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SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

CLAIR CRAVER JOHNSON,
PLAINTIFF,
vs.
JOHN ROBERTS, M.D.,
DEFENDANT.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-2867

FILED
2014 FEB -4 PM 12: 34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

CLAIR CRAVER JOHNSON,
PLAINTIFF,
vs.
MEDICAL UNIVERSITY OF SOUTH CAROLINA,
DEFENDANT.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-8318

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

This matter is before the Court on the motions of Defendants John Roberts, M.D. ("Dr. Roberts") and Medical University of South Carolina ("MUSC") for an order granting summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure as to Plaintiff's Complaint. Defendants' motions call into question the six-year statute of repose governing medical malpractice actions and the tolling of claims due to insanity under the disability statute contained in section 15-3-40 of the South Carolina Code. Specifically, because the instant action was not filed until nearly nine years after the first alleged negligent act of Dr. Roberts and nearly

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eight years after the commencement of treatment giving rise to Plaintiff's claim, Defendants maintain that Plaintiff's medical malpractice claims are barred pursuant to the six-year repose provision for medical malpractice actions provided by section 15-3-545 of the South Carolina Code. Plaintiff has attempted to toll the limitations period by asserting she lacked the mental capacity to comprehend the extent of her injuries until June of 2010. However, as set forth herein, the only tolling provided for medical malpractice actions is that contained in § 15-3-545(D) and applicable only to minors. Moreover, even assuming § 15-3-40 were to apply, this action, having been commenced more than one year after the Plaintiff's disability ceased, is still time-barred. Accordingly, for the reasons set forth below, the Court finds Plaintiff's medical malpractice claims are barred pursuant to the applicable statute of repose.

FACTS AND PROCEDURAL HISTORY

Plaintiff initiated this medical malpractice action against MUSC on November 16, 2011, asserting claims of cognitive impairment and memory loss as a result of electroconvulsive therapy ("ECT") administered sporadically from 2003 until 2008 for the treatment of severe depression and mania. (See Complaint attached hereto as Exhibit "A"). On May 16, 2012, Plaintiff filed a separate action against Dr. Roberts associated with his prescription of certain medication which caused Plaintiff's need for ECT treatment as well as the ECT treatment itself. That action was commenced by "Notice of Intent to File Suit" filed on November 4, 2011. Both cases have been consolidated. The events giving rise to these matters are as follows.

Since the mid-1980s Plaintiff has been suffering from bi-polar disorder and depression. She was formally diagnosed with borderline bi-polar disorder while attending Winthrop University in the mid-1980s. According to Plaintiff's father, her mania peaked from 1984—1986, after which she dropped out of college and fell into a deep depression. Thereafter, for a

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period of about six years, Plaintiff was relatively stable and led a normal life. In 1997, her mania spiked once again, requiring hospitalization. Dr. Roberts, a licensed psychiatrist in private practice, began treatment of Plaintiff at this time. Over the next few years, Plaintiff required several hospitalizations in Rock Hill, Columbia and Charleston, during which she was treated with several different psychiatric medications, which Plaintiff alleges accelerated her manic episodes, cognitive impairment and ultimately caused the symptoms that led to the ECT.

During one of these numerous hospitalizations, Plaintiff was transferred from Piedmont Medical Center in Rock Hill to MUSC for an episode of psychotic mania. After she was discharged on a medication regimen, she was re-admitted to MUSC on November 26, 2003, with another episode of acute psychotic mania. On December 10, 2003, Plaintiff began ECT treatments. Plaintiff had numerous ECT treatments intermittently over the next several years in an attempt to either stabilize her acute mania into remission or to prevent a relapse. Plaintiff's last ECT treatment was on June 26, 2008.

Although the ECT treatment ended in June of 2008, Plaintiff and her expert maintain she did not "regain the mental capacity to understand and appreciate the harm she suffered as a result" of ECT until June of 2010. (See Affidavit of Harold J. Burstzajn, M.D.). Plaintiff subsequently initiated the instant actions against Dr. Roberts and MUSC on November 4, 2011, and November 16, 2011—nearly eight years after Plaintiff's commencement of ECT and nearly nine years after the first alleged act of negligence as to Dr. Roberts in prescribing certain medication. Consequently, due to the significant delay in commencing these actions, Defendants Dr. Roberts and MUSC filed the instant motions for summary judgment contending Plaintiff's claims are barred by the statute of repose and statute of limitations applicable to medical malpractice actions.

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STANDARD OF REVIEW

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment may be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56, SCRCP; Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008). The statute of limitations or statute of repose defense may be raised in a summary judgment motion. See McDonnell v. Consolidated School Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). The proper interpretation of a statute is a question of law for the court. Town of Summerville, 378 S.C. at 110, 662 S.E.2d at 41 (citing Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)).

LAW/ANALYSIS

I. PLAINTIFF'S CLAIMS ARE BARRED BY THE SIX-YEAR STATUTE OF REPOSE FOR MEDICAL MALPRACTICE ACTIONS.

Medical malpractice claims are subject to a three-year statute of limitations and a six-year statute of repose. S.C. Code Ann. § 15-3545(A). Specifically, section 15-3-545 of the South Carolina Code provides:

> [T]o recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, **not to exceed six years from date of occurrence**, or as tolled by this section.

S.C. Code Ann. § 15-3-545 (emphasis added).

A statute of limitations is a "procedural device that operates as a defense to limit the remedy from an existing cause of action" while the statute of repose actually "creates a substantive right in those protected to be free from liability after a legislatively determined

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period of time." Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993). The stated legislative purpose of the medical malpractice repose provision is to foster the delivery of quality health care services by reducing liability exposure. Hoffman v. Powell, 298 S.C. 338, 339-40, 380 S.E.2d 821, 821 (1989).

Notwithstanding the date of discovery of any claim, the six-year statute of repose begins to run upon an "occurrence" of medical negligence. See O'Tuel v. Villani, 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App. 1995) (finding medical malpractice claim arising out of alleged negligence in the failure to perform a caesarean delivery of the minor plaintiff barred because it was instituted more than six years from the date of occurrence, i.e. the date of birth) overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); see also Johnson v. Phifer, 309 S.C. 505, 424 S.E.2d 532 (Ct. App. 1992) (finding while cause of action accrued in 1987 when negligence was discovered, action filed in 1990 was barred by the medical malpractice statute of repose when negligence occurred in 1974-1977). By focusing on the occurrence of negligence underlying the claim, the statute of repose ignores the discovery, knowledge and even the existence of an injury in barring claims. Hoffman v. Powell, 298 S.C. 338, 339-40, 380 S.E.2d 821, 821 (1989). Furthermore, the expiration of a statute of repose extinguishes all causes of action, including those that may later accrue and those that have already accrued. Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006); see e.g. Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 394 S.C. 68, 74-75, 713 S.E.2d 639, 642 (Ct. App. 2011) (finding equitable indemnification claim brought ten years after event giving rise to medical malpractice action barred by six-year statute of repose). Indeed, as an absolute time limit beyond which liability no longer exists, a statute of repose "is not tolled for

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any reason because to do so would upset the economic balance struck by the legislative body." Langley, 313 S.C. at 404, 438 S.E.2d at 243 (citation omitted).

a. Plaintiff's Complaint against MUSC

The six-year repose provision of § 15-3-545 applies to public hospitals, such as MUSC, under the Tort Claims Act. See Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009) (finding the six year repose provision of § 15-3-545 applies to government hospitals under the Tort Claims Act). Applying § 15-3-545 to the instant case, Plaintiff has alleged acts of negligence against MUSC for performing ECT treatment on Plaintiff beginning as early as 2003. (MUSC Complaint at ¶ 2, 3 & 4).

The Complaint specifically alleges that "Plaintiff, while in the care of [MUSC] was involuntarily, repeatedly and improperly given ECT treatment" and that "[t]he ECT treatment by the defendant's employees took place between 2003 to 2008." (MUSC Complaint at ¶ 2 & 3). Plaintiff's medical records indicate the ECT was commenced on December 10, 2003. For purposes of the statute of repose, such allegations constitute an occurrence beginning as early as the commencement of treatment in 2003. See O'Tuel, 318 S.C. at 27, 455 S.E.2d at 700 (medical malpractice claim arising out of alleged negligence in the delivery of minor plaintiff barred where it was instituted more than six years from the date of occurrence, i.e. the date of birth); Johnson, 309 S.C. 505, 424 S.E.2d 532 (action barred by the medical malpractice statute of repose even though negligence was not discovered until three years prior). Thus, Plaintiff was required to bring the instant action against MUSC no later than December 10, 2009, six years from the date of the onset of treatment. Plaintiff's untimely Complaint filed on November 16, 2011, is therefore barred as a matter of law pursuant to § 15-3-545.

b. Plaintiff's Complaint against Dr. Roberts

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As to Dr. Roberts, Plaintiff alleges acts of negligence beginning in 2003 and earlier. See Roberts Complaint at ¶ 2 & 7). In particular, the Complaint alleges that "on or about 2003, [Dr. Roberts] began treating plaintiff with [ECT]" and that "Plaintiff, while in the care of the defendant Roberts, was involuntarily, repeatedly and improperly given ECT treatment at the request of the defendant Roberts . . ." (Roberts Complaint at ¶ 7). As with Plaintiff's claims against MUSC, the initiation of ECT in 2003 is the occurrence from which the statute of repose is set to run. However, Deposition testimony of Plaintiff's expert identifies alleged acts of negligence as to Dr. Roberts beginning even earlier with the prescription of Wellbutrin in 2002. (Deposition of Dr. Breggin, p. 101, l. 24—p. 102, l. 6). According to Plaintiff and her expert, Dr. Breggin, the prescription of Wellbutrin and Concerta accelerated her manic episodes, cognitive impairment and ultimately caused the symptoms that led to the ECT. When asked to identify a starting point for this alleged occurrence of negligence, Dr. Breggin offered the following:

> Q: Here's my concern, you have said repeatedly in this deposition, not only was there negligence, there was gross negligence in the fact he was prescribing Wellbutrin while she was in a manic phase. I just wanted you to get specific and point out to me in the medical records.
>
> A: **2/13/02 is a start.**

(Deposition of Dr. Peter Breggin, p. 101, l. 24—p. 102, l. 6). Consequently, Plaintiff's claims against Dr. Roberts, having arisen out of ECT initiated in 2003 and the prescription of Wellbutrin in 2002, are untimely under the six-year statute of repose.

II. NEITHER THE DISABILITY STATUTE NOR THE CONTINUOUS TREATMENT RULE APPLY TO TOLL PLAINTIFF'S CLAIMS.

To defeat the statute of repose and limitations bar, Plaintiff has attempted to toll the limitations period by offering expert testimony indicating that prior to June of 2010 "her capacity

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to comprehend what was going on in her life" was diminished by her ECT and underlying mental illness. The legislature has codified a means by which to toll the statute of limitations for individuals deemed "insane" in § 15-3-40. However, as explained in Langley v. Pierce, this statute is inapplicable to medical malpractice actions under the plain and unambiguous language of § 15-3-545(D). See Langley, 313 S.C. at 403, 438 S.E.2d at 243. In Langley, the South Carolina Supreme Court interpreted the interplay between the medical malpractice statute and the disability statute, observing that the "[i]nclusion of the phrase "**or as tolled by this section**" in subsection (A) clearly indicates that the **only** tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)," which "provides a limited tolling provision, applicable only to minors." Id. (emphasis in original).

Similarly, in O'Tuel, the Court of Appeals interpreted subsection (D) of the current medical malpractice statute as operating "to limit the period of tolling which would otherwise be applicable, and demonstrates that, while the legislature was concerned with increased exposure to claims created by the tolling statute, the legislature was not willing to completely abandon the protection given minors by the tolling statute." Id. 318 S.C. at 32-33, 455 S.E.2d at 703 (overruled on other grounds by I'On, L.L.C., 338 S.C. 406, 526 S.E.2d 716). Thus, as noted in Langley and O'Tuel, the plain language of § 15-3-545 limits tolling only to minors as provided in 15-3-545(D). Tolling for insanity otherwise provided by § 15-3-40 is, therefore, inapplicable in medical malpractice actions.

Consistent with this finding, South Carolina has likewise rejected such tolling mechanisms as the continuous treatment rule or the continuous tort doctrine as a means of tolling the statute of limitations in medical malpractice cases. The rationale for doing so was explained by the South Carolina Supreme Court in Harrison v. Bevilacqua, stating that adoption of the

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continuous treatment/continuous tort doctrine "would run afoul of the absolute limitations policy the Legislature has clearly set" through statute, including the six year repose provision of § 15-3-545. 354 S.C. 129, 138, 580 S.E.2d 109, 114 (2003). Thus, because the only tolling provided by § 15-3-545 is contained in Subsection (D) and applicable only to minors, application of the discovery rule or tolling provided by the disability statute will not revive a claim that is filed outside the statute of repose. Consequently, Plaintiff's claims, having been brought nearly eight years from the onset of treatment and nearly nine years after the first alleged negligent act of Dr. Roberts, are barred by the absolute six-year statute of repose within § 15-3-545.

III. EVEN ASSUMING PLAINTIFF LACKED THE MENTAL CAPACITY TO COMPREHEND HER INJURIES, PLAINTIFF'S CLAIMS ARE BARRED FOR FAILURE TO BRING THE ACTION WITHIN ONE YEAR AFTER THE DISABILITY CEASED.

Assuming, arguendo, that the disability statute applied, and taking as true Plaintiff's assertion that her mental impairment prevented her from comprehending her injuries, this action is barred by the limitations period established under § 15-3-40. Pursuant to the disability statute, an action may be tolled for the period within which the Plaintiff may be disabled due to "insanity" but the time for commencement of the action must not be extended "more than five years by any such disability" nor "in any case longer than one year after the disability ceases." S.C. Code Ann. § 15-3-40. Specifically, § 15-3-40 provides:

> If a person entitled to bring an action ... under Chapter 78 of this title ... is at the time the cause of action accrued either:
> (1) within the age of eighteen years; or
> (2) **insane;**
> the time of the disability is not a part of the time limited for the commencement of the action, **except that the period within which the action must be brought cannot be extended:**
> (a) **more than five years** by any such disability, except infancy; nor
> (b) **in any case longer than one year after the disability ceases.**

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§ 15-3-40 (emphasis added). The general rule as to the standard for insanity under tolling statutes is as follows:

> Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society, or the mental condition is such as to require care in a hospital.

Wiggins v. Edwards, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994) (quoting 54 C.J.S. *Limitations of Actions* § 117 at 159–169 (internal footnotes omitted)).

Here, Plaintiff and her expert assert Plaintiff "did not regain the mental capacity to understand and appreciate the harm . . ." allegedly caused by ECT **until** June of 2010. Therefore, construing the facts in the light most favorable to Plaintiff, the disability statute required Plaintiff to file the instant action no later than June of 2011. Accordingly, the instant action filed against Dr. Roberts on November 4, 2011 and MUSC on November 16, 2011—more than one year after the disability ceased—is untimely as a matter of law.

Furthermore, the express language of § 15-3-40 acknowledges that disability does not affect the date of accrual. By allowing individuals who are disabled "at the time the cause of action accrued" to have the statute of limitations extended, accrual is implied to take place while the individual is under a disability. S.C. Code Ann. § 15-3-40. Substantial evidence in the instant case, including admissions in Plaintiff's deposition, statements to her treating physicians, and evidence in her divorce proceedings indicate Plaintiff's claim accrued much earlier than June of 2010. Specifically, she testified in her deposition that, between 2006 and 2008, she was upset and aware of alleged memory loss and not being able to take care of herself as a result of ECT. (See Deposition of Plaintiff, p. 68, l. 9 – p. 69, l. 25). She later acknowledged that she lost the ability to take care of herself prior to her last ECT treatment in June of 2008 and that she

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attributed that ***at the time*** to ECT. (See Deposition of Plaintiff, p. 81, l. 20 – p. 82, l. 21). She reiterated later in her deposition that it was during her maintenance ECT (2005-2008) that she first started believing that she was suffering from memory problems as a result of ECT. (See Deposition of Plaintiff, p. 124, l. 12-19). She also stated to Dr. Roberts, and reiterated in her deposition, that on January 6, 2009, she was upset at the effect that ECT had on her at the time. (See January 6, 2009 Notes of Dr. Roberts; Deposition of Plaintiff, p. 125, l. 19 - 126, l. 9). Similarly, there are also references to Plaintiff's memory loss from ECT dating back to Plaintiff's divorce proceedings in 2007. For instance, Plaintiff's Life Care Plan, dated January 30, 2007, notes "[Plaintiff] has been having increasing problems with her memory." (See Life Care Plan for Clair Johnson, p. 4). Plaintiff's Life Care Plan further notes that Plaintiff "has reportedly developed increasing problems with directionality and memory" and that Plaintiff admitted being "afraid to drive due to increased problems with memory. . ." (See Deposition of Plaintiff, pp. 5 & 13).

Therefore, Plaintiff's recognition of her injuries in 2007 and earlier indicates the claim accrued while Plaintiff was under disability. Consequently, even if the disability statute were applicable, Plaintiff's claims, having been filed more than one year after her disability ceased, are still untimely as a matter of law.

CONCLUSION

In sum, Plaintiff's claims against Dr. Roberts and MUSC, having been commenced well over six years after the alleged occurrence of medical negligence, are barred by the medical malpractice statute of repose. Accordingly, based upon the foregoing, summary judgment in favor of Defendants John Roberts M.D. and Medical University of South Carolina is proper. Defendants' motion for summary judgment is, therefore, **GRANTED.**

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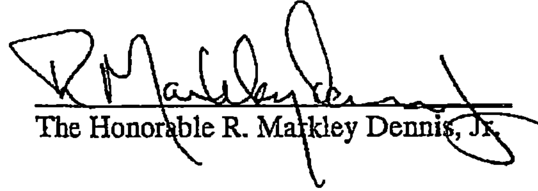
AND IT IS SO ORDERED.



The Honorable R. Markley Dennis, Jr.

January 23, 2014
Charleston, South Carolina

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BAKER RAVENEL BENDER

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July 14, 2015

HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
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RE: Clair Craver Johnson vs. Medical University of South Carolina
Case No.: 2011-CP-10-8318
AND
Clair Craver Johnson vs. John Roberts, M.D.
Case No.: 2012-CP-10-2867
Our File No.: 10517.0

Dear Ms. Kitchings:

Enclosed please find the order granting summary judgment in favor of the defendants which was, by mistake, not attached to the Notice of Intent to Appeal, along with the orders denying plaintiff's motion for reconsideration of these orders and entry of judgment.

By copy of this letter, I am notifying counsel for the defendants of this filing.

Sincerely,

Cravens Ravenel

D. Cravens Ravenel
DCR:sr; Enclosure
cc w/Encl.: William P. Early, Esquire
James E. Scott, IV, Esquire
The Honorable Julie J. Armstrong
Clair Craver Johnson

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