STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 19 2016
SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

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

C.A. No. 2011-CP-10-0934
App. No. 2014-001833
Opinion No. 5403 -- Filed May 4, 2016

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.

PETITION FOR REHEARING OF RESPONDENTS KENNETH A. DODDS, M.D. AND CHARLESTON NEPHROLOGY ASSOCIATES, LLC

The Plaintiff Patient, Virginia L. Marshall, was treated by Respondent Dr. Roane, a rheumatologist, from 2000 to 2007, who diagnosed her with a condition of undifferentiated connective tissue disease, an autoimmune disease. Respondent Dr. Dodds, a nephrologist, treated the Patient from September 15, 2004 through September 15, 2005, for proteinuria on a referral from Dr. Roane. Years later, in January/February 2010, she was diagnosed with a rare form of lymphoplastmatic lymphoma, a non-Hodgkin's blood cancer known as Waldenström's macroglobulinemia. In this medical malpractice action, commenced on February 7, 2011, the

Patient alleges that both the Respondents misdiagnosed her condition and should have discovered that she had Waldenström's earlier. As to Dr. Dodds, she more specifically alleges that he should have ordered certain testing during the treatment of her proteinuria and discovered that she had Waldenström's in February 2005.

The trial court held that the Patient's claims are barred by the statute of repose which began to run on September 15, 2004, when Dr. Dodds first saw the Patient based on her experts' testimony that her Waldenström's could have and should have been diagnosed by testing at that time. This Court has held "the circuit court erred in finding the statute of repose for medical malpractice actions begins to run after a medical professional's first alleged misdiagnosis." The Respondent Dr. Dodds respectfully submits that the Court has overlooked or misapprehended certain key matters of evidence as shown in the Record and applicable points of statutory and case law.

The medical evidence of record establishes that Dr. Roane – not Dr. Dodds – diagnosed and treated the Patient for her primary condition as an undifferentiated connective tissue disease for seven years, and he referred the Patient to Dr. Dodds for treatment of her proteinuria. The medical evidence also is undisputed that Dr. Dodds treated the Patient over a course of 12 months, with four office visits on September 15, 2004, November 11, 2004, February 7, 2005, and September 15, 2005, during which time her condition and levels were relatively stable. To establish her misdiagnosis malpractice claim, Plaintiff presented expert opinions that Dr. Dodds should have ordered additional testing and discovered her cancer at the initial visit in September 15, 2004. However, the experts did not offer any opinion that her prognosis or treatment was impacted by the delay in diagnosis. Rather, Plaintiff's oncology expert testified that her cancer is not curable but it is a "smoldering" type that does not have organ involvement, they do not

even begin treatment, and the patient can live a normal life. As of 2011, the Patient was stable and functional with no complications or organ failure, thus even with the alleged delayed diagnosis, she has survived past the average life expectancy of four to five years.

In S.C. Code Ann. § 15-3-545(A), the Legislature enacted a six-year statute of repose for medical malpractice action that runs from the date of occurrence of the alleged negligent act or omission and "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." Hoffman v. Powell, 298 S.C. 338, 339-340, 380 S.E.2d 821, 821 (1989). The Respondents maintain that on the evidence in this case, where there is a claim of negligence in making a diagnosis and treatment of a condition over a course of time, the statute of repose began to run on the date of the initial negligent act.

Applying the statute of repose as construed by the Supreme Court to the facts as shown by the undisputed medical records and the opinions of the Patient's own medical experts, the statute of repose began running after Dr. Dodds' first alleged misdiagnosis in September 2004, and a new six-year period of repose did not begin on each subsequent visit when Dr. Dodds allegedly failed to order the testing that would have revealed her cancer. Accordingly, the trial court properly granted summary judgment to Respondents on the Plaintiffs' medical malpractice claims as barred by the statute of repose. The Court's decision reversing the trial court effectively adopts a rule that creates a series of repose periods with each failure to correctly diagnose over the course of treatment that will upset the economic balance struck by the legislative body and run afoul of the absolute limitations policy set by the Legislature. For these reasons, as well as those also covered in their Final Brief, the Respondents respectfully request that the Court grant this Petition for Rehearing and affirm the trial court's grant of judgment to these Respondents.

1. The Court overlooked or misapprehended the undisputed facts regarding the diagnosis and course of treatment by Dr. Dodds as shown in the medical records.

From 2000 to 2007, the Plaintiff Patient was a patient of Dr. Roane, a rheumatologist, who diagnosed her with undifferentiated connective tissue disease. Dr. Roane referred the Patient to Dr. Dodds for a consult to treat her proteinuria in September 2004. Patient was seen by Dr. Dodds on September 15, 2004, and he prescribed Diovan to treat. She was advised to follow-up in two months, and at the time of the follow-up visit on November 11, 2004, the Patient reported that she was feeling very well and she had no complaints; Dr. Dodds did not order any urine tests, and just continued her medication. [ROA 345; Singer Dep. Ex. 5 – Timeline Summary. See also ROA 385; Dr. Luke Affidavit.] As alleged, when the Patient was seen by Dr. Dodds on February 7, 2005, her protein level was 3.1 g/day, and in September 15, 2005, it was 4.2 g/day. Those levels were not significantly different in comparison to the 3.5 g/day year earlier in September 2004, and she was considered stable with normal renal function. Although Dr. Dodds had recommended at the September 2005 visit that the Patient return for a follow-up in six months, she never returned to Dr. Dodds and eventually she self-discontinued her medications after she quit seeing Dr. Roane. [ROA 262; Luke Dep. 151. ROA 345; Singer Ex. 5.]

2. The Court overlooked or misapprehended the expert medical opinions from the Plaintiff's own experts.

The Plaintiff Patient submitted medical opinions from two experts – Dr. Barry Singer, an oncologist/hematologist, and Dr. Barry Luke, a nephrologist, in support of her claims of malpractice as to Dr. Dodds. As recited by this Court, those experts testified that: "The Marshalls' expert witnesses—Dr. Barry Singer and Dr. Robert Luke—opined that Dr. Dodds breached his duty of care at the February and September 2005 appointments, noting the protein

levels in Virginia's urine were elevated from previous tests and, thus, should have signaled to Dr. Dodds that cancerous protein was present and further testing was required." The Court has overlooked or misapprehended that each of those experts opined that Dr. Dodds should have performed the same additional test that would have detected her cancer at the first visit on September 15, 2004. Neither of the experts testified that any new condition developed or that the failure to diagnose in September 2004 was any different or caused any separate/distinct change in her condition or prognosis.

Dr. Singer opined that the Plaintiff Patient had cancerous protein in her urine in February 2005 that could have been detected by Dr. Dodds if he had ordered further testing with a urine protein electrophoresis test (UPEP) and/or a serum protein electrophoresis test (SPEP), and that it was medical negligence to fail to order the testing to determine the type of protein in her urine. [ROA 382; Singer Affidavit, ¶4-6.] However, Dr. Singer also testified that Dr. Dodds should have performed the UPEP/SPEP testing done earlier at the first visit in September 2004, and it would have shown her Waldenström's even then. [ROA 330-331; Singer Dep. 61:20–62:6. See also ROA 323-324, 337; Singer Dep. 8:12-9:1, 68:17–68:23.] Dr. Singer also testified that each of the four times that Doctor Dodds saw the Patient, her proteinuria was relatively stable. [ROA 340; Singer Dep. 88:15-20.]

Plaintiff's other expert, Dr. Robert Luke, testified in his deposition that the cancer was present as early as 2000, and at least by 2003, and that Dr. Dodds breached the standard of care during the September 2004 visit. [ROA 249, 284-386; Luke Dep. 25, 173-175.]

Plaintiff's oncology expert testified that Waldenström's is not curable, and the average life expectancy is four to five years. With a "smoldering" type that does not have organ involvement, they do not even begin treatment, and the patient can live a normal life. [ROA

325-327, 342-344; Singer Dep. 36-38, 129-131.] As of 2011, the Patient was stable and functional with no complications or organ failure. [ROA 328-29; 339; Singer Dep. 39, 58, 84.] Thus, even with the alleged delayed diagnosis, she has survived past the average life expectancy.

3. The Court has overlooked or misapprehended the Legislative purpose for enacting §15-3-545, and the Supreme Court's prior rulings on the statute of repose effectuating that purpose.

In South Carolina, medical malpractice actions are governed by a six-year statute of repose, Section 15-3-545(A), which provides the following:

> [A]ny action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . 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 the 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.

Since its passage, the Supreme Court consistently has upheld the absolute limits of the statute of repose in the face of equal protection and due process challenges and rejected other challenges that would extend or avoid the six-year period of repose regardless of any apparent hardship suffered by some plaintiffs. In the face of constitutional challenges, the Court has held that a six-year statute of repose is not unreasonable even though it seems unfair and harsh to bar a claim that may not have been discovered because there is a reasonable basis to protect the class of health care providers, and a rational relationship to the legitimate legislative purpose of reducing health care providers' exposure to liability and continued delivery of reasonable health care services. Hoffman v. Powell, 380 S.E.2d at 822; Smith v. Smith, 291 S.C. 420, 425, 354 S.E.2d 36, 39 (1987).

More recently, just last year, the Supreme Court again applied the statute of repose to bar a claim against a physician outside the six-year period. In so ruling, the Court repeated the well-

settled holdings regarding the statute of repose:

> The General Assembly has enacted a six-year statute of repose for medical malpractice actions. S.C. Code Ann. § 15–3–545. "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing *Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993)). "A statute of repose is 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." Id. (emphasis added) (citing *Langley*, 313 S.C. at 404, 438 S.E.2d at 243). Thus, "'[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.'" Id. (quoting *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 54 n. 6 (Minn.2005)).

Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 411 S.C. 557, 560, 769 S.E.2d 847, 848-49 (2015).

As the Court correctly holds, "the statute of repose begins to run at the time of an alleged negligent act or omission by a medical professional upon which a plaintiff seeks to impose liability in a cause of action for malpractice." However, the Court ignores the fundamental legislative purpose of the statute of repose by further holding that "when a plaintiff alleges a misdiagnosis or failure to diagnose a condition within the six-year period—which an expert witness opines to be a breach of the physician's duty of care—the statute of repose does not bar the cause of action merely because the physician previously misdiagnosed the condition outside the repose period."

The Court has also overlooked or misapprehended a distinction between a "negligent act" and a "negligence cause of action" as those terms apply to the statute of limitation with its discovery rule in comparison to the statute of repose that focuses only on the negligent act – not the injury. The Court's opinion effectively adds a discovery rule to the statute of repose contrary to the statutory intent and the settled precedent. *See* O'Tuel v. Villani, 318 S.C. 24, 27, 455

S.E.2d 698, 700 (Ct. App. 1995) overruled by on other grounds in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); Shadwell v. Craigie, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004).

Under the Court's holding in this case, the physician is exposed to liability for the entire period of treatment based on a misdiagnosis. Such a holding basically reaches the same result as the continuous treatment rule that the Supreme Court already has rejected in Harrison v. Bevilacqua, 354 S.C. 129, 133, 580 S.E.2d 109, 111 (2003). In Harrison, the Supreme Court refused to adopt the continuous treatment rule ("the doctrine of continuing tort") pursuant to which a malpractice cause of action for a continuous course of treatment would accrue at the termination of his physician's treatment of the plaintiff patient. In so holding the Supreme Court clearly stated: "[W]e find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set..." *Id.* at 114. The Supreme Court noted --- with specific emphasis – that "a statute of repose is 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." *Id.* (citing Langley v. Pierce, 438 S.E.2d at 243). By the same reasoning, to leave a physician proverbially "on the hook" for the entire period of treatment based on a misdiagnosis would upset that balance contrary to the Legislative intent.

The Trial Court wisely and correctly reasoned that according to the Plaintiff's own experts' opinions, the first alleged misdiagnosis occurred on September 15, 2004, at her initial visit, and the alleged second misdiagnosis at the February 2005 visit was simply the continuation of the initial misdiagnosis. Permitting the Patient to pursue this action commenced in 2011 – seven years after she began treatment with Dr. Dodds -- would allow her to subject him to

liability for medical malpractice after the legislatively proscribed six-year statute of repose expired. To use the words of the Supreme Court in Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n – "Such a result would be fundamentally at odds with the language and manifest purpose of the statute of repose." 769 S.E.2d at 850.

This Court expresses concerns that "the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for subsequent acts of negligence. However, that concern is not supported by the evidence as to Dr. Dodds' care and treatment of the Plaintiff Patient. The Court has overlooked or misapprehended that there is no evidence is that the Patient developed any new condition or that she presented any worsening symptoms that should have alerted him to perform additional testing or reevaluate a prior diagnosis; rather, the evidence of record is that the proteinuria for which Dr. Dodds was treating the Patient was relatively stable, and the experts did not offer any opinion that the indications for testing were any different in February 2005 from September 2004. Moreover, it appears that by inferring that the Respondent Physician somehow has manipulated the evidence to create immunity under the statute of repose, the Court has overlooked or misapprehended that the evidence upon which the repose bar rests comes from the Plaintiff's own experts. The General Assembly intended that the statute of repose set an absolute time limit on a physician's liability, and this Court's decision does not effectuate that intent.

4. The Court overlooked or misapprehended the reasoning of the decisions from the Georgia Court of Appeals upon which the trial court relied.

In reaching its conclusion, the trial court found persuasive the decision of the Georgia Court of Appeals in Howell v. Zottoli, 691 S.E.2d 564 (Ga. Ct. App. 2010), wherein the court

concluded "a later negligent act cannot serve as the new starting point of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition." *Id.* at 566. Applying that reasoning, the trial court reasoned Dr. Dodds' subsequent misdiagnoses after the September 15, 2004 visit were merely a continuation of the first misdiagnosis, not distinct acts of negligence that could serve as new trigger points for the statute of repose. This Court has rejected that reasoning as overly expansive and because our statute of repose differs from Georgia's. In so doing, this Court has overlooked or misapprehended that the Georgia Court's reasoning is consistent with the intent of the S.C. General Assembly and stands firmly on sound reasoning and important public policy fully consistent with the Legislative intent in our statute and case law.

As to the "overly expansive" reasoning, the Supreme Court has recognized that our statute of repose "includes broad and ***expansive*** language and then lists what claims are not included in the statute of repose." Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 769 S.E.2d at 50 (emphasis added). And, as to the differences between the statutes, the Georgia statute of repose runs from the date of the negligent act of treatment/omission/operation as does our statute: "(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." Ga. Code Ann. § 9-3-71. As discussed more fully in the Respondents' Final Brief, the Georgia Courts have held that the statute of repose bar applies in a misdiagnosis case even where the patient's presents with additional or significantly increased symptoms of the same disease, and only recognizes that a new repose period may be triggered if/when the misdiagnosed condition leads to the development of a new, more debilitating or less treatable

condition. *See* Kaminer v. Canas, 282 Ga. 830, 831, 653 S.E.2d 691, 693 (2007); Howell v. Zottoli, supra. The sound reasoning in those decisions is consistent with our own statute and judicial precedent and supports the trial court's decision in this case.

CONCLUSION

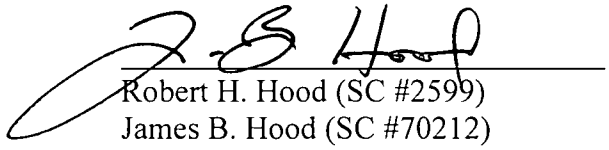
On a claim of negligence in failing to make a diagnosis over a course of treatment of a stable condition, the statute of repose begins to run on the date of the initial negligent act. In this case it began to run on September 15, 2004 when the Patient was first seen by Dr. Dodds, and expired before she commenced her legal proceeding on February 7, 2011.

On the evidence of record, the alleged negligence in failing to order the tests at the time of each office visits does not constitute separate occurrences that trigger separate periods of repose. Nor can the Plaintiff avoid the statute of repose bar by attempting to waive any claim for damages from September 15, 2004, until the February 9, 2005 visit. Accordingly, the trial court properly granted summary judgment because her claims against Dr. Dodds are barred by the six-year statute of repose in §15-3-545(A).

WHEREFORE, based on the foregoing, the Respondents Kenneth A. Dodds, M.D. and Charleston Nephrology Associates, LLC respectfully request that this Court reconsider its decision and affirm the summary judgment granted to them on the Plaintiffs' claims.

Respectfully submitted,

HOOD LAW FIRM, LLC



Robert H. Hood (SC #2599)
James B. Hood (SC #70212)
H. Cooper Wilson, III (SC #74939)
Deborah Harrison Sheffield, *Of Counsel (SC # 2757)*
172 Meeting Street / P.O. Box 1508
Charleston, SC 29402
P: (843) 577-4435 / F: (843) 722-1630

Attorneys for the Respondents
Kenneth A. Dodds, M.D. and
Charleston Nephrology Associates, LLC

May 19, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

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

C.A. No. 2011-CP-10-0934
App. No. 2014-001833

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.

Certificate of Service

The undersigned certifies that on this 19th day of May, 2016, a copy of the Petition for Rehearing on behalf of Respondents Kenneth A. Dodds, M.D. and Charleston Nephrology Associates, LLC., was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202

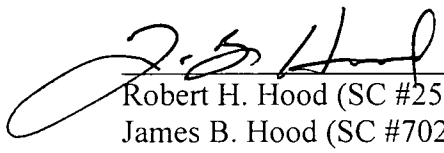
J. Edward Bell, III
Bell Legal Group
P.O. Box 2590
Georgetown, SC 29442

C. Carter Elliott, Jr.
Elliott & Phelan
P.O. Box 1405
Georgetown, SC 29442

D. Jay Davis, Jr., Esquire
James E. Scott, IV, Esquire
Russell G. Hines, Esquire
Stephen L. Brown, Esquire
Perry M. Buckner, IV, Esquire
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401

Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger & Goldstein, PA
P.O. Box 71121
N. Charleston, SC 29415-1121

Hood Law Firm, LLC



Robert H. Hood (SC #2599)
James B. Hood (SC #70212)
H. Cooper Wilson, III (SC #74939)
Deborah H. Sheffield, *Of Counsel,* (SC #2757)
172 Meeting Street
P.O. Box 1508
Charleston, SC 29402
(843) 577-4435

Attorneys for Respondents
Kenneth A. Dodds, M.D. and
Charleston Nephrology Associates, LLC

HOOD
LAW FIRM
LLC

JAMES B. HOOD
Partner
DIRECT DIAL: (843) 577-1223
E-MAIL: james.hood@hoodlaw.com

May 19, 2016

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
Deputy Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Virginia L. Marshall and Todd W. Marshall v. Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC
C/A Nos. 2011-CP-10-4057 and 2011-CP-10-934, Charleston CP
Appellate Case No. 2014-001833
HLF File No. 242.111

Dear Madam Clerk:

Enclosed please find the Petition for Rehearing on behalf of Respondents, Kenneth A. Dodds, M.D. and Charleston Nephrology Associates, LLC with a Certificate of Service. By copy of this letter, we are serving all counsel by mail.

Kind regards,

Yours truly,

James B. Hood

JBH/anj
Enclosure
cc: J. Edward Bell, III, Esquire
Blake A. Hewitt, Esquire/John S. Nichols, Esquire
C. Carter Elliott, Jr., Esquire
D. Jay Davis, Jr., Esquire/James E. Scott, IV, Esquire