THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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.

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issue on Appeal 1

Statement of the Case 1

Arguments 5

I. The Court should hold that the statute of repose means what it says. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future 6

a. The circuit court's ruling is contrary to the statute's language 6

b. In failing to follow the statute's language, the circuit court interpreted the statute broadly rather than narrowly 7

c. The South Carolina authorities the circuit court cited do not actually support the circuit court's ruling 8

II. This approach is different from the continuous treatment rule, which is a rule of tolling that would preserve *all* of Mrs. Marshall's claims for *every* occurrence of malpractice 10

III. The true basis of the circuit court's decision is a Georgia rule that this Court should reject. South Carolina does not ask whether the plaintiff's injury is "new" It asks whether the plaintiff suffered "damages" 13

Conclusion 16

TABLE OF AUTHORITIES

Cases

Grier v AMISUB of SC,
397 S.C. 532, 725 S.E.2d 693 (2012) 7, 15

Harrison v Bevilacqua,
354 S.C. 129, 580 S.E.2d 109 (2003) 11

Hodges v Rainey,
341 S.C. 79, 533 S.E.2d 578 (2000) 7

Hoffman v Powell,
298 S.C. 338, 380 S.E.2d 821 (1989) 8, 9, 12

Kerr v Richland Memorial Hospital,
383 S.C. 146, 678 S.E.2d 809 (2009) 8, 9

Langley v Pierce,
313 S.C. 401, 438 S E 2d 242 (1993) 8, 9

O'Teul v Villani,
318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995) 8, 12

Preer v Mims,
323 S.C. 516, 476 S.E.2d 472 (1996) 11

Shadwell v Cragie,
361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004) 8, 9, 10

(Other Jurisdictions)

Howell v Zottoli,
691 S.E.2d 564 (Ga. Ct. App. 2010) 13, 14

Kaminer v Canas,
653 S.E.2d 691 (Ga 2007) 13, 14

Statutes & Other Authorities

S.C. Code Ann. § 15-3-545 (2005) 3, 6

STATEMENT OF ISSUE ON APPEAL

South Carolina law requires a plaintiff to file a medical malpractice lawsuit no later than six years after the alleged malpractice "occurred." This deadline is an absolute bar to a complaint. It applies regardless of whether the plaintiff even knows that he or she has been injured.

This case involves a claim that there were multiple occurrences of malpractice. Some of these are outside the six-year window and are not the subject of this suit, but others are within the last six years and would seem to be fair game. The issue is whether the circuit court correctly held that the repose period for all of these occurrences began at the first instance of malpractice, or whether the court should instead have held that each occurrence of malpractice begins a new clock that is related to that occurrence.

STATEMENT OF THE CASE

The respondents are two physicians who spent a substantial amount of time giving Virginia Marshall aggressive treatment for a disease that her experts say she did not have. In the case of Dr Georgia Roane, this lasted for several years. In the case of Dr. Kenneth Dodds, it lasted about thirteen (13) months.

Mrs. Marshall sued Dr Dodds and Dr. Roane after she went to a third physician who immediately diagnosed her correctly, but Mrs. Marshall lost her suit on summary judgment because the circuit court held that the repose period for all of her claims began running the first time these doctors breached the standard of care. Mrs. Marshall agreed that claims for the early malpractice were off the table, but the circuit court held that the repose period for the first occurrence insulated the whole series of occurrences from liability.

The story of this case begins in the year 2000. This is when Dr. Roane diagnosed Mrs. Marshall with undifferentiated connective tissue disease and began treating her. (R. p. 47, ¶4).

Dr. Roane continued this diagnosis and treatment for the next seven (7) years. There were multiple appointments and several diagnostic procedures. This was a long-term relationship It is not a case that involves only one interaction between the physician and the patient. See, e.g. (R. pp. 47-49)

The gist of Mrs. Marshall's claim is that Dr. Roane kept ignoring repeated warning signs that the original diagnosis was wrong Mrs Marshall was relatively stable during treatment, but her experts say her lab work never really improved. For example, the protein in Mrs. Marshall's urine was one of her more important symptoms, and this level remained persistently abnormal. Mrs Marshall says that Dr Roane had a continuing duty to reevaluate the diagnosis and react properly. Instead of re-calculating, Dr. Roane stayed the course.

Mrs. Marshall's allegations against Dr. Dodds are generally similar, but over a much shorter time frame. Dr Dodds entered the picture in 2004 by virtue of a referral from Dr. Roane, and he treated Mrs. Marshall until September of 2005. Like the claim against Dr. Roane, the allegation of malpractice is that Dr. Dodds failed in his duty to monitor Mrs. Marshall's treatment and to respond appropriately when her symptoms did not improve. See generally (R. pp. 388-391) (an affidavit from one of Mrs. Marshall's experts).

Mrs. Marshall does not have connective tissue disease. She has cancer. She discovered this in 2010, when a different doctor — Dr. Eric Pride — conducted the investigation that Mrs. Marshall says her other doctors should have conducted previously.

Mrs. Marshall began the process of making claims against Dr. Roane and Dr. Dodds after she learned her correct diagnosis. She did this quickly, but not immediately She made the appropriate pre-suit filings against Dr. Dodds in February of 2011, and she filed similar documents as to Dr. Roane in April. Additional complaints followed in June (as to Dr. Dodds) and August (as to Dr. Roane). These were identical to the complaints that Mrs. Marshall served with her pre-suit filings. The cases were eventually consolidated. See (R. p. 4)

Both Dr. Dodds and Dr. Roane answered with a denial and a variety of affirmative defenses, including the assertion that all claims were barred by the statute of repose The statute of repose provides that a plaintiff must bring a medical malpractice suit within six years of the "date of occurrence." See S.C. Code Ann § 15-3-545 (A) (2005). This issue of timeliness was the principal issue that the parties argued to the circuit court.

Both doctors contended that the statute of repose for all of Mrs. Marshall's claims began to run at the "first occurrence" of malpractice. Dr. Roane was the first of the respondents to file for summary judgment on this basis. See (R. pp. 115-117) Dr. Dodds followed shortly thereafter. See (R. pp. 106-108). The filings are not identical, but the essence of the argument is the same.

The doctors focused on the fact that Mrs. Marshall's experts had identified breaches of the standard of care that occurred more than six years before the litigation started. The doctors claimed that any later malpractice was nothing more than a continuation of the original course of treatment. The argument went that subsequent errors could not restart the repose period. Because all of the negligence was the same, all of the negligence was barred.

Mrs. Marshall argued that this view was incorrect, and she stressed that she was not complaining about any of the original malpractice, which she agreed was stale. She admitted that her experts had identified breaches of the standard of care which occurred outside the six-year deadline, but she said that she was not suing for those breaches — she was suing for *later* breaches which caused *continued* pain and suffering as well as the costs of getting *more* treatment for a disease that she did not have. Mrs. Marshall did not file a memo opposing summary judgment. She gave her position during the hearing and in a follow-up letter to the court. The gist of the argument was that although all of this malpractice was in the same family, each deviation from the standard of care was its own claim with its own damages.

The circuit court agreed with the doctors and held that the statute of repose begins to run at the first occurrence of a negligent act. See (R. p. 7) and (R. p. 18). The court took this to mean that all of the claims were untimely. Mrs. Marshall's experts had identified multiple points where they said the warning signs should have caused the doctors to change direction, but the circuit court focused elsewhere — it focused on the earliest date the experts said that Dr. Dodds and Dr. Roane should have caught the cancer.

The circuit court saw Mrs. Marshall's argument as running contrary to South Carolina's rejection of the "continuous treatment" rule and contrary to the purpose of the statute of repose. The court also cited a decision from the State of Georgia for the proposition that a later negligent act cannot re-start the repose period if the later act is a repeated failure to diagnose a continuing condition. The court issued separate orders for each doctor. These orders were signed May 1, 2014 and filed May 2. See (R. pp. 3-11, pp. 12-24)

Mrs. Marshall filed a timely motion for reconsideration, see (R. pp. 151-154), which Dr. Roane and Dr. Dodds opposed, see (R. pp. 155-160, pp. 161-170), and which Mrs. Marshall supported with a reply. See (R. pp. 171-173).

The circuit court conducted a hearing on July 16, 2014. On August 7, it issued a form order that summarily denied the motion. See (R. p. 25).

ARGUMENT

This case is about whether the statute of repose means what it says. When the statute speaks about the six-year deadline, the trigger date is the date the malpractice "occurs." The statute does not talk about the "first" occurrence of malpractice or "a new chain" of malpractice. The circuit court's reasoning is not faithful to the statute's language. Whenever there is an occurrence of malpractice, the repose period extends six years into the future.

This is not the continuous treatment rule The continuous treatment rule is a rule of equitable tolling that holds all deadlines in abeyance while a patient is treating with his or her physician This rule would allow Mrs. Marshall to sue for *all* of the malpractice that her experts identified, but her claim is not that broad. She is only suing for the malpractice that occurred within the deadline. The continuous treatment rule is not in play.

The irony is that it is the respondents who are seeking to apply a rule that focuses on the continuous nature of Mrs. Marshall's treatment Their argument brings multiple occurrences of malpractice under one umbrella in an effort to insulate repeated breaches of the standard of care from liability. This is the view that the circuit court adopted, and this view is not faithful to South Carolina law. The circuit court's ruling does not fulfill the purpose of the statute of repose, it creates a windfall. This Court should reverse.

I. The Court should hold that the statute of repose means what it says. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future.

This Court should reverse because the circuit court's orders are controlled by an incorrect view of the law. Both of the summary judgment orders hold that the statute of repose begins to run at the "first occurrence of a negligent act." See (R. p. 7) and (R. p. 18). This holding was error.

The circuit court's view is contrary to the statute's language. It also goes against the rule that statutes which restrict the common law must be construed narrowly, not broadly. Although the circuit court cited multiple South Carolina cases, none of those cases actually support the circuit court's reasoning. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future

a The circuit court's ruling is contrary to the statute's language.

Section 15-3-545 (A) of the South Carolina Code contains the statute of limitations for medical malpractice lawsuits. It also contains the statute of repose. The "limitations" part of the statute provides that a plaintiff must file a malpractice claim within three years of the date of the doctor's treatment or omission, or within three years of the date the plaintiff should have discovered the injury. The "repose" provision explains that the suit must not begin later than "six years from date of occurrence, or as tolled by this section."

This statute seems to be straightforward. It appears to contemplate that whenever there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. It would seem to follow by extension that if there were multiple occurrences

of malpractice, there would be multiple repose periods. Yes, a repose period *does* start running at the first act of negligence. But just as one act of negligence creates one deadline, the sensible implication is that a series of negligent acts would create a series of deadlines.

It would have been easy to write the statute differently if the legislature did not want the statute to work this way. It would have been easy to say that a malpractice suit must be commenced within three years, but "not to exceed six years from date of *first* occurrence" Another option would have been to add a clause to the end of the paragraph. If the legislature intended to link multiple occurrences together, it might have closed sub-section (A) by saying "*If there are a series of negligent occurrences that are similar, the repose period begins to run at the first date of a negligent act or omission.*"

But the statute is not written this way, and as this Court knows, the cardinal rule of statutory instruction is to determine the statute's intent by examining the statute's language. *Hodges v Rainey*, 341 S C. 79, 85, 533 S.E 2d 578, 581 (2000). The language of this statute does not appear to give any support to the circuit court's holding that in a case involving multiple occurrences of malpractice or a series of occurrences that are similar, the repose period for all of these occurrences begins to run at the first act of negligence. The court's holding puts words in the statute that are not there.

b. In failing to follow the statute's language, the circuit court interpreted the statute broadly rather than narrowly.

The statute of repose is supposed to be interpreted narrowly, not broadly. This Court is familiar with the rule that "statutes in derogation of the common law are to be strictly construed." *Grier v AMISUB of SC*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). This

means that when a court interprets a statute that restricts common law rights like the right to sue a doctor for malpractice, the court will resolve any ambiguity in the way that represents the least encroachment on the common law. *Id* at 538, 725 S.E.2d at 697.

This principle required the circuit court to construe the statute of repose in the way that was more favorable to Mrs. Marshall, not the defendant doctors. And there does not appear to have been the need for the court to perform any real "construction" here — the statute's language seems plain and straightforward. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. This is the most sensible application of the statute's language as written.

c The South Carolina authorities the circuit court cited do not actually support the circuit court's ruling.

The circuit court's orders cited several South Carolina cases Both orders cite to this Court's decision in *O'Tuel v Villani* This citation comes immediately after the orders pronounce that the statute of repose begins running after the first occurrence of a negligent act. (R p 7) and (R. p. 18). The other South Carolina decisions that are prominently cited on the statute of repose are *Kerr v Richland Memorial Hospital*, *Shadwell v Craigie*, *Langley v Pierce*, and *Hoffman v Powell.*

None of these actually support the view that the repose period for a series of occurrences begins to run at the first act of negligence. As far as South Carolina decisional authority is concerned, the cases in the court's order do not shore-up the court's holding.

O'Teul v Villani involved a single occurrence of negligence. The allegation was that the doctor should have delivered a baby by C-section instead of allowing the baby to be

delivered by the traditional avenue. The opinion never discusses a "first" act of negligence or a "first" event in a chain of malpractice. The suit was barred because it was filed more than six years after the child's birth. See 318 S.C. 24, 455 S.E.2d 698 (Ct App. 1995).

Kerr v Richland Memorial Hospital is also a "one occurrence" case. The malpractice there was the failure to correctly diagnose a mole as cancerous. The issue in *Kerr* was whether the statute of repose applies to government hospitals. The word "first" does not even appear in the decision See 383 S.C. 146, 678 S.E.2d 809 (2009).

Langley v Pierce involved two occurrences of negligence, but the issue in the case was whether the repose period was tolled when Dr. Pierce moved to another state. See 313 S.C. 401, 438 S E 2d 242 (1993).

Hoffman v Powell was a constitutional challenge to the statute of repose. The opinion does not appear to contain any support for the proposition that the first act of negligence triggers the repose period for all acts of negligence that are similar. See 298 S.C. 338, 380 S E.2d 821 (1989). The underlying facts are not even referenced in the decision.

Shadwell v Cragie is different. It *does* involve multiple occurrences of negligence, but all of the occurrences were more than six years old when the plaintiff filed her suit. See 361 S.C. 492, 605 S.E.2d 567 (Ct App. 2004) The *Shadwell* case *is* instructive, but it is instructive in Mrs. Marshall's favor because the decision observes "the occurrence in this case is no later than the date of [the plaintiff's] *last* appointment." *Id.* at 499, 605 S.E.2d at 570 (emphasis added). If the repose period began at the first occurrence of negligence, the proper way to analyze *Shadwell* would have been to examine the first time that the defendant failed to tell the plaintiff about her kidney problems, not the last time.

Candor requires acknowledging that this language from *Shadwell* is not absolute. The modifying phrase "no later than" suggests that this Court may have been giving the plaintiff the benefit of the doubt rather than affirmatively holding that the occurrence was indeed the date of the plaintiff's last doctor's appointment. But Mrs. Marshall is not arguing that *Shadwell* controls. She is simply arguing that *Shadwell* and the other cases the circuit court cited do not support the circuit court's holding.

Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. This is the natural effect of the statute's language, and the circuit court did not cite a South Carolina case that suggests differently.

II. This approach is different from the continuous treatment rule, which is a rule of tolling that would preserve *all* of Mrs. Marshall's claims for *every* occurrence of malpractice.

Both of the circuit court's orders discuss a doctrine known as the "continuous treatment rule" or the "continuous tort rule." See (R pp. 8-9) and (R. pp. 17-18). South Carolina has refused to adopt this doctrine, and the circuit court viewed this refusal as illustrating that the statute of repose is supposed to be applied "strictly." The court took the view that Mrs. Marshall was trying to revive claims that would otherwise be barred and that her approach violated the idea that the statute of repose is an outer limit on a physician's liability. This view was not correct.

The problem with this reasoning is that it compares things that are not equivalent. The circuit court articulated the continuous treatment rule correctly — this rule says that when a patient is being continually treated by a doctor, the deadlines for a malpractice claim do not start running until the doctor's treatment for the particular condition is over. See (R.

pp. 17-18) (citing *Preer v Mims*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)). This rule arose as courts struggled to apply these sorts of statutes to wrongful conduct that is not a single act, but is instead "a course of conduct, a series of negligent acts, or a continuing impropriety of treatment." *Preer*, 323 S C. at 518-19, 476 S.E.2d at 473.

The Supreme Court rejected the continuous treatment rule in *Harrison v Bevilacqua*, reasoning that tollıng the limitations and repose deadlines would run afoul of the statute's language and purpose. 354 S.C. 129, 138, 580 S.E 2d 109, 113 (2003). The statute of repose is not supposed to be tolled. Once the repose period runs, the repose period applies.

With the utmost respect for the circuit court, the fact that South Carolina has rejected thıs doctrine really has no material bearing on Mrs. Marshall's claims. While it is perfectly fair to say that Mrs Marshall's case involves allegations that there were a series of negligent acts, Mrs. Marshall did not sue for her original misdiagnosıs and she has not argued that the repose period should be tolled. Instead, she has focused on the fact the Dr Roane and Dr. Dodds *kept* breaching the standard of care. The first malpractice occurred outside the six-year deadline, but Mrs. Marshall's experts have said that these doctors continued committing malpractice as time went on. This is different from a doctor who makes an inıtıal misstep but who has no reason to re-evaluate the treatment plan. The allegation is that there were repeated and identifiable mistakes, and that the errors got more obvious as time went on.

The proper construction of the law is that every time someone violates the standard of care, there is a period of time after that violation for a plaintiff to bring a lawsuit. Nothing in the statute of repose suggests otherwise. This is not a "construction" of the statute. It is an application of the statute's language. The statute speaks of an "occurrence" of negligence,

and if Mrs. Marshall's experts are right, there were a number of "occurrences" that took place within six years of Mrs. Marshall initiating this suit. Those claims should be viable.

Not only is Mrs. Marshall's view faithful to the statute's language, it is faithful to the statute's purpose as well. The statute of repose is a rule of closure. The Supreme Court explained this in *Hoffman v Powell*, when it upheld the statute against a constitutional challenge. Because medical condıtions can be dormant for a number of years, medıcal malpractice claims have a long "taıl" — an ındeterminate period where a physicıan's potential liability exposure ıs uncertain and unknown. See 298 S.C. at 340-41, 380 S E 2d at 822. *O'Teul v Vıllanı* is an example. The malpractice claım was tied to medical care that a child received at birth, but the child and his parents argued that they did not know the child was injured until he started school several years later. 318 S.C. at 27, 455 S.E 2d at 700

The statute of repose represents the legislature's judgment about the length of time that is reasonable for a physicıan to have potential exposure to a claim for malpractice. It encourages physicians to keep practicing medıcine by allowing them peace of mind after a certaın amount of tıme passes

But the statute is not a license to keep committing malpractice, the idea being that once someone breaches the standard of care, they can continue committing malpractice and insulate a series of mis-steps from liability. The circuit court was correct when it observed that the repose period is an outer limit on the right to sue, but that limit is tied to the occurrence of malpractice; not the "first" occurrence of malpractice or the first act in "a new chain" of malpractice. For every mistake, there is an outer limit that corresponds with that mistake. This is the correct view, and it is not the same as the continuous treatment rule.

III. The true basis of the circuit court's decision is a Georgia rule that this Court should reject. South Carolina does not ask whether the plaintiff's injury is "new." It asks whether the plaintiff suffered "damages."

The true basis of the circuit court's decision is a rule that the court imported from the State of Georgia. This rule provides that in a misdiagnosis case, the repose period begins to run at the first instance of a physician's negligence, which is the original misdiagnosis This is true even though the physician might have technically committed multiple acts of negligence over a long period of time. As this brief has attempted to articulate, this view does not appear to have any basis in the law of South Carolina. It must have come from Georgia, which is perfectly fine as long as the rule is sound.

The circuit court's decisions cited *Howell v Zottoli*, 691 S.E.2d 564 (Ga. Ct App. 2010) as persuasive, see (R. pp. 10-11) and (R. pp 19-20), but the principle case that adopts this rule and articulates its reasoning is *Kaminer v Canas*, 653 S.E.2d 691 (Ga. 2007) The circuit court cited *Kaminer* in its order as to Dr. Dodds. (R. pp. 17-18)

Georgia's rule is driven by two things. The first is the fact that Georgia focuses on the time of the plaintiff's "injury." The second is that Georgia says the only "injury" in a misdiagnosis case is the injury caused by the original misdiagnosis.

The *Kaminer* decision seems to put the point relatively plainly. The decision provides that even though a physician's subsequent failures to re-evaluate a diagnosis "may well constitute new and separate instances of professional negligence," Georgia's deadline statutes are no longer triggered by the occurrence of a negligent act or omission, instead they are tied to the date of the injury. See 653 S.E.2d at 695.

Kaminer is principally a statute of limitations case. It does not focus on the repose period until the end. This distinction matters because Georgia's statute of limitations is tied to the date of the plaintiff's injury. It does not focus on the date the malpractice occurred.

But *Howell v Zottoli* is purely a repose case, and *Howell* applies the same reasoning. The *Howell* court took the view that although there *were* multiple occurrences of negligence, there was no "new injury" as a result of the subsequent failures to correctly diagnose and treat the patient. Thus, even though there were multiple "occurrences," the court held that the plaintiff's claim was barred because there was only one "injury." See 691 S.E.2d at 566.

With the utmost respect for the Georgia courts and for the circuit court who found these foreign cases persuasive, this Court should reject this rule as *un*sound.

First, this rule has been controversial, even in Georgia *Kaminer* was a 4-3 decision by the Georgia Supreme Court, and as the dissent observes, it is not accurate to say that there is only a single and indivisible injury that flows from the serial misdiagnosis of a medical condition. If a patient has to *continue* to pay for the wrong medical treatment, and if the patient has to suffer *additional* stress and anxiety while the patient's actual disease worsens, these are further invasions of the plaintiff's rights that would not have occurred without additional breaches of the standard of care. One of the cases after *Kaminer* criticized this rule and the body of precedent it created as confusing and difficult to apply. That is from the concurring decision in *Howell*. See 691 S.E.2d at 568. The Court will recall that *Howell* is the same case the circuit court cited in granting summary judgment against Mrs. Marshall.

Second, South Carolina has not traditionally tied the viability of a negligence claim to whether the plaintiff has suffered a "new injury" or a "distinct injury " Instead, the law

has generally focused on whether the plaintiff has suffered "damages." The Supreme Court's decision in *Grier v AMISUB* articulates this principle. *Grier* provides that "to establish a cause of action for negligence [a plaintiff] must prove . . . (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." 397 S C at 537, 725 S.E 2d at 696. The *Grier* decision actually lists a number of cases that state the principle the same way. It does not matter if the injury is new. What matters is whether the new occurrence causes the plaintiff to incur additional damages.

With the utmost respect for the Georgia court system, this view is the better view. Mrs. Marshall's injury is not just her illness. A jury might not believe Mrs. Marshall's experts, but if the jury *did* believe them, the jury could conclude that each time they failed to reach a correct diagnosis, this failure resulted in a continued disease, additional pain, additional suffering, and additional expenses while Mrs Marshall was being aggressively treated for a diseased immune system when she really had (and has) blood cancer. A rule that ties the repose clock to the original misdiagnosis will encourage a physician to stick to a misdiagnosis rather than re-evaluate it. It will encourage someone to keep committing negligence rather than police his or her own work. A defendant's refusal to correct course will be rewarded by insulating not just one occurrence, but a chain of occurrences, from liability. This is more than an outer limit for liability. It is a windfall.

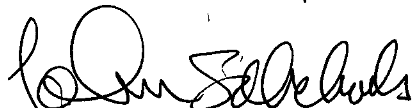
Mrs. Marshall's claims are focused. She tailored her allegations so that they would satisfy the statute of repose, and as she wrote when she was arguing to the circuit court, these additional instances of negligence caused her to suffer damages. See (R p. 406). A jury

might not believe Mrs. Marshall's experts, but these experts have identified specific breaches of the standard of care that occurred within six years of the date that Mrs. Marshall initiated these proceedings. For Dr. Roane, those breaches involve the failure to reach a hard or conclusive diagnosis after Mrs. Marshall's lab work showed no material improvement following a long period of aggressive treatment. For Dr. Dodds, those breaches involve the alleged failure to recognize that different tests of Mrs. Marshall's protein levels were yielding inconsistent results. A jury might decide that these doctors were not negligent, but if Mrs Marshall's experts are right, their failure to order a routine test let Mrs. Marshall's cancer grow for six years. Each day caused more damages. This view reflects reality, and it is the view that the law should apply.

CONCLUSION

This Court should reverse. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future

Respectfully submitted,



May 4, 2015

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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.

Respectfully submitted,

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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