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

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

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).**

Respondents, The Medical University of South Carolina and John Roberts, M.D. (Respondents), contention that Respondents' argument was not raised to and ruled upon by the Lower Court and is not preserved for review wrongly assumes that Appellant Clair Craver Johnson's (Appellant) argument is subject to a single conclusion, i.e., that the six year statute of repose was triggered by the initial electroconvulsive therapy (ECT) treatment in 2003 when a fact issue exists as to on what date Appellant sustained permanent injury.

Respondents began treating Appellant with bilateral ECT treatment in 2003 and continued that treatment until June 26, 2008. (R. p. 37-44)

A fact issue exists on Appellant's mental condition when the treatment was initiated in June of 2003 and when the treatment ended on June 26, 2010.

A fact issue is present as to at what point in her course of treatment did Appellant sustain the initial damage of which she complains.

Respondents contend that the initial bilateral ECT treatment started the clock running and that the six year statute of repose ran in 2009 thereby disregarding any need

to establish the point in time when the use of bilateral ECT treatment actually resulted in permanent brain damage.

Respondents' reliance on reported cases that hold that, for example, that South Carolina has rejected the "continuous treatment rule" is misplaced. Section 15-3-545(A) provides that:

> In any action . . . to recover damages for injury to the person arising out of any medical, surgical or dental treatment, omission, or operation giving rise to the cause of actions 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.

In Harrison v. Bevilacqua, 354 S.C. 129, 136, 580 S.E.2d 109 (2008) that court citing Langley v. Pierce, 313 S.C. 410, 438 S.E.2d 242, 243 (1993) refused to adopt the continuous treatment rule while acknowledging that it had recognized that the six-year statute of repose provision in § 15-3-545 "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered."

The Bevilacqua court went on to say that "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reasons because to do so would upset the economic balance struck by the legislative body." Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 at 244.

What Bevilacqua does not say is that if a physician, dentist or other medical practitioner has treated a patient for more than six years that patient is barred from initiating a claim for injury caused by a negligent act or omission occurring after six years of treatment but within three years of the date the injury takes place.

Respondents ask this Court to find the trigger of the limitation of action provision that is the six-year statute of repose by the initial date of treatment rather than the date of the initial injury when the condition for which Respondents received ECT made Appellant mentally confused and unable to understand and appreciate her condition. Only when the ECT treatment stopped was Appellant able to recognize her memory loss. When the loss became permanent is a question of fact. Respondents stopped ECT treatment when Appellant's condition became permanent, i.e., she was "cured" of the confusion for which she was receiving ECT treatment. The "trade off" for this cure was permanent brain damage.

Appellant contends that a fact issue exists as to when the permanent consequences of the Respondent's course of ECT treatment arose. Only when the fact finder is allowed to digest the information provided by the records and expert testimony will it be possible to determine the date on which the statute of repose began to run.

CONCLUSION

Electroconvulsive therapy treatment can be administered without permanent disability. Appellant should be permitted to make her case that Respondents took her ECT treatment to a point where permanent injury took place less than six years prior to the initiation of these actions.

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March 28, 2016

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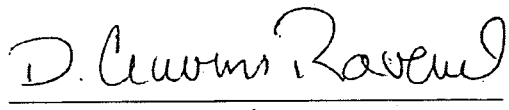
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Reply to Defendants' Initial Briefs complies with Rule 211(b), SCACR and the August 13, 2007 order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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March 28, 2016

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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 29th day of March 2016, served counsel below with Reply to Defendants' Initial Briefs 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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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 in the above-referenced matter are the original (unbound) and fifteen (15) bound copies of Appellant's Final Brief, Certificate of Counsel and Proof of Service thereof. I have enclosed an extra copy of each, which I would appreciate your clocking in and returning to me via courier delivering same.

Also enclosed for filing in the above-referenced matter are the original (unbound) and fifteen (15) copies of Reply to Defendants' Initial Briefs, Certificate of Counsel and Proof of Service thereof. I have enclosed an extra copy of each, which I would appreciate your clocking in and returning to me via courier delivering same.

By copy hereof, I am serving same upon counsel for Respondents via U.S. Mail and electronic transmission.

Thank you very much.

Sincerely yours,

D. Cravens Ravenel
DCR:sr
Enclosure

cc w/Enclosures:

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