon a Motion for Extension of Time to File Affidavit of Merit by Plaintiffs Fonda E. Patrick and Andre Patrick requesting that this court grant the Plaintiffs an extension of forty-five (45) days to supplement their Notice of Intent to File Suit with an affidavit of merit. A hearing on the matter was held on September 24, 2018, and the *pro se* Plaintiffs were present.

At the hearing, the Plaintiffs provided that they were represented by counsel, who filed the Notice of Intent to File Suit on January 2018. The Notice of Intent to File Suit stated that the Plaintiffs would file an expert affidavit within forty-five (45) days pursuant to S.C. Code Ann. § 15-36-100(C)(1). However, the Plaintiffs' attorney was released as counsel on February 14, 2018, which was eight (8) days prior to the deadline from when the Notice of Intent to File Suit needed to be supplemented with an affidavit of merit. The Plaintiffs informed the court that they were unable to find substitute counsel or obtain such an affidavit during the eight (8) day period.

S.C. Code Ann. § 15-36-100(C)(1) provides that “[u]pon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.” S.C. Code Ann. § 15-36-100(C)(1) further provides that the consequence of not filing an affidavit within the period specified is the granting of a motion to dismiss for failure to state a claim.

Given this language and the lack of a motion to dismiss from the Defendants and lack of objection from the Defendants, the court has determined that there is good cause as to why the Plaintiffs should be granted an extension of forty-five (45) days to file an affidavit of merit to supplement their Notice of Intent to File Suit.

THEREFORE, this court hereby GRANTS the Plaintiffs’ motion and the Plaintiffs have forty-five (45) days from the date of this Order to supplement their Notice of Intent to File Suit with an affidavit of merit.

AND IT IS SO ORDERED.

Walton J. McLeod, IV
Presiding Circuit Court Judge

Aiken, South Carolina
September 28, 2018



Aiken Common Pleas

Case Caption: Fonda E Patrick , plaintiff, et al VS Gasnel E Bryan , defendant, et al

Case Number: 2018NI0200003

Type: Order/Form 4

So Ordered

s/Walton J. McLeod, 2765

Electronically signed on 2018-09-28 11:43:44 page 3 of 3

ELECTRONICALLY FILED - 2018 Sep 28 12:22 PM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Fonda E Patrick and Andre Patrick,

Plaintiffs,

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 Center, LLC; Jonathan H.
Anderson, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, LLC; and Aiken Regional
Medical Centers, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2018-NI-02-00003

***Order Granting Defendants' Motions to
Dismiss Plaintiffs' NOI***

This matter came before the Court on March 5, 2019 upon Defendants' motions to dismiss Plaintiffs' Notice of Intent ("NOI") pursuant to Rules 3 and 12(b)(2)(5)&(6) of the South Carolina Rules of Civil Procedure on the basis that Plaintiffs' claims were barred by the applicable statute of limitations. Having listened to oral arguments and reviewed the submissions of the parties, for the reasons more fully set forth below, I hereby grant Defendants' motions and dismiss this case with prejudice.

RELEVANT FACTS AND PROCDURAL HISTORY

This is a medical malpractice action. Plaintiffs filed their NOI on January 22, 2018; however, as discussed in more detail below, Plaintiffs did not serve the NOI upon the defendants until November 2018.

In their NOI, Plaintiffs alleged they were injured as a result of a surgical procedure and

subsequent medical care provided by Defendants on or about January 30, 2015; however, Plaintiffs did not contemporaneously file an affidavit of an expert witness as required by S.C. Code § 15-79-125. Rather, Plaintiffs alleged they had reason to believe the statute of limitations was going to expire within ten days of the filing of the NOI; therefore, they stated they would file an expert affidavit within 45 days as allowed under S.C. Code § 15-36-100(C)(1). As a result, they had until March 8, 2018, to file an expert affidavit.

Shortly after filing the NOI, on February 14, 2018, H. Edward Smith, with consent of Plaintiffs, sought to be relieved as counsel (*see* Feb. 14, 2018 Consent Order). At the time Mr. Smith was relieved as counsel, the NOI had not been served on Defendants, Plaintiffs still had not filed an expert affidavit, and an extension of time to file an expert affidavit had not been requested.

On June 27, 2018, more than five months after they initially filed their NOI, Plaintiffs, at that point acting *pro se*, filed a motion for an extension of time to file an affidavit of an expert witness. Plaintiffs' motion was heard on September 24, 2018. As of the hearing date, the NOI still had not been served upon Defendants, nor were Defendants given any notice of Plaintiffs' motion. Following the hearing, the Court granted Plaintiffs a 45-day extension to file an expert affidavit (*see* September 28, 2018 Order).

On November 7, 2018, Plaintiffs, having recently obtained new counsel, filed a Supplement to Notice of Intent to Sue ("Supplement"), which included an expert affidavit. About a week later, Plaintiffs served the Supplement, the September 28, 2018, Order, and the NOI upon Defendants. That was the first time any of the Defendants had been served with any of the filings in this action, and constituted the first notice Defendants had of this action.

LEGAL ANALYSIS

The applicable statute of limitations in this case is three years. S.C. Code § 15-3-545. Filing a NOI tolls the applicable statute of limitations; however, that is subject to the NOI being served upon all defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure. S.C. § 15-79-125. Under the Rules, a summons and complaint must be served within the statute of limitations or within 120 days of filing. Rule 3, SCRCP; *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012).

Plaintiffs filed their NOI on January 22, 2018. Plaintiffs have not disputed that the statute of limitations began to run at the time of, or within a couple weeks of, the surgery performed by Dr. Bryan on January 30, 2015; therefore, pursuant to S.C. Code § 15-3-545, Plaintiffs filed the NOI just before the statute of limitations was set to expire. However, once they filed the NOI, they were then required to properly serve it within 120 days of the filing as dictated by Rule 3, SCRCP, which meant Plaintiffs had until May 22, 2018, to complete service or the statute of limitations would begin to run again.

Unfortunately, Rule 3 mandates a firm deadline for commencing an action within the applicable statute of limitations, which no court has the jurisdiction to extend. *See Mims, supra*. Therefore, contrary to Plaintiffs' contention, while the Court's September 28, 2018, Order may have provided Plaintiffs additional time to file an expert affidavit, it did not extend the deadline for completing service. When Plaintiffs failed to serve their NOI by May 22, 2018, their claims immediately became barred by the applicable statute of limitations.

WHEREFORE, for the reasons stated herein, Plaintiffs failed to commence this action within the applicable statute of limitations and Defendants Bryan, Chase, and Aiken Regional

Medical Center¹ are all entitled to a dismissal as a matter of law.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this action is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

****JUDGE'S SIGNATURE PAGE TO FOLLOW****

¹ Plaintiffs previously stipulated to the dismissal Jonathan H. Anderson, M.D. on March 4, 2019.



Aiken Common Pleas

Case Caption: Fonda E Patrick , plaintiff, et al VS Gasnel E Bryan , defendant, et al
Case Number: 2018NI0200003
Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2019-04-15 10:27:36 page 5 of 5

ELECTRONICALLY FILED - 2019 Apr 15 10:38 AM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018NI0200003

Fonda E Patrick et al
PLAINTIFF(S)

Gasnel E Bryan et al
DEFENDANT(S)

DISPOSITION TYPE (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
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **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.

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

After careful consideration of Plaintiff's arguments, the Court denies Plaintiff's Motion for Reconsideration in the above case.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/29/2019.

Eugene A. Fallon, Jr.
Andre Patrick for Andre Patrick
Fonda E Patrick for Fonda E Patrick
Aiken Regional Medical Centers Llc
Aiken Regional Medical Centers Llc
Aiken Regional Medical Centers Llc
Andre Patrick for Andre Patrick
Fonda E Patrick for Fonda E Patrick

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2019 Apr 29 1:10 PM - AIKEN - COMMON PLEAS - CASE#2018NI0200003



Aiken Common Pleas

Case Caption: Fonda E Patrick , plaintiff, et al VS Gasnel,E Bryan , defendant, et al

Case Number: 2018NI0200003

Type: Order/Electronic Form 4

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2019-04-29 13:03:22 page 3 of 3

ELECTRONICALLY FILED - 2019 Apr 29 1:10 PM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Civil Action No.: 2018- -

Fonda E. Patrick and
Andre Patrick,
Plaintiffs,

NOTICE OF INTENT TO FILE SUIT
(S.C. Code § 15-79-125A)
(Medical Malpractice)

vs.
Gasnel E. Bryan, M.D., Individually and as
an agent and/or employee of Aiken
Regional Medical Centers, L.L.C.; Frank
Y. Chase, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, L.L.C.; Jonathan H.
Anderson, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, L.L.C.; and Aiken
Regional Medical Centers, L.L.C.,
Defendants.

TO ALL NAMED DEFENDANTS:

This Notice of Intent to File Suit is submitted in compliance with the provisions of S.C. Code § 15-79-125(A) and S.C. Code § 15-36-100(B), (C). Compliance by Plaintiffs with the requirements of S.C. Code § 15-79-125(A) does not waive or modify their right to file a civil suit against Defendants in any court of competent jurisdiction. Plaintiffs allege the following:

A. PARTIES

The Plaintiffs above-named are entitled to relief on the following grounds:

1. The Plaintiffs are citizens and residents of the County of Barnwell, State of South Carolina.
2. Upon information and belief, Defendants Gasnel E. Bryan, M.D. (hereinafter referred to as Defendant Bryan), Frank Y. Chase, M.D. (hereinafter referred to as Defendant Chase) and Defendant Jonathan Hal Anderson, M.D. (hereinafter referred to as Defendant

Anderson) are citizens and residents of the County of Aiken, State of South Carolina.

3. Defendant Aiken Regional Medical Centers LLC (hereinafter referred to as Defendant Aiken Regional) was, at all times mentioned herein a corporation organized under the laws of the State of South Carolina which owns property and transacts business in the County of Aiken, State of South Carolina and was a licensed medical provider and hospital care facility doing business in the County of Aiken in Aiken, South Carolina. At all times mentioned herein, Defendants Bryan, Chase and Anderson were agents and/or employees of Defendant Aiken Regional and as such, Defendant Aiken Regional is vicariously liable for the negligence of Defendants Bryan, Chase and Anderson.

4. Accordingly, Aiken County is the appropriate venue for litigating the issues in this matter.

5. At all times mentioned herein there existed a patient/physician relationship between Plaintiffs and Defendants.

B. SHORT AND PLAIN STATEMENT OF THE FACTS SHOWING THAT THE PARTIES FILING THE NOTICE ARE ENTITLED TO RELIEF.

6. On January 30, 2015, Defendant Bryan, assisted by Defendant Anderson, at the Defendant Aiken Regional undertook to perform abdominal surgery on the Plaintiff, Fonda E. Patrick, in the form of exploratory laparotomy with a bilateral removal of ovaries along with lysis of abdominal adhesions.

7. Defendant Bryan, knowing Mrs. Patrick had abdominal adhesion disease, failed to determine the extent of adhesions in the Plaintiff's abdomen prior to undertaking the surgery performed on January 30, 2015.

8. When Defendant Bryan began that surgery, extensive adhesions were encountered

and the lysis of such caused an exceedingly long surgical period with significant blood loss. During that procedure, Mrs. Patrick's internal organs, abdominal wall and bowels were subjected to an unwarranted, unreasonable, and a dangerous degree of surgical trauma.

9. Upon encountering extensive adhesions as stated above, Defendant Bryan did not seek a surgical consult but, rather, continued to attempt to perform a complicated and lengthy surgery.

10. Defendants Bryan and Anderson at the outset of this surgery and in order to gain abdominal access, made an incision along an old transverse surgical incision thereby depriving Defendants of adequate observation and space to perform the surgical tasks.

11. In this lengthy surgery, Mrs. Patrick's abdominal wall and intestines were so traumatized that she developed a postoperative abdominal seroma; an intestinal ileus or obstruction; a fistula on or in her bowel; abdominal and pelvic abscesses; and surgical wound infection. These injuries and conditions necessitated lengthy and repeated hospitalizations; extensive medical treatment and surgeries; and, ultimately, a surgical resection of Mrs. Patrick's colon.

12. Such conditions and extended treatment referred to above have now resulted in chronic abdominal pain; frequent, chronic diarrhea; bowel incontinence; opiate medication dependency; and emotional depression and anxiety disorders.

13. Following the above set forth surgery on January 30, 2015, the Plaintiff also came under the care of Defendant Chase while she was hospitalized at the Defendant Aiken Regional.

CAUSE OF ACTION

14. Plaintiffs adopt the allegations of paragraphs one through thirteen and incorporate the same herein by reference as if stated verbatim.

15. All Defendants named herein had a duty to treat Plaintiff Patrick at a level that met or exceeded the nationally recognized standard of care, which was breached.

16. All Defendants named herein were negligent, grossly negligent, willful, wanton and reckless in their treatment of the Plaintiff Fonda Patrick and performed their duties towards her in a manner well beneath the nationally recognized standard of care for the same or similar healthcare providers in the same or similar circumstances.

17. Defendants, individually and/or by and through their agents, employees, servants, representatives and/or partners, breached their duties in their care and treatment of Plaintiff Fonda Patrick in one or more of the following particulars, acts or omissions:

- a. In failing to properly evaluate Plaintiff Fonda Patrick's medical needs at the initial and subsequent visits;
- b. In failing to determine the nature of Plaintiff Fonda Patrick's abdominal condition prior to attempting surgery;
- c. In failing to order the proper testing;
- d. In failing to properly examine, diagnose, treat and refer Mrs. Patrick as a patient in a timely fashion;
- e. In failing to exercise that degree or skill ordinarily used by surgeons, physicians and/or healthcare providers used under the same or similar circumstances;
- f. In failing to reasonably, prudently and timely detect and diagnose Plaintiff Fonda Patrick's post-operative injuries and conditions and failing to properly, prudently and aggressively treat the same, thus, allowing the post-operative injuries and conditions to progress and worsen ultimately resulting in a resection of Plaintiff Fonda Patrick's colon;
- g. Such additional and further particulars as may be learned through

discovery and/or proven at trial.

18. That as a direct and proximate result of the acts and/or omissions of Defendants set out hereinabove, Plaintiff Fonda Patrick was made to suffer significant pain and suffering, mental anguish, psychological and emotional disorders, loss of enjoyment of life, loss of earnings, loss of employment, decrease in the ability to earn, permanent, total disability, and medical expenses. All such damages during past and future.

19. The Plaintiff Andre Patrick is informed and believes that as a direct and proximate result of the Defendants acts and omissions his spouse, Plaintiff Fonda Patrick, has suffered the damages enumerated hereinabove thus causing him loss of her comfort, care, companionship, support, and consortium.

20. Because of the acts and/or omissions of the Defendants as enumerated hereinabove which resulted both proximately and directly in the damages suffered by Plaintiffs which damages are also set out above, the Plaintiffs seek a reasonable amount of actual damages against Defendants as well as an exemplary amount of punitive damages.

Thus Plaintiffs pray for judgment against Defendants in the following particulars to wit:

- a. A reasonable amount of actual damages;
- b. For an exemplary amount of punitive damages;
- c. For the costs and disbursements of this action;

C. STANDARD INTERROGATORIES - Rule 33(b) SCRPC

The information requested in the standard interrogatories found in Rule 33(b) of the South Carolina Rules of Civil Procedure is attached hereto.

D. AFFIDAVIT OF EXPERT

Counsel for Plaintiffs has reason to believe that the applicable statute of limitations for

this case will expire within ten (10) days of the filing of this Notice of Intent. Due to the time restraints, Plaintiffs have been unable to procure the affidavits from an expert. Therefore, expert affidavits will be filed within 45 days of the filing of this Notice of Intent pursuant to South Carolina Code of Laws, as amended §15-36-100(C)(1) and §15-79-125(A).

E. PRE-SUIT MEDIATION

Pursuant to South Carolina Code of Laws §15-79-125(c) and South Carolina Court Annexed ADR Rule 4, you are advised that this dispute is subject to pre-suit mediation within one hundred and twenty (120) days from the service of this Notice. The Aiken County Clerk of Court hereby appoints the following mediators:

Primary Mediator _____

Secondary Mediator _____

Alternatively, the parties hereto may agree on the choice of mediators at any time.

s/H. Edward Smith
H. Edward Smith, Esquire
BROWN, JEFFERIES & BOULWARE
Post Office Box 248
Barnwell, SC 29812
(803) 259-3532 - phone
(803) 259-0175 - facsimile
he.smith@att.net
ATTORNEY FOR THE PLAINTIFFS

01/19, 2018
Barnwell, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Civil Action No.: 2018- -

Fonda E. Patrick and
Andre Patrick,

Plaintiffs,

ANSWERS TO INTERROGATORIES

vs.

Gasnel E. Bryan, M.D., Individually and as
an agent and/or employee of Aiken
Regional Medical Centers, L.L.C.; Frank
Y. Chase, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, L.L.C.; Jonathan H.
Anderson, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, L.L.C.; and Aiken
Regional Medical Centers, L.L.C.,
Defendants.

TO DEFENDANTS:

Plaintiff hereby answers Standard Interrogatories as follows, but reserves the right to supplement answers and responses:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

a. Fonda E. Patrick
Post Office Box 274
Blackville, SC 29817

Mrs. Patrick, as the Plaintiff, is expected to testify as to her knowledge of the facts and circumstances surrounding this case; the medical treatment and surgeries she received in this case; her surgical injuries; her medical conditions; and her losses and damages.

b. Andre Patrick
Post Office Box 274
Blackville, SC 29817

The Plaintiff, Andre Patrick, as the spouse of Mrs. Patrick, would testify as to his knowledge and recollection of the facts and circumstances surrounding this case together with testimony relating to his knowledge of Mrs. Patrick's treatment; resulting injuries and conditions; the effect of such conditions on his wife; and his damages by way of loss of consortium.

- c. Dr. Gasnel E. Bryan
209 Abbeville Ave., NW
Aiken, SC 29801

Dr. Bryan is a named Defendant in the above-referenced matter and is expected to testify as to his knowledge and recollection of the facts and circumstances surrounding this case and in regards to his medical treatment of Mrs. Patrick in accordance with the medical records.

- d. Dr. Frank Y. Chase
410 University Pkwy. #2310
Aiken, SC 29801

Dr. Chase is a named Defendant in the above-referenced matter and is expected to testify as to his knowledge and recollection of the facts and circumstances surrounding this case and in regards to his medical treatment of Mrs. Patrick in accordance with the medical records.

- e. Dr. Jonathan Anderson
770 Medical Park Drive
Aiken, SC 29801

Dr. Anderson is a named Defendant in the above-referenced matter and is expected to testify as to his knowledge and recollection of the facts and circumstances surrounding this case and in regards to his medical treatment of Mrs. Patrick in accordance with the medical records.

- f. Dr. Katherine A. Morgan
96 Jonathan Lucas Street
Charleston, SC 29425

Dr. Morgan was a treating physician of Mrs. Patrick and is expected to testify as to her knowledge and recollection of the facts and circumstances surrounding this case and in regards to her medical treatment of Mrs. Patrick in accordance with the medical records.

- g. Any and all individuals listed in the medical records from Aiken Regional Medical Centers, Aiken, South Carolina and MUSC, Charleston, South Carolina.

These individuals are expected to testify as to their knowledge and recollection of the facts and circumstances surrounding this case and in regards to their medical treatment of Mrs. Patrick in accordance with the medical records.

- h. Dr. John V. Custer
1 Poston Road, Suite 145
Charleston, South Carolina

Dr. Custer was a treating physician of Mrs. Patrick and is expected to testify as to his knowledge and recollection of the facts and circumstances surrounding this case and in regards to his treatment of Mrs. Patrick in accordance with the medical records.

- i. Dr. Marc D. Noble, Charleston GI
1962 Charley Hall Blvd.
Charleston, South Carolina

Dr. Noble was a treating physician of Mrs. Patrick and is expected to testify as to his knowledge and recollection of the facts and circumstances surrounding this case and in regards to his medical treatment of Mrs. Patrick in accordance with the medical records.

- j. Any and all individuals listed in the medical records of Mrs. Patrick.

These various medical providers are expected to testify as to their knowledge and recollection of the facts and circumstances surrounding this case and in accordance with the medical records.

- k. Other than medical records referred to, no written or recorded statements have been taken from the witnesses.

- 2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER: Photographs of Mrs. Patrick's surgical wound are contained in medical records. Plaintiff has gathered medical records from January 30, 2015 through October 2017 generated by the hospitals named herein above. These medical records will be provided to Defendants for copying upon request.

- 3. In cases involving personal injury, set forth the names and addresses of all physicians who have treated the party and all hospitals to which the party has been committed in connection with said injuries and also set forth a statement of all medical costs involved.

ANSWER:

- a. Aiken Regional Medical Centers, Aiken, South Carolina
- b. MUSC, Charleston, South Carolina
- c. Those treating physicians identified in Interrogatory Answer No. 1.

d. Additional providers will be supplemented.

e. See Interrogatory Answer No. 5 for medical costs involved.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: Not applicable.

5. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

ANSWER: Mrs. Patrick suffered mental anguish, psychological and emotional upset, depressive and anxiety disorders, loss of enjoyment of life, loss of employment, loss of earnings, decreased ability to earn, permanent physical impairment, total disability as determined by the Social Security Administration, conditions of bowel incontinency and chronic diarrhea, and medical expenses.

All damages and losses being past and future.

Mrs. Patrick is still treating and all medical expense are not available. The actual, complete medical costs are being gathered and will be provided promptly upon receipt.

6. List the name and address of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

ANSWER: This information will be supplemented

Plaintiff reserves the right to elicit expert testimony from any and all medical providers as well as Defendants' experts.

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: Please see Answer to Interrogatory No. 1. Other than medical records of the care facilities referred to herein, no written or recorded statements have been taken from such witnesses.

Plaintiff reserves the right to supplement responses to these Interrogatories as additional documents are received and as additional information is gathered.

(SIGNATURE PAGE TO FOLLOW)

01-19, 2018
Barnwell, South Carolina

s/H. Edward Smith
H. Edward Smith, Esquire
Post Office Box 248
Barnwell, SC 29812
(803) 259-3532 – phone
(803) 259-0175 - facsimile
he.smith@att.net
ATTORNEY FOR THE PLAINTIFFS

ELECTRONICALLY FILED - 2018 Jan 22 12:07 PM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Fonda E. Patrick and Andre Patrick,
Plaintiffs,

Civil Action No.: 2018-NI-02-00003

vs.

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

**SUPPLEMENT TO
NOTICE OF INTENT TO SUE
(ATTACHING AFFIDAVIT OF MERIT)**

Defendants.

WHEREAS, Plaintiffs' prior attorney filed a Notice of Intent to File Suit on January 22, 2018, but did so without having contemporaneously filed an Affidavit of Merit and then later withdrew as counsel; and

WHEREAS, Plaintiffs, who at the time were *pro se* litigants, requested an extension of time to supplement the Notice of Intent to File Suit with an Affidavit of Merit; and

WHEREAS, on September 28, 2018, the Honorable Walton J. McLeod, IV, found that good cause existed to grant Plaintiffs' motion, thereby Ordering that Plaintiffs had forty-five days from the date of his Order (until November 13, 2018) to procure and file an Affidavit of Merit; and

NOW THEREFORE, pursuant to the aforementioned Order, Plaintiffs hereby file the attached Affidavit of Merit by Scott E. Hockenberry, M.D.

<signature on following page>

Respectfully submitted,

FINKEL LAW FIRM LLC

s/ Francis M. Hinson, IV

Francis M. "Brink" Hinson, IV (SC Bar # 74917)

Kelley Leddy (SC Bar # 103257)

1201 Main Street, Suite 1800

Columbia, SC 29201

803-765-2935 (tel)

803-252-0786 (fax)

bhinson@finkellaw.com

kledy@finkellaw.com

Attorneys for Plaintiffs

Columbia, South Carolina

November 7, 2018

AFFIDAVIT OF MERIT

I, Scott E. Hockenberry, M.D., F.A.C.S., being duly sworn, hereby swear and/or affirm and state as follows:

1. My name is Scott Hockenberry, and I am a physician, duly licensed to practice medicine by the state of Ohio. After graduating from Northeastern Ohio University's College of Medicine in 1989, I was trained at The Cleveland Clinic Foundation, completing a general surgical residency. Since 1994, I have been actively practicing general surgery and trauma surgery. I have been involved in peer review throughout my career and have served as chairman of the surgical peer review committee at Grant Medical Center from 2006 to 2013.
2. I have been Board Certified by the American Board of Surgery since 1995. I have instructed medical students and surgical residents from The Ohio State University and from Ohio University. I have trained trauma fellows during my time at Grant Medical Center between 1994 and 2009. I continue to teach surgical residents in Dayton, Ohio in the management of both trauma patients and acute care surgical patients. Through my education, training and experience. I am well versed in the standard of care as it relates to the post-operative management of patients who demonstrate a pelvic abscess following an abdominal surgery. My qualifications are more fully set forth in my *curriculum vitae*, a copy of which is attached hereto.
3. I have been asked to review medical records for Fonda E. Patrick and to provide opinions regarding the care and treatment of the various healthcare providers involved. Unless otherwise indicated, all of the opinions espoused herein are being offered to a reasonable degree of medical certainty.
4. I have been provided medical records relating to treatment Ms. Patrick received at Aiken Regional Medical Center in January, February, and March of 2015. I have reviewed these records and been asked to provide opinions as to whether the standard of care was met by the healthcare providers involved. In this endeavor, I have not reviewed records pertaining to any treatment Mrs. Patrick may have required/received at other institutions. While I may later review additional records, in formulating my initial opinions in this matter, I looked only at the aforementioned medical records relating to the treatment Ms. Patrick received Aiken Regional Medical Center.
5. On January 30, 2015, Dr. Gasnel E. Bryan performed an exploratory laparotomy with bilateral salpingo-oophorectomy on Ms. Patrick.
6. Throughout Ms. Patrick admission to Aiken Regional Medical Center in early 2015, Dr. Bryan remained her attending physician. Drs. Robert C. Terry and Dr. Frank Y. Chase, both of whom I understand to be general surgeons, were consulted and also involved in Ms. Patrick's care and treatment.
7. In the days following the surgery, Ms. Patrick experienced a number of problems, including nausea, vomiting, abdominal pain, and abdominal distention.
8. A CT scan, performed on February 2, 2015, was read as showing: "Scattered small bowel air-fluid levels likely indicating a postoperative ileus." Over the next approximately two

weeks, subsequent imaging studies repeatedly demonstrated that Ms. Patrick had complex pelvic abscess with air, indicating that a bowel injury had likely occurred during the surgery. Although her white blood cell count remained within the normal range, she was also experiencing a bowel obstruction, which was likely caused by the abscesses and further pointed to a bowel injury.

9. Given Ms. Patrick's signs and symptoms, coupled with numerous imaging studies evidencing a pelvic abscess that was increasing in size, the standard of care required that the physicians involved in her care timely drain and culture the pelvic abscess and also look to surgically repair the potential bowel perforation. Nonetheless, there was a considerable delay in rendering such treatment to Ms. Patrick.

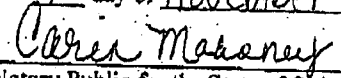
10. As described herein, having failed to timely and drain the pelvic abscess shown in numerous imaging studies, Drs. Bryan, Terry, and Chase fell below the applicable standards of care in their care and treatment of Ms. Fonda E. Patrick.

11. My opinions in this matter are based on the information contained in the records reviewed, as noted above, as well as my education, training, and experience. The factual bases of my opinions may be supplemented at a later time. This affidavit is given with the intent to comply with South Carolina Code of Laws §§ 15-36-100 and 15-79-125, which do not require me to state all negligent acts or omissions by a person/defendant. There may be additional bases for the opinions expressed herein that may be discovered or discussed at a later time, and I may testify to the information contained in this affidavit and additionally testify about opinions or other matters that may not be addressed in this affidavit. In the event that additional records are provided, or if other information is made available, I specifically reserve the right to amend or otherwise alter my opinions contained within this statement and to supplement or amend my opinions in this matter, whether by written means or by virtue of testimony.

FURTHER AFFIANT SAYETH NOT.


Scott E. Hockenberry, M.D., F.A.C.S.

Subscribed and sworn to before me
this 7 day of November 2018


Notary Public for the State of Ohio
My commission expires: 12-22-2020



CARIN MAHONEY
Notary Public, State of Ohio
My Commission Expires
12-22-2020

Scott E. Hockenberry, M.D., F.A.C.S.

285 East State Street Suite 640
Columbus, Ohio 43215
Office: (614)469-7261
Email: shockenb@ohiohealth.com

Clinical Experience

8/15/94 - Present	Senior partner, Advanced Surgical Techniques, Inc.
1994 - 2009	Active Trauma Surgeon, Grant Medical Center, (Level I Trauma Center) Columbus, Ohio

Administrative Roles

2011	Vice Chairman Department of Surgery Grant Medical Center
2011	Vice Chairman Section of Trauma Surgery
2006 - 2009	Chairman Department of Surgery
2002 - 2006	Chairman Section of Trauma Surgery
2006 - present	Chairman of Surgery Peer Review Committee
2006 - present	Member of the Multi Specialty Peer Review Committee
1994 - 2009	Member of the Trauma Surgery Peer Review Committee
2002 - 2010	Member of the Medical Executive Committee

Education

Postgraduate Education

7/1/89 – 8/15/94 Cleveland Clinic Foundation, Cleveland, Ohio
General Surgery Residency

Graduate Education

9/85 – 5/89 Northeastern Ohio Universities College of
Medicine, Rootstown, Ohio

Undergraduate Education

6/83 – 8/86 Kent State University, Kent, Ohio
GPA – 3.50 (cum laude)

Examinations

2006 American Board of Surgery Recertification (96 percentile)
9/95 American Board of Surgery Certifying Exam
9/94 American Board of Surgery Qualifying Exam

Licensure

State Medical Board of Ohio 35-06-6676
ATLS Certification since 1993
ATLS Instructor since 2000

Memberships

Fellow of the American College of Surgeons
Ohio Chapter ACS Committee on Trauma
American Medical Association
Ohio State Medical Association
Columbus Medical Association
Columbus Surgical Society (President 2005)
Board Member Franklin County American Cancer Society

Publications

Thomas B., Falcone, R.E., Vasquez, D., Santanello, S., Townsend, M., Hockenberry, S.E., Innes, J.T., Wanamaker, S.R.: Ultrasound Evaluation of Blunt Abdominal Trauma: Program Implementation, Initial Experience and Learning Curve. The Journal of Trauma: Injury, Infection and Critical Care 1997. Volume 42, No. 3

K.C.R. Farmer, M.D., et.al. "Pneumomediastinum Following Transanal Excision of a Rectal Tumor." Aust. N.Z.J. Surg. 1993, 63, 568-571

Presentations

Hockenberry, S.E., Surgical Treatment of Inflammatory Bowel Disease. Inaugural meeting of the Columbus Chapter of CCFA. September, 1996
J.B.

Harrison, M.D., et.al. "Stapled Nipple Valve to Pouch improves Results in Continent Ileostomy Patients." Presented at the 1993 ASCRS meeting

Hockenberry, S.E., Citywide Surgical Grand Rounds, Dayton, Ohio; Surgical Treatment of Crohn's Disease. March, 1999

1	State of South Carolina)	In the Court
2	County of Aiken)	Of Common Pleas
3	Fonda E. and Andre)	Case No.: 2018-NI-02-00003
4	Patrick)	
5	Plaintiffs,)	
6	vs.)	Transcript of Record
7	Gasnel E. Bryan, et al.,)	
8	Defendants.)	

9
 10 September 24, 2918
 11 Aiken, South Carolina

12 BEFORE:
 13 The Honorable Walton McLeod, Judge

14
 15 APPEARANCES:
 16
 17 Fonda E. and Andre Patrick, Pro se
 18 Plaintiffs
 19
 20 No Appearance On Behalf Of The Defendants
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Steven E. LeBlanc, R.P.R., Circuit Court Reporter
 P.O. Box 184, Lexington, South Carolina 29071

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7 EXHIBITS

8 NO. DESCRIPTION ID EVDS.

9 NONE

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P.O. Box 184, Lexington, South Carolina 29071

1 Thereupon, the following proceedings were had,

2 THE COURT: Patrick versus Bryan.

3 MS. PATRICK: Yes, Your Honor. Fonda and Andre
4 Patrick.

5 THE COURT: Ms. Patrick, are you representing
6 yourself?

7 MS. PATRICK: Yes, sir.

8 THE COURT: Okay. I'll go out of order. We're
9 actually doing number 12 now. This is a motion for an
10 extension to file an affidavit. So you're representing
11 yourself?

12 MS. PATRICK: Yes, sir.

13 THE COURT: Go ahead and tell me about this, Ms.
14 Patrick.

15 MS. PATRICK: Yes, Your Honor. I did have
16 representation for a lawsuit against Gasnel Bryan for
17 surgery that I undertook in January of 2015 and I was in
18 the hospital for six months and upon my release I
19 retained an attorney and he let the case kind of drop for
20 quite a while and at the eleventh hour. In December of
21 2017 he notified me that he had gotten with an expert on
22 the case and they did not see that there was a case so he
23 asked to be released as my representation from the case.

24 THE COURT: Who was your lawyer?

25 MS. PATRICK: Edward Smith, Barnwell County.

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1 THE COURT: Okay. When was he relieved?

2 MS. PATRICK: He was relieved because his suggestion
3 was that --

4 THE COURT: When? When?

5 MS. PATRICK: When. In February.

6 THE COURT: Of 2018?

7 MS. PATRICK: '18. Mm-hmm.

8 THE COURT: Okay. And I'm just looking at your file
9 for the first time. So had you filed suit?

10 MS. PATRICK: My understanding was that I had filed
11 suit but once I got with Mr. Smith again, he had not
12 filed anything. He had just filed the intent without any
13 of the people that are on the suit receiving any
14 notification of it.

15 THE COURT: So you're seeking leave from the Court
16 to seek out an expert; is that correct?

17 MS. PATRICK: I'm actually seeking --

18 THE COURT: Or time.

19 MS. PATRICK: -- time so that I can seek an attorney
20 and an expert.

21 THE COURT: That's the extent of your motion?

22 MS. PATRICK: Yes, sir.

23 THE COURT: Okay. Well, I've got to take a look at
24 this. I'm writing some notes on you in your file but you
25 may have a problem there with the amount of time that's

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1 passed. I haven't reviewed all of the dates involved but
2 you need to understand you may have a problem --

3 MS. PATRICK: Yes.

4 THE COURT: -- as far as whether I can grant such a
5 request. With that I said, I'm not going to rule from
6 the bench because I want to make sure I look at the
7 documents before I make such a decision. But we'll
8 review this and make a decision whether we can grant you
9 such an extension, okay?

10 MS. PATRICK: Okay.

11 THE COURT: Is there any other circumstances
12 you want to tell me about? You have never gotten a
13 lawyer. Have you tried to get another lawyer?

14 MS. PATRICK: I have tried several attorneys and I
15 have even gone to Charleston, Myrtle Beach and there --

16 THE COURT: You don't need -- I'm sorry. You don't
17 need to tell me about your meetings with attorneys.

18 MS. PATRICK: But just upon like me working with
19 Mr. Smith, Attorney Smith, I just don't think that I
20 received the proper representation through him because he
21 didn't give me the adequate representation.

22 THE COURT: Well, that's not a matter for what we're
23 here about though. You're asking about an extension of
24 time. Who helped you with this motion?

25 MS. PATRICK: There was another attorney that said

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1 that he would take the case but he wasn't willing to take
2 it so he really just gave me, like helped me and said
3 this is probably what you need to do if you're looking
4 for someone.

5 THE COURT: Okay. All right. Well, we'll review
6 this file and see if we can get you an answer as soon as
7 possible, okay?

8 MS. PATRICK: Okay.

9 THE COURT: I don't want to rule from the bench when
10 I haven't reviewed the documents.

11 MS. PATRICK: Okay. So from this point what do we
12 need to do?

13 THE COURT: I'll make a decision and I'll file it
14 and you just need to make sure you check with the Clerk's
15 Office to see when something has been filed, my ruling,
16 okay?

17 MS. PATRICK: Okay. Thank you.

18 WHEREUPON, THE HEARING WAS CONCLUDED.

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CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)
(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
and Official Circuit Court Reporter for the Eleventh Judicial
Circuit in and for the State of South Carolina, do hereby
certify that I reported the proceedings in the before
captioned case in the Court of Common Pleas in and for the
State of South Carolina on the 24th day of September, 2018.

I FURTHER CERTIFY that the forgoing 6 pages
constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel
to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at
Lexington County, this 3rd day of December, 2018.

By:s/ Steven E. LeBlanc

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

1	State of South Carolina)	In the Court
2	County of Aiken)	Of Common Pleas
3	Fonda E. Patrick, et al.,)	Case No.: 2018-NI-02-00003
4	Plaintiffs,)	
5	vs.)	Transcript of Record
6	Gasnel E. Bryan, et al.,)	
7	Defendants.)	
8	_____)	

9
10 March 5, 2019
11 Aiken, South Carolina

12 BEFORE:

13 The Honorable Keith Kelly, Judge

14
15 APPEARANCES:

16 Francis M. Hinson, IV, Esquire
17 Attorney for the Plaintiffs

18
19 Hutson S. Davis, Junior, Esquire
20 Kenneth Norman Shaw, Esquire
21 James Drayton Nance, Esquire
Attorneys for the Defendants

22 ALSO PRESENT:

23 Fonda and Andre Patrick

24

25

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1 Thereupon, the following proceedings were had,

2 THE COURT: I believe that brings us to Patrick
3 versus Bryan.

4 MR. HINSON: Your Honor, Francis Hinson for the
5 plaintiffs, and there's actually a motion to dismiss
6 filed by each of the defendants that are effectively the
7 same motion and I think they're listed in order on the
8 roster.

9 THE COURT: I see that. Okay. Each defendant.
10 Okay. So actually three motions.

11 MR. HINSON: Yes, Your Honor. The hospital filed
12 one, that's Aiken Regional Medical Center, and then there
13 was one filed on behalf of defendant Chase and defendant
14 Bryan.

15 THE COURT: Got you. Okay.

16 MR. HINSON: Essentially, Your Honor, I don't want
17 to speak for my opposing counsel but I understand it to
18 be essentially the same argument coming from all three
19 defendants.

20 THE COURT: All right. Gentlemen. Yes, sir.

21 MR. SHAW: Your Honor, Kenneth Shaw here on behalf
22 of Aiken Regional Medical Center. Yes. This is a motion
23 to dismiss an NOI, Your Honor. The NOI was filed on
24 January 22nd, 2018 so a little over a year ago and it was
25 filed, this is a medical malpractice action obviously

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1 relating to a surgery that was performed on January 30th
2 of 2015. At the time the NOI was filed it was filed
3 without the required expert affidavit. There was a
4 statement made in the NOI that the statute of limitations
5 was about to run, therefore, they could not get an
6 affidavit prior to that so they would supplement the NOI
7 within the 45 day required time period.

8 Shortly after filing the NOI, plaintiffs' counsel
9 withdrew as counsel. Actually I believe that occurred on
10 February 14th, so really just a little less than a month
11 after the filing of the NOI plaintiffs' counsel withdrew.
12 That was with the consent of the plaintiffs and at that
13 point in time, at the time of the withdrawal of counsel
14 there was no mention in the order approving the
15 withdrawal of counsel with any sort of extension of time
16 for plaintiffs to get new counsel, for plaintiffs to get
17 an expert affidavit or anything like that. It just was a
18 withdrawal as counsel.

19 Several more months go by and then on June 27th of
20 2018 plaintiffs filed a motion for extension of time to
21 file an expert affidavit. In that motion they admit that
22 the statute of limitations ran or was about to run on
23 January 30th of 2018. When they filed it, they knew at
24 that time that they would need to give notice to the
25 defendants.

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1 At the time that the motion was filed as far as I
2 know none of the defendants but certainly Aiken Regional
3 Medical Center had no notice of this lawsuit. They had
4 not been served with the Notice of Intent. They were not
5 served with the motion for an extension of time to file
6 an expert affidavit. They had no notice of the hearing
7 that was subsequently held in September on that motion
8 for an extension of time and I believe that is true for
9 all of the defendants here. None of the defendants were
10 present for that hearing. That hearing was held again,
11 on January 28th. The Judge in hearing that, and I
12 believe that the transcript is attached to one of the
13 motions here and I'll let my esteemed co-counsel over
14 here mention that or talk about that because they filed
15 it as part of their motion, but it was clear from that
16 hearing that obviously none of the defendants were
17 present.

18 After the hearing the judge ruled that he would
19 grant the motion for an extension of time to file the
20 expert affidavit. Nothing in the order, however,
21 references the time frame for serving the Notice of
22 Intent. That's not discussed in the hearing. It's not
23 in the transcript. It's not in the order. It's silent
24 as to that. The only thing that even remotely touches on
25 it is that the judge makes a statement during the hearing

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1 that you may have time issues or something to that
2 effect.

3 So in any event, the plaintiffs at that point go and
4 get new counsel and then on November the 7th they file a
5 supplement to the NOI with an expert affidavit attached.
6 Again, this is on November 7th, 2018 so at this point we
7 are now about ten months after the filing of the Notice
8 of Intent. After the filing of the supplemental NOI,
9 service is completed upon I believe most, I think all of
10 the defendants. Service was completed on Aiken Regional
11 Medical Center on November 9th, 2018. I say service was
12 completed. Aiken Regional Medical Center received the
13 Notice of Intent. Whether service was proper or not I'm
14 not conceding that but we did receive notice of it. At
15 that point that was the first we had heard of this
16 action. It was the first that we had heard of this
17 extension of time for it and again, we're talking about
18 at this point nearly four years after the incident.
19 occurred.

20 So we responded by filing a motion to dismiss the
21 Notice of Intent. The basis for the motion to dismiss or
22 the primary basis for the motion to dismiss is the
23 failure to serve the Notice of Intent either within the
24 statute of limitations or within the 120 days as required
25 by Rule 3 of the South Carolina Rules of Civil Procedure.

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1 Statute 15-79-125 states that the NOI, filing of an NOI
2 tolls the statute of limitations, however, the very next
3 sentence says that the Notice of Intent must, must, and
4 it uses the word must, must be served pursuant to the
5 rules for summons and complaint. That rule is Rule 3 and
6 again, under Rule 3 you are required to serve it within
7 either the statute of limitations or within 120 days of
8 the filing of the NOI whichever gives you more time.

9 In this case that would be the 120 days as again, I
10 think it's conceded that the statute of limitations would
11 have been January 30th of 2015 so, therefore, the 120
12 days would have given them more time, however, that 120
13 day time period would have been essentially I think May
14 22nd of 2018. May 22nd, 2018 comes and goes before any
15 of these defendants had any notice that this Notice of
16 Intent had been filed. It came before the plaintiff
17 filed a motion seeking an extension of time in regards to
18 the expert affidavit. So again, certainly it was before
19 we were finally served some six months later in November.

20 The plaintiff this morning filed a memorandum in
21 opposition and I've had, fortunately the first hearing
22 kind of took long enough that I had an opportunity to
23 kind of read through it and go through some of the
24 arguments that are made there and as I kind of understand
25 it there's this talk in here of 120 days and he

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1 references back to the mediation deadline. We're not
2 arguing that the plaintiffs have failed to mediate this
3 case within 120 days. That's not our argument at all.
4 Our argument is that the plaintiffs have failed to serve
5 the Notice of Intent within 120 days. It just so happens
6 that those deadlines are the same. I'm not aware and
7 there's no citation in the plaintiffs' brief that says
8 that a Court may extend the statute of limitations or the
9 deadline to serve a summons and complaint, you know? I
10 mean, the only law that I'm aware of is the Mims Ex Rel.
11 Mims versus Babcock Center case from 2012 that states
12 that a summons and complaint must be served within the
13 statute of limitations or within 120 days of the filing.
14 I'm not aware of anything that says that a Court may
15 extend that 120 days for service and certainly what we
16 haven't seen here, I would imagine, if anything, if such
17 a thing existed, it would be under circumstances where
18 perhaps there was a defendant who was evading service or
19 something to that effect and the plaintiff had showed
20 they made good faith efforts to serve them to no avail.
21 We don't have that here. There's no - nothing within the
22 plaintiffs' memorandum, nothing within the affidavit that
23 was filed that said they made any effort to serve these
24 defendants within the statute of limitations or within
25 120 days of the filing.

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1 The plaintiffs, essentially their argument is we
2 filed the Notice of Intent just before the statute of
3 limitations ran, we didn't file an expert affidavit, and
4 we didn't serve the defendants, but we should be given
5 leeway to come back 11 months later and proceed with this
6 case well after the statute of limitations has run. If
7 you take that to its logical conclusion, it renders the
8 South Carolina Rules of Civil Procedure Rule 3 completely
9 meaningless. It renders the 125, the requirements of
10 15-79-125 that you have to file an expert affidavit
11 contemporaneously with the NOI or at least within 45
12 days, it renders that meaningless because then what every
13 plaintiff could do is just before the statute of
14 limitations runs, just file a Notice of Intent but don't
15 serve it. Just sit back and wait and you could
16 theoretically wait for years and then go to the court and
17 say, well, we were struggling trying to find an attorney.
18 We had all these things going on and we won't leave --
19 And make that argument when the defendants aren't even
20 present to argue their case because you still haven't
21 served them.

22 And then the Court for one reason or another which
23 I'm still not quite sure what happened following the
24 September hearing as to why the Court granted the 45 day
25 extension, there's language in the order that seems to

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1 suggest that because the defendants didn't file a motion
2 to dismiss or didn't object to the motion, that the Court
3 was gonna grant it but I'm not exactly sure how the Court
4 thought we were supposed file a motion to dismiss or file
5 an objection when we didn't know anything about the
6 Notice of Intent. It kind of put us in a difficult
7 situation from that perspective.

8 So, Your Honor, I mean, here the simple argument
9 again coming back is they're required under the rules to
10 either serve the notice, they have to serve the Notice of
11 Intent, they have to do it pursuant to Rule 3 and they
12 have to do so either within the statute of limitations or
13 within 120 days. They just simply failed to do that in
14 this case.

15 THE COURT: Anything from --

16 MR. NANCE: Your Honor, my name is Jim Nance and I
17 represent Dr. Anderson and Dr. Bryan. Just for the Court
18 to let you know, I imagine you know, Dr. Anderson has
19 been voluntarily dismissed from this action because he
20 was not named in the ultimate affidavit that was
21 submitted and I will confirm that Dr. Bryan was not
22 served with anything until December the 14th of 2018 at
23 which time he was served with the Notice of Intent along
24 with the affidavit and we certainly adopt counsel's
25 arguments in regards to this matter.

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1 THE COURT: You said December 14th, 2018?

2 MR. NANCE: December the 14th, yes, sir.

3 THE COURT: Yes, sir.

4 MR. DAVIS: Yes, sir. I'm Hutson Davis. I
5 represent Dr. Frank Chase. Dr. Chase was actually served
6 with a summons and complaint on November the 8th of 2018
7 and then a corrected Notice of Intent on November the
8 28th of 2018 so he had some notice that there was a
9 lawsuit out there on the 8th but he actually only got the
10 Notice of Intent on 11/28 of '18, and we have in our
11 brief adopted, in our motion adopted the brief that's
12 been discussed earlier. I would point out that in our
13 motion we did order a transcript of the hearing that's
14 been talked about where the extension took place and we
15 have attached that to our brief and in there it's clear
16 that no defendant was present or could be heard and
17 interestingly enough in the Judge's order, Judge McLeod
18 says, given the language, I think he's talking about the
19 statute, and the lack of a motion to dismiss by the
20 defendants and the lack of an objection by the
21 defendants, and that takes place in September of 2018
22 three months before anybody was served.

23 I agree with the argument that a ruling in the
24 plaintiffs' favor here would lead to the certainty that
25 you could file a Notice of Intent and just sit on it and

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1 not serve anybody at any time, get whatever extensions
2 you needed and then proceed with your lawsuit and I don't
3 think that's the intent of the statute, Your Honor.
4 Thank you.

5 THE COURT: Thank you, gentlemen. Yes, sir.

6 MR. HINSON: Thank you, Your Honor. Francis Hinson
7 with the Finkel Law Firm for the plaintiffs. Your Honor,
8 we did file a memorandum this morning as I brought a
9 paper copy. Would you --

10 THE COURT: I think it's here. It is. I have it
11 filed at 8:25 this morning. Yes, sir.

12 MR. HINSON: Your Honor, this is an unusual
13 situation to say the least. Ms. Fonda Patrick who is
14 here today with her husband Andre, she had a surgery
15 performed on January 30th, 2015, a salpingo-oophorectomy
16 which is the removal of the ovaries and fallopian tubes.
17 Afterwards she had a severe complication for which no one
18 is blaming the surgeon for having a bowel injury. It's
19 the failure to recognize the injury after the surgery in
20 a timely manner and a failure to properly react.

21 She had an abscess that needed to be drained. All
22 of the physicians who were caring for her, I think it may
23 be similar to too many cooks spoil the broth type of
24 situation in that when everyone is waiting for somebody
25 else to make a move, nobody does it so no one is draining

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1 her abscess and it goes on for quite some time and it
2 causes her severe injury and she will spend four months
3 plus in the hospital dealing with this issue.

4 After she gets out of the hospital, she timely hires
5 counsel. She hires Mr. H. Edward Smith in Barnwell and
6 for nearly two years he has her file. For nearly two
7 years. And eight days before the statute of limitations
8 is going to run, January 22nd, 2018 he files an NOI
9 without an affidavit of merit.

10 Now, the statute makes clear that the filing of an
11 NOI tolls the statute of limitations. So the statute of
12 limitations is tolled as of January 22nd, 2018. The
13 statute also makes clear that if the SOL, the statute of
14 limitations is about to run within ten days, you can file
15 without the affidavit of merit and supplement within the
16 next 45 days. So he was absolutely within the statute
17 doing so but he doesn't do so. He moves to withdraw as
18 counsel and on February 14th the Court allows Mr. Smith
19 to withdraw as counsel and the Patricks are left as pro
20 se litigants in a medical malpractice case. They had
21 just a few weeks left before this 45 days is gonna run
22 and they're calling up and Ms. Patrick has provided an
23 affidavit to this. It's an attachment to our motion.
24 She's calling up attorneys saying please, can you help
25 me. Calls up numerous attorneys. When they hear there's

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1 only a few weeks left on a complicated medical
2 malpractice case, they say, ma'am, I can't help you.

3 I'll represent to the Court that the paper copy of
4 the records fills up an entire banker's box. No one
5 would help her. She goes to the Court and says I need
6 more time. I have been left with -- And this is the
7 motion hearing. I want to get the date right. The
8 motion hearing was September 24th. She goes in front of
9 Judge McLeod. She says I need more time. I think I can
10 get counsel. If I have more time, I can do it and Judge
11 McLeod grants her 45 more days and, Your Honor, that's
12 within Judge McLeod's discretion.

13 The statute for medical malpractice, the requirement
14 for affidavits references the Rules of Civil Procedure,
15 references Rule 3 for the service of complaints which
16 then references Rule 6 and Rule 6 of our South Carolina
17 Rules of Civil Procedure gives the Court great discretion
18 to extend deadlines for good cause. And, Your Honor,
19 Judge McLeod heard this pro se litigant's plea and
20 decided that there was good cause to extend the deadline.

21 Now, I'm not sure why Judge McLeod's order doesn't
22 mention the issue with service because at that point the
23 time for service, if you don't have an extension, had
24 already passed but Judge McLeod says I'm gonna give you
25 45 more days to go get that affidavit of merit and he was

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1 aware that service hadn't taken place because it's in the
2 hearing. Not only would there be no certificates of
3 service in the file, at the hearing Ms. Patrick is up
4 front with the Court and she tells the Court and she's
5 speaking of Mr. Smith, he had just filed the intent
6 without any of the people that are on the suit receiving
7 any notification of it. She's up front with the Court.
8 She's honest with the Court and the Court still gives her
9 45 more days.

10 Your Honor, she comes to me. There's 45 days left
11 and she says I have this order from the Court that says I
12 have 45 days. I said we better get busy and we got an
13 affidavit of merit and we got everybody served in just as
14 timely a fashion as we could. We met -- The Judge's
15 order was September 28th, and I would note, Your Honor,
16 that she filed the motion asking for an extension back in
17 June. It's not that she's been sitting on her laurels,
18 Your Honor. She filed the motion on June 27th. It just
19 took a long time to be heard. The wheels of justice turn
20 slowly. The Judge issues the order on September 28th,
21 says you have 45 days from my order. That's Judge
22 McLeod. And on November 7th, that's well within the 45
23 days, the affidavit of merit is filed and then in
24 November, December everybody gets served.

25 Your Honor, Judge McLeod has already ruled on this

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1 matter. He found that there was good cause to extend the
2 deadline. He recognized that he had a pro se litigant
3 who had been put in a very difficult situation and in our
4 brief, Your Honor, we reference our courts have said and
5 I represent this is an unpublished opinion but in City
6 Financial Mortgage versus Kennedy, our Court of Appeals
7 said there is a desire for procedural leniency with pro
8 se litigants within the bounds of the law and I have a
9 string of citings there, Your Honor, court after court
10 after court from state after state saying similar things.
11 That the rules still apply to pro se litigants but when
12 we can give them a little bit of leniency with deadlines
13 and such, we do and Judge McLeod did that. He said there
14 was good cause. This pro se litigant -- Well, at the
15 time she wasn't. She went and found an attorney as soon
16 as she got out of the hospital and then just days and
17 weeks before the time to file the affidavit of merit
18 she's left without an attorney.

19 And, Your Honor, respectfully to the Court, I'm not
20 sure that Judge McLeod's order can now be overruled by
21 another Circuit Court Judge. We have a long history in
22 South Carolina that's pretty explicit that one Circuit
23 Court Judge has no power to review, revise or reverse the
24 action of another Circuit Court Judge. State versus
25 Harrelson, 211 S.C. 11 1947 and with all respect to the

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1 Court, the Appellate Courts may one day decide something
2 differently but today the rule of this case has been that
3 there was an extension granted for good cause, my client
4 was able to come find an attorney, myself, we've spent
5 money, we've gone and gotten an affidavit of merit, we're
6 ready to proceed with our case.

7 And importantly, Your Honor, the defendants haven't
8 been prejudiced in this matter. Having to defendant a
9 lawsuit isn't prejudice. Nothing has changed. They're
10 still able to defendant the lawsuit. Records haven't
11 been destroyed. Everything is still there and the ends
12 of justice will not be promoted by dismissing Mr. and
13 Mrs. Patrick's case and we would ask the Court that you
14 let us proceed, have us conduct a pre-suit mediation and
15 if that's not successful, proceed to the filing of the
16 complaint and proceed with discovery and the trial of the
17 case. Thank you.

18 MR. SHAW: Your Honor, if I may just quickly respond
19 to a couple of the points there. First off again, Judge
20 McLeod's order only grants an extension in regards to the
21 time frame to file an expert affidavit. He makes no
22 mention, no reference to whether or not there was a
23 statute of limitations issue, whether or not the
24 affidavit or the Notice of Intent had ever been properly
25 served. Anything to that effect is completely silent as

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1 to that. So there is no way that a reading of his order
2 can be inferred to say that he's granting an extension on
3 the time in which to serve the Notice of Intent. I don't
4 know how you can read that into that. He's simply
5 stating that assuming you have done everything else
6 right, I'm gonna give you 45 days more to get an expert
7 affidavit, but at that point they hadn't.

8 And again, I certainly understand, and I will tell
9 you I empathize with the position that the plaintiffs are
10 in and certainly I apologize to them on behalf of, you
11 know, as a member of the Bar that they were left in the
12 situation that they were left in. But to say that - to
13 come back now and penalize my client because frankly
14 their attorney dropped the ball -- And I'm not referring
15 to this one.

16 THE COURT: I know.

17 MR. SHAW: -- they are prejudiced. I mean, to say
18 that they're not would be that any case -- That's why we
19 have a statute of limitations. We are now well beyond
20 the three years. We're beyond four years since this took
21 place. Whether or not the witnesses are all available.
22 All that kind of stuff. There are statutes. That's the
23 reason why we have these statutes of limitations.

24 And as far as -- And then also in regards to the not
25 being served, had we been timely served with the Notice

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1 of Intent to begin with right after like most attorneys
2 do when they file the Notice of Intent, they immediately
3 serve it right after that. For one reason or another
4 that wasn't done in this case. But had it been done,
5 when that 45 days passed and no expert affidavit had been
6 filed, I assure you I would have been filing a motion to
7 dismiss this NOI at that time but because we knew nothing
8 about this case we weren't in a position to do that.

9 And certainly I think there's some confusion. I
10 don't know what happened with Judge McLeod. Obviously
11 you're not Judge McLeod. You can't speak for him. I'm
12 not sure what happened between the time of the hearing
13 and the time of drafting the order but it appears like he
14 - it appears from the order like he forgot that none of
15 the defendants were there because his order specifically
16 references the failure of the defendants to do anything.
17 Again, I think as we have all stated, I'm not sure how we
18 were supposed to do anything when we didn't know anything
19 about it. We couldn't do anything about it. So
20 certainly we have been prejudiced by this and by former
21 counsel's actions to withdraw as counsel and presumably,
22 I would hope anyway, when he withdrew as counsel, he told
23 his client you have got at this point about 25 days left
24 to get an expert affidavit, and if you need more time,
25 you need to go to the Court and ask them for more time.

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1 I would hope that he did that. If he didn't do that,
2 then we've got even more problems. But they certainly
3 were aware of the time and it's in the affidavit that Ms.
4 Patrick filed. She knew they were under time
5 constraints. I certainly believe that they were out
6 looking for an attorney but they waited five months
7 before they filed a motion for an extension of time.
8 That should have been done at the same time that they
9 asked for relief of counsel.

10 And certainly to the extent that you can grant an
11 extension of time to serve which I'm not even sure you
12 can do that but to the extent you can, that should have
13 been granted at the same time. Again, there's no
14 reference of that. So at this point I think that they're
15 under an obligation. They have to do those things within
16 the statute of limitations or within the applicable time
17 frame and they didn't do either in this case and now to
18 come back well after those deadlines have passed and ask
19 for an extension of time, you're not really asking for an
20 extension of time. You're asking for the time of the
21 deadlines to just be ignored altogether and just asking
22 for there to be no deadline essentially is what they're
23 asking for in this case.

24 THE COURT: Anything further?

25 MR. HINSON: Just briefly, very briefly, Your Honor.

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1 15-79-125 makes clear that filing of the NOI tolls the
2 statute of limitations. It has been tolled. And then
3 the Ross versus Waccamaw case which is 404 S.C. 56 2013,
4 that case was dealing with, and it's cited in our brief,
5 Your Honor, that case is dealing with the failure to
6 complete the mediation conference, the 120 day deadline
7 and the Court notes that the statute is silent as to the
8 consequences of failing to meet this deadline and it says
9 the failing to do so is not -- Excuse me. I want to read
10 this sentence exactly. We hold that failing to comply
11 with the 120 day statutory time period is a non
12 jurisdictional procedural defect. We further find that
13 the Circuit Court retains discretion to permit the
14 mediation process to continue beyond the 120 day time
15 period and may consider principles of estoppel and waiver
16 to excuse non compliance.

17 Your Honor, this was what was before Judge McLeod.
18 It was made known to him that nobody had been served and
19 he determined that there were principles of estoppel and
20 waiver that would excuse these. He gave the Patricks 45
21 more days. They went and found myself and my firm. We
22 filed an affidavit. We've got an affidavit of merit and,
23 Your Honor, I want to quote from ex parte Dibble 279 S.C.
24 592, the Courts have the inherent power to do all things
25 reasonably necessary to ensure that just results are

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1 reached to the fullest extent possible.

2 Your Honor, kicking the Patrick's case at this point
3 after all they have been through, they've been working
4 their best to bring this medical malpractice case and
5 that would not be just results and the Court, both Judge
6 McLeod and Your Honor have the power to keep this case
7 moving forward and we're ready to move it, Your Honor.

8 THE COURT: Okay.

9 MR. DAVIS: Your Honor, please, I just have one
10 comment. The statute contemplates the tolling of the
11 statute of limitations by the NOI. That contemplates a
12 complete NOI. That is one that has a certificate of
13 merit with it. In that statute it gives a little bit of
14 extra time if you're close to the statute of limitations
15 to file the certificate of merit. But I would argue to
16 the Court that NOI is not valid to toll the statute until
17 the complete requirements of the NOI has been fulfilled
18 which includes the filing of the certificate of merit in
19 every way, fashion that it's done under the rules.

20 THE COURT: Yeah. And the 120 days you're talking
21 about and the 120 days they're talking about are two
22 different 120 days.

23 MR. HINSON: And I recognize that, Your Honor. We
24 just think it shows that some leniency can be granted,
25 that the Circuit Court has the power to do so and we

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1 think because the time had already expired for service,
2 when it was heard by Judge McLeod, that was part of his
3 order was granting them some more time, otherwise his
4 order extending time to file an affidavit of merit
5 wouldn't have made any sense.

6 THE COURT: Okay. I might have different thoughts
7 about that but anyway. All right. It's under
8 advisement. Everybody pay close attention to your AIS
9 email addresses. Thank you, gentlemen. Very good to see
10 all of you.

11 MR. HINSON: Thank you, Your Honor.

12 MR. DAVIS: Thank you, Your Honor.

13 MR. NANCE: Thank you, Your Honor.

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1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4

5 I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
6 and Official Circuit Court Reporter for the Eleventh Judicial
7 Circuit in and for the State of South Carolina, do hereby
8 certify that I reported the proceedings in the before
9 captioned case in the Court of Common Pleas in and for the
10 State of South Carolina on the 5th day of March, 2019.

11 I FURTHER CERTIFY that the forgoing 23 pages
12 constitute a true and accurate record of said proceedings.

13 I FURTHER CERTIFY that I am neither related, counsel
14 to, nor of interest to any party hereto.

15 IN WITNESS WHEREOF, I have hereunto set my hand at
16 Lexington County, this 11th day of July, 2019.

17

18

19 By:s/Steven E. LeBlanc

20

21 Steven E. LeBlanc, Sr., R.P.R.,
22 Eleventh Circuit Court Reporter
23 State of South Carolina.

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STATE OF SOUTH CAROLINA ^{SEP}
COUNTY OF ~~BERKELEY~~ ^{Aiken}

Fonda E. Patrick and
Andre Patrick,

Plaintiffs,

vs.

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 an
agent and/or employee of Aiken Regional
Medical Centers, LLC; Jonathan H.
Anderson, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, L.L.C.; and Aiken
Regional Medical Centers, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2017-NI-02-0003 ^{9/30}

**MOTION FOR EXTENSION
OF TIME TO FILE
AFFIDAVIT OF MERIT**

Pro se Plaintiffs move for an extension of time of 45-days to supplement their Notice of Intent to File Suit with an affidavit of merit. The basis for their motion is as follows:

In January of 2016, the Fonda and Andre Patrick came to attorney H. Edward Smith, Esq., seeking representation in a medical malpractice action. Attorney Smith undertook representation but waited until the brink of the running of the statute of limitations, until January 22, 2018, to file a Notice of Intent to File Suit and did so without an affidavit of merit from an expert (the statute of limitations likely ran on or about January 30, 2018).

Instead of retaining an expert and filing an affidavit of merit, Attorney Smith withdrew from the case on February 14, 2018. As such, Fonda and Andre Patrick were left as *pro se* litigants at a time that was only **eight days** from when the NOI needed to be supplemented with an affidavit of merit, as provided by S.C. Code §15-79-125(A) and S.C. Code §15-36-100(C)(1). With such a short period of time with which to supplement the NOI, Fonda and Andre Patrick,

despite diligent effort, could not secure substitute counsel to assist with finding an expert to review the medical file and provide an affidavit of merit.

Recognizing "that the neglect of [their prior] attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to an attorney can be successfully used as a ground for relief," Davis v. Lunceford, 279 S.C. 503, 506, 309 S.E.2d 791, 793 (Ct. App. 1983), *pro se* litigants Fonda and Andre Patrick pled for leeway from the Court and submit that their having been unable supplement their meritorious NOI with the affidavit, during the eight-day time period discussed above, represents **excusable negligent** on their part, as Attorney Smith's actions and withdrawal left them in a very difficult and precarious position. See Davis v. Lunceford, 274 S.C. 576, 266 S.E.2d 73 (1980) (time should be enlarged because of a showing of a meritorious claim and excusable neglect). With such a short window with which to secure an expert and affidavit of merit, no other attorneys would agree to spend the time and money to review the file, as every other attorney they contacted was concerned that his/her efforts would be in vain, as the court would find that the deadline to supplement the NOI had already run.

Pro se litigants Fonda and Andre Patrick respectfully request that this Court grant them 45-days to supplement the NOI with an affidavit of merit. If given such an extension of time, the *pro se* litigants believe that can find substitute counsel and obtain the required affidavit.

Respectfully submitted,



Fonda E. Patrick (*pro se*)
 Andre Patrick (*pro se*)
 P.O. Box 274
 Blackville, SC 29817
 803-803-634-3922 (telephone)
Pro Se Plaintiffs

June _____, 2018
 Columbia, South Carolina

Certificate of Electronic Notification

Recipients

Robert Brown - Notification transmitted on 11-07-2018 01:17:36 PM.

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A filing has been submitted to the court RE: 2018NI0200003

Official File Stamp: 11-07-2018 01:17:24 PM

Court: CIRCUIT COURT

Common Pleas

Aiken

Case Caption: Fonda E Patrick , plaintiff, et al VS Gasnel E
Bryan , defendant, et al

Event(s):

Notice/Notice of Appearance

Document(s) Submitted: Affidavit/Affidavit of

Filed by or on behalf of: Francis M. Hinson, IV

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Robert Lesley Brown

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Aiken Regional Medical Centers Llc

Aiken Regional Medical Centers Llc

Frank Y Chase

Jonathan H Anderson

Aiken Regional Medical Centers Llc

Eugene A. Fallon, Jr.

Andre Patrick for Andre Patrick

Andre Patrick for Andre Patrick

Fonda E Patrick for Fonda E Patrick

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Gasnel E Bryan

Aiken Regional Medical Centers Llc

Fonda E Patrick for Fonda E Patrick

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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Fonda E. Patrick and Andre Patrick,
Plaintiffs,

Civil Action No.: 2018-NI-02-00003

vs.

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

**CORRECTED CERTIFICATE OF
SERVICE BY MAIL
(Certified Mail)**

Defendants.

Victoria L. Baker personally appeared before me and stated the following under oath:

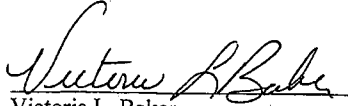
I am not less than 18 years of age. I am not an attorney in this action. I am not a party in this action.

I served the **Notice of Intent to File Suit** in the above matter by mailing the **Notice of Intent to File Suit** by certified mail, return receipt requested. Mailing was made on November 8, 2018 from the United States Post Office, Columbia, South Carolina. The envelope was addressed as follows:

**Aiken Regional Medical Centers, LLC
c/o Corporate Service Company, Registered Agent
1703 Laurel Street
Columbia, SC 29201**

The Post Office receipt is attached with the return receipt as Exhibit "A, showing acceptance of service by Corporate Service Company, Registered Agent for Aiken Regional Medical Centers, LLC on **November 9, 2018.**

SWORN TO before me this 28th
day of November, 2018
Barney Thomas
Notary Public for South Carolina
My Commission Expires 11/28


Victoria L. Baker
Finkel Law Firm
Post Office Box 1799
Columbia, SC 29202
803-765-2935
vbaker@finkellaw.com

ELECTRONICALLY FILED - 2018 Nov 28 3:10 PM - AIKEN - COMMON PLEAS - CASE#2018NI0200003

Exhibit "A"

FINKEL
LAW FIRM LLC

Francis M. "Brink" Hinson, IV, Esq.
bhinson@FinkelLaw.com

Reply to Columbia Office

November 8, 2018

Via Certified Mail Return-Receipt Requested

Aiken Regional Medical Centers, LLC
c/o Corporate Service Company, Registered Agent
1703 Laurel Street
Columbia, SC 29201

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; Jonathan H. Anderson, M.D. Individually
and as an agent and/or employee of Aiken Regional Medical Centers, LLC
and Aiken Regional Medical Centers, LLC
Civil Action No: 2018-NI-02-00003
Our File No: 87195-53767

Dear Dr. Sir/Madam:

Please be advised that my office recently filed a notice of appearance and is now representing Fonda and Andre Patrick in the above-referenced matter. Initially, the Notice of Intent to File Suit in this claim was filed by attorney H. Edward Smith, with the law firm of Brown Jefferies & Boulware. However, Mr. Brown and his firm were later relieved as counsel for the Plaintiffs. Subsequently, upon a motion filed by Mr. and Mrs. Patrick, who at the time were proceeding as *pro se* litigants, Judge Walton J. McLeod issued an Order (signed on September 28, 2018) granting the Plaintiffs an extension of time, until November 13, 2018, to supplement the Notice of Intent to File Suit with an Affidavit of Merit. For your convenience and ease of reference, a copy of the Notice of Intent to File Suit and the Order from Judge McLeod are enclosed.

Pursuant to the Order, enclosed for service upon you, please find the *Supplement to the Notice of Intent to Sue (Attaching Affidavit of Merit)*. I would ask that you please forward this to your attorney and have him/her contact me accordingly.

Sincerely,



Francis M. "Brink" Hinson, IV

BMH/vlb
Enclosures (as noted)

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
Tel: (803) 765-2935
Fax: (803) 252-0786

CHARLESTON
Litigation, Real Estate & REO
3955 Faber Place Drive, Suite 200
Post Office Box 225 (29402)
North Charleston, SC 29405
Tel: (843) 577-5460

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Post Office Box 71727 (29415)
North Charleston, SC 29405
Tel: (843) 577-5460

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Exhibit "A"

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. - Print your name and address on the reverse so that we can return the card to you. - Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <i>[Signature]</i> ☐ Agent ☐ Addressee B. Received by (Printed Name) <i>C. D. Smith</i> C. Date of Delivery <i>11/1/18</i> D. Is delivery address different from item 1? ☐ Yes ☐ No If YES, enter delivery address below:	
1. Article Addressed to: <i>Aiken Regional Medical Centers, LLC</i> <i>c/o Corporate Service Company,</i> <i>Registered Agent</i> <i>1703 Laurel St.</i> <i>Columbia SC 29201</i>		3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☒ C.O.D.	
2. Article Number (Transfer from) <i>7012 3460 0003 5562 6013</i>		4. Restricted Delivery? (Extra Fee) ☐ Yes	

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Restricted Delivery Fee (Endorsement Required)	NOV 08 2018	
Total Postage & Fees	\$ 8.04	

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 City, State, ZIP+4[®] *Columbia SC 29201 87195-5369*

PS Form 3800, August 2006 See Reverse for Instructions

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Fonda E. Patrick and Andre Patrick,
Plaintiffs,

Civil Action No.: 2018-NI-02-00003

vs.

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

**CORRECTED CERTIFICATE OF SERVICE
BY MAIL
(Certified Mail)**

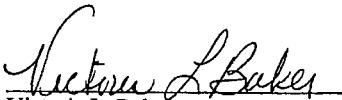
Victoria L. Baker personally appeared before me and stated the following under oath:

I am not less than 18 years of age. I am not an attorney in this action. I am not a party in this action.

I served the *Notice of Intent to File Suit* in the above matter by mailing the *Notice of Intent to File Suit* by certified mail, return receipt requested. Mailing was made November 08, 2018 from the United States Post Office, Columbia, South Carolina. The envelope was addressed as follows:

**Gasnel Bryan, M.D.
209 Abbeville Rd., NW
Aiken, SC 29801**

The Post Office receipt is attached with the return receipt as Exhibit "A, dated November 15, 2018 showing acceptance of service for the *Notice of Intent to File Suit*.


Victoria L. Baker
Finkel Law Firm
Post Office Box 1799
Columbia, SC 29202
803-765-2935
vbaker@finkellaw.com

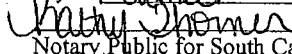
SWORN TO before me this 26th
day of November, 2018

Notary Public for South Carolina
My Commission Expires 6/25/28

Exhibit "A"



Francis M. "Brink" Hinson, IV, Esq.
bhinson@FinkelLaw.com

Reply to Columbia Office

November 8, 2018

Via Certified Mail Return-Receipt Requested

Gasnel E. Bryan, M.D.
209 Abbeville Rd NW
Aiken, SC 29801

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; Jonathan H. Anderson, M.D. Individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC and Aiken Regional Medical Centers, LLC
Civil Action No: 2018-NI-02-00003
Our File No: 87195-53767

Dear Dr Bryan:

Please be advised that my office recently filed a notice of appearance and is now representing Fonda and Andre Patrick in the above-referenced matter. Initially, the Notice of Intent to File Suit in this claim was filed by attorney H. Edward Smith, with the law firm of Brown Jefferies & Boulware. However, Mr. Brown and his firm were later relieved as counsel for the Plaintiffs. Subsequently, upon a motion filed by Mr. and Mrs. Patrick, who at the time were proceeding as *pro se* litigants, Judge Walton J. McLeod issued an Order (signed on September 28, 2018) granting the Plaintiffs an extension of time, until November 13, 2018, to supplement the Notice of Intent to File Suit with an Affidavit of Merit. For your convenience and ease of reference, a copy of the Notice of Intent to File Suit and the Order from Judge McLeod are enclosed.

Pursuant to the Order, enclosed for service upon you, please find the *Supplement to the Notice of Intent to Sue (Attaching Affidavit of Merit)*. I would ask that you please forward this to your attorney and have him/her contact me accordingly.

Sincerely,

A handwritten signature in cursive script that reads "Brink Hinson".

Francis M. "Brink" Hinson, IV

BMH/vlb
Enclosures (*as noted*)

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
Tel: (803) 765-2935
Fax: (803) 252-0786

CHARLESTON
Litigation, Real Estate & REO
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Post Office Box 225 (29402)
North Charleston, SC 29405
Tel: (843) 577-5460

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North Charleston, SC 29405
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1. Article Addressed to: Gasnel Bryan, m.d. 209. Abbeville Rd NW Aiken SC 29801		B. Received by (Printed Name) CLAIRE HUMPHRIES C. Date of Delivery	
2. Article Number (M) 7012 3460 0003 5562 7986		D. Is delivery address different from item 1? ☐ Yes ☐ No If YES, enter delivery address below:	
3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☒ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.		4. Restricted Delivery? (Extra Fee) ☐ Yes	
PS Form 3811, February 2004		Domestic Return Receipt 702595-02-M-1540	

7012 3460 0003 5562 7986

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For delivery information visit our website at www.usps.com	
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☒ Certified Fee	
☒ Return Receipt Fee (Endorsement Required)	
☐ Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$ 3.45	
Sent To Gasnel Bryan MD Street, Apt. No., or PO Box No. 209 Abbeville Rd NW City, State, ZIP+4 Aiken SC 29801 87195-5376	
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November 15, 2018 at 11:09 am

Delivered

AIKEN, SC 29801

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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Fonda E. Patrick and Andre Patrick,

Civil Action No.: 2018-NI-02-00003

Plaintiffs,

vs.

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

**CORRECTED CERTIFICATE OF
SERVICE BY MAIL
(Certified Mail)**

Defendants.

Victoria L. Baker personally appeared before me and stated the following under oath:

I am not less than 18 years of age. I am not an attorney in this action. I am not a party in this action.

I served the *Notice of Intent to File Suit* in the above matter by mailing the *Notice of Intent to File Suit* by certified mail, return receipt requested. Mailing was made November 08, 2018 from the United States Post Office, Columbia, South Carolina. The envelope was addressed as follows:

**Frank Y. Chase, MD
Aiken Surgical Associates
410 University Parkway #2310
Aiken, SC 298016835**

The Post Office receipt is attached with the return receipt as Exhibit "A, dated November 13, 2018, showing acceptance of service for the *Notice of Intent to File Suit*.

SWORN TO before me this 28th
day of November, 2018

Kathy Shomen
Notary Public for South Carolina
My Commission Expires: 6/25/28

Victoria L. Baker
Victoria L. Baker
Finkel Law Firm
Post Office Box 1799
Columbia, SC 29202
803-765-2935
vbaker@finkellaw.com

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EXHIBIT

“A”



Francis M. "Brink" Hinson, IV, Esq.
bhinson@FinkelLaw.com

Reply to Columbia Office

November 8, 2018

Via Certified Mail Return-Receipt Requested

Frank Y. Chase, MD
Aiken Surgical Associates
410 University Pkwy #2310
Aiken, SC 29801-6835

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; Jonathan H. Anderson, M.D. Individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC and Aiken Regional Medical Centers, LLC
Civil Action No: 2018-NI-02-00003
Our File No: 87195-53767

Dear Dr. Chase:

Please be advised that my office recently filed a notice of appearance and is now representing Fonda and Andre Patrick in the above-referenced matter. Initially, the Notice of Intent to File Suit in this claim was filed by attorney H. Edward Smith, with the law firm of Brown Jefferies & Boulware. However, Mr. Brown and his firm were later relieved as counsel for the Plaintiffs. Subsequently, upon a motion filed by Mr. and Mrs. Patrick, who at the time were proceeding as *pro se* litigants, Judge Walton J. McLeod issued an Order (signed on September 28, 2018) granting the Plaintiffs an extension of time, until November 13, 2018, to supplement the Notice of Intent to File Suit with an Affidavit of Merit. For your convenience and ease of reference, a copy of the Notice of Intent to File Suit and the Order from Judge McLeod are enclosed.

Pursuant to the Order, enclosed for service upon you, please find the *Supplement to the Notice of Intent to Sue (Attaching Affidavit of Merit)*. I would ask that you please forward this to your attorney and have him/her contact me accordingly.

Sincerely,

Francis M. "Brink" Hinson, IV

BMH/vlb
Enclosures (*as noted*)

COLUMBIA
1201 Main Street, Suite 1800
Post Office Box 1799 (29202)
Columbia, SC 29201
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CHARLESTON
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North Charleston, SC 29405
Tel: (843) 577-5460

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November 27, 2018

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Delivery Signature and Address



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Last Updated: 8/30/2018

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This item was delivered on 11/13/2018 at 12:17:00

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Postage	\$ 1.84
Certified Fee	3.45 NOV 08 2018
Return Receipt Fee (Endorsement Required)	1.75
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 8.04

Sent to: FRANK Y Chase MD - Aiken Surgical Assoc
Street, Apt. No., or PO Box No. 40 University Pkwy #2315
City, State, Zip+4: Aiken SC 29801 87195-5376
PS Form 3800, August 2006 See Reverse for Instructions

ELECTRONICALLY FILED - 2018 Nov 28

IKEN COMMON PLEASE USE #1 IN0200003

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Tracking Number: 70123460000355627993

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Your item was delivered to an individual at the address at 12:17 pm on November 13, 2018 in AIKEN, SC 29801.

✓ **Delivered**

November 13, 2018 at 12:17 pm
Delivered, Left with Individual
AIKEN, SC 29801

Get Updates ✓

Text & Email Updates

Tracking History

November 13, 2018, 12:17 pm

Delivered, Left with Individual
AIKEN, SC 29801

Your item was delivered to an individual at the address at 12:17 pm on November 13, 2018 in AIKEN, SC 29801.

November 12, 2018, 4:37 am

Departed USPS Regional Facility
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November 10, 2018, 8:35 pm

Arrived at USPS Regional Facility

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Fonda E Patrick and Andre Patrick,

Plaintiffs,

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 Center, LLC; Jonathan H. Anderson, M.D., Individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; and Aiken Regional Medical Centers, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2018-NI-02-00003

Aiken Regional Medical Centers' Motion to Dismiss NOI

PLEASE TAKE NOTICE that at such time and place as set by the Court, Defendant Aiken Regional Medical Centers, LLC (hereinafter "Aiken Regional") will move pursuant to Rules 3 and 12(b)(2)(5)&(6), SCRCP, for an order dismissing Plaintiffs' Notice of Intent to File Suit ("NOI") on the basis that Plaintiffs' claims are barred by the applicable statute of limitations.

RELEVANT FACTS AND PROCDURAL HISTORY

This is a medical malpractice action. Plaintiffs filed their NOI on January 22, 2018; however, as discussed in more detail below, Plaintiffs did not serve the NOI upon the defendants until November 9, 2018.

In the NOI, Plaintiffs alleged they were injured as a result of a surgical procedure performed by Defendant Bryan at Aiken Regional on January 30, 2015; however, Plaintiffs did not contemporaneously file an affidavit of an expert witness as required by S.C. Code § 15-79-

125. Rather, Plaintiffs alleged they had reason to believe the statute of limitations was going to expire within ten days of the filing of the NOI; therefore, they stated they would file an expert affidavit within 45 days as allowed under S.C. Code § 15-36-100(C)(1). As a result, they had until March 8, 2018 to file an expert affidavit.

On February 14, 2018, Plaintiffs consented to H. Edward Smith being relieved as their counsel (see Feb. 14, 2018 Consent Order).

On June 27, 2018, more than 5 months after they filed their NOI, Plaintiffs filed a motion for an extension of time to file an affidavit of an expert witness. Plaintiffs' motion was scheduled to be heard on September 24, 2018. As of the hearing date, Plaintiffs still had not served the NOI upon defendants nor given defendants any notice of their motion. Following the hearing, the Court granted Plaintiffs a 45 day extension to file an expert affidavit (see September 28, 2018 Order).¹

On November 7, 2018, Plaintiffs filed a Supplement to Notice of Intent to Sue which included an expert affidavit. Plaintiffs served the Supplement upon Defendant Aiken Regional via certified mail on November 9, 2018 (see Corrected Certificate of Service by Mail filed Nov. 28, 2018). That was the first time Defendant Aiken Regional had been served with any of the filings in this action, and constituted the first notice Defendant Aiken Regional had of this action.

LEGAL ANALYSIS

The applicable statute of limitations in this case is three years. S.C. Code § 15-3-545.

¹ It appears from the Order that the Court granted Plaintiffs' motion due to the fact that none of the defendants had filed a motion to dismiss the NOI, nor had any of the defendants objected to Plaintiffs' request; however, that was purely because the defendants had no knowledge of the NOI nor Plaintiffs' request for an extension. Since Defendant Aiken Regional had not been served, the Court lacked personal jurisdiction over it. See *Brown v. Evatt*, 322 S.C. 189, 470 S.E. 2d 848 (1996). Therefore, Defendant contends the Court erred in granting the motion and the Order should be withdrawn and/or considered null and void. Consequently, in addition to Plaintiffs' claims being barred by the applicable statute of limitations, Plaintiffs NOI should be dismissed for failing to timely adhere to the requirements of S.C. Code §§ 15-79-125 and 15-36-100.

Filing a NOI tolls the applicable statute of limitations; however, that is subject to the NOI being served upon all defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure. S.C. § 15-79-125. Under the Rules, a summons and complaint must be served within the statute of limitations or within 120 days of filing. Rule 3, SCRPC; *Mims ex rel. Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012).

Plaintiffs filed the NOI on January 22, 2018. Plaintiffs have repeatedly acknowledged that the statute of limitations began to run on January 30, 2015 when the surgery was performed by Dr. Bryan (see NOI ¶ D; Mot. For Ext. of Time, p. 1); therefore, pursuant to S.C. Code § 15-3-545, Plaintiffs filed the NOI just before the statute of limitations was set to expire on January 30, 2018. However, once they filed the NOI, they were then required to properly serve it within 120 days of the filing as dictated by Rule 3, SCRPC, which meant Plaintiffs had until May 22, 2018 to complete service. As noted above, Aiken Regional was not served until November 9, 2018, nearly six months after the deadline. Therefore, Plaintiffs failed to commence this action within the applicable statute of limitations and Defendant Aiken Regional is entitled to a dismissal as a matter of law.

Wherefore, for the reasons stated herein, Defendant Aiken Regional respectfully requests that the above-captioned action be dismissed and for such other and further relief as the Court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

s/ Kenneth N. Shaw

Kenneth N. Shaw SC Bar 77859

kshaw@hsblawfirm.com

J. Ben Alexander SC Bar 15323

baalexander@hsblawfirm.com

P.O. Box 2048

Greenville, SC 29602

864-240-3200

864-240-3300 (fax)

Attorney for Defendant Aiken Regional Medical
Centers, LLC

Dated: December 19, 2018
Greenville, SC

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Fonda E. Patrick and Andre Patrick,)

Plaintiffs,)

v.)

Gasnel E. Bryan, M.D., Individually and)

As an agent and/or employee of Aiken)

Regional Medical Centers, L.L.C.; Frank)

Y. Chase, M.D., Individually and as an)

agent and/or employee of Aiken Regional)

Medical Centers, L.L.C.; Jonathan H.)

Anderson, M.D., Individually and as an)

agent and/or employee of Aiken Regional)

Medical Centers, L.L.C.; and Aiken)

Regional Medical Centers, L.L.C.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-NI-02-00003

**NOTICE OF MOTION AND MOTION
TO DISMISS NOTICE OF INTENT
TO FILE SUIT ON BEHALF OF
GASNEL E. BRYAN, M.D. AND
JONATHAN H. ANDERSON, M.D.**

PLEASE TAKE NOTICE that at such time and place as set by the Court, the Defendants, Gasnel E. Bryan, M.D. (Dr. Bryan) and Jonathan H. Anderson, M.D. (Dr. Anderson) will move pursuant to SCRCP Rules 3, 12(b)(2)(5)&(6) for an order dismissing Plaintiffs' Notice of Intent to File Suit (NOI) on the basis that the Plaintiffs' claims are barred by the applicable statute of limitations.

The Defendant, Aiken Regional Medical Centers (ARMC), filed a Motion to Dismiss in the Aiken County Court of Common Pleas at 10:03am on December 19, 2018. The "RELEVANT FACTS AND PROCEDURAL HISTORY" and "LEGAL ANALYSIS" in ARMC's motion are the same for Drs. Bryan and Anderson except that Dr. Anderson was served with the NOI on or about November 26, 2018 and Dr. Bryan on or about December 14, 2018.

For these reasons this part of ARMC's motion is incorporated herein by reference with the changes set forth above.

In addition, Dr. Anderson was not named as a physician who breached the standard of care in the Affidavit of Scott E. Hockenberry, M.D. dated November 7, 2018, filed by the Plaintiff.

WHEREFORE, for the reasons stated herein, Defendants Gasnel E. Bryan, M.D. and Jonathan H. Anderson, M.D. respectfully request that the above-captioned action be dismissed and for such other and further relief as the Court deems just and proper.

December 28th, 2018

NANCE, McCANTS & MASSEY

/s/ James D. Nance

James D. Nance

SC Bar No.: 4171

218 Newberry Street, SW

Aiken, SC 29801

jimnance@nancefirm.com

803-649-6200

Attorney for Defendants:

Gasnel E. Bryan, M.D. and

Jonathan H. Anderson, M.D.

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Fonda E. Patrick and Andre Patrick,)

Plaintiffs,)

v.)

Gasnel E. Bryan, M.D., Individually and)
As an agent and/or employee of Aiken)
Regional Medical Centers, L.L.C.; Frank)
Y. Chase, M.D., Individually and as an)
agent and/or employee of Aiken Regional)
Medical Centers, L.L.C.; Jonathan H.)
Anderson, M.D., Individually and as an)
agent and/or employee of Aiken Regional)
Medical Centers, L.L.C.; and Aiken)
Regional Medical Centers, L.L.C.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-NI-02-00003

CERTIFICATE OF MAILING

I certify that I have served the Plaintiff with the foregoing **Notice of Motion and Motion to Dismiss Notice of Intent** by placing a true and accurate copy thereof in the United States Mail, First Class postage affixed to ensure delivery to the following:

Francis M. Hinson, IV
FINKLE LAW FIRM, LLC
1201 Main St., Ste. 1800
P.O. Box 1799
Columbia, SC 29202

Kenneth N. Shaw
J. Ben Alexander
HAYNSWORTH SINKLER BOYD
P.O. Box 2048
Greenville, SC 29602

Hutson S. Davis, Jr.
WARD & BROMLEY, LLC
10 Pinckney Colony Rd.
Victoria Bldg, Ste. 200
Bluffton, SC 29909

This 28th day of December, 2018

NANCE, McCANTS & MASSEY

By: /s/ James D. Nance
James D. Nance
SC Bar No.: 4171
218 Newberry Street, SW (29801)
P.O. Box 2881
Aiken, SC 29802-2881
(803) 649-6200
jimnance@nancefirm.com

Attorney for Defendants:
Gasnel E. Bryan, M.D. and
Jonathan H. Anderson, M.D.

2. At the hearing, Plaintiffs represented to the Court that as of the date of the hearing none of the Defendants in the case had been served.

Therefore, based on the arguments advanced in ARMC's Motion to Dismiss NOI and the above additional grounds, Plaintiffs failed to serve any defendant in this case within 120 days as required by Rule 3, SCRCPP, and as incorporated into the NOI statute. S.C. Code Ann. § 15-79-125. Plaintiffs' case should be dismissed pursuant to Rule 12(b)(5) & (6), SCRCPP, because the applicable statute of limitations expired on Plaintiffs' claims on May 22, 2018, which was 120 days after Plaintiffs filed their NOI, within which time Plaintiffs were required to serve their NOI on all defendants to meet the statute of limitations deadline. Rule 3(a)(2), SCRCPP.

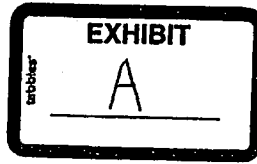
This Motion is further based upon the applicable statutory and case law of the State of South Carolina, the *South Carolina Rules of Civil Procedure*, and any pleadings, including exhibits thereto, filed herein.

The undersigned affirms, pursuant to Rule 11(a) of the *South Carolina Rules of Civil Procedure*, that consultation with opposing counsel would serve no useful purpose.

JOHNSON & DAVIS, PA

By: s/ Hutson S. Davis, Jr.
Hutson S. Davis, Jr.
S. Harrison Williams
10 Pinckney Colony Road, Ste. 200
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Chase, M.D.

January 4, 2019
Bluffton, SC



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1

1 State of South Carolina) In the Court
2 County of Aiken) Of Common Pleas
3 Fonda E. and Andre) Case No.: 2018-NI-02-00003
4 Patrick)
5 vs. Plaintiffs,) Transcript of Record
6 Gasnel E. Bryan, et al.,)
7 Defendants.)
8 _____)

9 September 24, 2018
10 Aiken, South Carolina

11
12 BEFORE:

13 The Honorable Walton McLeod, Judge

14
15 APPEARANCES:

16 Fonda E. and Andre Patrick, Pro se
17 Plaintiffs

18
19 No Appearance On Behalf Of The Defendants
20
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24
25

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

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Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

1 Thereupon, the following proceedings were had,

2 THE COURT: Patrick versus Bryan.

3 MS. PATRICK: Yes, Your Honor. Fonda and Andre
4 Patrick.

5 THE COURT: Ms. Patrick, are you representing
6 yourself?

7 MS. PATRICK: Yes, sir.

8 THE COURT: Okay. I'll go out of order. We're
9 actually doing number 12 now. This is a motion for an
10 extension to file an affidavit. So you're representing
11 yourself?

12 MS. PATRICK: Yes, sir.

13 THE COURT: Go ahead and tell me about this, Ms.
14 Patrick.

15 MS. PATRICK: Yes, Your Honor. I did have
16 representation for a lawsuit against Gasnel Bryan for
17 surgery that I undertook in January of 2015 and I was in
18 the hospital for six months and upon my release I
19 retained an attorney and he let the case kind of drop for
20 quite a while and at the eleventh hour. In December of
21 2017 he notified me that he had gotten with an expert on
22 the case and they did not see that there was a case so he
23 asked to be released as my representation from the case.

24 THE COURT: Who was your lawyer?

25 MS. PATRICK: Edward Smith, Barnwell County.

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P.O. Box 184, Lexington, South Carolina 29071

1 THE COURT: Okay. When was he relieved?

2 MS. PATRICK: He was relieved because his suggestion
3 was that --

4 THE COURT: When? When?

5 MS. PATRICK: When. In February.

6 THE COURT: Of 2018?

7 MS. PATRICK: '18. Mm-hmm.

8 THE COURT: Okay. And I'm just looking at your file
9 for the first time. So had you filed suit?

10 MS. PATRICK: My understanding was that I had filed
11 suit but once I got with Mr. Smith again, he had not
12 filed anything. He had just filed the intent without any
13 of the people that are on the suit receiving any
14 notification of it.

15 THE COURT: So you're seeking leave from the Court
16 to seek out an expert; is that correct?

17 MS. PATRICK: I'm actually seeking --

18 THE COURT: Or time.

19 MS. PATRICK: -- time so that I can seek an attorney
20 and an expert.

21 THE COURT: That's the extent of your motion?

22 MS. PATRICK: Yes, sir.

23 THE COURT: Okay. Well, I've got to take a look at
24 this. I'm writing some notes on you in your file but you
25 may have a problem there with the amount of time that's

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

1 passed. I haven't reviewed all of the dates involved but
2 you need to understand you may have a problem --

3 MS. PATRICK: Yes.

4 THE COURT: -- as far as whether I can grant such a
5 request. With that I said, I'm not going to rule from
6 the bench because I want to make sure I look at the
7 documents before I make such a decision. But we'll
8 review this and make a decision whether we can grant you
9 such an extension, okay?

10 MS. PATRICK: Okay.

11 THE COURT: Is there any other circumstances
12 you want to tell me about? You have never gotten a
13 lawyer. Have you tried to get another lawyer?

14 MS. PATRICK: I have tried several attorneys and I
15 have even gone to Charleston, Myrtle Beach and there --

16 THE COURT: You don't need -- I'm sorry. You don't
17 need to tell me about your meetings with attorneys.

18 MS. PATRICK: But just upon like me working with
19 Mr. Smith, Attorney Smith, I just don't think that I
20 received the proper representation through him because he
21 didn't give me the adequate representation.

22 THE COURT: Well, that's not a matter for what we're
23 here about though. You're asking about an extension of
24 time. Who helped you with this motion?

25 MS. PATRICK: There was another attorney that said

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

1 that he would take the case but he wasn't willing to take
2 it so he really just gave me, like helped me and said
3 this is probably what you need to do if you're looking
4 for someone.

5 THE COURT: Okay. All right. Well, we'll review
6 this file and see if we can get you an answer as soon as
7 possible, okay?

8 MS. PATRICK: Okay.

9 THE COURT: I don't want to rule from the bench when
10 I haven't reviewed the documents.

11 MS. PATRICK: Okay. So from this point what do we
12 need to do?

13 THE COURT: I'll make a decision and I'll file it
14 and you just need to make sure you check with the Clerk's
15 Office to see when something has been filed, my ruling,
16 okay?

17 MS. PATRICK: Okay. Thank you.

18 WHEREUPON, THE HEARING WAS CONCLUDED.
19
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25

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
and Official Circuit Court Reporter for the Eleventh Judicial
Circuit in and for the State of South Carolina, do hereby
certify that I reported the proceedings in the before
captioned case in the Court of Common Pleas in and for the
State of South Carolina on the 24th day of September, 2018.

I FURTHER CERTIFY that the forgoing 6 pages
constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel
to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at
Lexington County, this 3rd day of December, 2018.

By:s/ Steven E. LeBlanc

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-NI-02-00003

Fonda E. Patrick and
Andre Patrick,

Plaintiffs,

vs.

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 an
agent and/or employee of Aiken Regional
Medical Centers, LLC; Jonathan H.
Anderson, M.D., Individually and as an
agent and/or employee of Aiken Regional
Medical Centers, L.L.C.; and Aiken
Regional Medical Centers, LLC,

Defendants.

**AFFIDAVIT OF
FONDA E. PATRICK**

PERSONALLY APPEARED BEFORE ME, Fonda E. Patrick, who being duly sworn
deposes and says as follows:

1. I am an adult, over 18 years of age, and of competent mind. I declare that, to the best of my knowledge, recollection and belief, the information contained herein is truthful and accurate.
2. On January 30, 2015, I underwent an abdominal surgery at Aiken Regional Medical Center for the removal of my ovaries.
3. While I am not a physician, nurse, or other healthcare profession, and although I do not fully understand the medical issues surrounding my post-operative course, I do know that, following the surgery performed on January 30, 2015, I experienced terrible problems and was very sick. After spending several weeks at Aiken Regional Medical Center, I was transferred to MUSC and spent a significant amount of time there. It was not until May of 2015 that I was

discharged from MUSC. Even after being discharged and returning home, it took considerable time before I was able to function in a meaningful way.

4. In January of 2016, a little over half of year after my discharge from MUSC, I (along with my husband) retained the legal services of H. Edward Smith, Esq. It was my understanding that Mr. Smith was going to investigate whether I had a viable case for medical negligence and, if I did, that he would bring a lawsuit on my behalf. Further, it was my understanding that Mr. Smith and his law firm's staff were going to gather my medical records and do all that was needed to pursue a case for me. Over the course of the next nearly two years, I was frequently in contact with Mr. Smith and others at his firm. I was frequently told that things were moving forward and that I had a "substantial case."

5. On January 22, 2017, Mr. Smith filed a Notice of Intent to File Suit on my behalf. On February 13, 2017, Mr. Smith asked that I sign a paper that would relieve him as my counsel. I signed the document, and per my understanding, the very next day, the Court granted his request to be relieved as my attorney.

6. I tried diligently to find substitute counsel and contacted numerous law firms. However, due to the very short period of time in which action needed to be taken, every attorney with whom I spoke was unwilling to even so much as meet with me or otherwise look at my case. Thus, despite having brought my case to Mr. Smith when there was more than two years remaining on the statute of limitations, I had been left with a very small period of time in which to secure alternative representation. Not knowing any physicians who would review my medical records so as to provide an affidavit, I was unsure how to proceed.

7. On September 28, 2018, Judge McLeod granted me an extension of 45-days from the date of his order (thus until November 13, 2018), in which to submit an affidavit of merit in

support of the Notice of Intent to File Suit that had previously been filed against some of my healthcare providers.

8. Having received an order from the Court providing assurance that an affidavit of merit would be accepted so long as it was filed on or before November 13, 2018, I was able to secure new counsel. More specifically Francis M. "Brink" Hinson, IV, Esq., was willing to review my file and hire a physician to review the medical record, and he was thus able submit an affidavit of merit prior to the expiration of the extension of time granted by the Court.

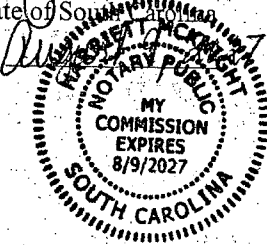
FURTHER AFFIANT SAYETH NOT.

Fonda E. Patrick
Fonda E. Patrick

Subscribed and sworn to before me
this 25th day of February 2019

Hairnet McKnight
Notary Public for the State of South Carolina

My commission expires: 8/9/2027



STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Fonda E. Patrick and Andre Patrick,
Plaintiffs,

vs.

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

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Civil Action No.: 2018-NI-02-00003

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Because Plaintiffs' Notice of Intent to File Suit was timely filed within the applicable statute of limitations and a qualifying affidavit of merit was filed within the requisite time period, as extended by the Court, Defendants' motions to dismiss Plaintiffs' NOI should be denied.

BACKGROUND

On January 30, 2015, Plaintiff Fonda Patrick underwent a salpingo-oophorectomy (the surgical removal of the ovaries and fallopian tubes) at Aiken Regional Medical Center. As a consequence of the surgery, she suffered injury and required nearly four months of hospitalization.

The Plaintiffs' Notice of Intent to File Suit (hereinafter "NOI") was timely filed, by H. Edward Smith, Esq., on January 22, 2018. The NOI was filed eight days before the three-year anniversary of Mrs. Patrick's surgery, and thus filing was indisputably accomplished within the applicable three-year statute of limitations. S.C. Code § 15-79-125(A) provides that "[f]iling the Notice of Intent to File Suit tolls all applicable statutes of limitations." (*emphasis added*). See

also, Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 59, 744 S.E.2d 547, 548 (2013) (stating that “filing the Notice of Intent tolls the statute of limitations”). Thus, the statute of limitations was tolled by the filing of NOI on January 22, 2018.

While the NOI was initially filed without an accompanying affidavit of merit, this is permissible, as provided in S.C. Code § 15-36-100(C)(1), because the statute of limitation would arguably have run within ten days from when the NOI was filed. In mid-February, H. Edward Smith, Esq., sought to withdraw from the case, and on February 14, 2018, the Court granted his request to be relieved as counsel. Thus, Plaintiffs were left as *pro se* litigants in a complicated medical malpractice action with confusing and meticulous requirements for affidavits, notices of intent, etc. Plaintiffs sought to obtain new counsel, but due to the very short time limitations, were unable to retain a law firm that was willing to review the file to spend the money needed to hire an expert to provide an affidavit of merit.

On June 27, 2018, Plaintiffs filed a motion seeking an extension of time to file an affidavit of merit. The motion was not heard until nearly two months later, when, on September 24, 2018, it came before the Honorable Walton J. McLeod. At the end of the week, on September 28, 2018, the Court issued an order granting the Plaintiffs an extension of 45-days from the date of the ruling (thus until November 13, 2018), by which to submit an affidavit of merit in support of the previously filed Notice of Intent to File Suit. (**Exhibit “A”**, Order of J. Walton J. McLeod, IV, dated 09-28-2018). With the benefit of the Court’s extension of time, Plaintiffs were then able to find new counsel. (**Exhibit “B”**, Affidavit of F. Patrick, ¶ 8).

On November 7, 2018, several days before the November 13th deadline, Plaintiffs’ new counsel filed an appearance in the case and filed an affidavit of merit testifying to medical negligence committed by the Defendants. Within days thereafter, all of the Defendants were served. Despite the Notice of Intent being timely filed, the filing of the NOI tolling the statute of

limitations, and the Plaintiffs having filed an affidavit of merit well within the time period extended by the Court, the Defendants, nonetheless, seek to dismiss Plaintiffs' case. As discussed herein Defendants' motion should be denied and Plaintiffs' case should be allowed to proceed.

APPLICABLE LAW AND ARGUMENT

Our Supreme Court has stated: "**Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.**" Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (*emphasis added*). Our law gives the trial court broad discretion with regard to the granting of extensions of time. To this regard, S.C. Code § 15-36-100(C)(1) provides:

The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. **Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.** If an affidavit is not filed within the period specified in this subsection **or as extended by the trial court** and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.

Referring to the default time by which complaints are to be served as set forth in Rule 3, SCRCF, S.C. Code § 15-79-125 provides that an NOI is typically to be served within 120-day period of its filing with the clerk of court. However, the trial court has wide discretion to extend this time period, and the South Carolina Rules of Civil Procedure and our case law give great deference to the trial court with regard to decisions to extend deadlines. *See eg., Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013) (holding the trial court retained jurisdiction after the expiration of the statutory 120-day deadline to hold a pre-suit mediation and

that court retains discretion to extend this deadline and “may consider principles of estoppel and waiver to excuse noncompliance” to comply with the deadlines set forth within S.C. Code § 15-79-125). Rule 6(b), SCRCP, provides:

Enlargement. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, **the time may be extended by** written agreement of counsel for an additional period not exceeding the original time provided in these rules, or **the court for cause shown may at any time in its discretion** (1) with or without written motion or notice order the period enlarged if request therefore is made before the expiration of the period as originally prescribed or extended or (2) **upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done....** (*emphasis added*)

Pursuant to Rule 6(b), SCRCP, if good cause is shown, the court can extend deadlines at any time. Further, our case law provides that these rules “should be liberally construed so as to promote justice and dispose of cases on the merits” and not on technicalities and missed deadlines. In re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997), Dixon v. Besco Eng’g., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).

While, of course, the rules of civil procedure are not changed for *pro se* litigants, our courts support “a desire for procedural leniency with *pro se* litigants within the bounds of the law.” Citifinancial Mortg., Inc. v. Kennedy, No. 2007-UP-062, 2007 WL 8325959 at *1 (S.C. Ct. App. Feb. 12, 2007) (*emphasis added*); see also Young v. Barrow, 130 S.W.3d 59, 62–63 (Tenn. Ct. App. 2003) (“courts should take into account that many *pro se* litigants have no legal training and little familiarity with the judicial system”); Commonwealth v. Miller, 416 S.W.2d 358 (Ky. 1967) (noting that courts do not hold *pro se* litigants to the same standard as attorneys and some leniency is given toward compliance with procedural requirements); Hanna-Mack v. Bank of Am., N.A., 218 So. 3d 971, 973 (Fla. Dist. Ct. App. 2017) (“*pro se* litigants are also afforded leniency on certain procedural technicalities in drafting motions and requesting relief. This leniency promotes

the courts' fundamental principle of allowing *pro se* litigants procedural latitude, a practice effected to ensure access to the courts for all citizens[....]" (*internal quotations and citations omitted*); Sumrell v. State, 972 So.2d 572, 574 (Miss. 2008) (noting that "*pro se* litigants are afforded some leniency"); Mmoe v. Commonwealth, 473 N.E.2d 169, 172 (Mass. 1985) (some leniency is appropriate in determining whether a *pro se* litigant has met the requirements of Massachusetts' Rules of Civil Procedure); Morneau v. State, 90 A.3d 1003, 1008 (Conn. App. 2014) ("It is the established policy of the Connecticut courts to be solicitous of *pro se* litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the *pro se* party [...] we allow *pro se* litigants some latitude") (*internal quotation omitted*); State v. Winfield, P.3d 1171, 1177 (Utah 2006) ("because of his lack of technical knowledge of law and procedure a layman acting as his own attorney should be accorded every consideration that may reasonably be indulged") (*internal quotation omitted*); Kaiser v. Sakata, 40 P.3d 800, 803 (Alaska 2002) (stating that Courts "hold the pleadings of *pro se* litigants to less stringent standards than those of lawyers," particularly where "lack of familiarity with the rules" rather than "gross neglect or lack of good faith" underlies the litigants' errors); Kinstler v. RTB S. Greeley, Ltd. LLC, 160 P.3d 1125, 1128 (Wyo. 2007) ("we afford *pro se* litigants some leniency from the stringent standards applied to formal pleadings drafted by attorneys"). Along a similar vein, the United States Supreme Court has recognized that *pro se* litigants have the right to have courts "liberally construe" their pleadings. Haines v. Kerner, 404 U.S. 519 (1972).

On September 24, 2018, the Court conducted a hearing and specifically determined that good cause existed to extend the time for Plaintiffs to file an affidavit of merit and otherwise comply with requirements set forth in S.C. Code § 15-79-125. As he except on the follow page highlights, that Order explicitly holds:

Given this language and the lack of a motion to dismiss from the Defendants and lack of objection from the Defendants, the court has determined that there is good cause as to why the Plaintiffs should be granted an extension of forty-five (45) days to file an affidavit of merit to supplement their Notice of Intent to File Suit.

THEREFORE, this court hereby GRANTS the Plaintiffs' motion and the Plaintiffs have forty-five (45) days from the date of this Order to supplement their Notice of Intent to File Suit with an affidavit of merit.

AND IT IS SO ORDERED.

At the time the Order was issued, the Court was aware that: (1) the NOI had been filed without an affidavit of merit; (2) the statute of limitations had run shortly after the NOI had been filed; and (3) the Defendants had not yet been served. (**Exhibit "C"**, Hearing Transcript from 9-24-2018, p. 4, lines 10-14, p. 4, line. 23 through p. 5, line 10; p. 9, lines 5-8). The Court was aware of the relevant facts and, even after 120-days had passed from the time the NOI was filed, had the retained power to extend the deadlines contained within S.C. Code § 15-79-125. Ross v. Waccamaw Cmty. Hosp., *supra*. Nonetheless, the Defendants now seek to reverse the Court's prior order. By way of example, page 2 of its motion, Defendant Aiken Regional Medical Center claims that "the Court erred in granting the motion and the Order should be withdrawn and considered null and void."

Judge McLeod has already ruled that Plaintiff has shown good cause to extend the standard time period set forth under S.C. Code §15-36-100 (C)(1). Because the Notice of Intent to File Suit was filed within the statute of limitations, it was entirely within Judge McLeod's discretion to extend the time for the supplemental filing of an affidavit of merit, which Plaintiffs did within the extended time period and then promptly accomplished with service of process on all of the Defendants. Judge McLeod's Order has become the law of the case, and given that Plaintiffs and

their new counsel met the extended deadline that he ordered, Defendants cannot prevail on their motions for dismissal. The Defendants' motions ask this Court to overrule Judge McLeod; however, South Carolina has a long-standing, explicit, and unequivocal rule that "one circuit judge has no power to review, revise or reverse the action of another circuit judge." Ex parte State, 263 S.C. 363, 367-68, 210 S.E.2d 600, 602 (1974); *citing* State v. Harrelson, 211 S.C. 11, 43 S.E.2d 593 (1947) and Steele v. Charlotte, Columbia and Augusta R.R. Co., 14 S.C. 324 (1880); *see also* Cook v. Taylor, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) *citing* Steele v. Charlotte, C & A R Co., 14 S.C. 324 (1879); Cudd v. Williams, 39 S.C. 452, 18 S.E. 3 (1893); State v. Harrelson, 211 S.C. 11, 43 S.E.2d 593 (1947); Dukes & Dukes, Inc. v. Hygrade Food Products Corp., 236 S.C. 69, 113 S.E.2d 254 (1960). With all respect to this Honorable Court, the relief Defendants seek is not within the Court's power.

Existence of Good Cause

Judge McLeod was well within his discretion to find that good cause existed to grant Plaintiffs a 45-day extension of time. Somewhat analogous to a motion to extend the time to file a supportive affidavit of merit pertaining to a timely filed notice of intent to file suit, our appellate courts have adopted the "good cause" standard for motions to set aside default. *See* Sundown Operating Co., Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) (stating that the "standard for granting relief from an entry of default under Rule 55(c) is mere 'good cause'"). Shedding light on what is meant by this somewhat ambiguous term of "good cause," in Sundown Operation Co., our Supreme Court stated:

This standard [of mere "good cause"] requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. The trial court need

not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. A motion under Rule 55(c) is addressed to the sound discretion of the trial court.

Id., at 607-08, 681 S.E.2d at 888 (*internal citations omitted*). Notably the “good cause” standard presents a lower bar than the “excusable negligent” standard. See *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997) (discussing how the “standard for setting aside an entry of default is whether ‘good cause’ exists under Rule 55(c), whereas the standard to set aside a judgment of default is ‘excusable neglect’ under Rule 60(b)”).

At the hearing held on September 24, 2018, Plaintiff put forth a satisfactory explanation of their “good cause” for an extension of time. Applying the three bullet points for consideration set forth in *Sundown Operating Co.*: (1) the timing of Plaintiffs’ search for substitute counsel and filing of a motion for an extension does not evidence dilatory behavior; (2) Plaintiffs have demonstrated a meritorious case, if by no other means than through the affidavit of merit signed by Dr. Scott Hockenberry; and (3) Defendants have not been prejudiced by the extension of time, as they have more than ample opportunity to defend the claims that are being brought and cannot not demonstrate that they have been put in any different position today, than they would have been in, had the extension not been granted.

Defendants argue that Plaintiff’s NOI should be dismissed because they were not served with the document until after 120 days of its filing. At time of the hearing held on September 24, 2018, the case file was absent of any certificates of service. Further, Plaintiff was entirely upfront with Court about this issue and specifically brought it to the Court’s attention that the Defendants had not yet been served. At the hearing, Mrs. Patrick stated: “My understanding was that I had filed suit but once I got with Mr. Smith again, he had not filed anything. He had just filed the intent

without any of the people that are on the suit receiving any notification of it.” (Exhibit “C”, Transcript of Hearing p. 4, lines 10-14).

The Court was aware of that Plaintiffs had not yet served the Defendants with NOI, and Judge McLeod even informed Plaintiff at the hearing that there might be a problem with the length of time that had passed. However, he decided not to rule from the bench but, instead, chose to fully review the case file before making a decision. (Exhibit “C”, Transcript of Hearing p. 5, lines 4-9). With the relevant facts before the Court, Judge McLeod acted well within his discretion and determined that good cause existed to grant Plaintiffs a 45-day extension and allow their case to proceed.

The applicable statute allows a judge to use his/her discretion to do “justice.” S.C. Code § 15-36-100(C)(1). Plaintiffs were stranded as *pro se* litigants just eight days before an accompanying affidavit of merit was due in a complicated medical malpractice case with confusing and meticulous filing requirements. The only way Plaintiffs could get out of their predicament was to ask the Court for relief in the form of an extension of time, and the Court acted within its discretion by granting the requested extension. Importantly, Defendants have not been prejudiced by the extension of time.

Jurisdiction Is Not an Issue

The Defendants present a red herring by asserting that personal jurisdiction prevented the Court from granting the extension of time that is the subject of this motion. Defendants’ position essentially asserts that because service of process had not been accomplished, the court lacked personal jurisdiction over the Defendants and thus could not extend the time for filing and service. (See Motion of Defendant Aiken Regional Medical Center, p. 2, fn. 1). Defendants’ argument presents a paradoxical and circular problem that, if adopted, would mean that a trial court could

never extend a deadline for service of process. However, as discussed within the memorandum, when good cause is shown, the trial court has wide latitude to grant extensions of time.

Defendants' argument conflates the pre-litigation requirements of S.C. Code § 15-36-100 with the commencement of litigation requirements under Rule 3, SCRCP. At the point when the NOI was filed, Plaintiff has not actually commenced litigation but had only undertaken the initial pre-suit filing requirements for a medical negligence case, which as set forth under the applicable statute, also served to toll the statute of limitations. See Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 744 S.E.2d (2013) (concluding that failure to timely complete the pre-litigation mediation process as required by section 15-79-125 does not divest the trial court of subject matter jurisdiction or mandate dismissal rather the trial court may consider principles of estoppel and waiver to excuse noncompliance). In this case, the trial court carefully considered Plaintiffs' predicament and decided to grant them leave, in the form 45-days from the date of the Order, to fully comply with all of the pre-suit requirements. Jurisdiction over the Defendants was not needed in order to grant such an extension of time.

In Ross, supra, our Supreme Court rejected the argument that noncompliance with the 120-day time limit for mediation mandated a penalty of dismissal for lack of subject matter jurisdiction. Id. at 63, 744 S.E.2d at 551. In so ruling, the Ross Court found that the time limit/period set forth in section 15-79-125 was not intended to place limitations on the circuit court's subject matter jurisdiction, and held that "failing to comply with the 120-day statutory time period is a non-jurisdictional procedural defect." Id. at 64, 744 S.E.2d at 551. The Court found that "the circuit court retains discretion to permit the mediation process to continue beyond the 120-day time period and may consider principles of estoppel and waiver to excuse non-compliance," and emphasized that a dismissal is "a function of the court's discretion based on the facts and circumstances, and not as a mandated one size-fits-all result." Id. The Ross Court expressly

declined to “construe section 15–79–125 as a trap for plaintiffs with potentially meritorious claims.” *Id.*

Furthermore, the intent of the legislature with respect to these statutes was to create a unique pre-litigation period of discovery and mandatory mediation, not to encourage unwarranted dismissals based on technical noncompliance with the medical malpractice statutes. *See generally, Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 363 S.E.2d 426 (2014). At this stage, the Parties are not even engaged in litigation but have only begun the mandatory pre-suit filings. A dismissal at this early stage, when equitable considerations abound, would contravene legislature’s intent of allow claims, such as that of the Plaintiffs, to proceed on the merits.

Equitable Tolling

To the extent that Judge McLeod’s order effectively served to equitably toll the time to supplement the NOI with an affidavit of merit and to serve the Defendants, such a decision was entirely within his discretion. “Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (*internal quotation omitted*). Equitable tolling is applicable to deadlines for filing affidavits, service of process, statutes of limitations, etc., because, although out laws encourage a plaintiff to pursue his/her rights diligently, when an extraordinary circumstance prevents a plaintiff from completing an action, the restriction imposed by the time limit does not further the purpose of encouraging diligence but, instead, creates an injustice. *See CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (stating that “[e]quitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to ‘pursu[e] his rights diligently,’ and when an ‘extraordinary circumstance prevents him from bringing a timely action,’ the restriction imposed by the statute of limitations does not further the statute’s purpose”). The

United States Supreme Court has noted that deadlines can be extended when “a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action; because the doctrine effectively extends an otherwise discrete limitations period set by [the legislature], whether equitable tolling is available is fundamentally a question of statutory intent.” Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014). Equitable tolling may be applied when it is justified under the circumstances. Hooper v. Ebenezer Sr. Serv’s. and Rehab. Ctr., 687 S.E.2d 29 (S.C. 2009).

While equitable tolling is somewhat different than an extension of time for good cause, a litigant seeking equitable tolling bears burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way. Credit Suisse Securities (USA) LLC v. Simmonds, 132 S. Ct. 1414 (2012). As discussed herein and as set forth in Mrs. Patrick’s affidavit, she tried diligently to timely meet all deadlines set before her, and it was only the extraordinary circumstance – being left without counsel, with a window of time so short that no other attorney would review her file – that placed her in a predicament where she needed an extension of time. Accordingly, the facts before Judge McLeod (and this Court) not only supported an extension of time for good cause, but also for supported equitable tolling.

CONCLUSION

Plaintiffs’ Notice of Intent to File Suit was timely filed within the applicable statute of limitations and a qualifying affidavit of merit was filed within the permissible period of extended by the Court. Accordingly, Plaintiffs request that the Court deny Defendants’ motions to dismiss Plaintiffs’ Notice of Intent to File Suit.

Respectfully submitted,

s/ Francis M. Hinson, IV

Francis M. "Brink" Hinson, IV (SC Bar # 74917)

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Attorneys for Plaintiffs

March 1, 2019
Columbia, South Carolina

EXHIBIT

“A”

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
Fonda E. Patrick and Andre)
Patrick,)
Plaintiffs,)
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 an agent and/or)
employee of Aiken Regional Medical)
Centers, LLC; Jonathan H. Anderson, M.D.,)
Individually and as an agent and/or)
employee of Aiken Regional Medical)
Centers, LLC; and Aiken Regional Medical)
Centers, LLC,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT
CA#: 2018-NI-02-00003

ORDER

This matter came before the court upon a Motion for Extension of Time to File Affidavit of Merit by Plaintiffs Fonda E. Patrick and Andre Patrick requesting that this court grant the Plaintiffs an extension of forty-five (45) days to supplement their Notice of Intent to File Suit with an affidavit of merit. A hearing on the matter was held on September 24, 2018, and the *pro se* Plaintiffs were present.

At the hearing, the Plaintiffs provided that they were represented by counsel, who filed the Notice of Intent to File Suit on January 2018. The Notice of Intent to File Suit stated that the Plaintiffs would file an expert affidavit within forty-five (45) days pursuant to S.C. Code Ann. § 15-36-100(C)(1). However, the Plaintiffs' attorney was released as counsel on February 14, 2018, which was eight (8) days prior to the deadline from when the Notice of Intent to File Suit needed to be supplemented with an affidavit of merit. The Plaintiffs informed the court that they were unable to find substitute counsel or obtain such an affidavit during the eight (8) day period.

S.C. Code Ann. § 15-36-100(C)(1) provides that “[u]pon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires.” S.C. Code Ann. § 15-36-100(C)(1) further provides that the consequence of not filing an affidavit within the period specified is the granting of a motion to dismiss for failure to state a claim.

Given this language and the lack of a motion to dismiss from the Defendants and lack of objection from the Defendants, the court has determined that there is good cause as to why the Plaintiffs should be granted an extension of forty-five (45) days to file an affidavit of merit to supplement their Notice of Intent to File Suit.

THEREFORE, this court hereby GRANTS the Plaintiffs’ motion and the Plaintiffs have forty-five (45) days from the date of this Order to supplement their Notice of Intent to File Suit with an affidavit of merit.

AND IT IS SO ORDERED.

Walton J. McLeod, IV
Presiding Circuit Court Judge

Aiken, South Carolina
September 28, 2018



Aiken Common Pleas

Case Caption: Fonda E Patrick , plaintiff, et al VS Gasnel E Bryan , defendant, et al
Case Number: 2018NI0200003
Type: Order/Form 4

So Ordered

s/Walton J. McLeod, 2765.

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EXHIBIT

“B”

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2018-NI-02-00003

Fonda E. Patrick and
 Andre Patrick,

Plaintiffs,

vs.

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 an
 agent and/or employee of Aiken Regional
 Medical Centers, LLC; Jonathan H.
 Anderson, M.D., Individually and as an
 agent and/or employee of Aiken Regional
 Medical Centers, L.L.C.; and Aiken
 Regional Medical Centers, LLC,

Defendants.

**AFFIDAVIT OF
 FONDA E. PATRICK**

PERSONALLY APPEARED BEFORE ME, Fonda E. Patrick, who being duly sworn
 deposes and says as follows:

1. I am an adult, over 18 years of age, and of competent mind. I declare that, to the best of my knowledge, recollection and belief, the information contained herein is truthful and accurate.
2. On January 30, 2015, I underwent an abdominal surgery at Aiken Regional Medical Center for the removal of my ovaries.
3. While I am not a physician, nurse, or other healthcare profession, and although I do not fully understand the medical issues surrounding my post-operative course, I do know that, following the surgery performed on January 30, 2015, I experienced terrible problems and was very sick. After spending several weeks at Aiken Regional Medical Center, I was transferred to MUSC and spent a significant amount of time there. It was not until May of 2015 that I was

discharged from MUSC. Even after being discharged and returning home, it took considerable time before I was able to function in a meaningful way.

4. In January of 2016, a little over half of year after my discharge from MUSC, I (along with my husband) retained the legal services of H. Edward Smith, Esq. It was my understanding that Mr. Smith was going to investigate whether I had a viable case for medical negligence and, if I did, that he would bring a lawsuit on my behalf. Further, it was my understanding that Mr. Smith and his law firm's staff were going to gather my medical records and do all that was needed to pursue a case for me. Over the course of the next nearly two years, I was frequently in contact with Mr. Smith and others at his firm. I was frequently told that things were moving forward and that I had a "substantial case."

5. On January 22, 2017, Mr. Smith filed a Notice of Intent to File Suit on my behalf. On February 13, 2017, Mr. Smith asked that I sign a paper that would relieve him as my counsel. I signed the document, and per my understanding, the very next day, the Court granted his request to be relieved as my attorney.

6. I tried diligently to find substitute counsel and contacted numerous law firms. However, due to the very short period of time in which action needed to be taken, every attorney with whom I spoke was unwilling to even so much as meet with me or otherwise look at my case. Thus, despite having brought my case to Mr. Smith when there was more than two years remaining on the statute of limitations, I had been left with a very small period of time in which to secure alternative representation. Not knowing any physicians who would review my medical records so as to provide an affidavit, I was unsure how to proceed.

7. On September 28, 2018, Judge McLeod granted me an extension of 45-days from the date of his order (thus until November 13, 2018), in which to submit an affidavit of merit in

support of the Notice of Intent to File Suit that had previously been filed against some of my healthcare providers.

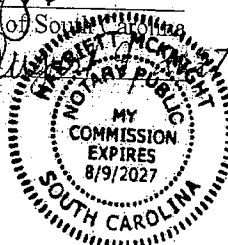
8. Having received an order from the Court providing assurance that an affidavit of merit would be accepted so long as it was filed on or before November 13, 2018, I was able to secure new counsel. More specifically Francis M. "Brink" Hinson, IV, Esq., was willing to review my file and hire a physician to review the medical record, and he was thus able submit an affidavit of merit prior to the expiration of the extension of time granted by the Court.

FURTHER AFFIANT SAYETH NOT.

Fonda E. Patrick
Fonda E. Patrick

Subscribed and sworn to before me
this 25th day of February 2019

Hairlett McKeight
Notary Public for the State of South Carolina
My commission expires: 8/9/2027



EXHIBIT

“C”

1 State of South Carolina)
2 County of Aiken) In the Court
3 Fonda E. and Andre) Of Common Pleas
4 Patrick) Case No.: 2018-NI-02-00003
5 Plaintiffs,)
6 vs.) Transcript of Record
7 Gasnel E. Bryan, et al.,)
8 Defendants.)
9

10 September 24, 2018
11 Aiken, South Carolina

12 BEFORE:

13 The Honorable Walton McLeod, Judge
14

15 APPEARANCES:

16 Fonda E. and Andre Patrick, Pro se
17 Plaintiffs
18

19 No Appearance On Behalf Of The Defendants
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Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

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MOTION

3

Certificate of Reporter

7

EXHIBITS

NO. DESCRIPTION

ID EVDS.

NONE

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

1 Thereupon, the following proceedings were had,

2 THE COURT: Patrick versus Bryan.

3 MS. PATRICK: Yes, Your Honor. Fonda and Andre
4 Patrick.

5 THE COURT: Ms. Patrick, are you representing
6 yourself?

7 MS. PATRICK: Yes, sir.

8 THE COURT: Okay. I'll go out of order. We're
9 actually doing number 12 now. This is a motion for an
10 extension to file an affidavit. So you're representing
11 yourself?

12 MS. PATRICK: Yes, sir.

13 THE COURT: Go ahead and tell me about this, Ms.
14 Patrick.

15 MS. PATRICK: Yes, Your Honor. I did have
16 representation for a lawsuit against Gasnel Bryan for
17 surgery that I undertook in January of 2015 and I was in
18 the hospital for six months and upon my release I
19 retained an attorney and he let the case kind of drop for
20 quite a while and at the eleventh hour. In December of
21 2017 he notified me that he had gotten with an expert on
22 the case and they did not see that there was a case so he
23 asked to be released as my representation from the case.

24 THE COURT: Who was your lawyer?

25 MS. PATRICK: Edward Smith, Barnwell County.

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P.O. Box 184, Lexington, South Carolina 29071

1 THE COURT: Okay. When was he relieved?

2 MS. PATRICK: He was relieved because his suggestion
3 was that --

4 THE COURT: When? When?

5 MS. PATRICK: When. In February.

6 THE COURT: Of 2018?

7 MS. PATRICK: '18. Mm-hmm.

8 THE COURT: Okay. And I'm just looking at your file
9 for the first time. So had you filed suit?

10 MS. PATRICK: My understanding was that I had filed
11 suit but once I got with Mr. Smith again, he had not
12 filed anything. He had just filed the intent without any
13 of the people that are on the suit receiving any
14 notification of it.

15 THE COURT: So you're seeking leave from the Court
16 to seek out an expert; is that correct?

17 MS. PATRICK: I'm actually seeking --

18 THE COURT: Or time.

19 MS. PATRICK: -- time so that I can seek an attorney
20 and an expert.

21 THE COURT: That's the extent of your motion?

22 MS. PATRICK: Yes, sir.

23 THE COURT: Okay. Well, I've got to take a look at
24 this. I'm writing some notes on you in your file but you
25 may have a problem there with the amount of time that's

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1 passed. I haven't reviewed all of the dates involved but
2 you need to understand you may have a problem --

3 MS. PATRICK: Yes.

4 THE COURT: -- as far as whether I can grant such a
5 request. With that I said, I'm not going to rule from
6 the bench because I want to make sure I look at the
7 documents before I make such a decision. But we'll
8 review this and make a decision whether we can grant you
9 such an extension, okay?

10 MS. PATRICK: Okay.

11 THE COURT: Is there any other circumstances
12 you want to tell me about? You have never gotten a
13 lawyer. Have you tried to get another lawyer?

14 MS. PATRICK: I have tried several attorneys and I
15 have even gone to Charleston, Myrtle Beach and there --

16 THE COURT: You don't need -- I'm sorry. You don't
17 need to tell me about your meetings with attorneys.

18 MS. PATRICK: But just upon like me working with
19 Mr. Smith, Attorney Smith, I just don't think that I
20 received the proper representation through him because he
21 didn't give me the adequate representation.

22 THE COURT: Well, that's not a matter for what we're
23 here about though. You're asking about an extension of
24 time. Who helped you with this motion?

25 MS. PATRICK: There was another attorney that said

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1 that he would take the case but he wasn't willing to take
2 it so he really just gave me, like helped me and said
3 this is probably what you need to do if you're looking
4 for someone.

5 THE COURT: Okay. All right. Well, we'll review
6 this file and see if we can get you an answer as soon as
7 possible, okay?

8 MS. PATRICK: Okay.

9 THE COURT: I don't want to rule from the bench when
10 I haven't reviewed the documents.

11 MS. PATRICK: Okay. So from this point what do we
12 need to do?

13 THE COURT: I'll make a decision and I'll file it
14 and you just need to make sure you check with the Clerk's
15 Office to see when something has been filed, my ruling,
16 okay?

17 MS. PATRICK: Okay. Thank you.

18 WHEREUPON, THE HEARING WAS CONCLUDED.

19
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Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,
and Official Circuit Court Reporter for the Eleventh Judicial
Circuit in and for the State of South Carolina, do hereby
certify that I reported the proceedings in the before
captioned case in the Court of Common Pleas in and for the
State of South Carolina on the 24th day of September, 2018.

I FURTHER CERTIFY that the forgoing 6 pages
constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel
to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at
Lexington County, this 3rd day of December, 2018.

By:s/ Steven E. LeBlanc

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
OF THE SECOND JUDICIAL CIRCUIT

Fonda E. Patrick and Andre Patrick,

Civil Action No.: 2018-NI-02-00003

Plaintiffs,

vs.

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,

**PLAINTIFFS' MOTION
FOR RECONSIDERATION**

Defendants.

PLEASE TAKE NOTICE that Plaintiffs, by and through their undersigned Counsel, as soon as they may be heard, move the Court to reconsider, alter, or amend, portions of the Order, entered on April 15, 2019, in the above-captioned case. In support of their Motion for Reconsideration, Plaintiffs would show this Court the following:

With all respect to this Honorable Court, the recent Order, which dismisses Plaintiff's Notice of Intent to File Suit, is based on a misapprehension that the time for service of process cannot be extended more than 120 days after the statute of limitations and that "Rule 3 mandates a firm deadline for commencing an action within the applicable statute of limitations, which no court has the jurisdiction to extend." (Order of April 15, 2019, p. 3). As discussed below: (1) the 120-day time period for service set forth in Rule 3(a), SCRCP, is **not** among the "absolute deadlines" contained within the South Carolina Rules of Civil Procedure; (2) Rule 6(b) provides that, for good cause, the time period for service of process can be extended; and (3) Mims v. Babcock Center, *infra*, does **not** hold that the 120-day deadline for service cannot be extended.

The Supreme Court of our sister state of Vermont did well summarizing the very issue at hand when it stated:

Rule 6 would not apply to the initial filing of a complaint when no other act to commence the action had been taken because the rule is limited to acts controlled by the procedural rules or by the court. The date by which one must initiate an action is controlled by statute. **The time permitted for service once a complaint has been filed, on the other hand, is a procedural matter controlled by the rules [of civil procedure].**

Bessette v. Dep't. of Corr., 928 A.2d 514, 518 (VT 2007) (finding it permissible for the trial court to allow a plaintiff to obtain an extension of time for service of the summons and complaint, pursuant to rules governing the enlargement of time).

S.C. Code § 15-79-125(A) provides: “The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure. The “Rules” referenced in the aforementioned code section include Rule 6(b), SCRCP, which is entitled “Enlargement [of Time]” and which states:

When by these rules [...] an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extend and under the conditions stated in them... (*emphasis added*).

Rule 6(b) lists four specific Rules of Civil Procedure to which Rule 6(b) is inapplicable. In other words, Rule 6(b) makes clear that while the time periods set forth in Rules 50(b), 52(b),

59, and 60(b) are “absolute deadlines” that may be extended only for the reasons (if any) set forth within those specific Rules, all other time periods and deadlines within the South Carolina Rules of Civil Procedure may be enlarged or extended, in the trial court’s discretion “for good cause shown.” See Overland, Inc. v. Nance, 423 S.C. 253, 815 S.E.2d 431 (2018) (holding that “the ten-day deadline in is an absolute deadline” and the trial court cannot use Rule 6(b) to extend the deadlines provided by Rule 59(e)). As Rule 3(a)’s 120-day time period for service set forth is not among the list of “absolute deadlines” contained in Rule 6(b), a plain reading of the rule demonstrates that the trial court may extend the time allowed for service of process under Rule 3(a), even in situations where the statute of limitations has expired.¹

Importantly, Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012) does not stand for the proposition that there is a prohibition against extending, for good cause, the 120-day deadline for service. In Mims, it was undisputed that the plaintiff never served the initial complaint. Although an amended complaint was later served, service took place well in excess of 120 days from the date that the initial complaint had been filed but still within the statute of limitations. The Mims court held that “the 120-day period only has relevance if service is accomplished outside of the statute of limitations” and that since the amended complaint was served within the statute of limitations, the excessive time that had elapsed since the initial complaint was filed was of no consequence. Id. at 247, 732 S.E.2d at 398. The Mims court did not find or in any way address whether the 120-day period for service could (or could not) be extended by order of the court, for such a motion or issue was never before the lower court. As Rule 6(b) provides that Rule 3(a)’s time to accomplish service of process is among the

¹ South Carolina recognizes the maxim of “*expressio unius est exclusio alerius*,” meaning that expression of one thing implies the exclusion of another. See Hughes v. W. Carolina Reg’l. Sewer Auth., 386 S.C. 641, 647, 689 S.E.2d 638, 641 (Ct. App. 2010).

deadlines that may, for good cause, be extended or otherwise expanded, the trial court does have jurisdiction to extend the period of time to accomplish service of process.

A review of the relevant dates and timeline at issue is as follows:

- Jan. 22, 2018 Plaintiffs, through their attorney H. Edward Smith, Esq., file a Notice of Intend to File Suit without an affidavit of merit
- Jan. 30, 2018 Approximate date when statute of limitations would run on Plaintiffs' claims
- Feb. 14, 2018 H. Edward Smith, Esq., withdraws as counsel for Plaintiffs
- Mar. 3, 2018 45-day deadline to supplement the NOI with an affidavit of merit (if an extension of time is not granted by the court)
- May 22, 2018 120-day deadline to serve all parties with the NOI (if an extension of time is not granted by the court)
- June 27, 2018 Plaintiffs, *as pro se* litigants, request an extension of time to file and serve an affidavit of merit
- Sept. 24, 2018 Plaintiffs' motion for an extension of time is heard by Judge McLeod
- Sept. 28, 2018 With knowledge that the NOI has not yet been served, Judge McLeod grants Plaintiff's 45-days (until Nov. 13, 2018) to supplement their NOI with an affidavit of merit
- Nov. 7, 2018 Plaintiff's supplement their NOI with an affidavit of merit, Finkel Law Firm files notice of appearance, and the NOI and affidavit of merit are sent out for service of process
- Nov. 13, 2018 Deadline for the extension granted by Judge McLeod

Importantly, at the time Judge McLeod granted Plaintiffs an additional 45 days to file an affidavit of merit, the Court knew that the statute of limitations had run, was specifically informed that Defendants had not yet been served, and was aware that the 120-day deadline for service had lapsed. Thus, it stands to reason that in granting the extension as it did, Judge McLeod was intending to toll the statute of limitations so as to extend the deadline to accomplish service of process, which as discussed above, Rule 6(b) specifically allows the trial court to do.

The trial court has considerable authority to toll the statute of limitations. See Hoover v. Ebenezer Sr. Services, 687 S.E.2d 29, 32 (2009) (quoting 54 C.J.S. Limitations of Actions § 115 (2005) and stating “In 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.”). The doctrine of equitable tolling exists for circumstances precisely like the one before the Court and was developed to permit, under certain circumstances, the filing of a lawsuit that otherwise would be barred by a limitations period. See CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014) (stating that “[e]quitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to ‘pursu[e] his rights diligently,’ and when an ‘extraordinary circumstance prevents’ [a plaintiff] from bringing a timely action,’ the restriction imposed by the statute of limitations does not further the statute’s purpose”). The tolling doctrine is used in the interests of justice to accommodate both a defendant’s right not to be called upon to defend a stale claim and a plaintiff’s right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which “‘focuses on the plaintiff’s excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.’” Machules v. Dep’t of Admin., 523 So. 2d 1132, 1134 (Fla. 1988).

When, on September 24, 2018, the Court heard Plaintiffs’ motion for an extension of time to serve the Defendants with an affidavit of merit, the Court took special care to review the circumstances surrounding Plaintiffs’ request for more time and the various difficulties and roadblocks that Plaintiffs had faced. The Court took into consideration that Plaintiffs’ former lawyer withdrew a mere days before the expiration of the statute of limitations, leaving Plaintiffs with the burden of finding new counsel who would be willing to take a complex and time-

sensitive case. The Court was not acting outside of its authority when it granted the *pro se* litigants additional time to supplement their NOI with an affidavit of merit and serve it upon the defendants. See Machules at 1135, (“courts have allowed tolling, partly because the plaintiff was acting without counsel or the untimely filing was due to attorney ineptitude.”).

Plaintiffs would respectfully show the court that the issue has already been decided and ruled upon by Judge McLeod. Judge McLeod was well aware that service had not been perfected and that the statute of limitations had run on this matter when he chose to grant limited relief to Plaintiffs by way of a 45-day extension. In effect, Judge McLeod tolled the statute of limitations for Plaintiffs by permitting them slightly more time to file an affidavit of merit and serve Defendants. The South Carolina Supreme Court has repeatedly held that relief which Defendants have sought – for one circuit court judge to set aside another circuit court judge’s order – is outside of the present court’s reach. Ex parte State, 263 S.C. 363, 367-68, 210 S.E.2d 600, 602 (1974) (citing State v. Harrelson, 211 S.C. 11, 43 S.E.2d 593 (1947) and stating “one circuit judge has no power to review, revise or reverse the action of another circuit judge.”).

“Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.” Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). There are many situations wherein what may be necessary to insure justice includes extending the 120-day prescribed time period for service of process. In addition to Vermont, most, if not all of our sister states that have addressed this issue have determined that the trial court has the inherent power to extend the time for service. See Leader v. Maroney, Ponzini & Spencer, 276 A.D.2d 194, 200 (N.Y. 2000) (“in keeping with the Legislative intent to liberally grant extensions in cases where, as here, the Statute of Limitations expired after filing, and in view of the fact that the plaintiff has a potentially meritorious cause of

action and the defendants made no showing of prejudice, we find that the [trial court] properly exercised its discretion in granting the plaintiff's motion for an extension of time to effect service."); Green v. Lingle, 166 So. 3d 221 (Fla. Dist. Ct. App. 2015) (holding that plaintiff's failure to perfect service on defendant before the hearing on defendant's motion to dismiss for failure to perfect service within 120 days of filing of the complaint did not preclude the trial court from exercising its discretion to grant an extension of time to accomplish service, in light of the expiration of the statute of limitations applicable to plaintiff's claim"); Oldroyd v. Kanjo, 432 P.3d 879, 884 (Wyo. 2019) ("Expiration of the statute of limitations alone can be sufficient to grant a permissive extension of time for service."); Heard v. Remy, 937 So. 2d 939, 943 (Miss. 2006) (holding that, if granted for good cause, an extension of time to serve process will toll the statute of limitations).

There could be a multitude of situations that justify a need for the trial court to extend the time to accomplish service of process. For example, suppose a plaintiff properly filed a notice of intent to file suit (or a complaint) on the eve of the statute of limitations running. The plaintiff might first attempt to serve the defendant by certified mail. If the defendant aimed to avoid service of process, the defendant might refuse to sign for the certified envelope. Several weeks, or even a month, might elapse before the U.S. Postal Service returned the certified mail paperwork which showed that service by certified mail could not be accomplished. At that point, a reasonable plaintiff might then seek to accomplish service by employing the services of a process server. If the defendant was adept at avoiding service, several more weeks might pass before the plaintiff recognized that service via the process server could not be accomplished. At that point, the plaintiff would have to move the court for permission to serve by publication. Given the court's docket, it could easily take weeks (or, in some counties, even months) for the

motion to be heard, and once the motion was heard, and presumably granted, service by publication takes no less than three full weeks to accomplish. All of this could easily (and understandably) span more than 120 days. In such a situation, the ever-vigilant plaintiff should not be barred from bringing suit and should be able to seek an extension to complete service of process.

For another example, suppose a client hires an attorney who works in solo practice to represent them. After investigating the client's claim, the attorney then files a notice of intent to file suit (or complaint) for his or her client a few weeks before the statute of limitations expires. Then, the attorney sends out the pleading for service via certified mail to the defendant. However, unfortunately, a few weeks later the attorney falls ill and then after another few weeks, the attorney passes away. Unbeknownst to the client, service of the pleading was not completed by the post office due to any number of reasons (e.g. address change, avoidance of service). At some point, the designee appointed by the deceased attorney to take over his or her caseload is notified of the death of the deceased attorney. It may take the designee months to sort through the deceased attorney's caseload and finally reach the client's file. At that point, after reviewing the file, the designee would have to follow up with the post office on whether or not a return-receipt was ever obtained. Once the post-office confirms that, in fact, the pleadings were not served via certified mail, the attorney now has to try other methods of service permitted by the South Carolina Rules of Civil Procedure. Now, certainly in this scenario, if the statute of limitations has run on the client's claim and the 120 deadline in Rule 3(a) is about to expire, pursuant to Rule 6(b), the Court should grant an extension on the 120 days to serve the defendant with the pleadings as good cause exists for this extension of time.

The South Carolina Rules of Civil Procedure allow for such an extension, for as discussed above, when good cause is shown, Rule 6(b), SCRCF, gives the trial court jurisdiction and power to extend the time for service set forth under Rule 3(a). *See generally, Ross v. Waccamaw Community Hosp.*, 404 S.C. 56, 65 744 S.E.2d 547, 552-53 (2013) (ruling that the deadline to accomplish pre-suit mediation could be extended by the court and noting that a “multitude of events could cause a mediation session to be delayed beyond the statutory period: illness or weather; fixing a date convenient for all parties; the need to appoint different mediators.”).

Furthermore, the Supreme Court of South Carolina Courts has explicitly stated that the court should serve to promote litigants access to the court and “avoid dismissal of cases on technical grounds and to allow adjudication of cases on the merits.” *Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014) (*quoting Ross v. Waccamaw Comm. Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013)). As such, the Court should allow this formerly pro-se litigant a chance to litigate her case and have it decided on the merits.

As good cause has been shown, and because Judge McLeod previously granted Plaintiffs an extension (and they filed an affidavit of merit within the 45 days and promptly served all the Defendants), the Court should not now dismiss Plaintiffs’ Notice of Intent to File Suit. In short, the trial court does have jurisdiction/authority to extend the deadline for completing service, which was previously granted and should stand.

WHEREFORE, Plaintiffs pray this Court reconsider and reverse its prior order and thereby deny Defendants’ Motions to Dismiss Plaintiffs’ Notice of Intent to File Suit and allow this meritorious litigation to proceed.

Signature Appears on Next Page

Respectfully submitted,

s/ Francis M. Hinson, IV

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Attorneys for Plaintiffs

April 19, 2019
Columbia, South Carolina

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.

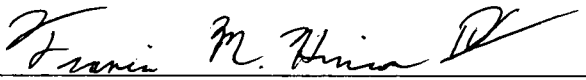
Gasnel E. Bryan, M.D., individually and as an agent and/or employee of Aiken Regional Medical Center, LLC; Frank Y. Chase, M.D., individually and as agent and/or employee of Aiken Regional Medical Center, LLC; Jonathan H. Anderson, individually and as agent and/or employee of Aiken Regional Medical Center,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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that the Record on Appeal is in compliance with Rules 209, 210, and 267 SCACR.

December 4, 2019


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