IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SAINT FRANCIS MEMORIAL HOSPITAL, Petitioner/Appellant. v. CALIFORNIA DEPARTMENT OF HEALTH, Respondent/Respondent.	)	No. S249132

APPELLANT'S OPENING BRIEF

After a Decision by the Court of Appeal,
First Appellate District, Division One
Case No. A150545

Superior Court of California
County of San Mateo
Case No.:CIV537118
Honorable George A. Miram

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1. Can the Doctrine of Equitable Tolling apply to a late-filed Petition of Writ of Mandate to challenge an action by a California State Regulatory Agency?
2. Do the facts of this case merit the application of the Doctrine of Equitable Tolling?

II. INTRODUCTION

This case arises from a fine issued by the California Department of Public Health (CDPH) against Saint Francis Memorial Hospital (SFMH) in accordance with Health and Safety Code §1280.1(c). The case was first tried before an adminstrative law judge, who ruled in favor of SFMH. CDPH, however, rejected the decision by the ALJ. After further briefing by the parties CDPH affirmed the fine.

SFMH submitted a request for reconsideration to CDPH, which was opposed by counsel for CDPH on the merits. Because of a belief that a tolling provision applied to the request for reconsideration, a timely Petition for Writ of Mandate was not filed by SFMH while waiting for a decision on the request for reconsideration.

CDPH then rejected the request for reconsideration, not on the merits, but because procedurally a request for reconsideration was not an available option

under the circumstances. SFMH then filed a Petition for Writ of Mandate in the Superior Court for the County of San Mateo. The writ petition was filed 11 days after the statutory deadline for this type of writ petition.

An initial demurrer on the statute of limitations was sustained with leave to amend by the trial court. A demurrer to the First Amended Petition for Writ of Mandate was sustained without leave to amend on the grounds the writ petition had not been timely filed, and judgement was entered for CDPH. On appeal to the First District Court of Appeal the trial court's ruling was affirmed. This court then accepted the case for review.

III. FACTUAL AND PROCEDURAL HISTORY

The following facts and procedural history comes from the Amended Petition for Writ of Administrative Mandamus, which can be found in the Clerk's Transcript at p. 100-156.

On August 28, 2012, CDPH issued an administrative penalty against SFMH in accordance with Health & Safety Code § 1280.1(c). (CT, p. 100-101, ¶3) The fine arose from a surgical procedure that involved a retained sponge. The cited regulation required hospitals to generally have surgical services policies and procedures in place. SFMH had appropriate policies and procedures in place, but CDPH took the position a negligence standard should apply to the implementation of the policies and procdures, although no such standard can be found in the

regulation.

The fine was timely appealed, and in July 2014, the case went to hearing before The Honorable Mary Stober, Administrative Law Judge . (CT, p. 101, ¶4) On May 7, 2015, Judge Stober issued her proposed decision, which was to grant the appeal; she found there was no regulatory basis for the penalty imposed. (CT, p. 101, ¶5) Judge Stober found SFMH had appropriate policies and procedures in place, and so there was no violation of the identified regulation. (CT 108-124).

On August 17, 2015, CDPH, through Mike Rainville, Assistant Chief Counsel for CDPH, notified the parties that CDPH had elected to reject the decision by Judge Stober pursuant to Government Code § 11517(c)(2)(E). In his letter, Mr. Rainville requested that the parties provide further briefing and evidence on five enumerated issues. This was later clarified by Mr. Rainville by way of correspondence dated September 9, 2015. (CT 101; see also CT 138-139 for the actual letter.)

On December 15, 2015, CDPH issued its decision rejecting the reasoning of Judge Stober, and affirming the issuance of the fine. (CT 102; see also CT 141-155) On December 30, 2015, SFMH submitted a request for reconsideration to CDPH. (CT 102). On January 8, 2016, CDPH issued its answer to the request for reconsideration on the merits. (CT 102; see also CT 76-81 for the actual response by CDPH) In the answer CDPH did not raise any question as to whether the

request for reconsideration could have been considered; the answer addressed the issues raised by the request for reconsideration on the merits.

On January 14, 2016 counsel for SFMH sent an email to the department counsel for CDPH that said the following:

> "Evelyn,
>
> We submitted our request for reconsideration on December 30. As I read the statute CDPH has until today to accept or reject the request. If no action is taken it is deemed denied. I think the additional five days for mailing arguably applies; do you agree? This would extend to next Tuesday to decide the request.
>
> The main reason I ask is we intend to petition for a writ of mandate with the Superior Court if the request for reconsideration is denied. Since we already have a copy of the administrative record I would like to use a joint appendix as the record for the writ. I would include the record we got from the administrative court, the documents related to the agency decision to reject the ALJ decision, the subsequent submissions by both of us, the agency decision denying the appeal, and then the subsequent submissions regarding reconsideration. I would also obviously include anything we get on the reconsideration. Let me know if you would be agreeable to this approach; I have used it before in another writ on an agency decision (involving the BRN)." (CT 85)

The response by counsel for CDPH, sent on Janaury 19, 2016 was as follows:

> "Good morning, Cyrus
>
> I believe you are correct.
>
> I will not be handling the matter in Superior Court; rather it will be an attorney from the AG's office. A referral has yet to be made from

our office, but when it takes place, I will notify you so that you can contact the assigned DAG.

Thank you.
Evelyn Hodson" (CT 85)

Government Code §11523 requires the filing of a Petition for Writ of Mandamus within 30 days of a final decision like the one at issue here. Government Code §11523 provides for an extension of time to file a writ petition if a request for reconsideration is made. Otherwise, January 15, 2016 was the 30th day after the issuance of the denial of the appeal by CDPH, and absent a request for reconsideration, would have been the last day to file a petition for writ of mandamus. The email to counsel indicating a planned writ petition was sent the day before.

On January 14, 2016 CDPH issued its decision which denied the request for reconsideration on the grounds that the decision issued on December 15, 2015 was a final decision for which a request for reconsideration could not be made. The notification was served by mail, only. This correspondence was not received by counsel for SFMH until January 22, 2016. (CT 102).

A. The Initial Petition for Writ of Administrative Mandamus and Demurrer

The initial Petition for Writ of Administrative Mandate was filed on January 26, 2016 (CT 1), four days after receipt of the rejection of the request for

reconsidertion, and 11 days after the deadline to file a writ petition on the original decision. On August 1, 2016 CDPH filed its Demurrer on Statute of Limitations. (CT 56) The issue of equitable tolling was not addressed in the original writ petition, but was brought up in the briefing on the demurrer.

On September 22, 2016 the trial court issued its order sustaining the demurrer with leave to amend "to allege additional facts necessary to assert the equitable tolling of the statute of limitations." (CT 159)

B. The Amended Petition for Writ of Administrative Mandamus and Demurrer

On October 12, 2016 SFMH filed its First Amended Petition for Writ of Administrative Mandamus. (CT 100) On November 16, 2016 CDPH filed a Demurrer to the First Amended Petition for Writ of Administrative Mandamus (CT 161). After briefing by the parties, the court held a hearing on January 12, 2017. (RT 2). The court had issued a tentative ruling to sustain the demurrer without leave to amend. After hearing oral argument by the parties, the trial court adopted the tentative ruling, and sustained the demurrer without leave to amend, based on the decision in *Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, 795-796. (CT 209-210).

On January 26, 2017 the court entered a judgement in favor of CDPH based upon the ruling on the demurrer. (CT 217-218). The judgement was then timely

appealed to the First District Court of Appeal.

On May 23, 2018 the Court of Appeal issued its decision affirming the judgement for CDPH. In so doing the Court of Appeal held that the doctrine of equitable tolling was not available under the circumstances of this case because the CDPH decision was, by its language, effective immediately, which precluded any request for reconsideration.

At the risk of stating the obvious, this court subsequently granted a Petition to Review.

IV. STANDARD OF REVIEW

Since this case arises as an appeal from a judgement entered after the trial court sustained a demurrer without leave to amend, the standard of review is to examine de novo whether the writ petition states sufficient facts to proceed under any theory. *Baranchik v. Fizulich* (2017) 10 Cal.App5th 1210, 1217. As the court said in *Ramirez v. Tulare County Dist. Attorney's Office (Ramirez)* (2017) 9 Cal.App.5th 911, 924:

> "On appeal from a judgment dismissing an action after sustaining a demurrer, we review de novo whether the complaint states facts sufficient to constitute a cause of action under any legal theory. [citation omitted] '"We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.

[Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law."' [citation omitted] We also consider matters which may be judicially noticed. [citation omitted] '"`We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] **We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale** [citation].'"'" (emphasis added)

V. THE DOCTRINE OF EQUITABLE TOLLING SHOULD HAVE BEEN APPLIED TO EXCUSE THE LATE FILING FOR WRIT RELEIF BY SFMH

Because there is a suggestion in the decisions by the trial court and the Court of Appeal that equitable tolling is not an available remedy under this case, this issue will be first addressed. A discussion regarding the application of equitable tolling to this case will then follow.

A. Equitable Tolling Should Be an Available Remedy for Actions Involving Petitions for Writ of Mandate Involving CDPH

The decision by the trial court ignored the issue of whether equitable tolling could apply to this case, although the issue was raised in the briefs, and at oral arguement. The trial court simply held a mistake as to law, and not facts, did not provide a basis for relief. (CT 210) The trial court relied on *Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, 795-796, a case which involved relief under Code of Civil Procedure §473, and did not even address equitable tolling. (CT 210)

While not expressly stated, the Court of Appeal in the present matter implied that equitable tolling is not an available remedy for actions arising from The Administrative Procedure Act. Specifically, the Court of Appeal said:

> We accept that there was an underlying mistake, but we disagree that it justifies a tolling of the 30-day period. '"The Administrative Procedure Act (Gov. Code, § 11500 et seq.) sets strict time deadlines for judicial challenges to administrative decisions."' (*Hansen v. Board of Registered Nursing* (2012) 208 Cal.App.4th 664, 669 [145 Cal. Rptr. 3d 739] (Hansen).) '"`As with any other cause of action, a proceeding for writ of mandamus is barred if not commenced within the prescribed limitation period. [Citations.] [¶] Statutes of limitation "are, of necessity, adamant rather than flexible in nature" and are "upheld and enforced regardless of personal hardship."'"'"

24 Cal.App.5th, at p. 622-623[1]

While the Court of Appeal did go on to engage in an analysis of whether equitable tolling should apply to the present case, to the extent the Court of Appeal decision suggested that equitable tolling is not available in this setting, the suggestion was incorrect. There is no public policy reason to be served by not allowing parties to rely on equitable tolling in cases against state regulatory agencies such as CDPH. To the contrary, considering the enourmous power wielded by such agencies, and the often complex regulatory schemes they develop for themselves, this area of the law is a fertile ground for inadvertent mistakes.

While the state should certainly be able to regulate industries like those regulated by CDPH, considering the relative power of the state versus private enterprises like SFMH, this court should make it clear that the doctrine of equitable tolling is alive and well in California, and can be applied to cases involving The Administrative Practices Act, and agencies like CDPH.

In *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, this court went through a meticulous analysis of the circumstances under which the doctrine of equitable tolling should be available. In *McDonald v. Antelope Valley Community College Dist.*, this court decided that equitable tolling

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[1]The Court of Appeal went on to say that it looked to the decision in *Hansen v. Board of Registered Nursing* for guidance "As do the parties . . . ." While CDPH did argue *Hansen v. Board of Registered Nursing* was an important relevant case, SFMH disagreed.

was an available remedy for the plaintiff in a case arising from the Fair Employment and Housing Act (Gov. Code, §12920, et. seq.). In addressing whether equitable tolling could apply to a given case generally this court said:

> "Though the doctrine of equitable tolling is judicially created and operates independently of the literal wording of most statutes of limitations, it is not immune to the operation of such statutes. In *Lantzy v. Centex Homes* [citation omitted] we discussed at length the circumstances in which a court should conclude equitable tolling does not apply to a particular statute of limitations.
>
> First, the Legislature may, if it so chooses, expressly negate application of equitable tolling to a limitations period by specifying that the list of tolling bases a statute of limitations contains is exhaustive. We gave as examples in Lantzy Code of Civil Procedure sections 340.6 and 366.2, each of which contains such a provision. [citation omitted.]
>
> Second, even in the absence of an explicit prohibition, a court may conclude that either the text of a statute or a manifest legislative policy underlying it cannot be reconciled with permitting equitable tolling." 45 Cal.4th, at p. 105.

In the present case there is nothing in the language of Government Code

§11523 which would prohibit the application of equitable tolling. Indeed, Government Code §11523 does not set forth a single, rigid limitations period. Rather, it has a variable limitation period depending upon whether reconsideration is available, and the timimg of a request for the administrative record to be prepared. There is nothing in the language of the statute to suggest the legislature intended to negate the availability of equitable tolling.

Further, Government Code §11523 was first enacted in 1945. The case of *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399 was decided the year before. In *Bollinger v. National Fire Ins. Co.* the court said:

> "It is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself." 25 Cal.2d, at p. 411

The legislature presumably was aware of this decsion when Government Code §11523 was enacted. If it had intended to foreclose equitable defenses against the application of §11523, the legislature could have done so when the statute was enacted. There have been several amendments since then, and none have addressed an effort to negate application of equitable defenses such as equitable tolling to the application of the limitation period set forth in the statute..

As to the second factor, the public policy considerations which militated against application of equitable tolling in *Lantzy v. Centex Homes* (2003) 31

Cal.4th 363 are not present in the context of Government Code §11523. Government Code §11523 does not include the "no action may be brought" language that was in the statute at issue in *Lantzy v. Centex Homes*. There was also other language in the language of the statue at issue in *Lantzy v. Centex Homes* (CCP §33715) which suggested the legislature intended for the limitation period to be strictly followed. There was also the fact that the limitation period at issue was 10 years, and there were understandable public policy concerns about extending an already lengthy limitations period.

Since none of the factors present in *Lantzy v. Centex Homes* are present here, and since the language of Government Code §11523 does not suggest an intent on the part of the legistlature to preclude equitable bars to the application of the limitation period, as a matter of public policy and equity, equitable tolling should be an available remedy to parties seeking to appeal decisions by regulatory agencies in accordence with Government Code §11523.

B. The Trial Court and Court of Appeal Erred in Not Applying Equitable Tolling to the Facts of this Case.

There is no dispute that, in retrospect, reconsideration was not an available option to SFMH after getting the decision from CDPH in December 2016. At the very end of the decision it indicates the decision became effective immediately. (CT 155) However, there is also no dispute that SFMH acted in good faith in

pursuing reconsideration and in initial remedy before filing a Petition for Writ of Mandate. There is also no dispute that both parties were initially confused as to whether reconsideration was an available option, as evidenced by the CDPH opposition to the request for reconsideration on the merits (CT 76-81) as well as the subsequent email exchange between counsel (CT 85).

The application of equitable tolling to these facts, in accordance with the test set out by this court in *McDonald v. Antelope Valley Community College Dist.,* should have been a simple matter. Indeed, the apparent reticence of the trial court and the Court of Appeal to apply equitable tolling bespeaks (1) an unfamiliarity with equitable tolling, and (2) the application of the more commonly addressed standard found in CCP §473.

For the trial court the erroneous application of the standard applied in cases dealing with CCP §473 is apparent from the court's decision citing to *Kupka v. Board of Administration.*

While *Kupka v. Board of Administration* did involve the statute of limitations, the key factor which distingushes that decision and the present case was that the plaintiff in *Kupka* simply missed the statute of limitations because of a mis-communication with his lawyer as to whether he had been retained. Mr. Kupka and his lawyer knew the deadline for filing the writ of mandate at issue, but the lawyer thought the client decided not to pursue it since he had not received a

retainer; Mr. Kupka thought it was agreed the lawyer would pursue the writ for him.

There was no discussion in *Kupka v. Board of Administration* as to whether equitable tolling could, or should, apply to provide relief to Mr. Kupka. Missing from the facts of the case was any sort of timely notice from Mr. Kupka to the respondent. This is a critical distinguishing factor.

Since under the jurisprudence of CCP §473, mistake as to the law cannot be a basis for relief, and cases involving attorney mistakes often involve CCP §473, it is logical to conclude the sensibility of the trial court was to apply the rules which stem from CCP §473, rather than the doctrine of equitable tolling.

For the Court of Appeal it is not as clear as to why equitable tolling was not applied. What is striking about the Court of Appeal decision is that the opening and reply briefs by SFMH heavily relied on this court's decision in *McDonald v. Antelope Valley Community College Dist.* The Court of Appeal only made passing reference to the decsion as one which addresses equitable tolling. There was no effort by the Court of Appeal, however, to go through the three-part test this court set forth in *McDonald v. Antelope Valley Community College Dist.* to be applied in cases in which equitable tolling is at issue.

In *McDonald v. Antelope Valley Community College Dist.,* Mr. McDonald and the other plaintiffs filed suit against the Antelope Valley Community College

District alleging racial harassment, racial discrimination, and retaliation. One of the plaintiffs, Sylvia Brown, initially pursued an administrative action through the office of the Chancellor of Human Resources at the California Community Colleges Chancellor's Office. While that action was pending Ms. Brown was advised the Chancellor's office "does not have primary jurisdiction over employment cases" and she was advised she may ultimately still have to pursue an action through the Department of Fair Employment and Housing (DFEH).

While the administrative action was still pending, but after the running of the statute of limitations, Ms. Brown filed an administrative complaint with DFEH. The Chancellor's office ultimately found her complaint to be unsubstantiated, but DFEH issued a right to sue letter, and a civil action was then filed.

The District moved for Summary Judgement on the statute of limitations. Ms. Brown argued the doctrine of equitable tolling applied in opposition to the motion. The trial court held the doctrine did not apply, and granted the motion. The Court of Appeal reversed, and held it was a triable issue of fact whether equitable tolling applied. This court granted review as to the sole issue of whether equitable tolling applied.

In *McDonald* this court initially held the legitimacy of the doctrine of equitable tolling is "unquestioned." (45 Cal.4th , at p. 100). With regard to the

application of the doctrine generally, this court went on to say:

> "Broadly speaking, the doctrine applies" "'[w]hen and injured person has several legal remedies, and reasonably and in good faith, pursues one.'"" (45 Cal.4th, at p. 100)

After going through some of the other cases which in the past applied the doctrine of equitable tolling, this court held the application of equitable tolling was firmly available in situations where a party pursued an alternative remedy short of a formal appeal so long as the following considerations were present in the following three part test:

> " . . . 'timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'[citation omitted.]" (45Cal.App.4th, at p. 102)

Other cases applying the Doctrine of Equitable Tolling on similar facts include *San Pablo Bay Pipeline Co., LLC v. Public Utilitites Com.* (2015) 243 Cal.App.4th 295, *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, and *Addison v. State of California* (1978) 21 Cal.3d 313. In each of these cases the plaintiff took some action to address the issue at hand which gave notice to the defendant, but failed to meet the statute of limitations.

In *San Pablo Bay Pipeline Co., LLC v. Public Utilitites Com.,* the issue was a PUC complaint filed by Chevron which the PUC found equitably tolled the

statute of limitations as to other issues later addressed. This was affirmed on appeal.

In *Collier v. City of Pasadena* the plaintiff was a fire fighter who timely filed a workers compensation claim. He was later terminated from his position, and filed for a disability pension. The disability claim was denied, and he did not timely file a writ of administrative mandamus. The trial court dismissed the writ petition on the grounds it was not timely filed. The Court of Appeal reversed, and held the filing of the workers compensation claim equitably tolled the timing on the pursuit of the disability claim writ.

In *Addison v. State of California* the plaintiffs filed a tort claim against the defendants in Federal Court. The Federal Court action was dismissed for lack of jurisdiction. While the motion to dismiss was pending in the Federal Court action the plaintiffs submitted a late government tort claim, which was rejected. When they later filed a state court action the defendants demurred on the statute of limitations. The trial court sustained the demurrer without leave to amend. The Court of Appeal reversed, finding the Doctrine of Equitable Tolling should have been applied by the trial court, and the Supreme Court affirmed.

Thus, looking at these four representative cases, in *McDonald v. Antelope Valley Community College District* the plaintiff erroneously filed an administrative claim with the defendant before the statute of limitations ran. In

San Pablo Bay Pipeline Co., LLC v. Public Utilitites Com. the erroneos initial filing was a PUC complaint. In *Collier v. City of Pasadena* the plaintiff filed a workers compensation claim; there had not even been an effort to timely file a disability claim. Finally, in *Addison v. State of California* the plaintiffs erroneously intially filed a Federal Court action.

In each of these cases equitable tolling was applied despite an initial mistake. It is submitted that the most important factor in each of these cases, which resulted in application of equitable tolling, was that the plaintiff took some formal action which alerted the defendant to the claims that would be made, and the formal action occurred before the running of the applicable limitations period. In each of these cases it was also true that the actions of the plaintiff were, in retrospect, mistaken in some way. The present case is no different, and should benefit from the same analysis as those cases.

As noted earlier, the Court of Appeal felt that the decision in *Hansen v. Board of Registered Nursing* (2012) 208 Cal.App.4th 664 contolled the outcome of this case. While in *Hansen* the appellate did initially file a request for reconsideration, it was done after the time within which a request for reconsideration could be made. That is where the similarities to the case presented end.

Factually, in *Hansen* the appellant was a nurse. The Board of Registered

Nursing filed an accusation against her, and when she did not respond, her default was entered and her nursing license was revoked. She claimed she had not received the accusation or the final decision because of an address change. She learned of what happened a little over three months after the decision to revoke her license was issued, and a little over two months after it became final. She then submitted a request for reconsideration, but this occurred nearly three months after the deadline for requesting reconsideration.

The most important aspect of *Hansen* as it applies to the present case is the following language:

> "Although a statute of limitations is equitably tolled while a party with multiple available remedies pursues one in a timely manner (e.g., *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100, 102 & fn. 2 [84 Cal. Rptr. 3d 734, 194 P.3d 1026]; *McAlpine v. Superior Court* (1989) 209 Cal.App.3d 1, 5 [257 Cal. Rptr. 32]), Hansen did not seek relief from the Board until it was too late." 208 Cal.App.4th, at p. 672-673.

In the present case, after citing to this language from *Hansen* the court of appeal said:

> "Similarly, we conclude that Saint Francis's request for reconsideration did not constitute the timely pursuit of an available

remedy since reconsideration was unavailable, and the Department's failure to indicate that reconsideration was unavailable in answering the request did not toll the deadline for filing a writ petition." 24 Cal.App.5th, at p. 624

In so ruling the Court of Appeal appears to have misconstrued what the *Hansen* court meant, and apparently focused unnecessarily on the reconsideration aspect of both cases. While it is true that in *Hansen* and the present case reconsideration requests were submitted when reconsideration was not an available option, in the present case the reconsideration request was submitted before the running of the limitations period of Government Code §11523. In *Hansen* the reconsideration request was submitted after the running of the limitations period of Government Code §11523.

When the *Hansen* decision is read with the decision in *McDonald v. Antelope Valley Community College District* as the background context, it is apparent that the *Hansen* appellant's request for reconsideration was too late in that it had not been presented within the 30 day period of Government Code §11523. It appears the Court of Appeal in the present action read the reference to "too late" as a reference to Government Code §11521, which governs when requests for reconsideration can be made. At the risk of being redundant, missing from the facts in *Hansen* was evidence of *any* notice given to the BRN within the

limitations period of Government Code §11523.

The absence of any timely notice in *Hansen* is what distinguishes it from the present matter. This is the only way to reconcile the decision in *Hansen* with the decisions in *McDonald v. Antelope Valley Community College District*, *San Pablo Bay Pipeline Co., LLC v. Public Utilitites Com.*, *Collier v. City of Pasadena*, and *Addison v. State of California*.

In this regard, the decision in *Collier v. City of Pasadena* is worth addressing in more detail. This case involved a firefighter employed by Pasedena who was injured on the job. He applied for worker's compensation benefits. Because he could no longer work, while his worker's comp claim was pending he was terminated, and paperwork was sent to him regarding a disability pension. However, the paperwork did not include a deadline. He completed the paperwork, but did not initially submit it. In the meantime, he was discharged, without notice, from the city's pension plan. When he later submitted the application for disability benefits, it was rejected on the grounds he was no longer a participant in the pension program.

Over a year later the workers comp claim was resolved. He subsequently submitted a request for disability benefits, and learned that he had been discharged from the pension program. When he filed a request to appeal the denial of the pension it was denied as untimely.

The court in *Collier v. City of Pasadena* relied on the decision in *Addison v. State of California*, which articulated a similar three part test as can be found in *McDonald v. Antelope Valley Community College District.* In *Collier v. City of Pasadena* and *Addison v. State of California* the courts were not dealing with the same exact claim in two different forums, but felt the initial notice to the defendant/respondent was sufficient to trigger the application of equitable tolling in favor of the petitioner/plaintiff.

If the filing of a workers comp claim can be considered to be adequate to equitiably toll a late-filed application for disability benefits, then certainly an improvident request for reconsideration which was submitted within the time period for the fililng of a Petition for Writ of Mandate should enjoy the same benefit of equitable tolling.

Applying the three part test from *McDonald v. Antelope Valley Community College District* to the present matter, (1) CDPH was apprised that SFMH would challenge the decision to affirm the administrative fine first by the request for reconsideration, and then by the email exchange between counsel, both of which occurred before the running of the 30 day period of Government Code §11523; (2) the request for reconsideration was pursued in good faith (this has not been disputed); and (3) CDPH suffered no prejudice as a result of the 11 day delay in filing the Petition for Writ of Mandate.

The underlying context of this case is also important to consider when deciding whether to equitably allow for the limitations period in this case to have been tolled. CDPH issued a montary fine against SFMH for the violation of a regulation which simply required that surgical policies and procedures be in place. Specifically, 22 CCR §70223 (b)(2), the basis for the fine, states:

> (b) A committee of the medical staff shall be assigned responsibility for:
>
> (2) Development, maintenance and implementation of written policies and procedures in consultation with other appropriate health professionals and administration. Policies shall be approved by the governing body. Procedures shall be approved by the administration and medical staff where such is appropriate.

The ALJ who heard the administrative case said the following in her decision:

> "In conclusion, the Department has provided no legal basis for why this Tribuanal should accept the Department's expanded interpretation of the language of the regulation, section 70223(b)(2), where no reasonable reading of that regulation would notify a Facility that it was responsible for all accidents." (CT 22)

Since CDPH fined SFMH for this incident based on this regulation it is reasonable to assume the agency has fined other hospitals under similar circumstances. From a public policy perspective a decision on the merits could have far reaching impact on the unwarranted CDPH practice of issuing fines

against hospitals without any regulatory basis. This is an issue that needs to be addressed by the appellate courts of this state. This case should be allowed to proceed on the merits so this can occurr.

VI. AT AT MINIMUM SFMH SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE OF EQUITABLE TOLLING SHOULD APPLY

As noted, this case arises from a judgement after a demurrer was sustained without leave to amend. At the hearing before the trial court it was requested that the determine whether equitable tolling should apply by way of an evidentiary hearing. Counsel for SFMH made the following request to the court:

> "At a minimum I would request that we at least have an evidentiary hearing on these issues, whether it is going to be the collateral–excuse me, equitable tolling or collateral estoppel, since both those are mixed issues of questions of facts and questions of law." (RT 7)

In *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736 the court bifurcated the trial in a premises liability case to first address whether equitable tolling applied to the defendants statute of limitations defense. The court held a bench trial on the issue of equitable tolling. The issue on appeal was whether the plaintiff was entitled to a jury trial on the issue of equitablt tolling. The trial court rejected the request for a jury trial on this issue, and the *Hopkins v. Kedzierski*

affirmed. In so doing, the court explained why this issue should be decided by the trial court as the trier of fact.

While SFMH submits that the factual issues in this case are undisputed, and so there should have been a ruling as a matter of law that equitable tolling applied, it is recognized that an order after a demurrer is interlocutory, and that the issue could still be decided by the court by way of an evidentiary hearing. Since this was a demurrer, the trial court should have at least taken this step. The ruling that equitable tolling was not available was erroneous, and a miscarrigae of justice.

Thus, while SFMH would like a ruling from this court that equitable tolling applies to the facts of this case in its favor, as a matter of law, at a minimum this court should reverse with directions to the trial court to consider equitable tolling as a defense to the statute of limitations by way of an evidentiary hearing, either separate from the underlying writ petition, or as part of the resolution of the writ petition.

VII. CONCLUSION

The facts of this case meet all four corners of the requirments set out by this court in *McDonald v. Antelope Valley Community College District.* Both the trial court and the Court of Appeal erroneously failed to allow for application of equitable tolling to cure the mistake made by SFMH. The interests of justice, and the public policy of this state, would be best served by allowing the application of

equitable tolling to the CDPH defense of the statute of limitations and to allow the underlying issue to be decided on the merits.

Accordingly, it is respectfully requested that the decision by the First District Court of Appeals be reversed, and this court either (1) find that the facts allow for application of equitable tolling to apply to the benefit of SFMH as a matter of law, or (2) find that equitable tolling can be an available remedy, and order the trial court to hold an evidentiary hearing to determine if the test for equitable tolling is met by the facts of the case.

Dated: September 20, 2018

SHEUERMAN, MARTINI,
TABARI, ZENERE & GARVIN

By:_____
Cyrus A. Tabari, SB #133842
Attorney for Appellant
SAINT FRANCIS MEMORIAL
HOSPITAL

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the enclosed APPELLANT'S OPENING BRIEF is produced using 14-point Roman type including footnotes and contains approximately 6108 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 20, 2018

Cyrus A. Tabari, SB #133842
Attorney for Appellant
SAINT FRANCIS MEMORIAL HOSPITAL

CERTIFICATE OF SERVICE

At the time of service I was at least 18 years of age and not a party to this legal action.

My business address is: 1033 Willow Street, San Jose, California 95125.

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Honorable George A. Miram
Judge of the Superior Court
County of San Mateo
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Redwood City, CA 94063

I am employed in the county where the mailing occurred. The document was mailed from San Jose, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 21, 2018

Diane Point

Diane Point