

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-0934

Virginia L. Marshall and
Todd W. Marshall, Appellants,

v.

Kenneth A. Dodds, M.D., Charleston
Nephrology Associates, LLC, Georgia
Roane, M D., and Rheumatology
Associates, P.A., Respondents.

REPLY BRIEF

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ARGUMENT

A. The Respondents refuse to acknowledge that there is no South Carolina case supporting their position and that they are adding words to the statute of repose.

The circuit court granted summary judgment because it believed that the statute of repose begins running at the “first occurrence” of a physician’s negligence. It did not matter if there were several occurrences. The court said the repose clock starts with the first breach of the standard of care. See (R. p. 7) and (R. p. 18).

The respondents have never identified any South Carolina case articulating this view.

The circuit court cited *O’Teul v Villani*, but that case only involved one instance of negligence, not multiple instances of negligence. The word “first” appears only one time in the decision, when the Court was describing the plaintiff’s discovery of his learning disabilities. 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App. 1995)

When the respondents sold this theory to the circuit court, they cited *O’Teul* as well as *Hoffman v Powell*, *Langley v Pierce*, and *Shadwell v Cragie*. See (R. pp. 122, 124) and (R. pp. 143-145). None of these cases talk about the “first” occurrence of negligence. The respondents were just misrepresenting South Carolina law.

The respondents’ briefs follow the same pattern. The briefs never cite a South Carolina case that articulates this principle, either in dicta or as a holding.

And the respondents never examine the statute of repose’s language or articulate why their reading is faithful to the way the statute is written. The statute does not contain any words of sequence. It does not say (or suggest) that multiple breaches of the standard of care should be treated as a one “occurrence” if those breaches are similar or are related.

B. The Respondents refuse to acknowledge the distinction between the “continuous treatment rule,” which revives stale claims, and the rule Ms. Marshall is advancing, which leaves stale claims alone.

Both of the respondents continue to emphasize South Carolina’s rejection of the continuous treatment rule. Dr. Dodds says this means that Ms. Marshall cannot pursue her claims “piecemeal.” Dr. Roane says that the “continuous treatment rule” and the “continuing tort doctrine” are different concepts and that the Supreme Court’s rejection of these approaches supports the circuit court’s decision.

Ms. Marshall cannot discover any meaningful difference between the “continuous treatment rule” and the “continuous tort doctrine” where deadlines are concerned. Our Supreme Court explained the continuous treatment rule in *Harrison v Bevilacqua*. See 354 S.C. 129, 135, 580 S.E.2d 109, 112 (2003). The Georgia Supreme Court recognized the “continuing tort” theory in *Everhart v Rich’s, Inc*. See 194 S.E.2d 425, 428 (Ga 1972). Both approaches take a series of negligent acts and treat them as a cumulative event for the purpose of deadlines. These rules say that the limitations and repose periods for *all instances* of malpractice do not begin until the *end* of treatment. The rules are basically the same. Ms. Marshall does not follow the argument that they are different in any way that matters here.

Those rules are not equivalent to the approach Ms. Marshall is advancing. She has openly acknowledged that claims for the original malpractice would be stale, but she has evidence of more malpractice that is within the deadline and she has identified damages that flow from those instances of negligence. The respondents still have not offered any lucid explanation of why Ms. Marshall’s approach is not correct. Instead, they are pushing the

same theory they pushed below, which is that the continuous treatment rule has been rejected and that everything is barred because the first act of negligence was outside the deadline.

The respondents are fixating on the word “continuous” and on phrases like “course of treatment,” but those can describe temporal connections, logical connections, sequential connections, or other connections that are irrelevant to the question whether multiple acts of medical malpractice should be aggregated for the purpose of the limitations or repose deadlines. We would never say that someone who engaged in a “continuous” crime spree committed only one crime, and if we said that someone “continued” to be unfaithful to his or her spouse, nobody would seriously contend that it made a difference whether the later instances of unfaithfulness were similar or different than the first.

The first cut of a physician’s malpractice may be the deepest, but this does not mean that subsequent cuts did not cause any harm. It is intellectually dishonest for the respondents to continue associating Ms. Marshall’s argument with the continuous treatment rule, and the respondents continue to give the statute of repose a broad construction instead of the narrow reading that the law requires.

C. The Respondents offer no principled reason why Ms. Marshall’s argument violates the purpose of the statute of repose and why granting immunity for repeated instances of negligence is the correct view.

Ms. Marshall’s interpretation honors the purpose of the statute of repose, which is to allow a physician to have closure six years after providing treatment. For the first act of malpractice, that closure comes six years after the first instance of negligence. For any later malpractice, it naturally follows that peace of mind will have to wait longer.

The Court does not need to take Ms. Marshall's word for it. The Supreme Court has articulated the same reasoning and rationale.

The Supreme Court has held that when a case presents a series of discrete wrongs that would each be independently actionable, the defendant's claim to repose, which means rest, is "vitiating." *State v Ortho-McNeil-Janssen Pharmaceutical*, Op. No. 27502 (S.C. Sup. Ct. filed Feb. 25, 2015) (Shearouse Adv. Sh. No. 8 at 31, 59). The court called this scenario "continuous accrual" and explained that if the deadlines in cases of repeated wrongdoing were tied to the first breach of duty or instance of misconduct, then "parties engaged in long-standing malfeasance would [] obtain immunity in perpetuity from suit even for recent and ongoing malfeasance." *Id.* (quoting *Aryeh v Canon Bus Solutions*, 292 P.3d 871, 880 (Cal. 2013)) There is no need to resort to Georgia law. This case puts the point plainly.

In fairness, the Supreme Court issued this decision well after the circuit court's order. However, fairness also requires acknowledging that there is no principled way to distinguish this analysis from the circumstances in Ms. Marshall's case.

Someone trying to distinguish the Supreme Court's decision might argue that the case involves the Unfair Trade Practices Act and not a claim for medical malpractice. That is true, but the court based its holding on the fact that the violations were ongoing and independently actionable, and when the evidence is viewed in Ms. Marshall's favor, the same can be said here. If each instance of malpractice caused Ms. Marshall to suffer additional damages, it naturally follows that each instance of malpractice was actionable. This is because South Carolina, unlike Georgia, has never required a new "injury." South Carolina focuses on whether negligence causes "damages." (Brief of Appellant, pp.14-15)

Someone might also try to distinguish the case by saying that it involved the statute of limitations and not the statute of repose, but the court's point was that the law should not provide immunity to ongoing negligence and that where misconduct is continuing, the justification for the defendant's claim to rest is "vitiating." The law should hold people accountable if they keep making mistakes. The statute of repose does not provide differently.

It makes sense that the Supreme Court would embrace "continuous accrual" but would reject the continuous treatment rule. The continuous treatment rule would toll parts of the initial malpractice claim after the repose period for those parts has lapsed. Continuous accrual does not do this. *Aryeh*, 292 P.3d at 880 (distinguishing the two approaches).

It also makes sense that the Supreme Court would embrace continuous accrual but reject the tolling argument made in *Langley v Pierce*. The statute of repose contains a tolling provision, and because the statute expresses a single circumstance when the repose period is tolled and includes the language "as tolled by this section," it naturally follows that this is the *only* circumstance when the repose period is tolled. 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). Ms. Marshall is not "tolling." She is seeking to pursue timely claims and to leave the stale ones alone.

It is difficult to understand why the respondents insist on ignoring these distinctions. It is also difficult to understand how they have a good faith basis for calling Ms. Marshall's theory "contrived" or suggesting that she is trying to be clever in how she drafted this lawsuit. This was the *respondents'* motion for summary judgment, which means that Ms. Marshall and her husband get the benefit of the doubt. Leaving stale claims alone is just diligent lawyering, and while a jury might not believe Ms. Marshall's experts, some of those

experts expressed shock at the repeated failure to do a routine test that would have found this woman's cancer. See (R. p. 341) (R. pp 288, 300-301, 320-321).

D. The record can certainly speak for itself, but the suggestion that Ms. Marshall's arguments are not preserved is inaccurate.

Ms. Marshall does not understand Dr. Roane's error preservation argument.

The complaints allege multiple acts of negligence — repeated failures to properly monitor elevated protein levels and repeated failures to change course in the face of persisting and non-responsive symptoms — that occurred within the repose period. No one hid the history that was outside the deadline. The pre-suit affidavits *acknowledged* it. See (R. p. 388); (R. p. 398).

Ms. Marshall reiterated this in a letter to the circuit court after the summary judgment hearing. (R. pp. 405-406). She wrote that it did not matter whether there were acts of negligence that occurred outside the repose period — she was suing for negligence that happened within the deadline. This was the same theory she offered in the argument on rehearing and it is the same theory she is arguing now.

When the circuit court ruled that the “first” date of malpractice was the trigger date, Ms. Marshall sought rehearing and pointed out that this reasoning was not faithful to the statute's language and was not consistent with any South Carolina cases.

Error preservation requires that the circuit court have a “fair opportunity” to consider the argument. *Atl Coast Builders & Contractors v Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). The circuit court had a “fair opportunity” to consider everything here. Indeed, the court *did* consider these arguments. The court's error was rejecting them.

CONCLUSION

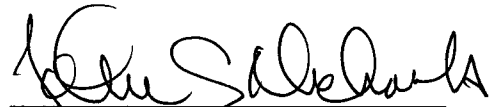
This is not a complicated case. There are certainly some factual differences between the claims against the defendants, but unless Ms. Marshall is missing something, there has been no argument that any of those factual differences make a difference in this appeal.

When the facts are viewed in Ms. Marshall's favor, those facts show that Dr. Roane and Dr. Dodds breached the standard of care on multiple occasions. Some of these breaches were outside the repose period but others were not. The breaches might be disputed, but everyone should agree that there is *some* evidence to support this view, and that is all that counts when considering summary judgment.

The circuit court held that the statute of repose begins to run at the first occurrence of a negligent act. This was the theory the respondents argued in their request for summary judgment, and this was the theory that the circuit court adopted. The Court should reverse because this rationale is not faithful to the language of the statute of repose or to the statute's purpose

May 4, 2015

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

May 5, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Final Brief of Appellants, Reply Brief and Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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