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-02-00003
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 Centers, LLC; Frank Y. Chase, M.D., individually and as agent and/or employee of Aiken Regional Medical Centers, LLC; Jonathan H. Anderson, individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; and Aiken Regional Medical Centers, LLC, Defendants

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

FINAL BRIEF OF RESPONDENT AIKEN REGIONAL MEDICAL CENTERS, LLC

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STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court correctly dismiss this action based upon its ruling that the Patricks failed to commence their action within the applicable statute of limitations as required by S.C. Code Ann. §§ 15-3-20 and 15-3-545 and Rule 3 of the South Carolina Rules of Civil Procedure?

STATEMENT OF THE CASE

Fonda E. Patrick and Andre Patrick (the "Patricks") filed a Notice of Intent to File Suit ("NOI") alleging medical malpractice against Gasnel E Bryan, M.D., individually and as an agent and/or employee of Aiken Regional Medical Centers, LLC; Frank Y. Chase, M.D., individually and as agent and/or employee of Aiken Regional Medical Centers, LLC; and Aiken Regional Medical Centers, LLC (collectively "Respondents") on January 22, 2018; however, as discussed in more detail below, the Patricks did not serve the NOI upon Respondent Aiken Regional Medical Centers, LLC (hereinafter "Aiken Regional") until November 9, 2018.

In the NOI, the Patricks alleged they were injured as a result of a surgical procedure performed by Respondent Gasnel E. Bryan, M.D. at Aiken Regional on January 30, 2015. (NOI, ¶ B, R. at 016). When they filed the NOI, the Patricks did not contemporaneously file an affidavit of merit as required by S.C. Code Ann. § 15-79-125. Rather, the Patricks 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 affidavit within forty-five days as allowed under S.C. Code Ann. § 15-36-100(C)(1). (NOI, ¶ D, R. at 019-020). As a result, they had until March 8, 2018 to file an affidavit of merit.

On February 14, 2018, the Patricks consented to H. Edward Smith being relieved as their counsel. (Consent Order, R. at 001-003). The Consent Order did not reference the deadline for filing an affidavit of merit, nor did it mention service of the NOI.

On June 27, 2018, more than five months after they filed their NOI and more than three

months after the forty-five day deadline for filing an affidavit of merit had expired, the Patricks filed a "Motion for Extension of Time to File an Affidavit of Merit." (Motion, R. at 64-068). The motion was heard on September 24, 2018 by the Hon. Walton J. McLeod. As of the hearing date, the NOI still had not been served upon Respondents, nor had Respondents been given any notice of the motion. Following the hearing, the Court granted the Patricks another forty-five days to file an affidavit of merit (Sept. 28, 2018 Order, R. at 004-006).

On November 7, 2018, the Patricks filed a Supplement to Notice of Intent to Sue which included an expert affidavit. (Supp. to NOI, R. at 026-32). The Patricks served the Supplement upon Aiken Regional via certified mail on November 9, 2018 (*see* Corrected CoS, R. at 069-072). That was the first time Aiken Regional had been served with any of the filings in the action and constituted the first notice Aiken Regional had of the action.

Aiken Regional responded by filing a motion to dismiss the NOI on December 19, 2018. (Mot. to Dismiss, R. at 084-087). Fellow Respondents Gasnel E. Bryan, M.D. and Frank Y. Chase, M.D. also filed motions to dismiss. (Motions, R. at 088-092). Respondents argued dismissal was appropriate on the grounds that the Patricks' claims were barred by the applicable statute of limitations.[1] Specifically, Respondents argued that while the Patricks had filed their NOI prior to

[1] In its motion to dismiss, Aiken Regional also argued dismissal was appropriate because the Patricks failed to timely adhere to the requirements of S.C. Code Ann. §§ 15-79-125 and 15-36-100. Not only had the Patricks failed to file an expert affidavit within forty-five days, they had also failed to mediate the case within one hundred and twenty days. Finally, Aiken Regional argued Judge McLeod erred in granting the Patricks an extension of time to file an expert affidavit. According to the order, Judge McLeod granted the 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 the request; however, that was only because the defendants had no knowledge of the NOI and the request for an extension. Since 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, Aiken Regional argued the order was erroneous and should have been withdrawn and/or deemed void. Judge Kelly did not address those arguments in granting Respondents' motions to dismiss; however, Aiken Regional would contend they should be considered as additional sustaining

the expiration of the statute of limitations, they failed to serve it within the statute of limitations or within 120 days of the filing of the NOI as required by Rule 3, SCRCP.

Respondents' motions to dismiss were heard on March 5, 2019 by the Hon. R. Keith Kelly. In their memorandum in opposition, which was filed just before the start of the hearing, the Patricks essentially ignored the service requirements of Rule 3, SCRCP. Rather, the Patricks focused their argument on and cited to case law regarding a completely different 120 day deadline - the deadline for mediation found in S.C. Code Ann. § 15-79-125. (*See* Pl. Mem. in Opp. to Def. Mot. to Dismiss, p. 3 citing *Ross v. Waccamaw Community Hosp.*, 404 S.C. 56, 744 S.E.2d 547 (2013), R. at 105). Despite the fact that neither their motion for an extension to file an affidavit of merit nor Judge McLeod's Order made any reference to S.C. Code Ann. § 15-79-125, the Patricks argued the Order extended both the 45 day deadline found in S.C. Code Ann. § 15-36-100 and the 120 day deadline for mediating a case found in S.C. Code Ann. § 15-79-125. (*Id.* at pp. 5-6, R. at 107-108).

On April 15 2019, Judge Kelly granted Respondents' motions to dismiss on the grounds that the Patricks had failed to timely commence the action. (April 15, 2019 Order, R. at 007-011). Judge Kelly held "Rule 3 mandates a firm deadline for commencing an action within the applicable statute of limitations, which no court has the jurisdiction to extend." (*Id.* at p. 3, R. at 009, citing *Mims ex rel. Mims. v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012)).

The Patricks responded with a motion to reconsider in which they focused their argument on the court's equitable power to toll the statute of limitations, and they argued Judge McLeod intended to do that when he granted the extension of time to file an affidavit of merit. (Mot. to Rec., R. at 132-141). On April 29, 2019, Judge Kelly issued a Form 4 Order in which he held,

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grounds. Rule 220(b), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")

"[a]fter careful consideration of Plaintiff's arguments, the Court denies Plaintiff's Motion for Reconsideration..." (Apr. 29, 2019 Order, R. at 012-014). The Patricks then timely filed this appeal in which they continue to argue Judge McLeod's Order should be interpreted as having equitably tolled the time for commencing the action.

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY FOUND THAT THE PATRICKS FAILED TO COMMENCE THEIR ACTION WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

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

The Patricks filed the NOI on January 22, 2018. They have never disputed the statute of limitations began to run on January 30, 2015 when the surgery was performed by Dr. Bryan; therefore, pursuant to S.C. Code Ann. § 15-3-545, the Patricks filed the NOI just before the statute of limitations was set to expire on January 30, 2018. After they filed the NOI, they were then required to serve it within 120 days of the filing (May 22, 2018) as dictated by Rule 3, SCRCP. As noted above, Aiken Regional was not served until November 9, 2018, nearly six months after the deadline. Therefore, the Circuit Court was correct in dismissing the Patricks' NOI on the basis they failed to commence the action within the applicable statute of limitations.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE ACTION MUST BE COMMENCED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

The Patricks argue the Circuit Court erred in finding the time for service of process cannot be extended beyond 120 days. In making this argument, the Patricks have misinterpreted the Circuit Court's ruling.

By statute, the Patricks had to commence this action within three years of the date of accrual. S.C. Code Ann. § 15-3-545. An action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within 120 days after filing. S.C. Code Ann. § 15-3-20. In 2004, in response to the legislature amending § 15-3-20, the Supreme Court amended Rule 3(a) of the South Carolina Rules of Civil Procedure to state:

> **(a) Commencement of civil action.** A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
>
> (2) if not served within the statute of limitations, actual service **must** be accomplished not later than one hundred twenty days after filing. (emphasis added)

In 2012, the Court took the opportunity to explain its amendment of Rule 3 in *Mims ex rel Mims v. Babcock Center Inc.*:

> In amending Rule 3(a), SCRCP, this Court recognized that the legislative intent in amending section 15–3–20(B) in 2002 was to provide a safety net for cases where filing of the summons and complaint occurs near the end of the statute of limitations and service is made after the limitations period has run. The statute and the rule, read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service **must** be made within 120 days of filing.

399 S.C. at 346, 732 S.E.2d at 397-98 (emphasis added).

Contrary to the Patricks' contention, *Mims* stands for the proposition that an action "**must**" be commenced within the applicable statute of limitations. To do that, a plaintiff **must** serve the summons and complaint prior to the expiration of the statute of limitations or within 120 days of the filing of the action. The use of the word "must" by both the legislature in drafting S.C. Code Ann. § 15-3-20 and the Court in drafting Rule 3 establishes this as a firm deadline, which no court has the power to extend. The Patricks have cited no legal authority for their contrary position.

Rather, the Patricks argue pursuant to Rule 6, SCRCP and the court's inherent powers to do all things necessary to insure just results are reached, the Circuit Court had the power to extend the 120 deadline for completing service. The Patricks concede there are no South Carolina appellate cases which support their argument, so they rely on numerous cases from other jurisdictions. (App. Br., s. A) The problem with relying on cases from other jurisdictions is the holdings are based on rules of civil procedure that are very different from the rules in South Carolina. The rules for service of process in New York, Florida, Wyoming, and Mississippi all specifically provide for a possible extension in cases where good cause is shown. *See e.g.* Rule 1.070(j), Fla.R.Civ.P. ("If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period.") Rules 3 and 4 of the South Carolina Rules of Civil Procedure do not include any such language.

Regardless, even if the Patricks were correct that Rule 6, SCRCP may permit a court to extend the time period for completing service of process under certain circumstances, that does

not mean a court has the power to extend the deadline for commencing an action within the applicable statute of limitations, which was the issue before the court in this case. The time limits for commencing the action in this case were clearly set forth by the legislature in S.C. Code Ann. §§ 15-3-20 and 15-3-545. Courts do not have the power to change time limits set forth by the legislature. *See Bray v. Marathon Corp.*, 356 S.C. 111, 117, 588 S.E.2d 93, 96 (2003) ("Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of the statute.").

As the Patricks point out, courts do have the inherent power to equitably toll the statute of limitations in "extraordinary" circumstances. *See Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 388 S.C. 108, 687 S.E.2d 29 (2009). However, tolling the statute of limitations is not the same as extending the time limit for commencing an action within the statute of limitations. "Toll" in the context of a statute of limitations means to stop the running of the statute (Black Laws Dictionary, 2nd. Pocket Ed., 2001), whereas "extend" means actually making the statutory period longer. *See also Hooper*, 388 S.C. at 115, 687 S.E.2d at 32 ("Tolling refers to **suspending or stopping** the running of a statute of limitations.") (internal citations omitted) (emphasis added). While courts may have the power to stop the running of the statute of limitations in very limited circumstances, they do not have the power to extend the time limits set forth by the legislature for commencing an action within the applicable statute of limitations.

III. JUDGE MCLEOD'S ORDER DID NOT EQUITABLY TOLL THE STATUTE OF LIMITATIONS.

The Patricks contend that in granting them a forty-five day extension to file an affidavit of merit, Judge McLeod also equitably tolled the statute of limitations. There is no evidence in the record to suggest Judge McLeod contemplated equitably tolling the statute of limitations, much less that he actually did so.

First off, the Patricks did not ask the court for an extension of time to commence the action. Rather, the Patricks filed a "Motion for Extension of Time to File Affidavit of Merit." As indicated by the title of the motion, the only relief they sought was "45-days to supplement the NOI with an affidavit of merit." (Mot, p. 2, R. at 065). In so doing, they referenced S.C. Code Ann. §§ 15-79-125(A) and 15-36-100(C)(1); however, they never mentioned S.C. Code Ann. § 15-3-20 or Rule 3, SCRCP, nor did they make any reference to the deadline for serving the NOI.

Contrary to the Patricks' contention, it was not made clear during the motion hearing on September 24, 2018 that the NOI had not been served. The only reference to service was when the Patricks 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." (Sept. 24, 2018 Hearing Transcript, p. 4, R. at 096).

The only thing that is clear from the Patricks' statement is Mr. Smith did not serve the NOI after he filed it, but it is not clear from the statement whether service may have been accomplished sometime thereafter. Judge McLeod did not ask any follow up questions or otherwise seek to clarify whether service had ever been completed. At no point in their motion or during the hearing did the Patricks specifically mention that as of the hearing date, none of the Respondents had been served. Instead, the focus was on the affidavit of merit issue.

Based upon his Order, it would appear Judge McLeod was operating under the impression Respondents had been served. He granted the motion, at least in part, because Respondents had not filed a motion to dismiss or objected to the request for an extension. (Sept. 28, 2018 Order, p. 2, R. at 005). The ruling presupposes service, as Respondents would not have known they needed to file a motion to dismiss or object to the requested extension unless they had been served.

Finally, there is nothing in Judge McLeod's Order which suggests he intended to grant the

Patricks an extension of time to serve the NOI. The Order simply granted the Patricks the relief they sought; it did not in any way address whether the Patricks had timely commenced the action. The Order held, "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." (*Id.*) The Order never referenced the time for serving the NOI. It never referenced the statute of limitations or whether the action had been timely commenced. It certainly never mentioned tolling the statute of limitations.

When the Order was entered on September 28, 2018, it had been more than four months since the statute of limitations had expired on the Patricks' claims. That is a considerably long time. South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations, *see American Legion Post 15 v. Horry County*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009), and Aiken Regional is not aware of any circumstance in which a South Carolina appellate court has equitably tolled the statute of limitations in a civil action after it had been missed by more than a month, much less four months. Surely, if Judge McLeod intended to toll the statute of limitations after such a long period of time, there would have been some discussion of it. Instead, the Order only discusses an extension of time to file an affidavit of merit. As the Patricks state in their brief, "expression unius est alterius." Judge McLeod either intentionally decided not to include any language about tolling the statute of limitations, or more likely, he simply never considered it.

IV. EQUITABLE TOLLING IS NOT APPROPRIATE IN THIS CASE.

The Patricks never filed a motion in which they sought an equitable tolling of the statute of limitations. The doctrine was not discussed during the September 24, 2018 hearing in front of Judge McLeod. While the Patricks very briefly mentioned equitable tolling in their memorandum

in opposition to Respondents' motions to dismiss (Mem. in Opp., p. 11, R. at 113), there was no discussion of it during the March 5, 2019 hearing in front of Judge Kelly. The first time they really argued the court should apply the doctrine was in their April 19, 2019 motion to reconsider. (Mot. to Rec., p. 5, R. at 136). Therefore, Aiken Regional contends the issue was never properly before the Circuit Court. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.") As a result, the issue is not reviewable by this Court. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating issues must be raised to and ruled upon by the trial court to be preserved for appellate review).

Nevertheless, this is not one of those "extraordinary" circumstances which warrants an equitable tolling of the statute of limitations. *See Hooper*, 386 S.C. at 116, 687 S.E.2d at 32 (equitable tolling may be used in cases where a litigant failed to commence the action within the applicable statute of limitations because of an "**extraordinary**" event beyond his or her control). As noted in *Hooper*, equitable tolling should be used sparingly and only after the party claiming the statute of limitations should be tolled establishes facts sufficient to justify the use of the doctrine. (*Id.*) The facts of this case are not so extraordinary as to support an equitable tolling.

Equitable tolling typically applies in situations where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from timely commencing a lawsuit. *Id.* In the present action, unlike in *Hooper* and unlike the hypothetical situation posed by the Patricks in their brief (App. Br., s. A), Respondents were in no way responsible for the Patricks' failure to timely commence the action.

Other than the withdrawal of their counsel, which they consented to, the Patricks have put forth no explanation as to why they were unable to serve the NOI prior to the May 22, 2018

deadline. Lack of counsel is not an "extraordinary" circumstance which warrants equitable tolling of the statute of limitations. *See Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct.App.1998) ("The statute is not delayed until the injured party seeks advice of counsel... instead, reasonable diligence requires a plaintiff to act with some promptness.") Despite knowing the NOI had not been served, the Patricks simply made no attempt to complete service until November 2018.

Also, unlike in *Hooper*, this is not a situation in which the Patricks barely missed the deadline for commencing the action. In *Hooper*, the plaintiff completed service approximately one week after the 120 deadline. Here, the Patricks missed the deadline by nearly six months. The Patricks have put forth no facts upon which the court could reasonably surmise they "diligently" attempted to timely commence their action, but were prevented from doing so by extraordinary circumstances beyond their control. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 134 S.Ct. 2175 (2014); *see also Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008) (discussing policy considerations for statutes of limitations and citing cases from numerous jurisdictions for why equitable tolling should not be used in circumstances where plaintiffs have not diligently pursued their claims). As a result, even assuming *arguendo* the Patricks timely raised the issue, the Circuit Court correctly refused to apply the equitable tolling doctrine to this case.

CONCLUSION

The Patricks did not serve their NOI within the statute of limitations or within 120 days of filing the NOI. As a result, it is undisputed they failed to commence their action within the statute of limitations. The deadline to commence the action was never extended, nor did the Patricks ever specifically ask that it be tolled until they filed the motion for reconsideration of Judge Kelly's

order. That request came too late and was not accompanied by any compelling facts which would support such extraordinary relief. For all those reasons, Judge Kelly's orders should be affirmed.

Respectfully submitted,

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Dated: 1/2/2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent Aiken Regional Medical Centers, LLC complies with Rule 211(b), SCACR:

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