THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
OCT 28 2015
SC Court of Appeals

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge

Case No. 2011-CP-10-8318
Appellate Case No. 2015-001463

Clair Craver Johnson..Appellant

v.

The Medical University of South Carolina..Respondent

Case No. 2012-CP-10-2867

Clair Craver Johnson..Appellant

v.

John Roberts, M.D..Respondent

BRIEF OF RESPONDENT THE MEDICAL UNIVERSITY OF SOUTH CAROLINA

William P. Early, SC Bar #15657
Kristen B. Fehsenfeld, SC Bar #76971
PIERCE, HERNS, SLOAN & WILSON, LLC
P.O. Box 22437
Charleston, SC 29402
Phone: (843)722-7733; Fax: (843)722-7732
willearly@phswlaw.com
kristenfehsenfeld@phswlaw.com
Attorneys for the Respondent the Medical University of South Carolina

COUNSEL OF RECORD:

D. Cravens Ravenel
BAKER, RAVENEL, & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803)799-9091; Fax (803)779-3423
cravenel@brblegal.com
Attorneys for Appellant Clair Craver Johnson

James Edward Scott, IV
Donald Jay Davis, Jr.
Stephen L. Brown
Russell G. Hines
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
P.O. Box 993
Charleston, SC 29402
Phone: (843)720-5406
jdavid@ycrlaw.com; jscott@ycrlaw.com;
sbrown@ycrlaw.com; rhines@ycrlaw.com
Attorneys for Respondent John Roberts, M.D.

TABLE OF CONTENTS

Table of Authorities..........ii

Statement of Issues on Appeal..........1

Introduction..........1

Statement of the Case..........2

Argument..........4

I. THE SOLE ARGUMENT BRIEFED BY APPELLANT WAS NOT RAISED TO AND RULED UPON BY THE LOWER COURT AND IS THEREFORE NOT PRESERVED FOR REVIEW..........4

II. THE LOWER COURT CORRECTLY CONCLUDED APPELLANT'S MEDICAL MALPRACTICE CLAIMS AGAINST MUSC ARE TIME-BARRED BY THE ABSOLUTE SIX-YEAR STATUTE OF REPOSE ESTABLISHED BY THE GENERAL ASSEMBLY..........5-6

Conclusion..........13

TABLE OF AUTHORITIES

CASES

David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006)....................4

Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005)....................4

Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 411 S.C. 557, 769 S.E.2d 847 (2015), reh'g denied (Apr. 9, 2015)....................4, 7-8

Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 725 S.E.2d 693 (2012)....................4, 13

CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011)....................4

Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)....................5

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)....................5

Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 628 S.E.2d 38 (2006)....................6-8

Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993)....................6, 9

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)....................7

Charleston Cnty. Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)....................7

Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989)....................7

Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003)....................7, 9

Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 678 S.E.2d 809 (2009)....................7

Sims v. Amisub of S. Carolina, Inc., 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014), reh'g denied (May 19, 2014), cert. granted (Nov. 19, 2014), aff'd, No. 2014-001179, 2015 WL 4751030 (S.C. Aug. 12, 2015)....................9

Calaway ex rel. Calaway v. Schucker, 193 S.W.3d 509 (Tenn. 2005)....................9-10

Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994)....................11

Davis v. Lunceford, 287 S.C. 242, 335 S.E.2d 798 (1985)..11-12

Mende v. Conway Hospital, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991)..............................12

STATUTES

S.C. Code Ann. § 15-3-545..6-10

S.C. Code Ann. § 15-3-40..10

S.C. Code Ann. § 15-79-125(A)..12-13

S.C. Code Ann. § 15-36-100(C)(1)..13

RULES

Rule 56(c), SCRCP..4

Rule 220(c), SCACR..14

SECONDARY AUTHORITY

54 C.J.S. *Limitations of Actions* § 117..11

STATEMENT OF ISSUES ON APPEAL

I. THE SOLE ARGUMENT BRIEFED BY APPELLANT WAS NOT RAISED TO AND RULED UPON BY THE LOWER COURT AND IS THEREFORE NOT PRESERVED FOR REVIEW.

II. THE LOWER COURT CORRECTLY CONCLUDED APPELLANT'S MEDICAL MALPRACTICE CLAIMS AGAINST MUSC ARE TIME-BARRED BY THE ABSOLUTE SIX-YEAR STATUTE OF REPOSE ESTABLISHED BY THE GENERAL ASSEMBLY.

INTRODUCTION

This appeal involves issues of statutory construction concerning the application of the medical malpractice statute of repose and relevant tolling provisions. In South Carolina, the absolute six-year repose period for claims arising out of medical malpractice is deemed to run from the date of the treatment giving rise to the injury. S.C. Code § 15-3-545. The date of treatment in this case, i.e. the occurrence from which the statute of repose is set to run, is not disputed. In fact, this date of treatment controls regardless of whether Appellant has or should have discovered her injury. For this reason, South Carolina has consistently refused to adopt tolling mechanisms such as the continuous treatment rule, which would otherwise permit Appellant's claims under the rationale asserted in her brief and rejected by the circuit court below.

Notwithstanding, Appellant has overlooked this guiding legal framework in an attempt to circumvent the six-year statute of repose bar by arguing an issue of fact exists as to the date of the occurrence, i.e. initiation of treatment. Not only does this argument fail for lack of preservation, it ignores prevailing jurisprudence and asks this Court to apply the continuous treatment rule, a doctrine which has never been adopted in South Carolina. Regardless whether Appellant discovered or should have discovered her injury, Appellant's failure to file suit until nearly eight years after the treatment alleged to have given rise to Appellant's claim, and two years after the expiration of the statute of repose, constitutes an unequivocal bar to Appellant's claims. As a strict

outside limitation period enacted by the General Assembly, the medical malpractice statute of repose represents "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006).

Simply put, under these circumstances, the legislature intended § 15-3-545(A) to bar Appellant's action. Permitting Appellant's malpractice claims to proceed under the rationale argued by Appellant would violate the legislatively proscribed six-year repose provision. For these reasons, as detailed herein, this Court should affirm the February 4, 2014 Order of the circuit court finding Appellant's claims barred for failure to file suit within the requisite repose period.

STATEMENT OF THE CASE

Appellant 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") treatment administered sporadically from 2003 until 2008 for the treatment of severe depression and mania. (See Appellant's Complaint at p. 2). Appellant filed a separate action against her private psychiatrist, Dr. John Roberts, associated with his prescription of certain medication which caused Appellant's need for ECT treatment, as well as the ECT treatment itself. Both cases have been consolidated. The events giving rise to this action are as follows.

Since the mid-1980s Appellant has been suffering from bi-polar disorder and depression. She was formally diagnosed with borderline bipolar disorder while attending Winthrop in the mid-1980s. Appellant's mania peaked from 1984-1986, after which she dropped out of college and fell into a deep depression. Thereafter, for a period of about six years, Appellant was relatively stable and led a normal life. In 1997, her mania spiked once again, requiring hospitalization. Dr. John Roberts began treating Appellant at this time. Over the next few years, Appellant required several

hospitalizations in Rock Hill, Columbia and Charleston, during which she was treated with several different psychiatric medications.

During one of these numerous hospitalizations, she 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 3, 2003, Appellant began ECT treatments. Appellant 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. Appellant's last ECT treatment was on June 26, 2008.

Notwithstanding evidence to the contrary, Appellant's expert claims that the Appellant 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. at p. 3).

On June 25, 2010, prior to filing the Summons and Complaint in the instant action, Appellant filed a Notice of Intent to File Suit, wherein she sought an extension of time to file an expert affidavit as provided by S.C. Code Ann. §§ 15-79-125 and 15-36-100. The notice stated "time constraints" prevented Appellant from filing an affidavit of a medical expert. While § 15-36-100 provides a period of forty-five days within which to file the expert witness affidavit, no extension was provided by the Court. By Appellant's own admission, as stated in the Notice of Intent to File Suit, the limitations period was believed to expire within ten days from the date of the Notice of Intent to File Suit, dated June 25, 2010. Thus, according to Appellant, her claims would expire on July 5, 2010.

On August 25, 2010, Appellant dismissed the matter without prejudice. Appellant eventually obtained an expert witness affidavit on August 10, 2011, and the instant Complaint was

subsequently filed on November 16, 2011, nearly eight years after Appellant began receiving ECT treatments, and almost two years after the expiration of the six-year statute of repose.

By order dated February 4, 2014, the circuit court granted summary judgment in favor of Respondents MUSC and John Roberts M.D., finding Appellant's claims barred by the statute of repose. Appellant thereafter filed a Motion to Alter or Amend and for Reconsideration under Rule 59(e), SCRCP, which was denied on May 29, 2015. This appeal follows.

STANDARD OF REVIEW

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005). "'Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.'" Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015), reh'g denied (Apr. 9, 2015) (citing Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)).

ARGUMENT

I. THE SOLE ARGUMENT BRIEFED BY APPELLANT WAS NOT RAISED TO AND RULED UPON BY THE LOWER COURT AND IS THEREFORE NOT PRESERVED FOR REVIEW.

To defeat the statute of repose bar, Appellant asserts for the first time on appeal that an issue of fact exists as to when and whether the use of ECT caused her permanent mental injuries. (Appellant's Brief at p. 8). This argument being raised now for the first time on appeal is not preserved for appellate review.

It is well-settled that an issue not raised and ruled upon cannot be raised for the first time on appeal. Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Appellant's argument before the lower court centered solely on the tolling provisions of the disability statute. Specifically, relying on S.C. Code § 15-3-40, Appellant maintained the time period within which to file suit was tolled from 2003 until 2010 during which "her capacity to comprehend what was going on in her life" was diminished by her ECT and underlying mental illness. See Plaintiff's Memorandum in Opposition to Summary Judgment at p. 2). Appellant further relied exclusively on this argument in her Reply to Defendant's Opposition to Plaintiff's Motion for Reconsideration. See Reply to Opposition to Motion for Reconsideration at p. 1 (referencing only the Affidavit of Harold J. Bursztajn, M.D., wherein Dr. Bursztajn stated Appellant did not regain the mental capacity to appreciate the harm suffered from her treatment with ECT).

Accordingly, because Appellant failed to raise the issue as to when and whether ECT caused Appellant's injuries, the argument is barred from this Court's consideration for lack of preservation. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

II. THE LOWER COURT CORRECTLY CONCLUDED APPELLANT'S MEDICAL MALPRACTICE CLAIMS AGAINST MUSC ARE TIME-BARRED BY THE

ABSOLUTE SIX-YEAR STATUTE OF REPOSE ESTABLISHED BY THE GENERAL ASSEMBLY.

Even if preserved, Appellant's misguided assertion that an issue of fact exists as to when and whether the use of ECT caused her permanent mental injuries overlooks and misinterprets the prevailing jurisprudence and legislative intent underlying the enactment of the six-year repose provision barring this matter. For the reasons that follow, this Court should affirm the Order of the lower court dismissing Appellant's claims as time-barred.

A. Appellant's claims are barred by the absolute six-year statute of repose for medical malpractice actions.

The General Assembly has enacted a six-year statute of repose for medical malpractice actions, which provides in relevant part:

> [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 repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing Langley v. Pierce, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993)). "A statute of repose is typically an *absolute time limit* beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." Id. (emphasis added) (citing Langley, 313 S.C. at 404, 438 S.E.2d at 243). Thus, "'[s]tatutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists.'"

Columbia/CSA-HS Greater Columbia Healthcare Sys., LP, 411 S.C. at 560-61, 769 S.E.2d at 848-49 (quoting Capco of Summerville, Inc., 368 S.C. at 142, 628 S.E.2d at 41(quotation omitted)).

The question posed by Appellant is whether the statute of repose applicable to Appellant's action was triggered at the date of first treatment so as to bar Appellant's claims against Respondent MUSC. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Charleston Cnty. Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)).

Section 15-3-545(A) provides in relevant part:

> [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). 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, 340, 380 S.E.2d 821, 822 (1989).[1]

Interpreting the plain and unambiguous language of 15-3-545(A), the legislature clearly intended the repose provision to set the time limit for filing a claim based upon the act or omission of the defendant, in this case MUSC. Because Appellant's claims arise out of her ECT treatment, the trigger date/occurrence for the statute of repose is the date of her first treatment on December 3, 2003. See Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 114 (2003) (rejecting the continuous treatment rule, finding claims not brought within six years of onset of treatment are

[1] The six-year repose provision of § 15-3-545 applies to both government and private hospitals. 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).

barred pursuant to the medical malpractice statute of repose). It is from this date that the absolute outer limit of the six year repose provision established by the legislature was set to run. Thus, Appellant was required to bring the instant action no later December 3, 2009, six years from the date of the onset of treatment.

The expiration of the statute of repose on December 3, 2009 therefore extinguished all Appellant's causes of action, including those that may later accrue and those that have already accrued. See Capco of Summerville, Inc., 368 S.C. at 142, 628 S.E.2d at 41; see e.g. Columbia/CSA-HS Greater Columbia Healthcare Sys., 411 S.C. at 560, 769 S.E.2d at 848 (finding equitable indemnification claim brought ten years after event giving rise to medical malpractice action barred by six-year statute of repose).

Such a strict construction of the statute of repose under the circumstances of this case is further supported by the legislature's expressed intent to limit exceptions to the statute to only three scenarios: (1) Section 15-3-545(B) excludes from the operation of the statute of repose actions where a foreign object, such as a surgical instrument, is left in the "body or person of any one" and permits these actions to "be commenced within two years from date of discovery or when it reasonably ought to have been discovered;" (2) Section 15–3-545(C) excludes actions that arose "prior to June 10, 1977;" and (3) Section 15-3-545(D) provides tolling for claims of minors. S.C. Code Ann. § 15-3-545. If the General Assembly desired to expand the reach of these exceptions to incorporate the situation at issue here, it certainly could have done so. See Columbia/CSA-HS, 411 S.C. at 562, 769 S.E.2d at 849 (noting the General Assembly limited the reach of the exceptions to the statute of repose to only those exceptions cited above, and stating, "[i]f the General Assembly desires to expand those exceptions to include the situation presented here, that decision lies exclusively in the Legislative Branch.").

Consistent with this legislative intent to limit exposure and foster quality health care services, 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. As explained in Harrison v. Bevilacqua, adoption of the 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. at 138, 580 S.E.2d at 114.

Furthermore, because the only tolling provided by § 15-3-545 is contained in Subsection (D) and applicable only to minors, the insanity or incompetency tolling provisions of the disability statute, S.C. Code Ann. § 15-3-40, do not apply. See Langley, 313 S.C. at 403, 438 S.E.2d at 243. Consistent with this rationale, the disability statute's inapplicability to medical malpractice actions was recently reaffirmed in Sims v. Amisub of S. Carolina, Inc., 408 S.C. 202, 216, 758 S.E.2d 187, 195 (Ct. App. 2014), reh'g denied (May 19, 2014), cert. granted (Nov. 19, 2014), aff'd, No. 2014-001179, 2015 WL 4751030 (S.C. Aug. 12, 2015). There, the South Carolina Court of Appeals reinforced the controlling precedent established in Langley, observing that if the disability statute were to apply to medical malpractice actions, it would be in conflict with the six year statute of repose set forth in § 15-3-545(A). Id.

Here, as in Harrison, Sims and Langley, application of the discovery rule or tolling provided by § 15-3-40 will not revive a claim that is filed outside the absolute limitations period established by the statute of repose.[2] Consequently, as the lower court properly determined,

---

[2] Courts in other jurisdictions have similarly declined to apply statutes such as South Carolina's disability statute § 15-3-40 to medical malpractice statutes of repose. In Calaway ex rel. Calaway v. Schucker, 193 S.W.3d 509 (Tenn. 2005), the Supreme Court of Tennessee found no tolling exception for minority with regard to its three-year medical malpractice statute of repose, premising its holding on the clear language of the statute and its consistent characterizations of the medical malpractice statute of repose as an absolute three-year bar to such claims. In so finding,

Appellant's claims, having been brought nearly eight years from the onset of treatment, are barred by the absolute six-year statute of repose imposed by § 15-3-545(A).

B. Even assuming Appellant lacked the mental capacity to comprehend her injuries, Appellant's claims are barred by the expiration of the limitations period set by the disability statute.

As an alternative ground for granting summary judgment, the circuit court correctly ruled that even assuming the disability statute applied, Plaintiff's action was still 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 Appellant 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.[3] 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.**

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

> 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.

---

the Calaway court emphasized that the Tennessee disability statute "serves to toll only statutes of limitations and not statutes of repose."

[3] The repose provision of § 15-3-545 limits the time during which the insanity provisions of § 15-3-40 would permit an action to be brought.

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, Appellant and her expert assert she "...did not regain the mental capacity to understand and appreciate the harm..." allegedly caused by ECT **until** June 2010. (See Notice of Intent, dated June 25, 2010, attached hereto as Exhibit "C"). Therefore, the disability statute required Appellant to file the instant action by June 25, 2011. Although Appellant filed a Notice of Intent on June 25, 2010, the dismissal of the action without prejudice on August 25, 2010, precluded Appellant from tolling the action so as to render Appellant's November 16, 2011 Complaint time-barred. See (Stipulation of Dismissal, at p. 1); see Davis v. Lunceford, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985) ("When an action is dismissed without prejudice, the statute of limitations will bar another suit if the statute has run in the interim.").

Furthermore, substantial evidence in the record, including Appellant's sworn deposition testimony, statements to her treating physicians, and materials from her divorce 2007 proceedings indicate she acknowledged her alleged problems associated with ECT much earlier than June of 2010. Specifically, Appellant testified 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 Appellant, 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 attributed that loss ***at the time*** to ECT. (See Deposition of Appellant, p. 81, l. 20 – p. 82, l. 21). Appellant's prior knowledge was again reiterated in her deposition wherein she testified 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 Appellant, pp. 124, l. 12-19). Similarly, there are references to Appellant's memory loss from ECT date back to Appellant's divorce proceedings in 2007. See

(See Life Care Plan for Clair Johnson, pp. 4, 5 & 13, dated January 30, 2007, noting "[Appellant] has been having increasing problems with her memory, . . . has reportedly developed increasing problems with directionality and memory" and that Appellant admitted being "afraid to drive due to increased problems with memory. . ."

Based on this evidence, Appellant comprehended her injuries as early as 2006, affording her only one year within which to bring a claim under the disability statute. Consequently, even if applicable, neither the disability statute nor the discovery rule could revive the instant action.

C. Appellant's claims are not subject to the tolling provision of 15-79-125 where the Notice of Intent was defective.

Section 15-79-125(A) of the South Carolina Code imposes pre-litigation filing requirements upon individuals intending to file suit for medical malpractice, which provide, in pertinent part:

> Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100 . . .

The filing of the notice of intent will toll the limitations period. However, "[w]hen an action is dismissed without prejudice, the statute of limitations will bar another suit if the statute has run in the interim." Davis, 287 S.C. at 243, 335 S.E.2d at 799; see cf. Mende v. Conway Hospital, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991) (recognizing the ruling in Davis, but finding the statute of limitations defense had been waived).

Here, despite filing the Notice of Intent on June 25, 2010, Appellant dismissed the matter without prejudice on August 25, 2010. Adopting Appellant's assertion that the limitations period accrued as late as July 5, 2010, the dismissal without prejudice filed on August 25, 2010 deprived

Appellant from benefiting from the tolling provision of § 15-79-125, barring Appellant's November 16, 2011 Complaint.

Moreover, a notice of intent will not toll the limitations period if the notice is defective. See Grier v. Amisub of South Carolina, 397 S.C. 532, 725 S.E.2d 693 (2012) (observing failure to conform pre-suit affidavit to requirements of § 15-79-125 would bar medical malpractice action). Pursuant to section 15-79-125(A), an affidavit of an expert witness must be filed contemporaneously with the notice of intent to file suit. S.C. Code Ann. § 15-79-125(A) (Supp. 2012). In contravention of the pre-suit requirements of § 15-79-125(A), Appellant failed to file an expert witness affidavit with the Notice. Rather, the Notice sought an extension of time to file the affidavit, citing "time constraints" as preventing Appellant from filing an affidavit of a medical expert. In certain circumstances and upon approval from the court, the rule provides a plaintiff an additional forty-five days to file an expert affidavit. However, Appellant failed to file an expert witness affidavit until August 10, 2011, over one year after the expiration of the forty-five day period provided by § 15-36-100(C)(1).

Thus, even assuming the action was tolled despite the subsequent dismissal without prejudice, the tolling provision of § 15-79-125 was never triggered because the Notice of Intent failed to comply with §§ 15-79-125 and 15-36-100. Accordingly, the statute of limitations having expired on July 5, 2011, bars Appellant's claims.

CONCLUSION

For the reasons addressed herein, Appellant's action against MUSC having been commenced neither within six years of the occurrence, nor within one year after the alleged disability of the Appellant was removed, is barred by the absolute limitations period established by the legislature, and Respondent respectfully requests that the Court affirm the Order of the

Circuit Court granting summary judgment in favor of MUSC on these grounds. Respondent further asks the Court to affirm the Order presently on appeal for any ground appearing on the record or previously argued to the lower court as provided by Rule 220(c), SCACR.

William P. Early, SC Bar #15657
Kristen B. Fehsenfeld, SC Bar #76971
PIERCE, HERNS, SLOAN & WILSON, LLC
P.O. Box 22437
Charleston, SC 29402
Phone: (843)722-7733; Fax: (843)722-7732
willearly@phswlaw.com
kristenfehsenfeld@phswlaw.com
Attorneys for the Respondent the Medical University of South Carolina

10/26, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 28 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge

Case No. 2011-CP-10-8318
Appellate Case No. _________

Clair Craver Johnson..Appellant

v.

The Medical University of South Carolina..Respondent

Case No. 2012-CP-10-2867

Clair Craver Johnson..Appellant

v.

John Roberts, M.D..Respondent

PROOF OF SERVICE

I certify that on the 26th day of October, 2015, I served a copy of Respondent MUSC's Initial Brief on Appeal and Designation of Matter to be Included in the Record on Appeal to counsel of record 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:

D. Cravens Ravenel
BAKER, RAVENEL, & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803)799-9091; Fax (803)779-3423
cravenel@brblegal.com
Attorneys for Appellant Clair Craver Johnson

James Edward Scott, IV
Donald Jay Davis, Jr.
Stephen L. Brown
Russell G. Hines
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
P.O. Box 993
Charleston, SC 29402
Phone: (843)720-5406
jdavid@ycrlaw.com; jscott@ycrlaw.com;
sbrown@ycrlaw.com; rhines@ycrlaw.com
Attorneys for Respondent John Roberts, M.D.

William P. Early, SC Bar #15657
Kristen B. Fehsenfeld, SC Bar #76971
PIERCE, HERNS, SLOAN & WILSON, LLC
P.O. Box 22437
Charleston, SC 29402
Phone: (843)722-7733; Fax: (843)722-7732
willearly@phswlaw.com
kristenfehsenfeld@phswlaw.com

Attorneys for the Respondent the Medical University of South Carolina