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**May 18 2021**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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Appellate Case No. 2019-000046

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Elvia Stoppiello and Gilberto Garcia,.....Appellants,

v.

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

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PETITION FOR REHEARING

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COME NOW Appellants Elvia Stoppiello and Gilberto Garcia, pursuant to Rule 221, SCACR, and other rules of Court, and petition for rehearing as to the Court’s recent decision in *Stoppiello v. Turner*, Op. No. 2021-UP-151 (S.C. Ct. App. filed May 5, 2021), affirming the lower court’s decision in regard to the dismissal of Appellants’ complaint pursuant to Rule 12(b)(6) or sections 15-3-530(5) and 15-3-535. The grounds for the Appellants’ petition are addressed in detail herein, in prior briefs, and in the Record on Appeal, all of which are incorporated herein.

Appellants argue that the circuit court erred in dismissing their complaint against the Defendants under Rule 12(b)(6), SCRCPC and sections 15-3-530(5) and 15-3-535 of the South Carolina Code (2005). Appellants assert that the statute of limitations should be tolled to five years pursuant to section 15-3-40 of the South Carolina Code (2005), and under *Grillo v. Speedrite*

*Products*, 340 S.C. 498, 508, 532 S.E2d 1 (S.C. Ct. App. 2000). This Court affirmed the circuit court's decision pursuant to Rule 220(b), SCACR, and other authorities.

1. Appellants seek a petition for rehearing as to this Courts finding that, "the circuit court did not err in dismissing the complaint pursuant to Rule 12(b)(6) or sections 15-3-530(5) and 15-3-535 because Stoppiello knew or should have known of the injuries she sustained in the accident prior to a concussion diagnosis on March 28, 2016. Stoppiello's medical reports indicate she suffered from headaches, light-headedness, and dizziness two weeks following the accident and sought medical attention. As a result, Stoppiello was aware of the injuries she sustained in the accident, and we find the complaint was not timely filed on May 24, 2018, because the statute of limitations had expired."

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. Appellant Stoppiello was not aware that she suffered a traumatic brain injury until Dr. Smith diagnosed her with one on March 28, 2016. (R. pp. 82-83). 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.

Dr. Marshall A. White, MD, a board-certified neurologist, preformed and Independent Medical Evaluation on Ms. Stoppiello on November 14, 2018. (R. pp. 84-85). Dr. White's findings include but are not limited to the following:

"She was an extremely poor historian , unable to provide much detail at all. The history obtained largely comes from her husband and the medical records." (R. p. 85).

"She is extremely disorganized from a cognitive standpoint. She has limited short- and long-term memory. She has difficulty concentrating. She appears dysthymic." (R. p. 85).

"Neuropsychiatric testing preformed by Dr. Robert Moss shows the patient to have mild neurocognitive disorder, secondary to traumatic brain injury and pain disorder due to psychological factors and simple phobia/anxiety specifically related to the motor vehicle collision." (R. p. 85).

**"It is my opinion, to a reasonable degree of medical certainty, that Ms. Stoppiello is experiencing sequelae of traumatic brain injury, with neurocognitive defects and neuropsychiatric difficulties and ongoing headaches that are causally related to the motor vehicle collision occurring in 2015."** (*emphasis added*) (R. p. 85).

"She and her husband are extremely unsophisticated in terms of understanding and accessing the medical system. They are not receiving adequate care at this time, and their understanding of treatment options and medical matters are extremely limited. It would be important for her to have someone who can provide a level of understanding to them regarding the medical system and to serve as a liaison between health care providers and the family. Someone who speaks Spanish would be ideal to assist in this matter. There appear to be significant language barriers with respect to medical communication and their understanding of these concepts. Additional treatment needs to be provided in the form of headache management, management of insomnia and treating her underlying mood disturbances and anxiety disorder related to the collision." (R. p. 85).

As supported in Dr. White's findings above, the circuit court did err in dismissing the complaint pursuant to Rule 12(b)(6) or sections 15-3-530(5) and 15-3-535 because Stoppiello did not have the cognitive capacity, understanding, knowledge, or resources sufficient to have reasonably known her symptoms were a result of the injuries she sustained in the accident, prior to the concussion diagnosis by Dr. Smith on March 28, 2016.

2. Appellants seek a petition for rehearing as to this Courts finding, “As to whether section 15-3-40 of the South Carolina Code (2005) tolled the statute of limitations, we find Stoppiello did not submit evidence showing she met the standard of insanity as required by the statute. Stoppiello did not present any evidence, through medical reports or otherwise, that she lacked understanding, was incapable of managing her affairs, did not understand her own rights, or was unable to function in society.”

As evidenced in the Record on Appeal at pages 84-85, Dr. White’s report goes into specific detail as to the evidence the Court determined was lacking. Dr. White’s evaluation presents evidence through medical reports, that she lacked understanding, was incapable of managing her affairs, did not understand her own rights, and was unable to function in society without necessary support. The details are more fully outline in the excerpts from Dr. White’s report in section 1 above and in describing Ms. Stoppiello’s incapacity as a result of her “experiencing sequelae of traumatic brain injury, with neurocognitive defects and neuropsychiatric difficulties,” states:

“She and her husband are extremely unsophisticated in terms of understanding and accessing the medical system. They are not receiving adequate care at this time, and their understanding of treatment options and medical matters are extremely limited. It would be important for her to have someone who can provide a level of understanding to them regarding the medical system and to serve as a liaison between health care providers and the family. Someone who speaks Spanish would be ideal to assist in this matter. There appear to be significant language barriers with respect to medical communication and their understanding of these concepts. Additional treatment needs to be provided in the form of headache management, management of insomnia and treating her underlying mood disturbances and anxiety disorder related to the collision.” (R. p. 85).

The Courts explanation in this matter relies on *Wiggins v. Edwards*, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994), "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 overall inability to function in society**, or the mental condition is such as to require care in a hospital." (*emphasis added*). Appellants are entitled to toll the statute of limitations if Appellant Stoppiello was unable to understand the nature or effects of her acts, manage her own affairs, or understand or protect her rights at the time the cause of action was accrued. See S.C. Code § 15-3-40(2)

Section 15-3-40 of the South Carolina Code (2005) is applicable in this case. Ms. Stoppiello meets the standards discussed in *Wiggins*. As similarly argued by the Respondents, Appellants argue that, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Id.* Paragraphs 17 - 20 of the Appellants' complaint outline the that the traumatic brain injury as a result of a concussion was discovered months after the collision and that the Appellant had no knowledge or understanding of the link between her persistent headaches, other symptoms and her traumatic brain injury. (R. p. 21)

Evidenced by Dr. White's Report (R. pp. 84-85) and as stated in the Appellants' Motion to Reconsider,

Elvia'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 (2018) 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. It is undisputed that the Plaintiffs filed the Summons and Complaint on May 25, 2018, well within the five-year period. In addition, the Plaintiffs have demonstrated that Elvia is still considered disabled. Dr. White performed his medical evaluation on November 14, 2018. In his evaluation, Dr. White describes Elvia 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, and that Elvia is still impaired under the statute.

For the forgoing reasons, Appellants respectfully petitions for rehearing as to the Court's recent decision affirming the lower court's decision in regard to the dismissal of Appellants' complaint pursuant to Rule 12(b)(6) or sections 15-3-530(5) and 15-3-535, and request that the matters outlined above be reevaluated in light of the medical opinions presented in the Record on Appeal.

Respectfully Submitted,

s/Brian T. Smith

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PROOF OF SERVICE

I certify that the Petition for Rehearing was filed with the South Carolina Court of Appeals and served on the Respondents' counsel of record by electronic service to the email addresses listed below, on May 18, 2021, in accordance with the Amended Order of the South Carolina Supreme Court dated May 29, 2020.

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Respectfully Submitted,

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