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THE COURT: Good morning. This is your motion for summary judgment?

MR. BUCKNER: Yes, Your Honor, Perry Buckner here on behalf of MUSC. There are actually two motions pending. I think one of them is a consent motion. The plaintiff's counsel has kindly consented to amend the answer which is somewhat pertinent to today because one of the alternative defenses that we've added is part of that consent motion.

THE COURT: Okay.

MR. BUCKNER: I don't know that Your Honor has signed the order but I believe that it has been consented to by Mr. Bolus.

THE COURT: It's signed if -- Mr. Bolus you've agreed to that.

MR. BOLUS: Yes, sir.

THE COURT: That's fine.

MR. BUCKNER: And then the more important matter is our motion for summary judgment today by the lone defendant in the case, MUSC. And in essence it is just that plaintiff's claims are untimely. Now they are untimely for two different reasons because there are two different assertions of liability in this case so it sort of provided the framework. The first thing that we're

1 talking about is an allegation against MUSC that there  
2 was a failure to treat and properly diagnose the  
3 plaintiff's periodontal disease.

4 And when we're talking about the statute of repose,  
5 which is all we're talking about for this diagnosis of  
6 periodontal disease, we're talking about under 15-3-  
7 545(a) the date of an occurrence, which as we've  
8 previously had occasion in front of Your Honor, but what  
9 we're talking about in previous cases and in this one is  
10 the assertion of a negligent act; not a cause of action  
11 for negligence, but where has there been, where does it  
12 start their assertion of these negligent acts.

13 And in regards to the treatment or misdiagnosis,  
14 failure to treat plaintiff's periodontal plaintiff's  
15 expert, Doctor Goldstein, actually testified that this  
16 began in 2004 unambiguously in his deposition and I  
17 attached that testimony to my brief in this case. And he  
18 said that when plaintiff presented to MUSC in 2004 he had  
19 periodontal disease. It should have been treated; it  
20 wasn't. And he came back and it still wasn't treated and  
21 he continued on and the periodontal disease advanced.

22 Now as you're familiar and the case law cited in our  
23 brief South Carolina judicial rejection of the continuous  
24 treatment rule and the continuous tort rule come into  
25 play here. So once we got an allegation or assertion of

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1 a negligent act by plaintiff's expert who is the only  
2 person in this case who can make that kind of assertion.  
3 Obviously, whatever the plaintiff says is irrelevant  
4 because he is not qualified to make that opinion and of  
5 course our experts deny liability.

6 So once we got that assertion of a negligent act in  
7 '04 that starts the timeline for the six year statute of  
8 repose under 15-3-545(a) and it ran in 2010. Plaintiff  
9 filed this case in May of 2012, which I think was two  
10 years untimely in regards to the periodontal disease  
11 case.

12 Now there has been some assertion although I take  
13 issue with it that the plaintiff may have been mentally  
14 disabled or insane and would fall under the tolling  
15 statute. But there is a recent case that I believe is  
16 Mims v Amasub of South Carolina [phonetic] that says the  
17 tolling statute has nothing to do with the statute of  
18 repose because the med mal statute of repose in 15-3-  
19 545(a) says only as tolled by this section. And what the  
20 section says is if that there is a limited minor tolling  
21 statute if you are under the age of 18 and that's it.

22 So that has no bearing on our statute of repose  
23 argument. And I think that those claims were filed  
24 untimely by at least two years. We were in front of Your  
25 Honor earlier last year I guess would have been February

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1 in a very similar case where we had treatment going back  
2 as far as eight years and there is no sort of  
3 distinguishing or assertions of a separate occurrence of  
4 negligence. It's the same course of treatment; the  
5 failure to do the same thing and I think it is untimely  
6 because of that. The second part of our motion is in  
7 regards to what I've called in layperson's terms improper  
8 drilling.

9 The plaintiff claims, and obviously we're viewing  
10 the facts in the light most favorable to him today, that  
11 when he was having a bridge and crown work performed in  
12 2007, now there is some dispute as to when this occurred  
13 but there is no dispute that it happened in 2007 and I  
14 think Mr. Bolus will concede that, that after he had this  
15 bridge cemented that Doctor McGill, an employee of MUSC,  
16 drilled into a lower opposing wisdom tooth and that it  
17 immediately caused him pain. He said that in his  
18 deposition. He immediately notified Doctor McGill of the  
19 pain and that he thought Doctor McGill messed up that  
20 day.

21 He came back four or five times and when he says  
22 four or five times we can determine from the treatment  
23 records those are all within 2007 and at the latest in  
24 January of 2008 to inform Doctor McGill that he was upset  
25 and still having pain with his lower wisdom tooth. And

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1 his testimony incredibly is that Doctor McGill just  
2 didn't respond to him; that he just stared at him in  
3 silence. But we think that puts him obviously not on  
4 some sort of imputed notice but actual notice of a claim.

5 Now I understand that he has had continuing pain and  
6 maybe even some you know worsening of the condition but

7 ---

8 THE COURT: --- you don't think that's a scintilla?

9 MR. BUCKNER: I don't think so, Your Honor. I  
10 think the case law is clear ---

11 THE COURT: --- why wouldn't it be ---

12 MR. BUCKNER: --- that once you have an injury you  
13 don't need to know the extent of the injury and I think  
14 that we cited the Dean case.

15 THE COURT: I disagree with you on that one. We  
16 may agree to disagree on that particular thing, okay.

17 MR. BUCKNER: Well, Your Honor, I would refer the  
18 court to I think it's the Dean case that we cited which  
19 deals with sort of the extent of the injury. He comes  
20 back to Doctor McGill, and this is according to his  
21 testimony, and says Doctor, I'm unhappy with the work  
22 that was performed. The bridge felt great. It was  
23 hitting just great but then you drilled into this lower  
24 wisdom tooth. And he thinks it's a filling and let's  
25 assume today for purposes of today that it is a filling

1 and he comes back four or five times to say this thing is  
2 still bothering me and claims that Doctor McGill messed  
3 up, which I think is in terms of deposition testimony as  
4 good as we're going to do for actual notice of a claim  
5 and then comes back two years later for different work.  
6 And there is no sort of any further indication that he  
7 said anything about it until filing this lawsuit in May  
8 of 2012.

9       So I think the statute of limitations probably ran  
10 because we're dealing with a government agency here two  
11 years from that date. So even if we give him the benefit  
12 of the doubt I think we're January of 2010 so again two  
13 and a half years too late. Thank you, Your Honor.

14       THE COURT:    Okay.    Mr. Bolus?

15       MR. BOLUS:    Yes, sir. Thank you. Your Honor, I  
16 wasn't retained on the case until last year. My client  
17 filed a pro se complaint on that. And in his complaint  
18 he alleges the malpractice would have been committed  
19 between March of 2007 to his last treatment date would  
20 have been about what he says in this complaint June of  
21 2010.

22       On the statute of repose my client was a patient of  
23 MUSC from about 1998 until about February of 2010. In  
24 2001 he was diagnosed with periodontal disease. He went  
25 back to MUSC in 2004 and there was no mention of it.

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1 Whether he had it or not, it wasn't in the records. Now  
2 counsel cites Doctor Goldstein, which is my expert, as  
3 saying well he probably had it back in 2004. But there  
4 is no documentation that he actually had it in 2004.

5 THE COURT: But didn't you just say he had it in  
6 2001?

7 MR. BOLUS: He had it in 2001.

8 THE COURT: Okay. It just suddenly miraculously  
9 went away?

10 MR. BOLUS: Judge, there is no expert saying that.

11 THE COURT: Well, yes there is an expert that says  
12 that; your expert.

13 MR. BOLUS: My expert said that in 2007 and Doctor  
14 McGill said in 2007 he had periodontal disease. We think  
15 that's when the clock starts ticking at that time. My  
16 client was not in continuous treatment with MUSC. He  
17 went there in 2001, went there three years later in 2004  
18 and then about three years later in 2007. I don't  
19 believe that is continuous treatment as considered by the  
20 court.

21 There are intervening factors, intervening time  
22 periods for that; that would make the clock start at 2007  
23 when Doctor McGill testified in his deposition that he  
24 saw the periodontal disease. He didn't inform my client  
25 he had periodontal disease and it was very evident from

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1 the pictures that Doctor McGill took of my client's mouth  
2 at that time. So I believe that certainly within the six  
3 year time period starting in 2007.

4 THE COURT: Okay.

5 MR. BOLUS: Now on the issue of the improper  
6 drilling. Your Honor, my client has a ninth grade  
7 education. He has been diagnosed with bipolar disorder.  
8 I think the statute of limitations is when would my  
9 client become aware that he had an injury? Now he says  
10 in 2007 his wisdom tooth was improperly drilled.

11 However, nobody at least I don't think a reasonable  
12 person would comprehend what kind of injuries somebody  
13 would sustain from an improper drilled tooth.

14 My client alleges that because of the improperly  
15 drilled tooth he had to get his teeth pulled, about four  
16 of them, back in 2010 and had to get the remaining pulled  
17 in January of 2012. Now he relates all that to the  
18 improperly drilled tooth. I don't think a reasonable  
19 person would understand that the damages that you would  
20 have would occur from that tooth. So I think when did he  
21 become aware or should have become aware.

22 I think really the issue of both the statute of  
23 repose and the statute of limitations and certainly the  
24 kind of convoluted facts that we have here is really for  
25 a jury to decide.

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1 THE COURT: Okay. Mr. Buckner?

2 MR. BUCKNER: Yes, Your Honor, just in brief reply.  
3 First of all I'm fine with the characterization that he  
4 wasn't in continuous treatment. The reason we raised the  
5 rejection to the continuous treatment rule is in the case  
6 that he raised that as a basis for tolling it. If he  
7 wants to say he wasn't in continuous treatment I'm fine  
8 with that; we agree with that.

9 THE COURT: I understand.

10 MR. BUCKNER: What we know is he was in treatment  
11 in '04 and to the extent that he is sort of saying well  
12 nobody really said he had periodontal disease in '04  
13 that's not what his expert says because the testimony was  
14 in your opinion that if he had periodontal disease in '02  
15 would he still have it in '04 and his expert said most  
16 likely yes.

17 THE COURT: Okay.

18 MR. BUCKNER: And then he directly asked him is  
19 that a breach of the standard of care to not treat it in  
20 '04 and he says yes. So I think that brings it squarely  
21 within the statute of repose. I don't think the fact  
22 that his client has a 9th grade education and bipolar  
23 disorder means that we can toll any statute ---

24 THE COURT: --- let me ask you something; maybe I  
25 misunderstood. You said he went back and he complained

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1 he didn't like the bridge, he drilled in it and then he  
2 left and then he returned for further treatment?

3 MR. BUCKNER: Yes. To give you a little bit ---

4 THE COURT: --- how many years later?

5 MR. BUCKNER: The chronology on that would probably  
6 be, and the plaintiff's own expert and the plaintiff  
7 disagrees with this, either in July of 2007 or October of  
8 2007 is when he presented for this crown and bridge work.

9 THE COURT: Right.

10 MR. BUCKNER: And that's when the improper drilling  
11 happened and that's when he said he was in pain and he  
12 told the doctor he thought he messed up. Well, he didn't  
13 tell him that but he testified he felt that.

14 And then on four or five subsequent visits which I  
15 think because of the treatment records unambiguously are  
16 in 2007 and at the latest January of '08 because we can  
17 track that, he says he goes back to Doctor McGill and  
18 says Doc, I'm still having a problem with that tooth you  
19 drilled on. What happened; which to me says I know I've  
20 got a problem ---

21 THE COURT: --- I understand that ---

22 MR. BUCKNER: --- and I know who I think did it ---

23 THE COURT: --- and then he goes back to the same  
24 doctor in 2010?

25 MR. BUCKNER: A little more than two years after

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1 that January of '08.

2 THE COURT: Okay. I'll grant your motion. Thank  
3 you. Prepare an appropriate order based on your memo.

4 MR. BUCKNER: Thank you, Your Honor.

5 THE COURT: Okay. Thank you. And if you will  
6 each identify yourselves Mr. Buckner again and the party  
7 you're representing please.

8 MR. BUCKNER: Perry Buckner on behalf of MUSC.

9 THE COURT: And Keith?

10 MR. BOLUS: Keith Bolus, Your Honor, on behalf of  
11 the plaintiff.

12 THE COURT: Thank y'all so much. I appreciate it.


13 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*  
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C E R T I F I C A T E

1  
2 I, the undersigned, Joyce C. Rueger, Official  
3 Circuit Court Reporter for the Ninth Judicial Circuit of  
4 the State of South Carolina, do hereby certify that the  
5 foregoing is a true, accurate, and complete Transcript of  
6 Record of the proceedings had and evidence introduced in  
7 the trial of the captioned case, relative to appeal, in  
8 the Court of Common Pleas for Charleston County, South  
9 Carolina on the 15th day of January, 2015.

10 I do further certify that I am neither of kin,  
11 counsel, nor interest to any party hereto.

12  
13 November 21, 2016

14  
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16   
17 Joyce C. Rueger, CVR-M  
18 Court Reporter  
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**CHARLES E. BAKER Sr.**

**Appellate,**

**Vs.**

**Case No. 2015-0013**

**M.U.S.C**

**Defendant,**

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**SC Court of Appeals**

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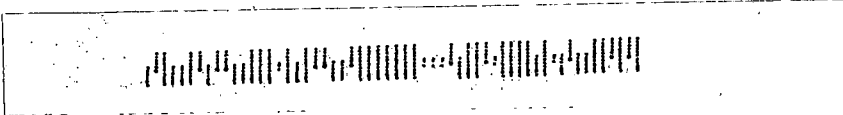
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