THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001463
Circuit Court Case Nos. 2012-CP-10-2867 and 2011-CP-10-8313

Clair Craver Johnson, Appellant,

v.

John Roberts, M.D., Respondent.

And

Clair Craver Johnson, Appellant,

v.

Medical University of South Carolina, Respondent.

MEDICAL UNIVERSITY OF SOUTH CAROLINA PETITION FOR REHEARING ***WITH SUGGESTION FOR REHEARING *EN BANC****

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NOW COMES Respondent Medical University of South Carolina ("MUSC"), by and through the undersigned counsel, petitioning the Court of Appeals for a rehearing pursuant to Rule 221, SCACR, and a reconsideration of this matter, which the Court of Appeals decided via opinion filed on February 7, 2018 (the "Subject Opinion"), reversing the Circuit Court's grant of summary judgment in favor of the Respondent MUSC, as well as the other Respondent John Roberts, M.D.

SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 219(b), SCACR, Respondent submits that the question addressed in the Subject Opinion—concerning the operation of the statute of repose for medical malpractice claims, S.C. Code Ann. § 15-3-545(A), specifically its operation with respect to the continuous treatment rule, is of exceptional importance to the bench and bar, and, in turn, the public, and therefore suggests a rehearing *en banc*. The full Court may also wish to address the error preservation questions presented by this appeal.

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

Most respectfully, the Subject Opinion reflects that the Court overlooked or misapprehended the following material points.

Plaintiff-Appellant Clair Craver Johnson's Complaint alleges damages arising from her treatment at MUSC by way of electroconvulsive therapy ("ECT"). That treatment started at MUSC on December 10, 2003 and continued until June 26, 2008. Johnson did not bring an action against MUSC until November 16, 2011, nearly eight years after her allegedly negligent treatment at MUSC began.[1]

[1] Johnson earlier filed a Notice of Intent to File Suit on June 25, 2010 without the requisite expert affidavit. S.C. Code Ann. §§ 15-79-125 and 15-36-100. When she could not obtain the requisite expert affidavit in a timely fashion, the Notice of Intent was dismissed.

I. APPELLANT JOHNSON'S ARGUMENT ON APPEAL WAS NOT PRESERVED AT THE TRIAL COURT LEVEL.

To defeat the statute of repose bar, Johnson 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 Johnson's Brief at Page 8. This argument was not raised before the trial court, and cannot now be raised for the first time on appeal.

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."). Johnson's argument before the lower court centered solely on the tolling provisions of the disability statute. January 9, 2014 Hearing Transcript, R. pp. 197-205. Specifically, relying on S.C. Code § 15-3-40, Johnson 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. Johnson's Memorandum in Opposition to Summary Judgment, R. pp. 112-113.

On appeal, Johnson pivoted to arguing that the "occurrence" that triggered the running of the statute of repose was some date other than her first ECT treatment in December of 2003. Appellant Johnson's Brief, Page 7.

Respectfully, the Court in the Subject Opinion chose to reverse the trial court on an issue that Johnson never raised or argued before the trial court, namely that the occurrence that triggered the statute of repose was not the initial ECT treatment in 2003, but rather could be continued to a later date. This was not an argument made by Johnson before the trial court. Rather, Johnson repeatedly argued that the disability statute somehow tolled the statute of repose, an argument directly refuted by the language of S.C. Code Ann. § 15-3-545 and Harrison v. Bevilacqua, 354

S.C. 129, 138, 580 S.E.2d 109, 114 (2003) (quoting Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993)).

It is not the Court of Appeals' role to identify issues on the record that were never raised by an appellant. See Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Watson v. Underwood, 407 S.C. 443, 452, 756 S.E.2d 155, 160, n. 9 (Ct.App. 2014) ("'[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt.' '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'") (citations omitted); McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct.App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); (First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); Cont'l Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via a reply brief); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Because Johnson failed to argue before the trial court that the "occurrence" that triggered the statute of repose was something other than the initial ECT treatment in 2003, 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 MEDICAL MALPRACTICE STATUTE OF REPOSE, S.C. CODE ANN. § 15-3-545, CANNOT BE EXTENDED BY THE CONTINUOUS TREATMENT RULE OR THE CONTINUING TORT DOCTRINE AND BARS PLAINTIFF'S CLAIMS.

A. AS A MATTER OF LAW, THE STATUTE OF REPOSE CANNOT BE TOLLED BY A CONTINUOUS TORT.

The General Assembly has enacted a three-year statute of limitations and a six-year statute of repose for medical malpractice actions:

> [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(A) (emphasis added).

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), which is inapplicable to the current matter. Harrison, 580 S.E.2d at 114 (quoting Langley, 438 S.E.2d at 243). As stated by the Supreme Court in Johnson "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. at 113-14 (quoting Langley, 438 S.E.2d at 243) (emphasis added in Harrison).

Thus, any disabilities other than minority, which is explicitly added by Section 15-3-545(D), including "insanity" as argued by Johnson, cannot toll the statute of repose as a matter of law. Johnson's sole argument before the trial court and on appeal was that the statute of repose was tolled by Johnson's insanity. Since this is wrong as a matter of law, the trial court should be affirmed solely on this grounds.

"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., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing Langley, 438 S.E.2d at 243). "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. (citing Langley, 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. 557, 560-61, 769 S.E.2d 847, 848-49 (2015) (quoting Camacho v. Todd & Leiser Homes, 706 N.W.2d 49, 54 n. 6 (Minn. 2005)).

Interpreting the plain and unambiguous language of 15-3-545(A), the legislature clearly intended the repose provision to set a hard time limit for filing a claim based upon the act or omission of the defendant, in this case MUSC. That time limit may only be tolled by a person's minority. It cannot be tolled by any court constructed rules, including the discovery rule, or other disabilities, including "insanity" as set forth in S.C. Code Ann. § 15-3-40(2).

In her Appellate Brief, Johnson attempts to incorporate the discovery rule into the statute of repose by claiming, without any evidentiary support, that Johnson's injuries were not discovered until later. Appellant Johnson's Brief, Page 7 ("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."). This argument is contradicted by the plain language of Section 15-3-545(A), which allows for no tolling of the statute of repose by discovery or anything else, other than minority.

Similarly, the trigger date for the statute of repose is an "occurrence," not when a full-blown claim with damages arose. Thus, in O'Tuel v. Villani, 318 S.C. 24, 27, 455 S.E.2d 698,

700 (Ct.App. 1995), overruled on other grounds by I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 423 & n. 12, 526 S.E.2d 716, 725 & n. 12 (2000), the Court of Appeals held that the "occurrence" that triggered the statute of repose was the date of a child's birth, when a physician allegedly failed to perform a ceasarean delivery, not seven years later when the parents discovered the child had learning disabilities. See also Johnson v. Phifer, 309 S.C. 505, 424 S.E.2d 532 (Ct.App. 1992) (finding while cause of action accrued in 1987 when negligence was discovered, action filed in 1990 was barred by the medical malpractice statute of repose when negligence occurred in 1974-1977).

Because Johnson's claims arise out of her ECT treatment, the trigger date or "occurrence" for the statute of repose is the date of her ECT treatment. The trigger date is not when a claim accrues, as Johnson argues, but when there is an "occurrence," that is an action or delict by the defendant that possibly leads to a claim.

Moreover, pursuant to Harrison, 580 S.E.2d at 114, the medical malpractice statute of repose cannot be extended by either the continuous treatment rule or the continuing tort rule. Thus, the trigger date for Johnson was the date of her first treatment on December 3, 2003. 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, Johnson was required to bring the instant action no later December 3, 2009, six years from the date of the onset of treatment.

The Subject Opinion distinguishes the Supreme Court's holding in Harrison based on the reasoning in Marshall v. Dodds, 417 S.C. 196, 209, 789 S.E.2d 88, 94 (Ct.App. 2016), cert. granted, wherein the Court reversed the trial court, holding the trial court had "erred in finding the statute of repose for medical malpractice actions begins to run after a medical professional's first alleged misdiagnosis."

Respectfully, Marshall was incorrectly decided and does not support affirmance here. This conclusion is, in part, supported by the fact that the Supreme Court has granted certiorari to review the Marshall opinion, although it has not reached a ruling as of this filing. If the Marshall opinion is overturned by the Supreme Court, then the reasoning for the Court's ruling in this matter would be completely undermined and would clearly justify affirmance of the trial court's ruling. This basis alone justifies a reconsideration of the Subject Opinion.[2]

The Marshall opinion and the Subject Opinion overlook and misapprehend the import of the Supreme Court's rejection of the continuing tort rule in Harrison. In Harrison, the Supreme Court rejected not only the continuous treatment rule but also the continuing tort rule. Both the Marshall opinion and the Subject Opinion ignored this holding. The continuing tort rule is not merely another name for the continuous treatment rule. Rather, the continuing tort rule is a separate concept, which the Harrison Court separately addressed and separately rejected. Harrison, 580 S.E.2d at 114 ("Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree.").

The Harrison opinion began its discussion of the continuing tort rule explaining:

Under Georgia law, the doctrine of continuing tort:

> applies "where any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time."... Under this theory, the statute of limitation does not begin to run "until such time as the continued tortious act producing injury is eliminated."

Id. (quoting Mears v. Gulfstream Aerospace Corp., 225 Ga. App. 636, 484 S.E.2d 659, 664 (Ct.App. 1997)) (citations omitted).

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[2] MUSC would join in Respondent Roberts' suggestion that, if the Court is not inclined to reconsider this matter, it should at least hold it in abeyance pending the Supreme Court's decision in Marshall v. Dodds.

The Harrison Court then observed that under Georgia law "the 'continuing tort' theory is inapplicable to actions for medical malpractice 'since it would nullify the intent of the [Georgia] General Assembly that, after five years, no medical malpractice action could be brought, even when a disability attaches to toll the running of the statute because the statute of repose abolishes any action five years after the negligent or wrongful act or omission.'" Id. (quoting Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514, 521 (Ct.App. 1998)). The Harrison Court concluded:

> for the same reason we reject adoption of the continuous treatment rule,[3] Georgia has rejected application of its own continuous tort theory to medical malpractice claims. Accordingly, we find [the petitioner's] argument on the continuing tort doctrine unavailing.

Id.

In declining to adopt the continuing tort rule, our Supreme Court expressly endorsed and, indeed, employed the very "same reason[ing]" as that underlying Georgia's rejection of the continuing tort rule in the particular context of medical malpractice actions - again, the reason being that applying the rule in this context would nullify the legislative intent that the statute of repose abolishes any action with the passage of the prescribed number of years after the negligent or wrongful act or omission. Id. at 114. As stated by the Georgia Court of Appeals, "although the focus of a statute of repose is generally the date of the alleged negligent act, a later negligence 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 v. Zottoli, 302 Ga.App. 477, 479, 691 S.E.2d 564, 566 (2010).

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[3] The Harrison Court had already rejected adoption of the continuous treatment rule on the grounds it conflicted with legislative intent: "Put simply . . . judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above." Harrison, 580 S.E.2d at 114; see also id. at 113 (including the medical malpractice statute of repose in § 15-3-545(A) among "the statutes discussed above").

With its rejection of the continuing tort rule, Harrison therefore stands for the following proposition, unaccounted for in Marshall and the Subject Opinion: When any negligent act is of a continuing nature - that is to say, when, under appropriate circumstances, the law regards certain negligent conduct, even though continuing, as legally indistinct and indivisible, which may be the case even if injury is produced in varying degrees over a period of time - the statute of repose for all claims arising out of such an act begins to run right away, i.e., when it first occurs. To hold otherwise would frustrate the legislative intent behind the statute of repose.

By the same token, MUSC's allegedly negligent treatment of Johnson occurred on a continuous basis from 2003 to 2008. Under the ruling in Harrison, it cannot and should not be viewed as a separate and distinct chain of torts, but rather as a single continuous tort. Moreover, since that single continuous tort allegedly started in 2003, the statute of repose deadline for Johnson passed in 2009, utterly extinguishing any claim she might have against MUSC at that time.

B. ACCORDING TO HER OWN EXPERT, JOHNSON'S CLAIMS ARISE OUT HER INITIAL TREATMENT IN 2003 AND THE INDIVISIBLE CONTINUATION OF THAT TREATMENT, WHICH CANNOT TOLL THE STATUTE OF REPOSE.

Johnson's expert, Harold J. Burstztajn, M.D., has testified that the Defendants' alleged deviation from the standard of care arose primarily from an alleged failure to obtain informed consent and an initial failure to consider alternatives. Although Dr. Burstztajn also references certain purported failures during the course of Johnson's treatment, these are all inextricably intertwined with the failures occurring at the start of her treatment and are a continuation of same:

> Q. All right. Are you going to render an opinion in this case that the involuntary or the decision by the decision makers to use involuntary Electroconvulsive Therapy beginning in December of 2003 in and of itself was a deviation from the standard of care?
>
> A. Relative to the lack of informed consent and the failure to explore alternatives prior to instituting such a process, yes.
>
> Q. All right. Is it in and of itself a deviation from the standard of care to

involuntarily give someone Electroconvulsive Therapy?

A. Not by itself.

Q. Okay. And in this case, what makes that a deviation from the standard of care, that decision -- let me preface my question -- that decision to give the plaintiff in this case involuntary Electroconvulsive Therapy?

A. The failure to do an adequate evaluation or alternatives, the failure to institute treatments to restore the patient to competency, continuing to proceed with Electroconvulsive Therapy without adequate, an adequate informed consent process, an adequate process of monitoring and re-evaluation.

Q. Anything else?

A. That is some of what -- let me just take a quick look at my original, my original notes here. Yes. Instituting Electroconvulsive Therapy in a patient who would be foreseeably vulnerable to some of the known and recognized side effects of ECT without considering alternative treatment methods and instituting alternative treatment methods which would not have had these risks; the presentation of Electroconvulsive Therapy as an inevitable choice of treatment when it wasn't; and then continuing it well beyond the generally accepted number of treatments including the use of ECT on an ongoing maintenance basis without exploring alternatives; a failure to perform an adequate assessment of decision making competence while instituting involuntary ECT; proceeding with involuntary ECT which by itself is a foreseeably traumatic process to a patient who is already feeling helpless, hopeless and worthless by reason of having a mood disorder with depressive and manic components to it; without adequately providing the patient with ongoing psychotherapy which could explore with the patient, support the patient and minimize the potentially traumatic effects of involuntary ECT; proceeding with ECT in a context of an extended ECT, in the context where there was a potential conflict of interest among the people who gave so-called substituted judgment; not exhausting reasonable medical choices prior to instituting a course of 80 plus ECT treatments from 2003 to 2008; proceeding with such a course of ECT without giving Ms. Johnson the opportunity to benefit from a comprehensive program of psychotherapy; proceeding with ECT, including long-term bilateral ECT, without sufficient monitoring of the foreseeable risk of cognitive impairment, even when Ms. Johnson was complaining about it; and then insufficient response to such impairment when it obviously was occurring. And finally, there seems to be no consideration given to the foreseeably traumatic experience of forced ECT or the terror Ms. Johnson was likely to experience under these circumstances.

Q. All right. Those are the, your opinions in this case?

A. Yes, they are.

Q. Okay. All right. Do you have a --

A. I should also add that in exploring the informed consent forms which have been signed in this case, they are absolutely inadequate relative to the kind of informed consent process for ECT, which both the hospital guidelines indicate as well as the generally accepted guidelines for ECT such as the NICE, N-I-C-E, Guidelines which are the British National Health Service Guidelines for ECT, especially given the fact that what we have here is 80 plus ECT's over a course of

almost five years.

Deposition of Burstztajn, Pages 21:18 to 25:18, R. pp. 242-43.

Dr. Burstztajn's testimony makes clear that his primary complaint with the actions of the Defendants arose from the initiation of the ECT treatment in 2003. In particular, Dr. Burstztajn's primary concern is an alleged lack of informed consent and an alleged failure to explore other options prior to initiation of the ECT treatment in 2003, well outside the statute of repose window. Dr. Burstztajn also opines that this failure to obtain informed consent and explore other options continued throughout the treatment, and that the continuation of the treatment and the cumulative effect of the treatment are also failures on the part of the Defendants. But these allegations are simply a continuation of the initial alleged failure. They are not subsequent acts of purported negligence, but rather the continuation of the initial occurrence in 2003.

In short, Dr. Burstztajn has alleged a continuing tort. As stated by Harrison, Dr. Burstztajn has alleged "negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time." Harrison, 580 S.E.2d at 114. Because these alleged omissions are part of a continuing tort, they cannot toll the medical malpractice statute of limitations, which can only be tolled by minority. Id.

In light of the above, the Subject Opinion sets up an impossible task for the parties and any trial court or jury that might hear this case. The Court's holding, if it stands, will allow Johnson to seek compensation for her treatment in the six years leading up to the filing of the complaint but not for the injuries she suffered from actions taken more than six years before the Complaint. In other words, the Subject Opinion invites the parties to undertake the impossible task of determining what injuries Johnson suffered from "occurrences" during the six year statute of repose window, while excluding any injuries arising outside of that window. This would of course

exclude injuries arising from the alleged initial failure to provide informed consent and Defendants' alleged initial failure to explore alternative treatments in 2003. These are the very delicts that form the basis for most of Dr. Burstztajn's allegations, and they are indisputably outside of the statute of repose window.

Certainly, Dr. Burstztajn has offered no opinion whether such a division of damages would even be possible. The subsequent acts and omissions are inextricably intertwined and indivisible from the initial treatment decision. With regards to Johnson's injuries, Dr. Burstztajn's affidavit speaks exclusively in terms of an alleged on-going and indivisible injury suffered over her entire treatment period and largely arising out of her initial hospitalization in 2003, purportedly without sufficient informed consent:

> [Johnson sustained] prolonged and, to a degree, permanent exacerbation of cognitive impairments, including memory loss; impaired capacity to participate in her divorce proceedings; impairments in the post-traumatic spectrum resulting from the physically and emotionally traumatic experience of extended involuntary treatment with ECT, which produced feelings of helplessness, terror, and personal violation; a prolonged period of confusion and demoralization, resulting in loss of access to a significant segment of her life experience and a loss of continuity of autobiographical memory; diminished trust in mental-health care providers; diminished hope for the future; and loss of the potential benefits of appropriate treatment with psychotherapy, medications, and a meaningful informed-consent process.

Burstztajn Affidavit, R. p. 16.

In other words, Dr. Burstztajn has drawn no distinction between the alleged failures and damages suffered prior to November of 2005, which would be barred by the statute of repose based on the Subject Opinion, and those failures and damages suffered after November of 2005, which would not be barred by the statute of repose according to the Subject Opinion.

Put simply, there is no evidence that Johnson's claims can be divided in this matter. Johnson's alleged damages do not arise from separate, distinct events, but rather from a

continuation of the same course of treatment over a five year period. Any effort to tease apart those damages ignores the clear legislative intent behind S.C. Code Ann. § 15-3-545(A), that all medical malpractice claims must be brought within six years of the date of occurrence, and that this time limit may only be tolled by minority. S.C. Code Ann. § 15-3-545(D).

III. JOHNSON'S CLAIMS ARE ALSO BARRED BY THE STATUTE OF LIMITATIONS.

In addition to failing to address the rejection of the continuing tort rule, the Subject Opinion also does not address the trial court's ruling that Johnson is also barred by the medical malpractice statute of limitations. The circuit court correctly ruled that, even assuming the disability statute applied, Johnson's action was still barred by the limitations period established under S.C. Code Ann. § 15-3-40, which establishes tolling guidelines for disabilities.

The statute of limitations for medical malpractice actions is "three years from date of discovery or when it reasonably ought to have been discovered." S.C. Code Ann. § 15-3-545(A). Johnson 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. R. pp. 69-70, Deposition of Johnson, p. 68, line 9 – p. 69, line 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. R. p. 71, Deposition of Johnson, p. 81, line 20 – p. 82, line 21. Johnson'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. Suppl. R. p. 7, Deposition of Johnson, p. 124, lines 12-19.

Similarly, there are references to Appellant's memory loss from ECT date back to Appellant's divorce proceedings in 2007. Suppl. R. pp. 14-15, Life Care Plan for Clair Johnson, dated January 30, 2007 ("[Johnson] has been having increasing problems with her memory, . . .

has reportedly developed increasing problems with directionality and memory" and Johnson admitted being "afraid to drive due to increased problems with memory"). Johnson's last ECT treatment was on June 6, 2008.

Based on this evidence, Johnson comprehended her injuries as early as 2006, and certainly no later than June of 2008. If there is no tolling, her Complaint, filed on November 16, 2011 was past the statute of limitations deadline. S.C. Code Ann. § 15-3-545(A).

Johnson relies on the disability statute, which tolls the statute of limitations for a number of reasons, including insanity. Johnson and Dr. Burstztajn assert that Johnson "did not regain the mental capacity to understand and appreciate the harm" allegedly caused by ECT until June 2010, when Johnson filed her initial Notice of Intent to File Suit. R. pp. 3-4, 16-17. Although this Notice of Intent was dismissed on August 20, 2010, R. p. 9, it establishes the outer limits of Johnson's effort to toll the statute of limitations.

Pursuant to the disability statute, Johnson's action may be tolled due to "insanity," but such tolling may not extend the statute of limitations "longer than one year after the disability ceases." S.C. Code Ann. § 15-3-40 states:

> 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).

It should be beyond dispute that Johnson's insanity tolling period ended at the latest in June of 2010, when the first Notice of Intent was filed. Johnson admits this in her brief. Appellant's

Brief, Pages 1-2. Johnson, however, ignores the one year limit created by the tolling statute. Once Johnson emerged with her sanity in June of 2010, her disability ceased, and she had one year to file her claim within the statute of limitations. Since she did not file until November of 2011, her claim is not timely under the statute of limitations, even if she can rely upon the disability statute.

CONCLUSION

For the reasons set forth herein, as well as those set forth in the previously submitted appellate briefs of Respondents MUSC and Roberts's, as well as Respondent Roberts' Petition for Rehearing, which, except insofar as they may be inconsistent herewith, MUSC adopts by reference, MUSC asks the Court to affirm summary judgment in its favor.

Respectfully submitted,

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March 8, 2018

THE STATE OF SOUTH CAROLINA
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I, Joseph C. Wilson, of Pierce, Herns, Sloan & Wilson, LLC, counsel for Respondent Medical University of South Carolina, hereby certify that the foregoing **PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on March 8, 2018, properly posted for delivery to the following addressees:

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March 8, 2018

Via Federal Express, Next Business Morning Delivery:
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29211

Re: Clair Craver Johnson v. John Roberts, MD
Clair Craver Johnson v. Medical University of South Carolina
Appellate Case No. 2015-001463
Case No. 2012-CP-10-2867
PHSW File No. D2286.00

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent MUSC's Petition for Rehearing and Suggestion of Rehearing *en banc* and original and one (1) copy of the Proof of Service for same and our firm's check in the amount of $25.00 for the motion fee, concerning the above matter.

Please file the originals and return a filed copy of each to my office in the enclosed, stamped envelope.

Thank you for your assistance in this matter.

With kind regards, I am,

Sincerely,

Joseph C. Wilson, IV

cc: Johnathan Blake Asbill, Esquire (w/ encl.)
Bradley Lewis Lanford, Esquire (w/ encl.)
Russell G. Hines, Esquire (w/ encl.)