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 REPLY 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

Cyrus A. Tabari
SHEUERMAN, MARTINI,
TABARI, ZENERE & GARVIN
A Professional Corporation
1033 Willow Street
San Jose, California 95125
Telephone: 408.288.9700
Facsimile: 408.350-1432
Email: ctabari@smtlaw.com
State Bar No. 133842

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I. THE AUTHORITIES CITED BY CDPH DO NOT SUPPORT THE ARGUMENT EQUITABLE TOLLING IS NOT AVAILABLE IN APA CASES

In the answer brief on the merits submitted by CDPH the initial argument presented is that equitable tolling is not an available remedy in cases dealing with the APA. While there are authorities cited for this proposition by CDPH, a review of the authorities reveals they do not support this asserted position.

For example, in *Eichman v. Escondido Union High School Dist.* (1964) 61 Cal.2d 100 there was no attempt to rely on equitable tolling, nor was the subject addressed. The same is true of the other cases cited by CDPH; none of them address the application of the doctrine of judicial tolling in the context of the APA. The effort to rely on these cases, which do not address equitable tolling in any context, is misplaced.

The notion that the time limitations set forth in the APA cannot be extended by the doctrine of equitable tolling is belied by the cases that have allowed the application of equitable tolling. For example, in *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88 the issue was the statute of limitations found in Government Code §12960 (d), which states:

> (d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to

cooperate occurred, except that this period may be extended as follows:

(1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

The language in Government Code §12960 (d) that says "No complaint may be filed . . ." is semantically no different from the language in Government Code §11523 that says when the request for judicial review "shall" be filed. Indeed, it is not hard to imagine that the School District in *McDonald v. Antelope Valley Community College Dist.* likely made a similar argument to that presented by CDPH here about the availability of equitable tolling in the present case.

The same is true as to the other published cases which have allowed for the application of equitable tolling. In *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917 the statute of limitations at issue came from the Pasadena Municipal Code, §2.54.150(d). This section is not specifically quoted in the decision, and a review of the current code shows that the code has been completely revised since 1983. However, it can be presumed that the section in question contained language along the lines of the "shall" language found in Government Code §11523.

In *Addison v. State of California* (1978) 21 Cal.3d 313, another case in which equitable tolling was applied, the statute in question was Government Code §945.6. In *Addison* the court noted that the court in *Chase v. State of California* (1977) 67 Cal.App.3d 808, 812 had previously said that this type of statute of limitation is "mandatory and must be strictly complied with . . . ." (21 Cal.3d, at p. 316) This did not stop the court in *Addison v. State of California* in applying the

doctrine of equitable tolling to the statute at issue despite the mandatory and strict compliance that was otherwise required.

The argument that equitable tolling should not apply to cases arising from the APA is unpersuasive. This court should find that equitable tolling is an available remedy for cases like the present one.

II. IN EVERY CASE IN WHICH EQUITABLE TOLLING WAS APPLIED THE PARTY WHO BENEFITTED FROM THE DOCTRINE MADE A LEGAL MISTAKE

The fallback argument by CDPH, should the court decide that equitable tolling is an available remedy for cases arising from the APA, is that SFMH nevertheless is not entitled to the benefit of this doctrine because of a legal mistake. As with the argument on the application of equitable tolling, this argument must also fail.

Each of the published decisions in this state in which equitable tolling was applied involved a situation in which a legal mistake occurred, which in turn resulted in the statute of limitations at issue not being met. In *McDonald v. Antelope Valley Community College Dist.* plaintiff Brown filed a discrimination complaint with the Chancellor's Office in November 2001 (45 Cal.4th, at p. 98). That same month the chancellor's office wrote to each of the plaintiffs and said:

"'[T]he Chancellor's Office does not have primary jurisdiction over

employment related cases and in order to obtain a final determination, you must file your complaint with the Department of Fair Employment and Housing .... You may file a complaint with DFEH at any[]time before or after the [D]istrict issues its report and you may do so whether or not you also submit objections to the Chancellor's Office.'"(45 Cal.4th, at p. 98)

It was a legal mistake for the plaintiff's attorney to not file with DFEH, especially given this warning. Indeed, the trial court relied on this letter in deciding that equitable tolling could not apply (45 Cal.4th, at p. 99). That decision was obviously later reversed on appeal.

On the subject of whether a party who seeks to apply the doctrine of equitable tolling has to show that there were multiple remedies presented from which to choose, this court, in *McDonald v. Antelope Valley Community College Dist.*, said:

"That tolling principle is not dispositive here. Recently, in *Schifando v. City of Los Angeles*, supra, 31 Cal.4th at page 1092, we held exhaustion of internal administrative remedies prior to filing a FEHA claim is not mandatory. Based on that holding, the District argues equitable tolling should not apply in this case.

However, we also settled more than 30 years ago the further principle

that equitable tolling may extend even to the *voluntary* pursuit of alternate remedies." (45 Cal.4th, at p. 101; italics in original)

In *Collier v. City of Pasadena* the court described the factual situation presented as follows:

"Collier's own alleged facts reveal his lawyer did not file the application for disability pension until August 20, 1977. This date was nearly 2 years after the fire which caused his disabling conditions; 19 months after he was terminated from employment as a firefighter; and, nearly 17 months after he received the blank application form from the city. Pasadena ordinances require proceedings for disability pensions to be commenced within six months 'from the date of the injury or illness or the date the right accrued.'" (142 Cal.App.3d, at p. 922)

There was no justification for the failure by Colliers' lawyer to have timely filed the appeal of the denial of the disability pension; unlike the present case, nothing was done in good faith that was thought, at the time, to result in a tolling of the statute. This was clearly a legal mistake by his counsel. Nevertheless, equitable tolling was applied despite this blatant legal error.

In *Addison v. State of California* the plaintiff initially filed in Federal Court. While the filing in Federal Court was timely, the Federal case was dismissed for

lack of subject matter jurisdiction. When the plaintiff re-filed the applicable statute of limitations had run. The act of filing in Federal Court despite the lack of subject matter jurisdiction was clearly a legal error. Similarly, it was not a situation where the plaintiff was faced with alternative remedies; the wrong venue was chosen by the plaintiff's counsel. Despite these errors of law, equitable tolling was applied.

In the Answer Brief on the Merits CDPH argues "This case involves no facts warranting equitable tolling." (ABM 33). While clearly a rhetorical statement, it is also unsupportable. Indeed, while CDPH goes on to try to argue why the test for application of equitable estoppel is not met in this case, the argument fails on the merits.

As noted in the Opening Brief on the Merits (21) the court in *McDonald v. Antelope Valley Community College Dist.,* articulated a three-part test for the application of equitable tolling, which can be summarized as follows: (1) Timely notice to the defendant, (2) Lack of prejudice to the Defendant, and (3) Reasonable and good faith conduct on the part of the plaintiff. (45 Cal.App.4th, at p. 102). Each element of this test is met here.

A. CDPH RECEIVED TIMELY NOTICE SFMH WOULD CHALLENGE ITS DECISION

It is submitted CDPH received timely notice that SFMH would challenge

the decision to reject the ALJ decision, and affirm the citation. This occurred by way of the Request for Reconsideration (RJN Ex. A), and by the subsequent email to counsel for CDPH, which was sent before the running of the 30 day limit of Government Code §11523 (CT 85). CDPH argues in its brief neither of these incidents of actual notice being given could constitute the kind of notice required to apply equitable tolling. This argument is a non sequitur given the content of both documents.

None of the cases that address the notice requirement in equitable tolling specify the type of notice required. From an equitable perspective, all that should be required is that the Defendant receive some form of actual notice of an intent to challenge the decision. CDPH argues the Request for Reconsideration cannot meet this requirement because the Request for Reconsideration was "void ab initio." (ABM 40). This argument defies logic because the request was obviously received, and CDPH responded to it both on the merits, and later to deny it. Simply put, any notice, particularly actual notice, should suffice. Whether SFMH could validly submit the Request for Reconsideration is irrelevant to the issue of whether the request served to put CDPH on actual notice that SFMH intended to challenge the final decision.

Incredibly, CDPH also argues " . . .the email from Saint Francis's counsel does not constitute formal and timely notice of the petition for judicial review."

(ABM 40) Of course the email did not constitute formal and timely notice of the petition for judicial review; if it did this appeal would be unnecessary. The question is whether email notice to the attorney of record for CDPH is the type of "notice" required for the application of equitable tolling.

The Answer Brief cites the code sections from the Code of Civil Procedure that apply to the service of a summons and complaint (ABM 40); none of these statutes applies to the generic subject of notice. In looking at the jurisprudence of equitable estoppel it is clear that no specific formal notice has ever been required; every case simply refers to "notice" as being a requirement. Actual notice, in some form, occurred in each of the cases where equitable tolling was applied.

It is not reasonably disputable that CDPH received timely, actual notice of the intent by SFMH to challenge the final decision. Thus, SFMH should be deemed to have met this first element for the application of equitable tolling.

B. CDPH CANNOT SHOW PREJUDICE WILL RESULT FROM THE APPLICATION OF EQUITABLE TOLLING TO THIS CASE

In the Answer Brief on the Merits CDPH makes the argument SFMH cannot show a lack of prejudice to CDPH " . . .because the Department is entitled to rely on legislative rules establishing the finality of its adjudicative decision in order to execute its statutory charge of safeguarding the public health." This is a rhetorical

non sequitur. It certainly it not a demonstration of any prejudice that will inure to CDPH if equitable tolling is applied to this case. If this were the test for prejudice, then none of the published cases decided in favor of the plaintiff would have ended that way as any defendant would be able to make such an argument.

In *Stalberg v. Western Title Ins. Co.* (1994) 27 Cal.App.4th 925, 933 the court described the kind of prejudice that a defendant would need to show to defeat a claim of equitable tolling as actual prejudice on the merits:

> "The equitable tolling of the statute of limitations is designed to obviate a statute of limitations defense. The "prejudice" which may preclude application of the doctrine of equitable tolling **is prejudice to the defendant's ability to defend a claim on the merits.** Defendant has made no showing at any time that its ability to defend against plaintiffs' claim on the merits was prejudiced by plaintiffs' delay in filing this action." (Emphasis added)

Similarly, in the present case CDPH has not shown prejudice in terms of its ability to defend against the Petition for Writ of Mandate on the merits would result if equitable tolling were applied.

C. SFMH ACTED REASONABLY AND IN GOOD FAITH

In the Answer Brief on the Merits CDPH argues that the "reasonable and good faith" prong cannot be met by SFMH because of, in essence, a mistake

cannot be deemed "reasonable." This argument misses the mark of what is required to show reasonable and good faith conduct on the part of the party seeking to apply equitable tolling.

In *Collier v. City of Pasadena* the court suggested that the question of whether the partying seeking to apply equitable tolling acted reasonably and in good faith could be looked at in a couple of different ways:

> "One possible indicium of reasonableness and good faith is whether a plaintiff filed the second claim within a reasonable time after the period of tolling concluded . . . .
>
> Another possible indicium of reasonableness and good faith is whether the plaintiff takes affirmative actions which might mislead the defendant into believing the plaintiff was foregoing his second claim." 142 Cal.App.3d, at p. 931-932.

In the present case, the timing of when SFMH filed its Petition for Writ of Mandate meets the *Collier* test of reasonableness. The Petition for Writ of Mandate was filed four days after receipt of the letter from CDPH advising the Request for Reconsideration was denied, and 11 days after the 30 day period of Government Code §11523 had run. Under any circumstance this timing cannot be considered unreasonable.

With regard to the other "indicium" articulated by *Collier* there is no

evidence of affirmative acts on the part of SFMH meant to mislead CDPH with regard to challenging the final decision.

The decision in *Collier* is the clearest articulation of what the test of reasonableness should be in the context of equitable tolling. In accordance with *Collier* the question of reasonableness should focus on whether the party seeking the application of equitable tolling could be found to have not been diligent in pursuing its claim. Using this test on the present facts, the timing of when SFMH submitted the request for reconsideration to CDPH, and then when it subsequently filed the Petition for Writ of Mandate, demonstrates SFMH acted reasonably by timely submitting the request for reconsideration, and then the filing of the Petition for Writ of Mandate just a matter of days after the request for reconsideration was rejected. There was no lack of diligence once the mistake had been recognized. Thus, the actions by SFMH should be viewed as "reasonable" in the context of equitable tolling.

III. EQUITABLE ESTOPPEL IS NO LONGER AN ISSUE

It is acknowledged that while equitable estoppel was pursued at the trial court and with the District Court of Appeals, it was not raised by way of the Petition for Review, and was not addressed in the opening brief. If the court would like to hear on the subject of equitable estoppel the Petitioner will be happy to brief the subject. Otherwise, this issue is not raised as part of the present

proceeding.

IV. SFMH DOES NOT OPPOSE THE REQUEST FOR JUDICIAL NOTICE

SFMH does not oppose the Request for Judicial Notice submitted by CDPH. This is not to mean it is conceded that the subject of the request for judicial notice is necessarily relevant to the issues presented to this Court. However, for purposes of Evidence Code §§452, 453, and 459 it is not challenged that the documents are of a sort which may be judicially noticed.

V. CONCLUSION

Based on the foregoing, the Opening Brief on the merits, the record on appeal, and good cause having been established, it is submitted that (1) equitable tolling should be an available remedy in this case, and (2) SFMH meets all the requirements to benefit from the application of equitable tolling to the filing of the Petition for Writ of Mandate. Therefore, it is respectfully requested that this Court apply the doctrine of equitable tolling to the case presented, and direct the Trial

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Court to reverse its judgement, and consider the underlying Petition for Writ of Mandate on the merits.

Dated: January 3, 2019

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 REPLY BRIEF is produced using 14-point Roman type including footnotes and contains approximately 2,928 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: January 3, 2019

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.

I mailed a copy of APPELLANT'S REPLY BRIEF as follows: placed the envelope for collection and mailing on the date and at the place shown below, following our ordinary business practices. I am readily familiar with this businesses's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal service, in a sealed envelope with postage fully prepaid.

Dated mailed: January 4, 2019. The envelope was addressed as follows:

Gregory D. Brown
Nimrod Elias
Deputy Attorney General
California Department of Justice
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

Honorable George A. Miram
Judge of the Superior Court
County of San Mateo
400 County Center
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: January 4, 2019

Diane Point