

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

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

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Opinion No. 5535 (S.C. Ct. App. Filed Feb. 7, 2018)

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Clair Craver Johnson, Respondent,  
v.  
John Roberts, M.D., Petitioner.  
And

Clair Craver Johnson, Respondent,  
v.  
Medical University of South Carolina, Petitioner.

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**MEDICAL UNIVERSITY OF SOUTH CAROLINA PETITION FOR  
WRIT OF CERTIORARI**

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## **CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 18, 2018.

### **QUESTIONS PRESENTED**

1. Did the Court of Appeals err in holding that Plaintiff Johnson's argument on appeal was not preserved at the circuit court level?

2. Did the Court of Appeals err in holding that the medical malpractice statute of repose, S.C. Code Ann. § 15-3-545, can be extended by the continuous treatment rule or the continuing tort doctrine and, thus, did not bar Plaintiff Johnson's claims?

3. Did the Court of Appeals err in failing to address the circuit court's ruling that Plaintiff Johnson's claims are also barred by the statute of limitations?

### **STATEMENT OF THE CASE**

Plaintiff-Respondent Clair Craver Johnson's Complaint alleges damages arising from her treatment at Medical University of South Carolina ("MUSC") by way of electroconvulsive therapy ("ECT"). That treatment started at MUSC on December 10, 2003 and continued until June 26, 2008. 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 in 2003, when Johnson's treatment began. Amended Complaint, Appendix pp. 12-15.

Johnson did not bring an action against MUSC until November 8, 2011,<sup>1</sup> nearly eight years after her allegedly negligent treatment at MUSC began and more than three years after it ended. Complaint, Appendix pp. 24-32.

On January 23, 2014, The Honorable R. Markley Dennis, Jr. granted Defendants MUSC and John Roberts, M.D. summary judgment, finding 1) that Johnson's claims were barred by the six-year statute of repose for medical malpractice actions, S.C. Code Ann. § 15-3-545, 2) that neither the disability statute nor the continuous treatment rule applied to toll Johnson's claims, Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242, 243 (1993) (limiting tolling provisions to those contained in S.C. Code Ann. § 15-3-545(D)); Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109, 114 (2003) (continuous treatment doctrine "would run afoul of the absolute limitations policy the Legislature has clearly set . . ."), and 3) that, even if the disability statute applied, Johnson failed to bring her claims within a year after her disability ceased. S.C. Code Ann. § 15-3-40(2)(b). Order Granting Summary Judgment, Appendix pp. 211-222.

Plaintiff Johnson appealed this ruling on a single ground. Johnson argued that there was an issue of fact that the date of discovery of her claim under S.C. Code Ann. § 15-3-545(A) was not until 2010, when she first "recovered some control of her mental faculties." Appellant Johnson's Brief, pp. 1-4, Appendix pp. 570-573.

On February 2, 2018, the Court of Appeals reversed the circuit court relying on Marshall v. Dodds, 417 S.C. 196, 789 S.E.2d 88 (Ct.App. 2016), *cert. granted*, August 23, 2017, on the

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<sup>1</sup> 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. Notice of Intent to File Suit, Appendix pp. 5-6. When she could not obtain the requisite expert affidavit in a timely fashion, the Notice of Intent was dismissed. Stipulation of Dismissal, Appendix p. 9. Her original Complaint with an expert affidavit was filed on November 8, 2011. Complaint, Appendix p. 24-32.

grounds that Johnson has a claim for her on-going treatment within the six-year statute of repose. Court of Appeals' Opinion, Appendix pp. 622-628.

## ARGUMENT

### **I. PLAINTIFF JOHNSON'S ARGUMENT ON APPEAL WAS NOT PRESERVED AT THE CIRCUIT COURT LEVEL.**

To defeat the statute of repose bar, Johnson asserted for the first time on appeal that an issue of fact exists as to when the use of ECT caused her permanent mental injuries. Appellant Johnson's Brief, p. 8, Appendix p. 577. This argument was not raised before the trial court, and it cannot 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, Appendix pp. 198-207. 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, Appendix pp. 114-115.

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, pp. 7-9, Appendix 576-578.

The Court of Appeals reversed the circuit court on an issue that Johnson never raised or argued before the circuit 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 during the on-

going treatment. Court of Appeals' Opinion, Appendix pp. 626-628. Even the Court of Appeals recognized that this was not an argument made by Johnson before the trial court. Court of Appeals' Opinion, Appendix p. 626 ("It cannot be said that Appellant's arguments are clearly preserved."). Rather, Johnson repeatedly argued that the disability statute somehow tolled the statute of repose:

- “. . . plaintiff was so mentally disturbed by the effect of the medical care provided by MUSC and John Roberts, M.D. that it was not until June of 2010 that she could have reasonably have [sic] discovered the existence of a claim for medical malpractice.” Plaintiff Johnson's Memorandum in Opposition to Motion for Summary Judgment, Appendix p. 114.
- “. . . however, § 15-3-40, the controlling statute for action under the Tort Claims Act would by its express term set a five (5) year limit for the commencement of tort actions against the state by a plaintiff who is laboring under a disability other than infancy.” Id.
- “The deposition testimony and affidavit of Harold J. Burstztajn, M.D., filed in these cases, and the deposition testimony of Peter Breggin, M.D. conclude that the treatment by MUSC and Roberts so impaired plaintiff's cognitive ability that she did not regain the mental capacity to understand and appreciate the harm she suffered as a consequence of the negligence of MUSC and Roberts until June of 2010. Id. at 114-115.
- “There is evidence that Roberts and MUSC were continuing to treat plaintiff in a negligent manner at least through December 21, 2006 and likewise there is evidence that the plaintiff remained incompetent until no earlier than June of 2010.” Id. at 115; January 9, 2014 Hearing Transcript, Appendix pp. 198-207.

This argument is 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 appellate court's 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 circuit 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 JOHNSON’S CLAIMS.**

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

For medical malpractice actions, South Carolina has combined a three-year statute of limitations, running from the date of discovery, and a six-year statute of repose, running from the date of occurrence, into a single statute, which states in relevant part:

(A) In any action, other than actions controlled by subsection (B), to 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 as defined in Article 5, Chapter 79, Title 38 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.**

(D) Notwithstanding the provisions of Section 15-3-40, if a person entitled to bring an action against a licensed health care provider acting within the scope of his profession is under the age of majority at the date of the treatment, omission, or operation giving rise to the cause of action, the time period or periods limiting filing of the action are not tolled for a period of more than seven years on account of minority, and in any case more than one year after the disability ceases. Such time limitation is tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor.

S.C. Code Ann. § 15-3-545 (emphasis added).

Inclusion of the phrase “or as tolled by this section” in subsection (A) clearly indicates that the legislature intended to only toll the time limitations contained in § 15-3-545(A) by what is contained in Subsection (D). Subsection (D) provides a limited tolling provision applicable only

to minors. It does not allow for tolling on the basis of “insanity.” Sims v. Amisub of S.C., Inc., 414 S.C. 109, 116, 777 S.E.2d 379, 383 (2015) (general tolling provisions of S.C. Code Ann. § 15-3-40, including “insanity” are not applicable to and do not toll § 15-3-545).

Since Subsection (D) only tolls the time limitation for minors, it is inapplicable to the current matter. Harrison, 580 S.E.2d at 113-14 (quoting Langley, 438 S.E.2d at 243). As stated by the Supreme Court in Harrison “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), 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 attempted 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, Appendix p. 576 ("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 cesarean 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. This is enforced by the fact that Johnson's primary complaint is the failure to obtain informed consent prior to the initiating of her ECT treatment in 2003. 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. That date is 2003.

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 Court of Appeals' 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 of Appeals reversed the circuit court, holding that the circuit 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 of Appeals' ruling in this matter would be completely undermined and would clearly justify affirmance of the circuit court's ruling. This basis alone justifies acceptance of certiorari in this matter.

The Marshall opinion and the Court of Appeals' Opinion in this matter overlook and

misapprehend the import of the Supreme Court's rejection of the continuing tort rule in Harrison and fail to recognize the impossibility of attempting to parse out damages arising from a continuing tort. In Harrison, the Supreme Court rejected not only the continuous treatment rule but also the continuing tort rule. Both the Marshall opinion and the Court of Appeals' 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).

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,<sup>2</sup> 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).

With its rejection of the continuing tort rule, Harrison therefore stands for the following proposition, unaccounted for in Marshall and the Court of Appeals' Opinion in this matter: When any negligent act is of a continuing nature - that is to say, when 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.

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<sup>2</sup> 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”).

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 for 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, Appendix pp. 244-245.

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 a “negligent or tortious act [that] 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.

Because Johnson has alleged and presented evidence of a continuing tort, the Court of Appeals’ Opinion sets up an impossible task for the parties and any trial court or jury that might hear this case. The Court of Appeals’ 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, including the initial alleged failure to obtain informed consent that is at the center of Johnson’s claim. In other words, the Court of Appeals 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, Paragraph 7, Appendix p. 18.

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 Court of Appeals' Opinion, and those failures and damages suffered after November of 2005, which would not be barred by the statute of repose according to the Court of Appeals' Opinion.

The Court of Appeals' opinion raises more questions than it answers. How is a jury supposed to determine what damages Johnson allegedly suffered before November of 2005 and what damages she suffered after November of 2005? Will Johnson be required to offer proof of damages incurred only after November of 2005 or any proof that her damages are divisible over time? What is the impact of Johnson's claim of alleged lack of informed consent, which is clearly a claim barred by the statute of repose, on her damages for treatment after November of 2005?

Does the trial court have to explain the impact of the Court of Appeals' ruling to the jury and instruct the jury not to award damages for injuries incurred prior to November of 2005?

Put simply, there is no evidence that Johnson's claims can be divided as would be required by the Court of Appeal's Opinion. 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 impact on her health, and any damages incurred, cannot be factually or logically split into two time periods. More to the point, any effort to tease apart those damages ignores the clear legislative intent behind S.C. Code Ann. § 15-3-545(A), namely 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).

Because Johnson has alleged and presented evidence of a continuing tort, her damages cannot be split and the statute of repose cannot be tolled by her continuing treatment. Consequently, Defendant MUSC would ask that this Court reverse the Court of Appeals' Opinion as an application of the rejected continuing tort rule and reinstate the circuit court's grant of summary judgment to the Defendants based on the statute of repose.

### **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 Court of Appeals also failed to address the circuit 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. 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 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, there are references to Appellant’s memory loss from ECT that date back to Appellant’s divorce proceedings 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.

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 8, 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,

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. 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 based on the tolling granted by S.C. Code Ann. § 15-3-40(2)(b). 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.

The circuit court explicitly granted summary judgment based on this reasoning. Order Granting Summary Judgment, pp. 9-11, Appendix pp. 219-221. Neither Johnson nor the Court of Appeals addressed this ruling. Consequently, this Court should reverse the Court of Appeals and reinstate the circuit court's ruling granting summary judgment to the Defendants based on the tolling of the statute of limitations.

CONCLUSION

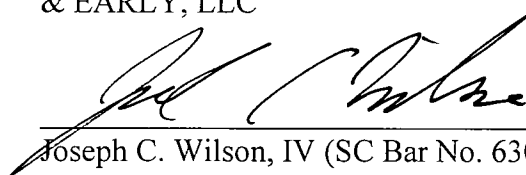
Defendant MUSC hereby adopts and incorporates in full the petition for certiorari of Defendant John Roberts, M.D.

For the reasons set forth herein, as well as those set forth Defendant Roberts' petition, Defendant 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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Charleston, South Carolina  
May 25, 2018

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

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

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Opinion No. 5535 (S.C. Ct. App. Filed Feb. 7, 2018)

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Clair Craver Johnson, Respondent,  
v.

John Roberts, M.D., Petitioner.

And

Clair Craver Johnson, Respondent,  
v.

Medical University of South Carolina, Petitioner.

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**MEDICAL UNIVERSITY OF SOUTH CAROLINA PETITION FOR  
WRIT OF CERTIORARI**

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& EARLY, LLC  
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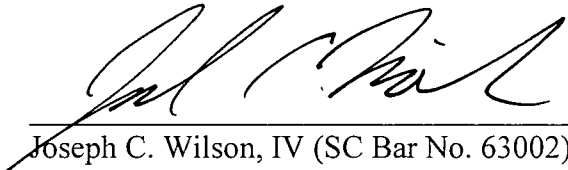
I, Joseph C. Wilson, of Pierce, Sloan, Wilson, Kennedy & Early, LLC, counsel for Petitioner Medical University of South Carolina, hereby certify that the foregoing **PETITION FOR CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 25, 2018, properly posted for delivery to the following addressees:

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