THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson
The Honorable R. Markley Dennis, Jr.
Charleston County

Trial Court Case No.: 2011-CP-10-08313
2012-CP-10-02867

Appellate Case No.: 2015-001463

Clair Craver Johnson . . . . . Appellant

v.

John Roberts, M.D. . . . . Respondent

And

Clair Craver Johnson . . . . . .Appellant

v.

Medical University of South Carolina . . . . . .Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **THE LOWER COURT ERRED BY CONCLUDING THAT THE TRIGGER DATE FOR COMPUTING THE RUNNING OF THE SIX YEAR STATUTE OF REPOSE AND THREE YEAR STATUTE OF LIMITATIONS WAS DECEMBER 10, 2003, THE DATE OF THE FIRST OF EIGHTY-SIX ELECTROCONVULSIVE THERAPY TREATMENTS ENDING ON JUNE 26, 2008, THE DATE OF THE EIGHTY-SIXTH SUCH TREATMENT, THE ERROR BEING THAT ELECTROCONVULSIVE THERAPY TREATMENT DID NOT CAUSE IDENTIFIABLE INJURY TO APPELLANT UNTIL NO EARLIER THAN 2009-2010 THEREBY TRIGGERING A THREE YEAR PERIOD IN WHICH TO INITIATE A CLAIM PURSUANT TO S.C. CODE ANN. § 15-545(A).**

STATEMENT OF THE CASE

These two (2) medical malpractice actions, consolidated by consent for discovery and trial, arise from medical treatment and advice provided to Appellant, Clair Craver Johnson, by staff of the Respondent Medical University of South Carolina (MUSC) and by the Appellant's personal psychiatrist, Respondent John Roberts, M.D. (Roberts), who participated in Appellant's care, including approval of the use of electroconvulsive therapy applied by Respondent MUSC to the brain of Appellant.

MUSC, with the knowledge and consent of Roberts, initiated a series of what became eighty-six (86) separate applications of electrical current into the brain of Appellant beginning on December 3, 2003 and ending on June 26, 2008 and at some point in that period permanent damage resulted. See Depositions and Affidavit of Harold B. Bursztjan, M.D.

Appellant contends that she did not discover nor was it reasonable to expect discovery of her claims against Respondents until she recovered some control of her mental faculties in 2010, giving her until 2013 (three years after connection of her loss

with Electroconvulsive therapy and within six years of the date of the cumulative impact of Respondents' acts constituting medical malpractice) to initiate an action or actions against Respondents.

Appellant contends the filing and service of the Summons and Complaints in these actions in 2011/2012 were therefore timely.

Respondents contend and the Court held that service by Appellant of Summons and Complaints in 2011 and 2012 were untimely since the initiation of electroconvulsive therapy in 2003 constituted the act of malpractice triggering the six (6) year statute of repose for Appellant to initiate actions against Respondents. Appellant contends that the evidence of the date triggering the statute of repose is not a question of law for the Court but is one of fact.

STATEMENT OF FACTS

Respondent Medical University of South Carolina (MUSC) holds itself out to the public as a hospital capable of safely administering electroconvulsive therapy to patients like Appellant.

Respondent John Roberts, M.D. (Roberts) holds himself out to the public as a medical doctor with a specialty in psychiatry.

Respondents MUSC and Roberts treated Appellant for mental disorders. Roberts prescribed a drug known as Wellbutrin for Appellant and jointly with MUSC agreed upon an undetermined series of electroconvulsive treatments for Appellant in addition to Wellbutrin.

Wellbutrin dosage continued and simultaneously Respondents subjected Appellant to electroconvulsive therapy (electrical current introduced into Appellant's

brain) beginning on December 3, 2003 with five (5) separate treatments, seven (7) separate treatments in April 2005, four (4) treatments in December of 2005, four (4) treatments in January of 2006, four (4) treatments in February of 2006, six (6) treatments in March of 2006, four (4) treatments in April of 2006, four (4) treatments in May of 2006, two (2) treatments in June of 2006, one (1) occasion in July 2006, two (2) occasions in September 2006, three (3) occasions in October 2006, five (5) occasions in November 2006, four (4) occasions in December 2006, three (3) occasions in January 2007, two (2) occasions in February 2007, three (3) occasions in March 2007, one (1) occasion in April 2007, one (1) occasion in May 2007, one (1) occasion in June 2007, one (1) occasion in July 2007, one (1) occasion in August 2007, one (1) occasion in October 2007, one (1) occasion in January 2008, one (1) occasion in March 2008, one (1) occasion in June 2008, totaling eighty-six (86) electroconvulsive therapy treatments. See Depositions and Affidavit of Harold B. Bursztajn, M.D.

Appellant was examined by Harold B. Bursztajn, M.D. following these eighty-six (86) treatments of electrical current into her brain and was found to be so mentally impaired as a result of the cumulative effect of the referenced use of electrical current between December of 2003 and June of 2008, that she was unable to understand her loss and its relationship to the eighty-six (86) applications of electroconvulsive therapy.

Appellant's position is that S.C. Code Ann. § 15-3-545(A) gave Appellant a cause of action arising from the application of electroconvulsive therapy that resulted in brain damage to Appellant not for electroconvulsive therapy treatment that did not result in symptoms. Appellant had three years from her final treatment of electroconvulsive therapy, June 26, 2008, in which to initiate a timely action since the symptoms

complained of did not arise until 2009 following the final electroconvulsive therapy treatment in June of 2008.

Appellant filed a timely motion for reconsideration of the joint order granting summary judgment filed in these consolidated cases on February 25, 2014. Separate orders denying Appellant's motion for reconsideration were signed in each of these consolidated actions on May 26, 2015 and filed on May 29, 2015.

ARGUMENT

This medical malpractice action arises from medical care for "bipolar disorder with psychosis" provided to Appellant, Clair Craver Johnson, by employees of the Respondent, Medical University of South Carolina (MUSC) and by Respondent, John Roberts, M.D. (Roberts).

Appellant was being treated by Respondent Roberts, a psychiatrist who referred Appellant to MUSC for the electroconvulsive therapy (ECT) that was administered by MUSC beginning December 10, 2003 and continuing until June 26, 2008. See Affidavit of Harold J. Burstztajn, M.D., attached to the Summons and Complaints in both referenced actions and the two Depositions of Harold J. Burstzajn, M.D.

Respondent, MUSC with Respondent Roberts concurrence, subjected Appellant to eighty-six (86) courses of ECT treatment between December 3, 2002 and June 26, 2008. ECT was applied to Appellant on five (5) occasions in December of 2003; on seven (7) occasions in April of 2005; on six (6) occasions in October of 2005; on four occasions in December of 2005; on four (4) occasions in January of 2006; on four (4) occasions in February of 2006; on six (6) occasions in March of 2006; on four (4) occasions in April of 2006; on four (4) occasions in May of 2006; on two (2) occasions in June of 2006; on

one (1) occasion in July 2006; on two (2) occasions in September of 2006; on three (3) occasions in October of 2006; on five (5) occasions in November of 2006; on four (4) occasions in December of 2006; on three (3) occasions in January 2007; on two (2) occasions in February of 2007; on three (3) occasions in March of 2007; on one (1) occasions in April of 2007; On one (1) occasion in May of 2007; on one (1) occasion in June of 2007; on one (1) occasion in July of 2007; on one (1) occasion in August of 2007; on one occasion in October of 2007; on one occasion in November of 2007; on one occasion in January of 2008; on one occasion in March of 2008; and on one occasion in June of 2008 for a total of eighty-six (86) electroconvulsive treatments.

As a direct result of the cumulative effect of this treatment Appellant suffered from mental confusion and memory repression. Appellant's mental confusion and the repression of Appellant's memory became symptomatic as early as 2009. See Bursztajn's Deposition July 26, 2013 at p. 1-10. Appellant ". . . relayed to physicians and others that she believed she was having problems with ECT as early as 2009. . . ." Deposition of Harold B. Bursztajn, M.D., July 26, 2013, p. 72, L. 1-10.

Given testimony that Appellant first experienced problems with electroconvulsive therapy in 2009 a jury issue is present over the timeliness of these actions. The issue is not whether use of electroconvulsive therapy is negligent from the first treatment but at what point (number and timing and type of electroconvulsive therapy) does use of electroconvulsive therapy constitute negligence.

See also p. 54, L. 1-24, p. 55, L. 1. Deposition of Harold B. Bursztajn, M.D., October 29, 2013 over the danger of using bilateral electroconvulsive therapy. Following termination of electroconvulsive therapy until June 25, 2010, Appellant's mental

condition improved to the point that she could appreciate the claims she had against MUSC and John Roberts, M.D. at which point she filed a Notice of Intent to File Suit naming Respondent MUSC as a defendant.

Appellant subsequently filed a Notice of Intent to File Suit against Respondent John Roberts, M.D. on November 4, 2011, followed by filing and serving a complaint against John Roberts, M.D. on or about April 27, 2012. Appellant also filed suit against MUSC on November 8, 2011 and effected service on November 23, 2011.

Appellant contends that the cumulative effect of these electroconvulsive therapy treatments constituted an independent tort damaging Appellant's brain and ultimately resulting in loss of her ability to reason and recall past events which she began to recognize in 2009-2010 following the termination of the electroconvulsive therapy in June of 2008.

Appellant further contends that applying the Six Year Statute of Repose found in S.C. Code Ann. § 15-3-545(A) to the cumulative electroconvulsive therapy treatment creates, at a minimum, a fact issue over the timeliness of the medical malpractice claims for injury related to electroconvulsive therapy taking place within six years of the symptom producing electroconvulsive therapy and within three years of the **discovery** of these claims. These actions were commenced within three years of the date electroconvulsive therapy produced symptoms that reasonably ought to have been discovered, i.e., 2009.

The complaint in Clair Craver Johnson vs. Medical University of South Carolina was served on MUSC on November 23, 2011. Appellant contends that applying the Six

Year Statute of Repose to the date of service of Appellant's action makes these actions timely.

S.C. Code Ann. § 15-545(A) contains a three year limitation of action provision for medical malpractice requiring any such action to be "commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action from date of discovery or when it reasonably ought to have been discovered; not to exceed six years from date of occurrence . . . ." The occurrence is the question. Is the first electroconvulsive therapy treatment on December 3, 2003 "the occurrence" or is the occurrence the date the electroconvulsive therapy treatment resulted in recognizable symptoms? Appellant contends that even protection of the medical community cannot justify defining date of occurrence as the date of the initial electroconvulsive treatment. The "delects" central to this action are the large number of electroconvulsive therapy treatments not the mere use of electroconvulsive therapy. A fact issue over when electroconvulsive therapy could have been found to have caused permanent brain damage is present and requires action by a jury. Appellant is entitled to a reasonable time from the date the loss was discoverable to initiate suit. Initial discovery apparently took place in 2009. Less than three years later suit was commenced.

While it is a simple matter to determine the running of the six (6) year statute of repose when there is a single act of negligence involved, the presence of eighty-six (86) acts over a period beginning on December 2, 2002 and running to and including June 26, 2008, each of which may not be characterized an act of negligence but collectively at some point can be so characterized is more difficult task and cannot be determined by the Court as a matter of law.

A fact issue as to **when** Clair Johnson allegedly sustained injuries are present in this action making O'Tuel as guardian v. Villani, 318 S.C. 24, 455 S.E.2d 698 (1995) inapposite to Clair Johnson's claim. There is evidence from which one could conclude that her damages occurred less than six (6) years from the date of the alleged negligence and within three (3) years of the malpractice alleged to have caused the injury.

Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993) involved claim of failure to diagnose cancer from lesions removed in 1979 and 1980. Langley filed suit in 1991 more than six years following the negligent act and was barred.

Ms. Johnson was treated for her condition by electroconvulsive therapy from 2003 to 2008 and the question is unresolved as to when and whether the use of electroconvulsive therapy caused her permanent mental issues.

Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2002) involved application of the continuous treatment rule to toll the statute of limitations and whether South Carolina would adopt that rule. It refused to do so and Ms. Johnson has not sought the application of such a rule to her facts. Ms. Johnson contends that her claim arose less than three years after it became available to her and certainly fewer than the six year statute of repose. Again, this case is not factually similar to the case at bar.

Clair Johnson was treated with electroconvulsive therapy involving the application of electrical current to her brain to treat bi-polar disorders and no evidence exists to demonstrate at what point the use of electroconvulsive therapy caused the permanent loss of memory about which Ms. Johnson complains.

The earliest that memory impairment and confusion were the subject of complaints by Ms. Johnson was in 2009. Suit was initiated in 2011, two years after the first indication of brain damage.

These reported cases are not supportive of Respondents contention that Ms. Johnson is barred by the six year statute of repose. There is no evidence in this action that memory loss and mental confusion are the anticipated side effect of electroconvulsive therapy or when it would be expected to appear.

Did Ms. Johnson's mental issues arise in 2009 or 2010 as the result of electroconvulsive therapy delivered in 2008? If so, Ms. Johnson had until 2014 to initiate her action and remain within the statute of repose.

CONCLUSION

In summary, fact issues abound in this action that must be presented to a jury and which cannot be decided by the Court as a matter of law in a summary judgment motion.

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September 28, 2015

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, D. Cravens Ravenel, an employee of Baker, Ravenel & Bender, L.L.P., attorneys for Appellant Clair Craver Johnson, hereby certify that I have, on this 28th day of September 2015, served counsel below with Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal by mailing copies of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following addresses:

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September 28, 2015

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RE: Clair Craver Johnson, Appellant v. John Roberts M.D., Respondent
And
Clair Craver Johnson, Appellant v. Medical University of South Carolina, Respondent
Appellate Case No.: 2015-001463
Our File No.: 10517.2

Dear Ms. Kitchings:

Enclosed for filing the above-referenced matter is an original and one (1) copy of my Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service thereof. Please return a clocked copy of each document to me via the courier delivering same.

By copy hereof, I am serving same upon counsel for Respondents.

Thank you very much.

Sincerely,

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