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-CP-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; and Aiken Regional Medical Centers, LLC.....
.....Respondents.

APPELLANTS' FINAL BRIEF

Francis M. "Brink" Hinson, IV (SC Bar # 74917)
Kelley R. Leddy (SC Bar # 103257)

FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Columbia, SC 29201
803-765-2935 (office)
803-973-0333 (facsimile)
bhinson@finkellaw.com
kleddy@finkellaw.com
Attorneys for the Appellants

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

WHETHER THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' NOI BASED UPON A MISTAKEN BELIEF THAT, EVEN FOR GOOD CAUSE SHOWN, NO COURT HAS THE POWER TO EXTEND THE TIME FOR SERVICE OF PROCESS TO TAKE PLACE?

STATEMENT OF THE CASE

On January 30, 2015, Appellant Fonda Patrick underwent a salpingo-oophorectomy (the surgical removal of the ovaries and fallopian tubes) at Aiken Regional Medical Center. In the underlying case, the gravamen of Appellants' claims assert that Mrs. Patrick's bowel was injured during the aforementioned operation and that despite numerous indications of the injury (such as imaging studies showing a pelvic abscess that was increasing in size), the Respondents negligently failed to provide timely treatment. (Aff. of Merit, ¶¶ 7-10, ROA at 028-029). As a result of the bowel injury going unrecognized and untreated for several weeks, Mrs. Patrick became septic, was transferred to the Medical University of South Carolina ("MUSC"), and required nearly four months of inpatient treatment. (Notice of Intent to File Suit, ROA at 015; Aff. of Merit, ¶¶ 7-10, ROA at 028-029; Aff. of F. Patrick, ¶ 3, ROA at 100-101). Mrs. Patrick was discharged from MUSC in May of 2015, and, just a few months later, she and her husband (the Appellants) promptly retained Attorney H. Edward Smith to pursue claims for medical negligence against the Respondents. (Aff. of F. Patrick, ¶ 4, ROA at 101).

On January 22, 2018, which was eight days before the three-year anniversary of the surgery giving rise to the Appellants' causes of action, Attorney Smith filed a Notice of Intent to File Suit (NOI) against the Respondents. (Notice of Intent to File Suit, ROA at 015-025). It is undisputed that the NOI was filed within the applicable three-year statute of limitations and that its filing served to toll all applicable statutes of limitations. It is also undisputed that the NOI was initially filed without an accompanying affidavit of merit, which, in situations where the filing is made within ten days prior to the expiration of the statute of limitations, is permissible under S.C. Code § 15-36-100(C)(1). In such circumstances, a plaintiff is allowed forty-days of additional time to supplement the pleading with an affidavit of merit, and the statute also grants

the trial court power to further extend this time period for good cause shown and as justice requires. Thus, Appellants had until March 3, 2018 to file an affidavit of merit, but this deadline could be extended by the Circuit Court.

Pursuant to S.C. Code § 15-79-125(A), the NOI was to 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." When an action is commenced at the eve of the statute of limitations, Rule 3(a), SCRCP, affords a 120-day time period for service of process, but Rule 6(b), SCRCP, provides a means by which the time for service can be extended by the Circuit Court. Thus, unless an extension was granted, Appellants had until May 22, 2018, to serve the NOI on the Respondents.

Without ever supplementing the NOI with an affidavit of merit, Attorney Smith sought to withdraw from the case, and on February 14, 2018, the Court granted his request to be relieved as counsel. (Order of Judge Keesley, ROA at 001). Thus, with a quickly approaching deadline to file an affidavit of merit from a qualified expert, Appellants were left as *pro se* litigants in a complicated medical malpractice action. Besides having not procured and filed an affidavit of merit at the time he withdrew from the case, Attorney Smith had also not undertaken to serve the NOI upon any of the Defendants/Respondents.

After their attorney's withdrawal, Appellants promptly and diligently sought to obtain new counsel and called numerous medical malpractice lawyers throughout the state. (Aff. of F. Patrick, ¶ 6, ROA at 101). However, due to the very short window of time (three weeks) to locate an expert witness to review the voluminous medical file and provide an affidavit of merit, Appellants were unable to retain an attorney that was willing and able to undertake the monumental task on such short notice. (Aff. of F. Patrick, ¶ 6, ROA at 101).

With the hope and expectation that they would be able to secure counsel if they could only provide him/her with more than a few days' time to accomplish all that needed to be done, on June 27, 2018, Appellants, acting *pro se*, filed a motion seeking an extension of time to file an affidavit of merit. (Motion for Extension, ROA at 064-065). As is common with many counties' dockets, the Appellants' motion was not heard until nearly four months later when, on September 24, 2018, it came before the Honorable Walton J. McLeod. At the time the motion for an extension was before Judge McLeod, the 120-day tolling period to accomplish service of process had passed, and during the September 24th hearing on the request for an extension of time, Appellants specifically notified the Court that the Defendant/Respondents had not yet been served. (Trans. of Hearing on Sept. 24, 2018, p. 4:8-14, ROA at 036).

On September 28, 2018, the Court issued an Order that granted Appellants an extension of 45-days from the date of the ruling (thus until November 13, 2018). (Order of Judge McLeod, ROA at 004). The Order granting an extension of time only made mention of time to file the affidavit of merit; however, given that the Court was aware that the NOI had not been served on anyone, that the 120-day deadline for service of process had passed, and that granting additional time to file the affidavit without also granting time to serve would be meaningless, it was Appellants' understanding that the Court's Order of September 28th provided them with 45-days to file an affidavit of merit and serve all of the Respondents. With the benefit of the Court having granted the extension of time, Appellants were then able to find representation by the Finkel Law Firm. (Aff. of F. Patrick, ¶ 8, ROA at 102).

On November 7, 2018, several days before the November 13th deadline, Appellants' new counsel filed an appearance in the case and also filed an affidavit of merit that appropriately attested to medical negligence having been committed by Respondents. (Notice of Appearance

of Francis M. Hinson, IV, ROA at 066). The very next day, November 8, 2018, the NOI and accompanying affidavit of merit were sent via certified mail for service upon the Respondents. In short, Appellants had accomplished what Judge McLeod had granted them leave to do by way of his September 28th Order.

On December 19, 2018, Respondent Aiken Regional Medical Center moved to dismiss Appellants' NOI, with Respondents Gasnel E. Bryan, M.D., and Frank Y. Chase, M.D., filing similar motions on December 28, 2018 and January 4, 2019, respectively. (Aiken Reg. Med. Centers' Motion to Dismiss NOI, ROA at 084-087; Gasnel E. Bryan, M.D., and Jonathan H. Anderson, M.D.'s Motion to Dismiss, ROA at 088-089; Defendant Frank Y. Chase, M.D.'s Motion to Dismiss, ROA at 091-092). Respondents' motions essentially sought to overturn the extension of time that Judge McLeod previously granted.

Respondents' Motions to Dismiss were heard before the Honorable R. Keith Kelly on March 5, 2019. Respondents' argued that Appellants' NOI should be dismissed because it had not been served within the statute of limitations or within 120 days after filing of the NOI. (Trans. of Hearing on Mar. 5, 2019, pp. 6:20-25, ROA at 045-063). On April 15, 2019, Judge Kelly granted Respondents' Motions to Dismiss and issued an Order dismissing Appellants' NOI with prejudice. (Order of Judge Kelly, ROA at 009-011). The Circuit Court's stated basis for the dismissal was a belief that time to accomplish service of process could never be extended for any reason, writing 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 Judge Kelly, p. 3, ROA at 009). Overlooking the equitable rules that, when good cause is shown and justice so requires, permit the Circuit Court discretion to grant extensions of time for commencing an action, the Court's April 15th Order added that "[w]hen Plaintiff's failed to serve

their NOI by May 22, 2018, their claims immediately became barred by the applicable statute of limitations." (Order of Judge Kelly, p. 3, ROA at 009). Judge Kelly's Order of April 15, 2019, essentially nullified and overruled Judge McLeod's prior Order from September 28, 2018, which had granted Appellants an extension of time until November 13, 2019.

On April 19, 2019, Appellants filed a Motion for Reconsideration, which Judge Kelly denied a few days later. (Motion for Reconsideration, ROA at 132; Order of Judge Kelly, ROA at 012-014). This appeal followed. For the Court's convenience, a synopsis/timeline of the relevant dates is as follows:

Jan. 30, 2015:	Salipingo-oophorectomy is performed at Aiken Reginal Medical Center.
May 2015:	Mrs. Patrick is discharged from MUSC.
Jan. 2016:	Appellants retain H. Edward Smith, Esq.
Jan. 22, 2018:	Mr. Smith files a Notice of Intent to File Suit.
Jan. 30, 2018:	Approximate date when the statute of limitations would run on Appellants' claims.
Feb. 14, 2018:	Mr. Smith withdraws as counsel for Plaintiffs.
Jan–May of 2018:	Appellants look for a new attorney. They call many different lawyers but no one will even look at their file because of the short time period that remains.
Mar. 8, 2018:	45-day deadline to supplement the NOI with an affidavit of merit (if an extension of time is not granted by the court) runs.
May 22, 2018:	The 120-day deadline to serve all parties with the NOI (if an extension of time is not granted by the court) runs.
June 27, 2018:	Appellants, acting as *pro se* litigants, move for an extension of time.
Sept. 24, 2018:	Appellants' 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 a 45-day extension.
Nov. 7, 2018:	Finkel Law Firm files notice of appearance and, the same day, an affidavit of merit is filed with the Clerk of Court.

Nov. 8. 2018: NOI and Affidavit of Merit are Sent for Service of Process via Certified Mail.

Nov. 13, 2018: Deadline of the extension granted by Judge McLeod.

Dec. 2018: All Respondents file motions to dismiss the NOI.

March 5, 2019: Respondents' motions to dismiss are heard by Judge Kelly.

April 15, 2019: Judge Kelly grants Respondents' motions to dismiss the NOI.

April 19, 2019: Appellants file a motion for reconsideration.

April 29, 2019: Judge Kelly denies Appellants' motion for reconsideration.

STANDARD OF REVIEW

1. *Rules of Civil Procedure*

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003). Thus, because the resolution of this matter turns on the interpretation of Rules 3 and 6, SCRCP, the appropriate standard of review is the same as the standard for the interpretation of a statute, which is an action at law. Fairchild v. S.C. Dep't. of Transp., 398 S.C. 90, 107–08, 727 S.E.2d 407, 416 (2012). An issue regarding the interpretation of a Rule of Civil Procedure is a question of law that is reviewed *de novo*. S.C. Coastal Conservation League v. S.C. Dep't. of Health & Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) (looking at the standard of review in matters dealing with statutory interpretation); Fairchild, *supra*. (*citing* Muci v. State Farm Mut. Auto. Ins. Co., 732 N.W.2d 88, 93 (Mich. 2007) ("The interpretation of court rules and statutes presents an issue of law that is reviewed *de novo*."). An appellate court reviews all questions of law *de novo*. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). "Questions of law may be decided with no particular deference to the trial court." Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009).

In interpreting the Rules of Civil Procedure, the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." Ex parte Wilson, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005). Courts should consider not only the particular clause in which words are used, but the words and their meaning in conjunction with the purpose of the whole rule and the policy of the rule. South Carolina Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991) (applying this rule of construction to a statutory provision). In construing a Rule of Civil Procedure, a rule's language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT&T Communications of Southern States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004) (applying the rule of construction to a statutory provision).

2. *Issues of Equity*

When a suit involves both legal and equitable issues, each retains its own identity as either legal or equitable for purposes of the applicable standard of review on appeal. Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct. App. 2011). Therefore, to the degree that the resolution of this matter considers or otherwise involves Judge McLeod's Order granting Appellants an extension of time, the Circuit Court's decision to grant the extension should not be disturbed unless there is a clear showing of an abuse of discretion. Morgan v. State Farm Mutual Ins. Co., 229 S.C. 44, 91 S.E.2d 723 (1956) (applying the abuse of discretion standard in reviewing the trial court's decision concerning whether to grant an extension of time to answer a complaint); Stickland v. Consol. Energy Prod. Co., 274

S.C. 554, 558, 265 S.E.2d 682, 684 (1980) (finding that the refusal of appellants' motion to be permitted to file an answer constituted an abuse of discretion requiring reversal).

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING APPELLANTS' NOI BASED UPON THE MISTAKEN BELIEF THAT NO COURT HAS THE POWER TO EXTEND THE TIME FOR SERVICE OF PROCESS TO TAKE PLACE. IN FACT, IF THE MOVANT CAN SHOW GOOD CAUSE, RULE 6, SCRCP, SPECIFICALLY PERMITS AN EXTENSION OF TIME FOR SERVICE OF PROCESS TO BE ACCOMPLISHED.

A. Rule 6, SCRP, Allows the Trial Court the Power to Grant Extensions of Time to Serve

The Circuit Court dismissed Appellants' NOI based on a misapprehension that the time period for service of process can never, under any circumstances, be extended. This is an incorrect interpretation of the Rules of Civil Procedure, which is summarized in the following statement from the Circuit Court: "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 Judge Kelly, p. 3, ROA at 009). Operating under this misinterpretation of Rule 3, the trial court improperly overruled another judge's prior order finding that good cause existed to grant the Appellants an extension of time. As discussed below, the 120-day time period for service set forth in Rule 3(a), SCRCP, can be extended because the Rule is not among the "absolute deadlines" contained within Rule 6(b), which provides that, for good cause, the time period for service of process can be extended.

Such a hard and fast rule flies in the face of the inherent powers vested in our trial court. "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). Our law gives the trial court broad discretion with regard to the granting of extensions of time. To this point, 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**. The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them. The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.
> (*emphasis added*).

By the plain application of the wording of Rule 6(b), if good cause is shown, the trial court can extend deadlines at any time. Notably, the last sentence of Rule 6(b) lists four specific Rules of Civil Procedure to which it is inapplicable and thus to which an extension of time cannot be granted. These four "carve outs" are only Rules 50(b), 52(b), 59, and 60(b) and do not include Rule 3(a). South Carolina recognizes the maxim of "*expressio unius est exclusio alterius*," 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). Therefore, since Rule 6(b) provides that 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 of the other time periods and deadlines contained within the South Carolina Rules of Civil Procedure are not absolutes and may be enlarged or extended within 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 under Rule 59 is an absolute deadline and

the trial court cannot use Rule 6(b) to extend the deadline since Rule 59 is specifically mentioned in Rule 6).

In summary, because Rule 3(a)'s 120-day time period for service is not among the list of "absolute deadlines" contained in Rule 6(b), a plain reading of the Rule demonstrates that the Circuit Court may extend the time allowed for service of process under Rule 3(a), even in situations where the statute of limitations has expired. Although South Carolina has no appellate decisions directly on this issue, the Supreme Court of Vermont has addressed the issue at hand, finding that the trial court holds the power to extend the time for service and stating:

> 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) (*emphasis added*) (finding that the rules governing the enlargement of time make it permissible for the trial court to allow a plaintiff to obtain an extension for service of the summons and complaint).

In addition to Vermont, 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 of process. *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). These holdings should not come as a surprise, for a trial court holds the power to apply equitable principles to toll the statute of limitations, it stands to reason that the court also holds the power to extend the time to accomplish service of process.

In support of its belief that the trial court lacks the power/ability to extend the time for service of process, the trial court's Order of April 15, 2019, references Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012). However, Mims 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 an issue was never before the lower court.

It should be noted that 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 showing 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 need to move the court for permission to serve by publication pursuant to S.C. Code § 15-9-710. Depending on the court's docket, it could easily take months for the motion to be heard, and once the motion was heard (and presumably granted), service by publication takes, at minimum, three full weeks to accomplish pursuant to S.C. Code § 15-9-720(B)(2). 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. Failure to serve within the 120 day deadline also constituting "good cause" for an extension could also include situations where a solo practitioner passes away after filing an action but before the pleading is sent out for service. Appellants won't belabor the details of that particular scenario, but, in short, would submit there are many situations where the interests of justice dictate that an extension of time to accomplish service should be permitted.

Because Rule 3(a)'s time to accomplish service of process is among the deadlines that, pursuant to Rule 6(b), may be extended or otherwise expanded, the trial court has jurisdiction to extend the period of time to accomplish service of process. Because the trial court's dismissal of Appellants' NOI was founded upon a misapprehension that the trial court did not have the power to extend the time for service, the Order of April 15, 2019, which dismissed Appellants' NOI, should be reversed and the Appellants should be allowed to proceed with their case.

B. *The 45-Day Extension Granted by Judge McLeod Must be Interpreted to Extend the Time to Accomplish Service of Process*, Otherwise *the Relief He Granted Would have been Meaningless*

Operating under an incorrect premise that a circuit court judge lacks the power to extend the deadline for service, Judge Kelly's Order of April 15, 2019, noted that "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." However, as discussed below, such an interpretation of the September 28th Order would render Judge McLeod's decision to grant a 45-day extension of time meaningless, effectively nullify his Order, and is not a reasonable interpretation of the first judge's intention to grant Appellants meaningful relief to have time to accomplish what their first attorney had failed to do.[1]

A review of the factual and procedural history demonstrates that, at the time Judge McLeod granted the Appellants a 45-day extension of time, the Trial Court was well aware: (1)

[1] The South Carolina Supreme Court has repeatedly held one circuit court judge cannot set aside another circuit court judge's order. 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."). As Judge Kelly's Order essentially nullified and invalidated Judge McLeod's prior order permitting an extension of time, the dismissal of the NOI should be reviewed as improper. If there was a question to whether or not Judge McLeod intended for the 45-day extension to allow Appellants time to accomplish service, this issue should have been addressed by Judge McLeod and not by Judge Kelly.

the statute of limitations on Appellants' claims had run on or about January 30, 2018; (2) the 120-day deadline for service of process had already passed; and (3) none of the Defendants had been served at the time of the hearing held on September 24, 2018. The Court's knowledge of these three issues is evident by a review of the hearing transcript and the pleading. At the close of the motion hearing, Judge McLeod stated that he would take the matter under advisement so as to review the file (Trans. of Hearing on Sept. 24, 2018, p. 6:9-10, ROA at 038) and the language within the NOI, filed on January 22, 2018, provides:

> 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)(l) and §15-79-125(A).

(Notice of Intent to File Suit, pp. 6-7, ROA at 019-020).

In addition to the Circuit Court's review of file evidencing that no certificates of service had been filed as of the time of the motion hearing, Appellants specifically informed the Court that none of the Defendants/Respondents had been served, candidly telling Judge McLeod: "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.**" (Trans. of Hearing on Sept. 24, 2018, p. 4:10-14, ROA at 036).

Aware of all of these matters, on September 28, 2018, Judge McLeod issued an order granting Appellants a 45-day extension of time. The final words of the Order state:

> 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.

(Order of Judge McLeod, filed Sept. 28, 2018, p. 2, ROA at 005).

If this ruling is to have any meaning or efficacy, the Order must be interpreted as granting Appellants an extension of time to get the NOI in compliance with the various requirements that the Court knew had not yet been met – i.e. relief in the form of time to file a qualifying affidavit of merit and to have the Respondents served. Given that service of process had not yet occurred and that the standard 120-day time period to accomplish service had already passed, it would have been meaningless for Judge McLeod to grant an extension of time with regard to the affidavit of merit alone.

Similar to the rules for interpreting a statute or a contract, when reviewing a prior trial judge's order, the latter judge should attempt to do so in a manner that gives meaning to the judge's ruling and intentions. *See* Investors Premium Corp. v. S.C. Tax Comm'n, 260 S.C. 13, 20, 193 S.E.2d 642, 645 (1973) (setting forth the Court's function in discerning legislative intent to interpret statutes in a way that both gives meaning to the use of the words and is logical); Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (noting that an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions meaningless or superfluous); Nicholson v. Nicholson, 378 S.C. 523, 532, 663 S.E.2d 74, 79 (Ct. App. 2008) (discussing the court's function in determining the lawful meaning and the intention of a contract between the two parties). Because granting time to file the affidavit would be pointless if there was not also time to serve, the only logical and reasonable interpretation of the Order from September 28, 2018, is that it granted 45-days to both file an affidavit of merit and serve the Respondents. Thus, it stands to reason that in granting the extension as he did, Judge McLeod intended to toll the deadline for service of process and extend the time to accomplish service, which as discussed above, Rule 6(b) specifically empowers the trial court to do.

In granting the Appellants a 45-day extension, Judge McLeod invoked the doctrine of equitable tolling. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period" and is not limited solely to the statute of limitations but "may be applied where it is justified under all the circumstances." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115-117, 687 S.E.2d 29, 32-33 (2009). "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." 54 C.J.S. Limitations of Actions § 115 (2005). The doctrine of equitable tolling exists for circumstances precisely like the one that was before the trial court – where the Appellants have worked diligently but nonetheless met roadblocks and no injustice would befall the Respondents if the NOI were allowed proceed – and was developed to permit, under certain circumstances, the filing of a lawsuit that would otherwise 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 something to be done in a timely manner. 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) (noting that "courts have allowed tolling, partly because the plaintiff was acting without counsel or the untimely filing was due to attorney ineptitude.").

The Rules of Civil Procedure and our case law give great deference to the trial court regarding its decisions on when 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 deadline to hold a pre-suit mediation and that the court retains discretion to extend the deadline and "may consider principles of estoppel and waiver to excuse noncompliance" to comply with deadlines). The South Carolina Supreme Court has explicitly stated that our judicial system 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, *surpra.*). It is well settled that the Rules of Civil Procedure "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). Ever mindful of these principles, Judge McLeod was well within his discretion to apply equitable principles so as to allow the Appellants, who were then *pro se* litigants and through no fault of their own, required additional time in order to have the opportunity for their case to be decided on the merits.

When Judge McLeod heard Appellants' motion for an extension, the Court took special care to review the circumstances surrounding Appellants' request for more time and the various difficulties and roadblocks they had and were facing as *pro se* litigants. The Appellants' former lawyer withdrew only days before the expiration of the statute of limitations, leaving them with the burden of finding new counsel who would be willing to take a complex case with a very short window of time. While the rules of civil procedure are not in any way changed for *pro se* litigants, our courts have often supported a desire for procedural leniency with *pro se* litigants

within the bounds of the law.[2] *See* 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*

[2] Appellants fully acknowledge that *pro se* litigants must follow the rules in every respect but also submit that some degree of leniency with *pro se* litigants is commonly allowed in South Carolina. Our Appellate Courts' only references to procedural leniency with *pro se* litigants come from unpublished opinions and therefore, in accordance with Rule 268(d)(2), SCACR, are not cited.

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).

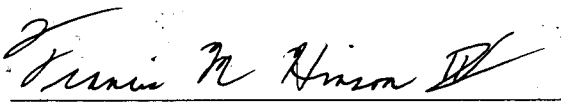
At the time Judge McLeod granted the *pro se* Appellants an extension of 45 days, the Court knew the statute of limitations had run shortly after the NOI was filed, was specifically informed that Respondents had not yet been served, and was aware that the 120-day period for service of process had passed. The trial court found that Appellants had demonstrated good cause to grant an extension of time to file an affidavit of merit and to serve process. For the Order granting an extension to have any meaning, there must have been an intention to toll the deadline for service of process. Because the Judge McLeod had already ruled that the interests of justice dictate that the Appellants be given until November 13, 2018, to accomplish what needed to be done (which they successfully completed), Judge Kelly could not subsequently rule that the NOI should be dismissed and essentially nullify the relief that another trial court judge had given.

CONCLUSION

Trial courts are vested with the authority to extend the time for service, and this power was properly exercised by Judge McLeod's Order extending Appellants' time to file an affidavit of merit to accompany the NOI and to serve them both upon Respondents. However, Judge Kelly's Order of April 15, 2019, nullified this extension based on a misapprehension that the time to accomplish service could never be extended, even when good cause is shown and in the

interests of justice so required. To interpret Judge McLeod's Order to have been intended not to permit Appellants time to accomplish service would be to render his order meaningless. If there is uncertainty as to whether Judge McLeod intended to apply equitable tolling doctrines to extend the time to accomplish service, this question should be addressed by Judge McLeod, who heard Appellants' motion for an extension, and not to Judge Kelly. Accordingly, the trial court should not have dismissed Appellants' NOI, the Order of April 15, 2019, should be REVERSED and Appellants permitted to proceed with their action, or, alternatively, the matter must first be remanded to Judge McLeod for a determination/clarification of his Order of September 28, 2018.

Respectfully submitted,



Francis M. "Brink" Hinson, IV (S.C. Bar No. 74917)
FINKEL LAW FIRM LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, SC 29202
803-765-2935 (tel)
803-973-0333 (fax)
Attorneys for Appellants

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