STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
CHARLES E. BAKER, SR.,	)	CASE NO. 2012-CP-10-3114
PLAINTIFF,	)	
vs.	)	**ORDER GRANTING SUMMARY JUDGMENT**
MEDICAL UNIVERSITY OF SOUTH CAROLINA,	)	
DEFENDANTS.	)	

This matter is before the Court upon Defendant, the Medical University of South Carolina's (hereinafter "MUSC" or "Defenant"), Motion for Summary Judgment. A motions hearing was held on January 15, 2014. Defendant contends that the Plaintiff's claims are time-barred, in part, because the Plaintiff failed to timely commence this action within the applicable statute of repose as set forth in S.C. Code Ann. § 15-3-545(A) and also, in part, because the Plaintiff failed to timely commence this action with the applicable statute of limitations set forth in S.C. Code Ann. § 15-78-110. Having fully considered the issues before the Court, the Court finds that Defendants' Motion should be GRANTED.

INTRODUCTION

The Plaintiff, Charles E. Baker, Sr., instituted the above-captioned matter by filing his Complaint on May 11, 2012, alleging a cause of action for dental malpractice against the Defendant. It appears Plaintiff was treated at Defendant's Dental Faculty Practice sporadically over a number of years, ranging from 1998 until November of 2010. Plaintiff's assertions of liability can be categorized as two-part and are addressed respectively below.

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Allegations of Improper Drilling

First, Plaintiff claims that in 2007, Dr. Theodore S. McGill[1], while acting within his scope of employment for MUSC, improperly drilled into a lower, opposing wisdom tooth after delivering an upper-right bridge for teeth 7-10. (See Plaintiff's Complaint at Pg. 2, ¶ 4; see also, Depo. Excerpt of Plaintiff, Page 91, Lines 8 – Page 93, Line 6). Plaintiff contends that this drilling caused him instant pain and discomfort, that he notified Dr. McGill immediately that same day of his pain, and that he continually informed him of continued pain and discomfort in that same area on his next "four or five" subsequent visits in 2007 to MUSC. (See Pltf.'s Compl. at Pg. 2, ¶ 4; see also, Depo. Excerpt of Plaintiff, Page 98 Line 23 – Page 99, Line 24). Plaintiff also admitted that he believed immediately that Dr. McGill had "messed up" by even attempting this unnecessary drilling. See Depo. Excerpt of Plaintiff, Page 98 Line 23 – Page 99, Line 24)

While there is some dispute as to exactly when the supposed drilling occurred, it is undisputed that any such act would had to have occurred in 2007[2] and that any and all complaints of associated pain by Plaintiff to Dr. McGill came, at the very latest by January of 2008, nearly four and half years prior to the commencement of this lawsuit.[3] Plaintiff contends that despite the raising of his concerns to Dr. McGill over the next several months, no remedial treatment was provided in any fashion and that the tooth that was drilled upon continued to cause him pain.

In no uncertain way, Plaintiff's own pleadings and deposition testimony demonstrate he was on aware of an injury in 2007, believed MUSC to be at fault immediately, and had actual

[1] Dr. McGill was originally named in this suit by the Plaintiff as a Defendant. However, he was dismissed by stipulation pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure on November 13, 2012. MUSC remains the lone Defendant.

[2] Plaintiff testified that this supposed "drilling" occurred on October 4, 2007.

[3] After a series of visits in 2007 and one in January of 2008, Plaintiff was not seen by Dr. McGill until February of 2010.

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notice of a claim. Even viewing Plaintiff's testimony and allegations in the light most favorable to him, the Court finds any cause of action related to this "improper drilling" accrued in January of 2008, at the latest, and pursuant to S.C. Code Ann. § 15-78-100, had run by January of 2010, thereby rendering this claim untimely by nearly two and half years.

Allegations of Inadequate Treatment of Periodontal Disease

Second, Plaintiff's sole liability expert, Dr. Stanton Goldstein, testified that Defendant's lack of treatment of Plaintiff's periodontal disease also fell below the standard of care.

On June 11, 2014, Dr. Goldstein was deposed in this matter. When clarifying his criticisms of MUSC's failure to provide any periodontal care to Mr. Baker, he specifically noted that such failures began in April of 2004 when Plaintiff presented to MUSC for dental care and treatment related to a cantilever bridge. In pertinent part, Dr. Goldstein testified as follows when questioned by *Plaintiff's own counsel*:

Q: Let me back up. The April 04' visit, what was that for?
A: (Reading) 'It was a consultation. Patient concerned about cantilever bridge. Looks like 3/4, discussed options, recommend extraction of 3, then fixed bridge from 2 to 6. Referred to Dr. Tabor.'
Q: Is there any mention of the patient having treatment for periodontal disease?
A: There's no mention of that. No.
Q: Any recommendations or notations in 04'?
A: No.
Q: Okay. In your opinion, then, if he had the periondontal disease in 02', would he still have it in 04'?
A: Most likely. Yes.
Q: Okay. But yet it's not mentioned in these records from MUSC?
A: No. It's not.
Q: And that's 04'?
A: Correct?
Q: If he had the periodontal disease in 02' and it still persists in 04' but it's not documented nor is it recommended for any kind of treatment, is that normal practice?
A: **I would say not.**
Q: **Is that a breach, so to speak, of a standard, medical standards or dental standards?**

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A: If there's a gap of two years, patient comes back for a new evaluation, it should be stated. It seems to be a breach of the standard of care. Yes.

(See Depo. of Dr. Goldstein, Page 83, Line 19 – Page 85, Line 3)

Although Plaintiff was not treated by Defendant MUSC for over three years after this 2004 visit, Dr. Goldstein testified that these same failures in periodontal care continued in May of 2007 when Plaintiff again presented to MUSC with requests for the crown and bridge work referenced above. The Court finds that Dr. Goldstein's testimony did not distinguish any alleged failures that supposedly occurred in April of 2004 from those alleged failures that supposedly occurred in 2007. Indeed, any and all criticism of MUSC's lack of periodontal treatment of the Plaintiff are identical in that the sole criticism asserted the repeated failure to treat Plaintiff's advancing periodontal disease in any manner. Because these allegations of negligent acts as to this Defendant begin in 2004, the statute of repose began to run in April of 2004 and expired in April of 2010, over two years prior to the filing of Plaintiff's lawsuit. As a result, the Court finds that Plaintiff's claims concerning periodontal treatment are time-barred by S.C. Code Ann. § 15-3-545(A).

STANDARD FOR SUMMARY JUDGMENT

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

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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 Concerning Inadequate Care For Periodontal Disease Are Untimely Pursuant To The Six-Year Statute Of Repose Set Forth In. § 15-3-545(A)

The six-year repose provision of S.C. Code Ann. § 15-3-545 applies to public hospitals, such as the Defendant, 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, the Court finds that the Plaintiff has commenced this action more than two years after the running of the six-year statute, and that any and all claims related to improper periodontal care should be dismissed as a matter of law.

Under the statute of repose, the triggering date which initiates the beginning of the six-year period is the "date of occurrence." Specifically, the statute provides the following:

> "...any action...to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation...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(A)(emphasis added).

The six-year period constitutes an "outer limit beyond which a medical malpractice claim is barred, regardless of when it is discovered." *O'Tuel v. Villani*, 318 S.C. 24, 455 S.E.2d. 698 (Ct.App. 1995) (overruled in part and on other grounds by *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)). Unlike the statute of limitations, the statute of repose for medical malpractice actions begins to run at the first occurrence of a ***negligent act***. *Id.* The

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statute of repose ignores the discovery, knowledge, and even the existence of any injury in barring claims; instead, its focus centers squarely on that first act of negligence underlying the claim. *Hoffman v. Powell*, 298 S.C. 338, 339-40, 380 S.E.2d 821 (1989) (the medical malpractice statute of repose bars claims "regardless of whether [the claim] has or should have been discovered" or "whether [the claimant's] injuries are latent or readily apparent."). The expiration of a statute of repose extinguishes all causes of action, including those that may later accrue and those that have already accrued. *Columbia/CSA-HS Greater Columbia Healthcare System v. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n*, 394 S.C. 68, 713 S.E.2d 639 (Ct. App. 2011); *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006); *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993). These statutes of repose create a substantive right, designed to protect the economic balance struck by the legislative body in this state. *Langley*, 313 S.C. at 404, 438 S.E.2d at 243-44.

Because it is black letter law that a Plaintiff must establish by expert testimony that the defendant breached the applicable standard of care, any and all assertions of a negligent act in this case are derived solely from the testimony provided by Dr. Goldstein, Plaintiff's expert. *Botehlo v. Bycura*, 282 S.C. 578, 583, 320 S.E.2d 59, 62 (Ct. App. 1984); *Armstrong v. Weiland,* 267 S.C. 12, 225 S.E.2d 851 (1976). Plaintiff is unqualified to provide such testimony. Because Plaintiff's expert testified that this Defendant, by and through its employees, breached the standard of care as early as April of 2004 in failing to treat Plaintiff's periodontal disease, Plaintiff's claims of liability violate the six-year statute of repose.

A. South Carolina Has Refused to Adopt the "Continuous Treatment/Continuous Tort" Doctrine

This Court finds that Plaintiff may not advance his otherwise time-barred claims simply because he alleges that MUSC's treatment and alleged negligence continued over a span of time

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and somehow "reoccurred" thereby renewing the time within which to commence this action. South Carolina has judicially rejected such notions, recognizing that to adopt either the continuous treatment or continuous tort rule would run contravene the adopted legislative policy of our General Assembly in establishing a statute of repose for medical negligence actions. *Harrison v. Bevilacqua,* 354 S.C. 129, 580 S.E.2d 109 (2003); *Dunbar v. Carlson*, 341 S.C. 261 533 S.E. 919 (2000); *Shadwell v. Craigie*, 361 S.C. 492, 605 S.E.2d 567 (2004). Therefore, despite MUSC's continued treatment of the Plaintiff in 2007 and alleged recurring negligence, the Court finds that the operative date for purposes of determining the timeliness of this action remains the first alleged act of negligence in April of 2004.

The Court also finds that Plaintiff also may not legitimately assert that any 2007 treatment was a "separate and distinct" occurrence of negligence. Quite conversely, Dr. Goldstein testified that the 2007 failure to treat Plaintiff's periodontal disease was no different than in 2004. As such, a subsequent allegation of a negligence act is of no consequence because of South Carolina's rejection of the continuous tort rule. In pertinent part, Dr. Goldstein stated:

> Q: And it's your belief that Dr. McGill should have rediagnosed him with periodontal disease in 2007? That's your chief complaint?
> A: That's my chief complaint?
> Q: Yes, sir.
> A: I believe he should have reevaluated the periodontal situation for Mr. Baker in both 2004 and 2007. But there's no indication that he did so.

(Depo. of Dr. Goldstein, Page 95, Lines 13-22). As the Georgia Court of Appeals held in Howell v. Zottoli, 691 S.E.2d 564 (Ga. Ct. App. 2010), which addresses a similar set of facts:

> "although the focus of a statute of repose is generally the date of the alleged negligent act, a later negligent act cannot serve as the new starting point of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition."

Howell, 302 Ga. App. at 479.

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B. § 15-3-545(A)'s Limited Tolling Provision Is Inapplicable to Plaintiff

The Court also finds that any alleged "mental incapacity" or other tolling argument presented to this Court by the Plaintiff is irrelevant to the statute of repose. Even presuming that the Plaintiff qualifies, the Court finds that the disability tolling statute set forth in S.C. Code Ann. § 15-3-40 does not apply to the six year statute of repose set forth in S.C. Code Ann. § 15-3-545.

In rejecting the application of the "moving" non-resident defendant tolling statute to the medical malpractice statute of repose in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the Supreme Court noted the following:

> "§15-3-545 specifically provides that an action for medical malpractice must be commenced within 'six years from date of occurrence, *or as tolled by this section.*' Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion 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)."

This rationale is of equal application to the disability tolling provisions, which like the "moving" non-resident tolling provisions, are not found within the statutory language of § 15-3-545.

In fact, very recently, the South Carolina Court of Appeals did find that the disability tolling statute does not apply to the statute of limitations set forth in S.C. Code Ann. § 15-3-545(A). In *Sims v. Amisub of South Carolina, Inc.*, 2014 WL 551545 (Feb. 12, 2014), the Court held that the incompetency tolling provisions set forth in S.C. Code Ann. § 15-3-40 are inapplicable to the statute of limitations for medical malpractice actions because of the "or as tolled by this section" language. This holding is similarly dispositive regarding the statute of repose because it is found in this very statute. Wherefore, the Court finds that Plaintiff's claims are time-barred by the statute of repose.

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II. Plaintiff's Claims Regarding Improper Drilling Are Time-Barred Pursuant To § 15-78-100

Lastly, the Court finds that Plaintiff's allegations of "improper drilling" were not timely filed within the two-year statute of limitations applicable to this Defendant. Unlike the statute of repose, the statute of limitations accrues pursuant to the legislatively-enacted discovery rule which requires Plaintiff to commence her action "within three years from [the] date of discovery or when it reasonably ought to have discovered." S.C. Code Ann. § 15-3-545(A). Where the defendant is a governmental entity such as MUSC, the action must be commenced, pursuant to the discovery rule, within two years after the date the loss was or should have been discovered. S.C. Code Ann. § 15-78-110 (requiring actions brought pursuant to the Tort Claims Act be commenced within two years after the date the loss was or should have been discovered).

Under the discovery rule, the statute of limitations begins to run from the date the Plaintiff knew or should have known that, by the exercise of reasonable diligence, a cause of action exists. *Holmes v. National Service Industries, Inc.*, 395 S.C. 305, 717 S.E.2d 751 (2011). Indeed, notice is imputed when a person, through the exercise of reasonable diligence, should have known of the existence of a wrongful act. In *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996), the exercise of reasonable diligence was defined to mean:

> "that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist."

In this case, notice need not be imputed as the face of the Plaintiffs' Complaint, admissions in Plaintiff's deposition, and admissions by Plaintiff's own expert, all indicate that Plaintiff had actual notice of **an alleged wrongful act and injury** as early as 2007. As set forth previously, Plaintiff testified that he immediately felt pain upon the drilling of the lower tooth, immediately thought Dr. McGill "messed up", and went back to Dr. McGill on subsequent visits to MUSC

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express his concerns about the pain and the improper drilling. (See Depo. Excerpt of Plaintiff, Page 91, Lines 8 – Page 93, Line 6; Depo. Excerpt of Plaintiff, Page 98 Line 23 – Page 99, Line 24; see also Plaintiff's Complaint at Pg. 2.) While Plaintiff may contend that his injuries or pain continued well after or worsened, the Court finds that such assertions are insufficient to defeat the statute of limitations defense in this case. As the South Carolina Supreme Court noted in *Dean*, "the fact that the injured party may not comprehend the ***full extent*** of the damage is immaterial." 321 S.C. at 364, 468 S.E.2d at 647. All that is required is notice of ***a*** injury, not the entire injury. As a result, even when viewed in the light most favorable to the Plaintiff, any and all assertions of liability related to "improper drilling" are untimely as this matter was not filed until May of 2012 until nearly four and half years after the alleged incident and subsequent visits where he voiced concern.

At the hearing of this motion, Plaintiff also argued that his bipolar disorder, depression, and lack of formal education prevented him from being on notice of a claim. The Court finds these arguments to be without merit. First and foremost, any and all conditions claimed by the Plaintiff do not qualify under the "insanity tolling" statute set forth in § 15-3-40. However, even if they did, no qualified expert has opined that the Plaintiff's condition rendered him insane or mentally incompetent so as to bring § 15-3-40 into question. Wherefore, the Court finds that Plaintiff's claim of "improperly drilled" are time-barred pursuant to S.C. Code Ann. § 15-78-110.

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CONCLUSION

In sum, Plaintiff's claims against MUSC are untimely as a matter of law. Accordingly, based upon the foregoing, summary judgment in favor of the Medical University of South Carolina is proper. Defendants' motion for summary judgment is, therefore, **GRANTED.**

AND IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.

January 19, 2015
Charleston, South Carolina

ATTEST A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.
By DEPUTY CLERK

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
Case No. 2012-CP-10-3114

Charles E. Baker

Plaintiff,

Medical University of South Carolina

Defendant.

ORDER

FILED
2015 MAY -6 PM 12:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter comes before me upon Motion to Alter or Amend and for Reconsideration, filed 2/4/2015, by Plaintiff, by and through counsel. After fully considering said Motion, this Court finds no need for oral argument in this matter and therefore the Motion to Alter or Amend and for Reconsideration is denied;

AND IT IS SO ORDERED!

R. MARKLEY DENNIS, JR.
Presiding Judge

Charleston, South Carolina

May 5, 2015