

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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S.C. SUPREME COURT

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

Appellate Case No. 2018-000914
Opinion No. 5535 (S.C. Ct. App. Filed Feb. 7, 2018)

Clair Craver Johnson,

Respondent,

v.

John Roberts, M.D.,

PETITIONER

And

Clair Craver Johnson,

Respondent,

v.

Medical University of South Carolina,

PETITIONER

**REPLY BRIEF OF [REDACTED] MEDICAL
UNIVERSITY OF SOUTH CAROLINA**

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ARGUMENT

I. APPELLANTS' ALLEGED NEGLIGENT ACTS WERE IN JUNE OF 2003, AND ANY CLAIM ARISING FROM THOSE ACTS EXPIRED IN 2009 PURSUANT TO SOUTH CAROLINA'S SIX YEAR STATUTE OF REPOSE.

South Carolina's medical malpractice statute of repose bars any actions six years after the date of occurrence. S.C. Code Ann. § 15-3-545(A). The statute of repose, as interpreted by Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242, 243 (1993), and Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109, 114 (2003), sets **“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.” Harrison, 580 S.E.2d at 113-14 (quoting Langley, 438 S.E.2d at 243) (emphasis added in Harrison).

Respondent Clair Craver Johnson's expert, Harold J. Burstztajn, M.D., was very clear in his deposition that his complaint with Ms. Johnson's treatment was “the lack of informed consent and the failure to explore alternatives prior to instituting” ECT in December of 2003. Deposition of Burstztajn, Pages 21:18 to 22:2, Appendix pp. 244-245. Dr. Burstztajn agreed that involuntary ECT was not, in and of itself, a deviation from the standard of care. Deposition of Burstztajn, Page 22:3-7, Appendix pp. 245. Thus, as acknowledged by Ms. Johnson's own expert, the allegedly negligent act or delict giving rise to her claims was in 2003 when Appellants M.U.S.C. and Dr. John Roberts allegedly failed to obtain informed

consent or explore alternatives. Following this initial alleged act of negligence or occurrence, the purported harm arising from the delict occurred throughout the course of Ms. Johnson's ECT treatment from 2003 to 2008. But, as stated repeatedly, South Carolina's statute of repose is triggered by the allegedly negligent occurrence, not when the harm arises. See, e.g., O'Tuel v. Villani, 318 S.C. 24, 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, 526 S.E.2d 716, 725 & n. 12 (2000) (South Carolina statute of repose triggered by "occurrence" not when some harm arises from the allegedly negligent act).

Given Dr. Burstztajn's testimony, any argument by Ms. Johnson seeking to extend the statute of repose past the 2003 occurrence is a tolling argument that is not applicable to the medical malpractice statute of repose, which can only be tolled by minority. Langley, 438 S.E.2d at 243 (limiting tolling provisions to those contained in S.C. Code Ann. § 15-3-545(D)). This Court and the Court of Appeals have correctly recognized that, under the plan language of S.C. Code Ann. § 15-3-545, the statute of repose cannot be tolled or extended by on-going harm, O'Tuel, 455 S.E.2d at 700, by continuous treatment, Harrison, 580 S.E.2d at 111-14, by a continuing tort, Harrison, 580 S.E.2d at 114, or by any other tolling doctrine. Langley, 438 S.E.2d at 243.

Ms. Johnson ignores this well-settled, bright line interpretation of the statute

of repose and attempts to hold M.U.S.C. and Dr. Roberts responsible for an alleged delict in 2003 based on Plaintiff's continuing treatment until 2008, even though Ms. Johnson's expert has admitted that the ECT treatment was not "in and of itself" a deviation from the standard of care. Any alleged negligence that occurred after 2003 was nothing more than a continuation of the original alleged occurrence of failing to obtain informed consent or explore alternatives. As such, Ms. Johnson's claims based on a lack of informed consent or a failure to explore alternative treatment expired in 2009. The trial court's dismissal of these claims should, therefore, be reinstated.

II. MS. JOHNSON IS URGING REINSTATEMENT OF THE CONTINUING TREATMENT RULE, A TOLLING PROVISION REJECTED BY THE PLAIN LANGUAGE OF S.C. CODE ANN. § 15-3-545.

Ms. Johnson's efforts to circumvent the South Carolina statute of repose are nothing other than arguments for the judicial adoption of tolling doctrines that are rejected by the statute's plain language. As noted, South Carolina does not follow the so-called continuous treatment doctrine, Harrison, 580 S.E.2d at 111-14, but Plaintiff's arguments would inevitably lead to the adoption of that doctrine in cases like this one that allege an on-going failure that arises at the start of treatment and inevitably continues throughout treatment.

Ms. Johnson's argument will inevitably result in an adoption of the continuous treatment rule whenever a claimant alleges a failure to obtain informed consent, a

failure to explore alternative treatments, or a failure to diagnose. Ms. Johnson's argument inevitably tolls the statute of repose through the final date of treatment for such claims. The negligence Ms. Johnson has alleged, namely the failure to obtain informed consent or explore alternatives, necessarily arises at the start of treatment and continues throughout treatment by the healthcare provider, who inevitably operates on the assumption that the original consent and treatment decisions were proper. The provider has no need or inclination to obtain consent again during the course of treatment because the provider believes that informed consent was obtained initially. Similarly, an original misdiagnosis or treatment decision will inevitably lead to a failure to act appropriately as treatment continues. This is the harm that flows from the original act, but it is the original act, namely the decision to initiate treatment, that triggers the statute of repose, and that triggering is not tolled by the subsequent harm.

The inevitable result of Ms. Johnson's position is that any claim based on an alleged failure to obtain consent or misdiagnosis will survive until the end of treatment. This is nothing more than a restatement of the rejected continuous treatment rule and in plain violation of the legislative intent behind S.C. Code Ann. § 15-3-545(A). Harrison, 580 S.E.2d at 113-14.

III. MS. JOHNSON IS ARGUING FOR THE ADOPTION OF THE CONTINUOUS TORT DOCTRINE, ANOTHER TOLLING MECHANISM REJECTED BY THE PLAIN LANGUAGE OF S.C. CODE ANN. § 15-3-545.

Relatedly, Ms. Johnson's arguments are indistinguishable from the separate tolling doctrine referred to as the continuing tort doctrine. As explained in Appellant MUSC's original Brief, Pages 15-18, the continuing tort doctrine is not the same as the continuous treatment rule but was similarly rejected by the opinion in Harrison, 580 S.E.2d at 114 ("Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree.").

Ms. Johnson fails to address this issue at all, likely because she is urging the adoption of a tolling doctrine that has already been rejected by this Court in Harrison. In fact, Ms. Johnson inadvertently acknowledges that she is urging adoption of the continuing tort doctrine in her citation of the Maryland Supreme Court opinion, Jones v. Speed, 320 Md. 249, 577 A.2d 64 (Md. 1990). See Respondent Johnson Brief, Pages 14-15. In Jones, the Maryland court interprets its medical malpractice statute of limitations, Md. Code Ann., Cts. & Jud. Proc. § 5-109(a) (West), in the context of a continuing failure to diagnose a brain tumor, where the initial failure was more than five years prior to the lawsuit, but the plaintiff was treated and not diagnosed within the five year window prior to the filing of the complaint.

Ms. Johnson urges that Jones is an example of a court extending the statute of repose by continuing treatment even though Maryland has not adopted the

continuous treatment rule. Ms. Johnson ignores key differences between Maryland and South Carolina law and between the language of the Maryland statute and the South Carolina statute. First, Maryland has adopted the continuing tort doctrine,¹ acknowledged it as a means of “tolling” its statutes of limitations, and used that doctrine to reach its conclusion in Jones:

Chevron argues, however, that its contract claims are not barred by the three-year statute of limitations because the continuing harm doctrine—which “tolls the statute of limitations in cases where there are continuing violations”—applies here. Litz v. Maryland Dep't of Env't, 434 Md. 623, 76 A.3d 1076, 1089 (Md. 2013) (internal citation and quotation omitted); see also Dave & Buster's, Inc. v. White Flint Mall, LLP, 616 Fed.Appx. 552, 558 (4th Cir.2015) (applying continuing harm doctrine to breach of contract action). “The continuing harm doctrine tolls the statute of limitations regardless of a potential plaintiff's discovery of the wrong.” Id. at 647, 76 A.3d 1076, 1089 n. 9. Under this doctrine, “every repetition of the wrong creates further liability and creates a new cause of action, and a new statute of limitations begins to run after each wrong perpetuated.” Jones v. Speed, 320 Md. 249, 577 A.2d 64, 69 n. 4 (Md.1990). Accordingly, “violations that are continuing in nature are not barred by the statute of limitations merely because one or more of them occurred earlier in time.” Litz, 434 Md. at 646, 76 A.3d 1076 (internal quotations and citation omitted).

¹ The Chevron opinion references the “continuing harm doctrine,” but Maryland courts use the terms “continuing harm,” “continuing violation,” and “continuing tort” interchangeably. See, e.g., Litz v. Maryland Dep't of Env't, 434 Md. 623, 646, 76 A.3d 1076, 1089 (2013); Bacon v. Arey, 203 Md. App. 606, 40 A.3d 435, 465 (2012).

Chevron U.S.A. Inc. v. Apex Oil Co., Inc., 113 F.Supp.3d 807, 820 (D. Md. 2015).

As noted repeatedly, South Carolina has rejected the continuing tort doctrine, Harrison, 580 S.E.2d at 114, so reliance on a Maryland case is immediately distinguishable.

Second, Maryland courts have adopted the continuing tort doctrine based on language in Maryland's medical malpractice statute of limitations that is distinguishable from South Carolina's medical malpractice statute of repose. Maryland's statute runs from the date of "injury," Md. Code Ann., Cts. & Jud. Proc. § 5-109(a)(1), instead of from the date of "occurrence" as the South Carolina legislature has adopted. Due to the use of the word "injury" as the triggering date, the Maryland Supreme Court has concluded that § 5-109(a)(1), the provision discussed in the Jones opinion cited by Ms. Johnson, is a statute of *limitation*, not a statute of *repose* imposing an absolute bar:

In Jones, we shifted away from the "absolute bar" description, allowing a claimant to proceed with her action against a doctor who commenced his negligent treatment of Jones many years before she filed her action, by treating each visit with the doctor as a potentially separate negligence claim, thereby splitting the visits falling within five years prior to filing suit from those falling earlier. . . .

Despite our occasionally disparate characterizations of § 5-109 in the past, we conclude now that § 5-109(a)(1) is a statute of limitations because its trigger is an "injury" which, under our holding in Hill, **means when the negligent act is coupled with some harm**, rather than being dependent on some action independent of the injury. The injury is the cause of action and, thus, § 5-109(a)(1) does not

immunize a health care provider simply through the passage of time following its negligent act or omission.

Anderson v. United States, 427 Md. 99, 46 A.3d 426, 443 (2012) (emphasis added).

Unlike Maryland's statute of limitations, South Carolina's statute of repose is triggered by the negligent act, not when that act is "coupled with some harm. O'Tuel, 455 S.E.2d at 700 (South Carolina statute of repose triggered by "occurrence" not when some harm arises from the allegedly negligent act).

In short, any reliance on Maryland law is entirely misplaced because Maryland has 1) adopted the continuous tort doctrine, 2) has no true statute of repose, and 3) the Maryland statute of limitations is triggered not by an occurrence, but by when a harm arises from the injury. For all of these reasons, Jones is neither analogous nor reliable law in South Carolina. More to the point, Ms. Johnson, by citing Jones, a decision based on the continuing tort doctrine, implicitly acknowledges her reliance on that doctrine, which has been rejected in South Carolina. Accordingly, under South Carolina law, Ms. Johnson's claim cannot be extended or tolled by the alleged continuing tort, and the trial court's dismissal should be reinstated.

IV. SOUTH CAROLINA'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS BARS PLAINTIFF'S CLAIMS EVEN IF THE STATUTE OF REPOSE DOES NOT.

Ms. Johnson's Brief, like the Court of Appeals' opinion, addresses only the applicability of the medical malpractice six year statute of repose contained in S.C. Code Ann. § 15-3-545(A). Neither Ms. Johnson nor the Court of Appeals address the statute of limitations contained in S.C. Code Ann. § 15-3-545(A). 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). Like the statute of repose, the statute of limitations is only tolled by minority.

Ms. Johnson's last ECT treatment was on June 26, 2008. Johnson Medical Records, Appendix p. 46. Ms. Johnson's Complaint in this action was filed more than three years later on November 8, 2011. Complaint, Appendix p. 24-32. Thus, if she discovered, or reasonably ought to have discovered, her potential claim prior to November 8, 2008, her Complaint is late due to the three year statute of limitations.

The evidence in the record shows that Ms. Johnson was undoubtedly aware of her potential claim prior to November 8, 2008. Ms. 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. Deposition of Johnson, p. 68, line 9 – p. 69, line 25, Appendix pp. 71-72. 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. Deposition of Johnson, p. 81, line 20 – p. 82, line 21, Appendix p. 73. Johnson later confirmed 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. Deposition of Johnson, p. 124, lines 12-19, Appendix p. 549. This is all more than three years before she filed her Complaint in November of 2011.

Similarly, Johnson’s medical records show that she was aware of her purported memory loss from ECT in 2007. Life Care Plan for Clair Johnson, dated January 30, 2007, Appendix pp. 556-557 (“[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.

Thus, regardless of this Court’s ruling on the statute of repose and whether it is tolled by an alleged continuing tort, Johnson’s claims are still barred by the statute of limitations. Her treatment ended on June 26, 2008, so there is no treatment within the three years prior to her filing a complaint. In short, Johnson’s claims expired under the statute of limitations at the latest on June 26, 2010, five months prior to filing her complaint. On this grounds alone, this Court can reverse the Court of

Appeals and reinstate the original trial court order dismissing these claims. The Court can do this regardless of how it ultimately rules on the statute of repose issues addressed in Marshall v. Dodds, 417 S.C. 196, 789 S.E.2d 88, 94 (Ct.App. 2016), cert. granted.

CONCLUSION

Appellant MUSC hereby adopts and incorporates in full the Reply Brief of Appellant John Roberts, M.D.

For the reasons set forth herein, as well as those set forth Appellant Roberts' Briefs, Appellant MUSC would ask that this Court reverse the Court of Appeals' Opinion and reinstate the circuit court's grant of summary judgment.

Respectfully submitted,

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December 31, 2018

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I, Joseph C. Wilson, IV, of Pierce, Sloan, Wilson, Kennedy & Early, LLC, counsel for Appellant Medical University of South Carolina, hereby certify that the foregoing **REPLY BRIEF OF APPELLANT MEDICAL UNIVERSITY OF SOUTH CAROLINA** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on December 31, 2018, properly posted for delivery to the following addressees:

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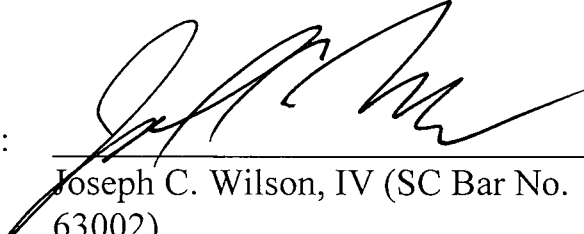
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