THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FOR GREENVILLE COUNTY
COURT OF COMMON PLEAS

Letitia H. Verdin, Circuit Court Judge

Case No: 2018-CP-23-03034

William D. Turner and Charter Communications, LLC..............................Respondents,

v

Elvia Stoppiello and Gilberto Garcia...Appellants.

INITIAL BRIEF OF APPELLANTS

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CASE LAW

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court error in ordering a dismissal of the case under Rule 12(b)(6), SCRCP?
2. Did the Trial Court err in ordering a dismissal of the case under South Carolina Code §15-3-530(5) and §15-3-535?
3. Appellant Stoppiello had a traumatic brain injury, a disability which under South Carolina Code §15-3-40, tolls the statute of limitations.

STATEMENT OF THE CASE

The facts underlying the case at bar involve a complex collision that took place on April 21, 2015. Appellants have alleged in their well-plead Complaint that Appellant Stoppiello was traveling on Airport Road when Respondent Turner, acting within the scope of his employment with Respondent Charter, failed to stop and collided with her vehicle. Appellant Stoppiello contends that she experienced backache, headaches and, finally a concussion and severe neurological impairment requiring medical treatment.

On May 24, 2018, Appellants Elvia Stoppiello [*hereinafter Appellant Stoppiello*] and Gilberto Garcia [*hereinafter Appellant Garcia*] filed suit against Respondents William D. Turner [*hereinafter Respondent Turner*] and Charter Communications [*hereinafter Respondent Charter*] alleging negligence stemming from the motor vehicle accident with a separate claim for negligent hiring against Respondent Charter.

An Affidavit of Service was filed June 25, 2018 indicating positive service upon Charter Communication. Counsel for the Respondents filed an answer on July 6, 2018 accepting service for William D. Turner and Charter Communication. On November 2, 2018, the Respondents filed a Motion to Dismiss or, Alternatively, for Summary Judgment pursuant to Rule 12(b)(6) of the SCRCP which was heard on November 28, 2018. On November 30, 2018, Judge Verdin granted

the Motion to Dismiss. On December 6, 2018, Appellants filed a Motion to Reconsider. Judge Verdin Ordered the Case Dismissed on December 12, 2018 and Denied the Motion to Reconsider on January 7, 2019.

STANDARD OF REVIEW AND ARGUMENT

I. The court errored in the dismissal of the case under Rule 12(b)(6), SCRCP on the grounds that the complaint fails to state facts sufficient to constitute a cause of action and to grant a Motion for Summary Judgment under Rule 56, SCRCP.

In *Miller v. Blumenthal Mills, Inc,* 616 SE2d 722, 365 S.C 204, 220 (Ct. App. 2005), the Court argues that "Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law". (*Id*) When motion for summary judgement is being disputed, "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Once the moving party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. (*Id*). In *Miller*, the court goes on to say that "Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. (*Id*)

Here, for reason more thoroughly laid out below, there are issues under dispute and therefore, dismissal under Rule 12(b)(6), SCRCP was not proper.

II. The Court improperly used a strict interpretation of South Carolina Code §15-3-530(5) and §15-3-535 when it dismissed the case.

The Respondents argue that "Pursuant to South Carolina Code §15-3-530(5) and §15-3-535, Plaintiffs' claim must have commenced within three years after they knew or by exercise of reasonable diligence should have known that they had a cause of action. Plaintiffs, however, filed their action on May 24, 2018 and therefore, failed to file their action within the time allowed by the statute of limitations" (Order for mot. to Dismiss, 3)

Appellants do not argue that the action was filed on May 24, 2018. The South Carolina Supreme Court modified its application of the statute of limitations in *Snell v. Columbia Gun Exchange Inc.*, 276 S.C 301, 278 S.E. 2d 333, 334 (S.C.1981) when it held that:

> Section 15-3-535 is of recent date and has not heretofore been construed by this Court. The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought, or a full-blown theory of recovery developed.

Here, initially following the accident, Appellant Stoppiello presented with sleep disturbances, balance difficulties, light headedness, dizziness, and headaches all of which were temporary in nature. Throughout chiropractic treatment she experienced severe headaches and seeing lights following each treatment session. (Palmetto Proactive 5/20/15). For this reason, chiropractic treatment was discontinued, she was diagnosed with Cervicocranial syndrome and referred to Palmetto Proactive for the remainder of treatment (Demaine 6/1/15). It was not until March 28, 2016 that Dr. Smith diagnosed her with a concussion without loss of consciousness. (Smith 3/28/16).

Without a medical finding of a concussion, in Appellant Stoppiello's case, a reasonable person with common knowledge and experience may have a different inference for the cause of

her injuries. Appellant Stoppiello had headaches and felt electricity. She then, as laid out in Dr. White's evaluation (White 11/14/18), suffered memory loss, memory lapses accompanied by cognitive decline, and personality changes. She and her husband began to have marital issues because they did not understand what Appellant Stoppiello was going through. She sought medical care that didn't help with her symptoms. She was diagnosed by Dr. Fox in the summer of 2015 (Fox 6/28/15) with simple tension headaches. Stress causes tension headaches and marital issues cause stress. A reasonable person of common knowledge and common experience with marital issues that is having headaches could infer, as in Appellant Stoppiello's case, that these issues were the cause of tension headaches.

This Court has ruled on the existence of circumstances in which the statute of limitations as it is written, should be viewed in a more objective manner. In *Grillo v. Speedrite Products*, 340 S.C. 498, 508, 532 S.E2d 1 (S.C. Ct. App. 2000), in ruling on a case where the cause of the injury, toxic exposure, was not immediately known and instead was recognized at a later date, the Court held that "We find more than one inference can be drawn as to when a reasonable person would have been on notice that he might have a cause of action .... Institution of an action based on those temporary symptoms would have been premature and possible frivolous." Here, Appellant Stoppiello was suffering cognitive deficits brought on by a traumatic brain injury and was not a person of common knowledge and experience. Elvia case differs from *Snell* in that she suffers from a traumatic brain injury. Appellant Stoppielo was not aware that she suffered a traumatic brain injury until Dr. White diagnosed her with one on March 28, 2016. Before her diagnosis, she suffered from a series of temporary symptoms that could not be directly attributed to the automobile accident that occurred on April 21, 2015.

III. The statute of limitations is tolled under S.C. Code §15-3-40 due to Appellant Stoppielo's diagnosis of a traumatic brain injury.

Appellant Stoppiello's evaluation from Dr. White shows that her disability is continuing in nature and the statute remains tolled for the five-year period. S.C. Code §15-3-40. S.C. Code §15-3-40 states that "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; nor (b) in any case longer than one year after the disability ceases. *Id.* Here, the five-year period runs from April 21, 2015 to April 21, 2020.

The Respondents use the case of *Wiggins v. Edwards*, 442 S.E.2d 169, 314 S.C. 126 (S.C., 1994) to argue that "she should have been aware of a potential claim on the date of the accident and that she needed to act with promptness when the facts and circumstances of the injury would have put her or a person of common knowledge and experience on notice that some right of hers had been invaded or that a claim against another party might exist." We disagree. *Wiggins* refers to an auto accident in which the Plaintiff did not sustain a head injury of any kind. In *Wiggins*, *Id* at 170, the Court explains that:

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.

Appellants refer to Dr. White's evaluation (White 11/14/18) showing that Appellant Stoppiello suffered from a traumatic brain injury that caused mental confusion. Dr. White offers

his medical opinion in the last paragraph, "It is my opinion, to a reasonably degree of medical certainty [Appellant Stoppiello] is experiencing sequelae of traumatic brain injury, with neurologic deficits and neuropsychiatric difficulties and ongoing headaches." (White, *Id*) Dr. White shows that her mental state would prevent her from understanding or protecting her rights. The respondents use *Snell* to argue that "They don't have to have a specific diagnosis. They don't have to have a full-blown theory of recovery." (Tr. p.10 lines 22-24) The Court in *Snell* holds that "the statutory period bars recovery in the absence of other *legally recognized disabilities*" *id* at 335 (emphasis added).

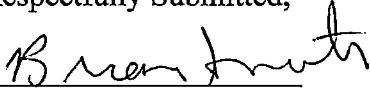
United States Code defines a disability as "a.) a physical or mental impairment that substantially limits one or more major life activities of such individual; b.) a record of such an impairment; or c.) being regarded as having such an impairment. 42 U.S.C §12102. Appellant Stoppielo was diagnosed with Traumatic Brian injury by Dr. White. Dr. White goes on to state in his IME "that [Appellant Stoppiello's symptoms] are causally related to the motor vehicle collision occurring in 2015 (White 11/14/18).

It is undisputed that the Plaintiffs filed the Summons and Complaint on May 25, 2018, well within the five-year period laid out by South Carolina Code §15-3-40. In addition, the Appellants have demonstrated that Appellant Stoppiello is still considered disabled. Dr. White performed his medical evaluation on Nov 14, 2018. In his evaluation, Dr. White describes Appellant Stoppiello as "extremely disorganized from a cognitive standpoint. She has limited short term and long-term memory. She has difficulty concentrating." Dr. White establishes that the disability is continuing. Appellant Stoppiello is still impaired under South Carolina Code §15-3-40.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court be reversed.

Respectfully Submitted,



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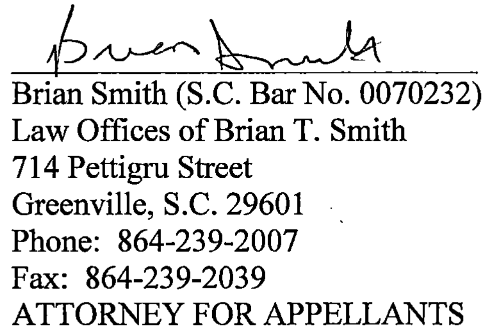
Proof of Service

I certify that I have served the Initial Brief of Appellants, Elvia Stoppiello and Gilbert Garcia, and the Designation of Matter to be Included in the Record on Appeal by depositing a copy of them in the United States Mail, postage prepaid, on May 14, 2019, addressed to: Office of Court Administration, 1220 Senate Street, Suite 200, Columbia, SC 29201.



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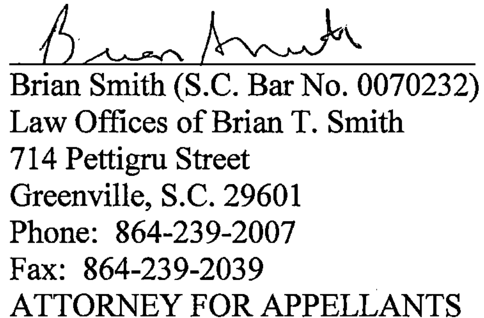

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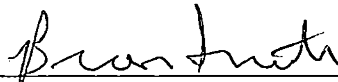

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Re: Elvia Stoppiello and Gilberto Garcia v. William D. Turner and Charter Communications, LLC/ Case No: 2018-CP-23-03034

The Honorable Jenny Abbot Kitchings:

Please see the following enclosed in the above-referenced matter:

1.) Initial Brief of Appellants;
2.) Designation of Matter to be Included in the Record on Appeal; and
3.) Proofs of Service

Sincerely,

Kara Polaski
Paralegal to Brian T. Smith

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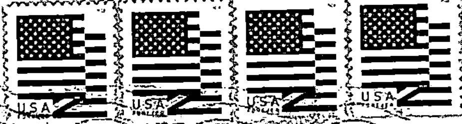

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