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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2019-000046
Unpublished Opinion No. 2021-UP-151; Filed May 5, 2021

Elvia Stoppiello and Gilberto Garcia,.....Petitioners,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on May 5, 2021. (App. 117). Petitioners filed a Petition for Rehearing on May 18, 2021. (App. 120). Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 23, 2021. (App. 127).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Trial Court properly dismissed the case under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure?

2. Did the Court of Appeals err in holding that the Trial Court properly dismissed the case pursuant to S.C. Code Ann. §§ 15-3-530(5) and 15-3-535?

3. Did the Court of Appeals err in holding that Petitioner was not entitled to toll the statute of limitations pursuant to S.C. Code Ann. § 15-3-40?

STATEMENT OF THE CASE

The facts underlying the case at bar involve a complex collision that took place on April 21, 2015. Petitioners have alleged in their well-plead Complaint that Petitioner 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. Petitioner Stoppiello contends that she experienced backache, headaches and, finally a concussion and severe neurological impairment-requiring medical treatment. (App. pp. 21-31).

On May 24, 2018, Petitioners Elvia Stoppiello [hereinafter Petitioner Stoppiello] and Gilberto Garcia [hereinafter Petitioner 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. (App. pp. 32-41). 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 (App. pp. 42-43, 62-73). On November 30, 2018, Judge Verdin granted the Motion to Dismiss. (App. pp. 14-20). On December 6, 2018, Petitioners filed a Motion to Reconsider. (App. pp. 8-13). Judge Verdin Ordered the Case Dismissed on December 12, 2018 and Denied the Motion to Reconsider on January 7, 2019. (App. pp. 5-7, 18-19). On January 11, 2019, Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals.

The parties proceeded with their briefs and the filing of the Record on Appeal. Petitioners filed their final brief on August 1, 2019. (App. pp. 89-99). Respondents followed with the filing of their final brief on August 1, 2019. (App. pp. 100-116). The South Carolina Court of Appeals Affirmed the decision of the Court of Common Pleas in their unpublished opinion filed May 5, 2021. (App. pp. 119). Petitioners filed their Petition for Rehearing on May 18, 2021. (App. pp. 120-126). On August 23, 2021, the South Carolina Court of Appeals denied the Petition for Rehearing. (App. p. 127).

Petitioner seeks a writ of certiorari to review that decision of The South Carolina Court of Appeals affirming the decision of the Court of Common Pleas in their Unpublished Opinion No. 2021-UP-151, filed May 5, 2021. (App. pp. 119).

ARGUMENTS

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE CURCUIT COURT ERRED IN DISMISSING THE COMPLAINT PURSUANT TO RULE 12(b)(6) or S.C. CODE ANN. §§ 15-3-530(5) and 15-3-535.

The Court of Appeals erred in 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." (App. p. 118).

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, Petitioner Stoppiello was suffering cognitive deficits brought on by a traumatic brain injury and was not a person of common knowledge and experience. Petitioner Stoppiello was not aware that she suffered a traumatic brain injury until Dr. Smith diagnosed her with one on March 28, 2016. (App. pp. 84-85). 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 an Independent Medical Evaluation on Ms. Stoppiello on November 14, 2018. (App. pp. 86-87). 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." (App. p. 87).
>
> "She is extremely disorganized from a cognitive standpoint. She has limited short- and long-term memory. She has difficulty concentrating. She appears dysthymic." (App. p. 87).
>
> "Neuropsychiatric testing performed 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." (App. p. 87).
>
> "**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*) (App. p. 87).
>
> "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." (*emphasis added*) (App. p. 87).

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.

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*).

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" (App. p. 16).

Petitioners 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, Petitioner 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. (App. p. 77). For this reason, chiropractic treatment was discontinued, she was diagnosed with Cervicocranial syndrome (App. p. 80) and referred to Palmetto Proactive for the remainder of treatment (A. pp. 80). It was not until March 28, 2016 that Dr. Smith diagnosed her with a concussion without loss of consciousness. (App. p. 84).

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, suffered memory loss, memory lapses accompanied by cognitive decline, and personality changes. (App. pp. 86-87). 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 with simple tension headaches. (App. pp. 82-83). 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.

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

II. PETITIONER IS ENTITLED TO TOLL THE STATUTE OF LIMITATIONS PURSUANT TO S.C. CODE ANN. § 15-3-40.

Petitioners bring this Petition for a Wirt of Certiorari asking this Court to find that the Court of Appeals erred in holding that Petitioners were not entitled to toll the statute of limitations pursuant to S.C. Code Ann. § 15-3-40.

The Court of Appeals erred in 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." (App. p. 119).

As evidenced in the Appendix at pages 86-87, 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 Argument I 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." (App. p. 87).

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 over-all inability to function in society**, or the mental condition is such as to require care in a hospital." (*emphasis added)*. Petitioners are entitled to toll the statute of limitations if Petitioner 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, Petitioners 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 Petitioners' complaint outline the that the traumatic brain injury as a result of a concussion was discovered months after the collision and that the Petitioner had no knowledge or understanding of the link between her persistent headaches, other symptoms and her traumatic brain injury. (App. p. 23)

Evidenced by Dr. White's Report and as stated in the Petitioners' 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.

(App. pp. 9, 86-87).

While a plaintiff need only submit a **"scintilla of evidence"** to avoid summary judgment, see *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 803 (S.C. 2009), the evidence must be material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. See *Taylor v. Atlantic Coast Line R. Co*., 59 S.E. 641 (S.C. 1907) (defining "scintilla of evidence" as any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror). (*emphasis added*). Moreover, "a court 'cannot ignore facts unfavorable to the [non-moving] party and [the court] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" *Bloom v. Ravoira*, 529 S.E.2d 710, 713 (S.C. 2000) (citing Hopson v. Clary, 468 S.E.2d 305, 307 (S.C. Ct. App. 1996)). In this case, the Court has overlooked the facts presented in Dr. White's Medical Evaluation.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

September 21, 2021
Greenville, SC

s/Brian T. Smith

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PROOF OF SERVICE

I certify that the Petition for a Writ of Certiorari and Appendix were filed with the Supreme Court of South Carolina and served on the Respondents' counsel of record by electronic service to the email addresses listed below, on September 21, 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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