

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

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

Opinion No. 5535 (S.C. Ct. App. filed February 7, 2018)

On Writ of Certiorari to the Court of Appeals
Supreme Court Case No. 2018-000914

Clair Craver Johnson,

v.

Respondent,

John Roberts, M.D.,

And

Petitioner,

Clair Craver Johnson,

v.

Respondent,

Medical University of South Carolina,

Petitioner.

**MEDICAL UNIVERSITY OF SOUTH CAROLINA'S
PETITION FOR REHEARING**

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NOW COMES Petitioner Medical University of South Carolina (“MUSC”), by and through his undersigned counsel, pursuant to Rule 263(b), SCACR, and hereby moves this Honorable Court to Reconsider its opinion denying MUSC’s Petition for Writ of Certiorari. *See Clair Johnson v. John Roberts*, Op. No. 27897 (S.C. Sup. Ct. filed June 19, 2019) (Shearouse Adv. Sh. No. 25 at 25). Petitioner MUSC makes this request based on the argument contained herein, as well as any arguments presented by Co-Defendant/Co-Petitioner John Roberts.

This Court denied MUSC’s and Roberts’ Petitions for Writ of Certiorari pursuant to Rule 220(b)(1) and relying upon this Court’s prior divided opinion in *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct.App. 2016), *aff’d as modified*, Op. No. 27873 (S.C. Sup. Ct. filed March 27, 2019) (Shearouse Ad. Sh. No. 13 at 37), *reh’g denied* (May 30, 2019). In doing so, the Court failed to address MUSC’s argument that Plaintiff-Respondent Clair Johnson’s claims were barred by South Carolina’s statute of *limitations*, distinguishing it from the *Marshall* matter, which only addressed South Carolina’s statute of repose.

MUSC continues to contend that Plaintiff Johnson’s claims are distinguishable from the claims in *Marshall* and that her injuries are not capable of being segregated between pre-statute of repose and post-statute of repose claims and hereby adopts its prior arguments on that issue, as well as the preclusion issue raised by both Petitioners. However, for purposes of this Petition, MUSC will focus solely on the statute of limitations issue in this brief, as it was not addressed by either the Supreme Court or the Court of Appeals at any point.

I. PLAINTIFF JOHNSON’S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Both the Supreme Court, in denying the Petition for Writ of Certiorari, and the Court of Appeals, in reversing the trial court, failed to address the circuit court’s ruling that Plaintiff

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. Order Granting Summary Judgment, pp. 9-11, Appendix pp. 219-221.

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. 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's prior knowledge of the alleged link between her injuries and her ECT treatment 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. 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 2007 Life Care Plan alleges that Johnson's memory loss arose from ECT and that she was aware of this in 2007 during her divorce proceedings. 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.

Based on this evidence, Johnson comprehended her injuries as early as 2006, and certainly

no later than June of 2008. Thus, Johnson had until June of 2011, at the very latest, to file her complaint. S.C. Code Ann. § 15-3-545(A). Since she waited until November 8, 2011, her complaint was past the deadline established by the statute of limitations and should be dismissed based on the statute of limitations.

Johnson's sole argument to circumvent this inevitable conclusion is that the statute of limitations was tolled for a number of reasons, including insanity. Johnson and her expert, Dr. Harold J. Burstztajn, assert that Johnson "did not regain the mental capacity to understand and appreciate the harm" allegedly caused by ECT until June 2010, Burstztajn Affidavit, Paragraph 8, Appendix 18, when Johnson filed her initial Notice of Intent to File Suit, Appendix pp. 5-6. Although this Notice of Intent was dismissed on August 20, 2010, Appendix p. 11, it establishes the outer limits of Johnson's effort to toll the statute of limitations.

Assuming the disability statute were to apply, 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).

Johnson filed her initial Notice of Intent to File Suit in June of 2010. Her own expert has opined that Johnson understood her condition by that time as well. In effect, Johnson has admitted

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Circuit Court Cases No. 2012-CP-10-2867 and 2011-CP-10-8313

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Court of Appeals Case No. 2015-001463

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I, William P. Early, Esquire, of Pierce Sloan Wilson Kennedy & Early, LLC counsel for Petitioner MUSC, hereby certifies that the foregoing **PETITION FOR REHEARING ON BEHALF OF PETITIONER 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 July 3, 2019, properly posted for delivery to the following addresses:

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Respectfully submitted,
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July 11, 2019
Charleston, South Carolina

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