THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2015-001463
Circuit Court Case Nos. 2012-CP-10-2867 and 2011-CP-10-8313

Clair Craver Johnson,

Appellant,

v.

John Roberts, M.D.,

Respondent.

And

Clair Craver Johnson,

Appellant,

v.

Medical University of South Carolina,

Respondent.

FINAL BRIEF OF RESPONDENT JOHN ROBERTS, M.D.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Cases (continued)

Statutes

Rules

INTRODUCTION

In this appeal Ms. Johnson[1] challenges the circuit court's twin summary judgments in favor of Dr. Roberts and MUSC,[2] i.e., Ms. Johnson challenges the circuit court's grant of summary judgment to the respective defendant in both of her consolidated actions for medical malpractice.

Ms. Johnson's challenge should fail, not only because the circuit court correctly concluded that her claims are barred by the six-year statute of repose for medical malpractice actions in S.C. Code Ann. § 15-3-545(A), but also, as threshold matter, because it is clear that Ms. Johnson cannot carry the burden that she, as the appellant, must shoulder to upset the presumptive validity of the judgments she appeals; indeed, it is neither appropriate nor necessary for this Court to even reach the merits of Ms. Johnson's appeal, because her only appellate argument is not preserved for review, and, in any event, it is rendered moot by the two-issue rule.

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[1] Plaintiff/Appellant Clair Craver Johnson is referred to as "Ms. Johnson."

[2] Defendants/Respondents John Roberts, M.D., and the Medical University of South Carolina are referred to as "Dr. Roberts" and "MUSC," respectively; collectively, they are referred to as the "Respondents."

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. As a threshold matter, is it appropriate or necessary for the Court to reach the merits of Ms. Johnson's appeal?

A. Is Ms. Johnson's appellate argument preserved for review?

B. Is Ms. Johnson's appellate argument rendered moot by the two-issue rule?

II. Assuming, *arguendo*, the merits are properly considered, did the circuit court correctly conclude that Ms. Johnson's claims are time-barred under § 15-3-545(A)?

COUNTER-STATEMENT OF THE CASE

Both of the medical malpractice lawsuits involved in this appeal were commenced by Ms. Johnson in Charleston County, in the Court of Common Pleas, one on November 8, 2011, against MUSC, the other on May 1, 2012,[3] [4] against Dr. Roberts, a psychiatrist in private practice. With the consent of all parties the cases were consolidated in the circuit court.

In both cases Ms. Johnson has alleged professional negligence relating to electroconvulsive therapy ("ECT") she received at MUSC on a number of occasions while under Dr. Roberts's care for certain mental disorders. The

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[3] Previously, on November 8, 2011, Ms. Johnson had filed notice of her intent to sue Dr. Roberts. The matter was not resolved through pre-suit mediation.

[4] Ms. Johnson's operative complaint against Dr. Roberts is her amended complaint filed May 16, 2012.

alleged negligence dates back to at least 2003,[5] when the course of treatment via ECT was commenced—after this course began in 2003, Ms. Johnson continued with ECT periodically until 2008. According to Ms. Johnson, the ECT was involuntary and improper and caused her damages, including loss of memory and exacerbated mental impairment. (R. pp. 10-17 [Dr. Roberts]; R. pp. 22-44 [MUSC].)

The Respondents moved for summary judgment, contending that Ms. Johnson's claims were time-barred under § 15-3-545(A), and their motions were heard in the circuit court on January 9, 2014, the Honorable R. Markley Dennis, Jr., presiding. (R. pp. 52-53; R. pp. 54-72; R. pp. 73-74; R. pp. 75-110; R. pp. 111-190; R. pp. 191-208.) The circuit court granted the Respondents' motions and thereafter denied Ms. Johnson's motion for reconsideration. (R. pp. 209-220; R. p. 310 [Dr. Roberts]; R. p. 311 [MUSC].)

This appeal follows.

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[5] Although not expressly pleaded, Dr. Roberts has been accused, via expert testimony on behalf of Ms. Johnson, of negligence dating back to February of 2002 relating to his prescription of certain medication to Ms. Johnson. (R. pp. 63-64.)

ARGUMENT

I. As a threshold matter, it is neither appropriate nor necessary for the Court to reach the merits of Ms. Johnson's appeal to affirm the summary judgments in favor of the Respondents.

To prevail on appeal Ms. Johnson has the affirmative obligation to present argument/analysis that is both preserved for review and sufficient to show reversible error as to every independent ground supporting the circuit court's summary judgments.[6] It is clear that Ms. Johnson has not met this

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[6] *See* Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (explaining that South Carolina's preservation requirements are "mandatory"); 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); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420-22, 526 S.E.2d 716, 723-24 (2000) (explaining, "as expressed in Rule 220(c), SCACR, . . . an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal[,] . . . [but] [a]n appellate court may not, of course, *reverse* for any reason appearing in the record.") (emphasis in original); Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (noting that the two-issue rule is applicable to circuit court orders); 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

obligation; therefore, it is neither appropriate nor necessary for the Court to reach the merits of Ms. Johnson's appeal to affirm the summary judgments in favor of the Respondents.

A. Ms. Johnson's appellate argument is not preserved for review.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam, 361 S.C. at 23, 602 S.E.2d at 779-80. Also, to be preserved, an argument must be "sufficiently specific to inform the trial court of the point being urged . . . ." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

In her issue statement Ms. Johnson frames the circuit court's alleged error as one of invasion of the province of the jury as to a question of fact and expressly identifies the error as "being that [ECT] treatment did not cause identifiable injury to appellant until no earlier than 2009-2010 thereby triggering a three[-]year period in which to initiate a claim pursuant to . . . § 15-[3]-545(A)." (App's Br. at p. 1 (capitalization and emphasis omitted).) In the body of her brief Ms. Johnson goes on to say, "the evidence of the date triggering the statute of repose is not a question of law for the Court but

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"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).

is one of fact"[7] and that "[her] position is that . . . § 15-3-545(A) gave [her] a cause of action arising from the application of [ECT] that resulted in brain damage to [her] not for [ECT] treatment that did not result in symptoms"[8] and that, with respect to the timeliness of her suits, "[t]he issue [for a jury] is not whether use of [ECT] therapy is negligent from the first treatment but at what point (number and timing and type of [ECT]) does use of [ECT] constitute negligence." (App's Br. at p. 5.)

Ms. Johnson simply did not make this argument to the circuit court in opposition to the Respondents' motions for summary judgment—and, of course, it was not ruled on by the circuit court. Indeed, this argument is contradictory to the argument she did make to the circuit court in opposition to the motions.[9] Ms. Johnson's appellate argument—her only appellate argument—is not preserved for review, and her appeal necessarily fails. Elam, 361 S.C. at 23, 602 S.E.2d at 779-80; I'On, L.L.C., 338 S.C. at 420-

[7] (App's Br. at p. 2.)

[8] (App's Br. at p. 3.)

[9] At the summary-judgment hearing Ms. Johnson's counsel argued as follows:

> [T]his lady received electro-convulsive shock therapy eighty-six times over a several years period of time -- 2003 to 2008. Each time she received that, it was a blow to her head, a tort. Each one . . . standing alone.

(R. p. 196, lines 11-17.)

22, 526 S.E.2d at 723-24; Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; *see also* Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996) (party may not argue one ground for objection at trial and another ground on appeal); *cf.* I'On, L.L.C., 338 S.C. at 420-22, 526 S.E.2d at 723-24; Watson, 407 S.C. at 452, 756 S.E.2d at 160, n. 9; McCall, 380 S.C. at 659-60, 670 S.E.2d at 701.

B. Ms. Johnson's appellate argument is rendered moot by the two-issue rule.

As a matter of law the circuit court ruled that "the six-year statute of repose [under § 15-3-545(A)] begins to run upon an 'occurrence' of medical negligence[,]"[10] that "the initiation of ECT in 2003 is the occurrence from which the statute of repose is set to run[,]"[11] and that there was no tolling mechanism available to Ms. Johnson. (R. pp. 215-217.) Aside from the fact that Ms. Johnson's appellate argument is unpreserved, because it is exclusively focused on the supposed existence of a question of fact for a jury, it does not sufficiently challenge the circuit court's legal analysis, which is, thus, the law of the case and requires affirmance under the two-issue rule. Jones, 387 S.C. at 346, 692 S.E.2d at 903; Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1; Soden, 333 S.C. at 566, 511 S.E.2d at 378; Shives, 328 S.C. at 474, 492

[10] (R. p. 213.)

[11] (R. p. 215.)

S.E.2d at 811, n. 2; *cf.* I'On, L.L.C., 338 S.C. at 420-22, 526 S.E.2d at 723-24; Watson, 407 S.C. at 452, 756 S.E.2d at 160, n. 9; McCall, 380 S.C. at 659-60, 670 S.E.2d at 701.

II. Assuming, *arguendo*, the merits are properly considered, the circuit court correctly concluded that Ms. Johnson's claims are time-barred under § 15-3-545(A).

While Ms. Johnson may ***now***[12] argue, "[t]he issue is not whether use of [ECT] is negligent from the first treatment but at what point . . . does use of [ECT] constitute negligence[,]"[13] nonetheless, "[she] contends that the ***cumulative effect*** of these [ECT] treatments constituted an independent tort . . . ." (App's Br. at p. 6 (emphasis added).) This idea of divorcing cumulative effect from causative origin is not only illogical but also contrary to § 15-3-545(A).[14]

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[12] To be clear, as noted above, this is contrary—and improperly so, *see* Taylor, 324 S.C. 200, 479 S.E.2d 35—to the position Ms. Johnson has previously taken in this case. (*See* R. pp. 196, lines 11-17 (wherein Ms. Johnson's counsel argued that each instance of ECT administered to her was "a tort . . . standing alone"); R. p. 113 (wherein Ms. Johnson describes the Respondents as "continuing to treat [her] in a negligent manner"); R. p. 11 (wherein Ms. Johnson alleges that Dr. Roberts breached duties of care owed to her "in connection with her 2003 to 2008 course of treatment").)

[13] (App's Br. at p. 6.)

[14] In pertinent part, § 15-3-545(A) provides as follows:

> In any action . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any

To begin, it seems that Ms. Johnson has conflated the date of accrual of a cause of action[15] with the date of occurrence under § 15-3-545(A). As observed in Langley v. Pierce, however, in effecting the economic balance struck by the legislative body, "'[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***.'") 313 S.C. 401, 404, 438 S.E.2d 243, 244 (1993) (emphasis added) (citation omitted).

Moreover, in Harrison v. Bevilacqua, our Supreme Court "declin[ed] to adopt the continuous treatment rule or the doctrine of continuing tort." 354 S.C. 129, 141, 580 S.E.2d 109, 115 (2003). Quoting its prior decision in Preer v. Mims, the Harrison Court first summarized the "continuous treatment rule" as follows:

> "The so-called 'continuous treatment' rule as generally formulated is that if the treatment by the

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> 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.

[15] *See* Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004) ("'A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.'") (citation omitted).

> doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated-unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive."

Id. at 135, 580 S.E.2d at 112 (quoting Preer, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)).

The Harrison Court went on to explain that—notwithstanding numerous policy considerations supporting adoption of the rule—"the continuous treatment rule should not be judicially adopted," because, "[p]ut 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[[16]]." Id. at 136-38, 580 S.E.2d at 112-13; *see also* Epstein v. Brown, 363 S.C. 372, 378, 610 S.E.2d 816, 819 (2005) ("Notwithstanding the very legitimate policy rationales in favor of adoption

[16] Among "the statutes discussed above" was, of course, the medical malpractice statute of repose in § 15-3-545(A). Id. at 137-38, 580 S.E.2d at 113 (explaining, "The primary argument against adoption of the continuous treatment rule is that it offends the clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose[,]" then expressly citing the repose provision in § 15-3-545(A) and noting the "'economic balance struck by the legislative body'" in enacting such a statute of repose) (citations omitted).

of a continuous treatment rule, we declined to adopt it, finding the Legislature has set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability") (citing Harrison, 354 S.C. at 136-37, 580 S.E.2d at 113).

The Harrison Court then addressed—and rejected—Harrison's additional argument that it should adopt the "continuing tort doctrine." Id. at 139, 580 S.E.2d at 114 ("Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree."). It explained,

> 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)).

Having explained the continuing tort theory, the Harrison Court explained that in Georgia, "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 . . . 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)). "Thus," the Harrison Court concluded, "***for the same reason*** we reject adoption of the ***continuous treatment rule***, Georgia has rejected application of its own ***continuous tort theory*** to medical malpractice claims. Accordingly, we find [Harrison's] argument on the ***continuing tort doctrine*** unavailing." Id. (emphasis added).

Ms. Johnson's claims, which arise out of a course of treatment initiated by 2003, but were not pursued via legal action until more than six years thereafter, are barred by the medical malpractice statute of repose in §15-3-545(A). Her argument to the contrary is incompatible with that statute (more specifically—and most importantly—the legislative intent reflected thereby[17]), while the circuit court's analysis faithfully adheres to

[17] Of course, "[i]t is well-established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 696 (2012) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). And, with respect to statutes of repose, our Supreme Court has recognized that they are "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." Langley, 313 S.C. at 404, 438 S.E.2d at 244 (emphasis in original).

the overriding responsibility of ascertaining and effectuating the legislature's intent.

CONCLUSION

For the reasons set forth herein, as well as those set forth in MUSC's brief, which, except insofar as they may be inconsistent herewith, Dr. Roberts adopts by reference pursuant to Rule 208(b)(6), SCACR, Dr. Roberts asks the Court to affirm summary judgment in his favor.

Respectfully submitted,

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CERTIFICATION FOR FINAL BRIEF OF RESPONDENT JOHN ROBERTS, M.D.

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I, Russell G. Hines, do hereby certify that the Final Brief of Respondent John Roberts, M.D. complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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