STATE OF SOUTH CAROLINA
In the Supreme Court

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,

Respondents,

v.

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

Petitioners.

PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF PETITIONERS KENNETH A. DODDS, M.D. AND CHARLESTON NEPHROLOGY ASSOCIATES, LLC

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CERTIFICATION OF COUNSEL

Counsel for the Petitioners certifies that their Petition for Rehearing was timely made [Jt. App. 11, 23] and finally ruled on by the Court of Appeals on August 19, 2016. [Jt. App. 45.]

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in reversing the Trial Court's grant of summary judgment to Petitioners Dr. Dodds and Charleston Nephrology Associates, LLC on the Plaintiffs' medical malpractice claims as barred by the statute of repose, S.C. Code Ann. §15-3-545(A), because the six-year period began to run on September 15, 2004 when Dr. Dodds allegedly first breached the standard of care by failing to order certain the testing that allegedly would have revealed that she had a rare disease known as Waldenström's macroglobulinemia?

Introductory Preface

This is an appeal involving two medical malpractice claims against two doctors that were consolidated for discovery and trial. As alleged, the Plaintiff Patient, Virginia L. Marshall,[1] was treated by Petitioner Dr. Roane, a rheumatologist, from 2000 to 2007, who diagnosed her with a condition of undifferentiated connective tissue disease, an autoimmune disease. Petitioner Dr. Dodds, a nephrologist, treated the Patient from September 15, 2004 through September 15, 2005, for high levels of protein in her urine (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.

As described by the Plaintiff Patient, her case is broadly based on allegations that the Petitioners misdiagnosed her condition and should have discovered that she had Waldenström's

[1] The Patient's spouse is also a plaintiff, but for clarity, they are generally referred to collectively as "Plaintiff Patient" throughout this brief.

earlier. However, the time frames and medical treatments relevant as to each Petitioner Physician are distinct and separate, and the Plaintiff Patient filed separate actions as to each Physician. As discussed in more detail below, the claims against Dr. Dodds -- commenced on February 7, 2011 -- are based on allegations that he should have ordered certain testing during the treatment of her proteinuria and discovered that she had Waldenström's in February 2005. Apart from any evidentiary dispute about whether Dr. Dodds breached the standard of case, 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 expert's testimony that her Waldenström's could have and should have been diagnosed by testing at that time.

The Court of Appeals reversed the Trial Court's decision, holding that the statute of repose does not begin to run after a medical professional's first misdiagnosis:

> [W]hen 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. [Jt. App. 7.]

The Petitioners respectfully submit that this Court should review the Court of Appeals' opinion because it effectively adopts a rule that creates a series of repose periods with each failure to correctly diagnose over the course of treatment for the same condition. This new rule is inconsistent with this Court's prior decisions on the statute of repose, and it will upset the economic balance struck by the legislative body and run afoul of the absolute limitations policy set by the Legislature. For these special and important reasons, as well as those also covered in their Final Brief, the Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari to review the Court of Appeals' decision and affirm the Trial Court's grant of judgment to these Petitioners.

STATEMENT OF THE CASE

By virtue of the fact that the course of treatment spanned July 1, 2005, the effective date of the Medical Malpractice Act, including S.C. Code Ann. §15-79-125 and 15-36-100, this case comes to the Court through a somewhat protracted process. Briefly, the Plaintiff Patient filed a Notice of Intent to File Suit and a summons and complaint against Dr. Kenneth A. Dodds and Charleston Nephrology Associates, L.L.C. [collectively referred to as Dr. Dodds] on February 7, 2011. [ROA 31.] After completing the presuit medication process, she later filed a separate summons and complaint on June 8, 2011. [ROA 55.] After motion and order, the Plaintiff Patient filed an amended complaint asserting only allegations covering before July 1, 2005, and an amended complaint asserting allegations covering after the effective date. [ROA 62, 69.]

Dr. Dodds and his Group filed answers to the amended complaints, generally denying all allegations of negligence and asserting affirmative defenses, including the statute of repose. [ROA 76, 83, 90, 98.] Motions for Summary Judgment were filed by Dr. Dodds and his Group, asserting that the claims were barred by the statute of repose. [ROA 106.] The motions came for hearing before the Honorable J.C. Nicholson, Jr., on March 3, 2014, who granted the motions for summary judgment by order, filed May 2, 2014. [ROA 12.] Although the Plaintiff Patient alleged that the cancer was present and should have been detected as early as February 9, 2005[2] -- within the six-year period -- the Trial Court held that the Plaintiff Patient's claims against Dr. Dodds are barred by the statute of repose based on her own expert's testimony that the first alleged misdiagnosis occurred on September 15, 2004 at her initial visit. Thereafter, the Plaintiff Patient made a motion for reconsideration, which was denied by Order, filed August 7, 2014. [ROA 151, 25.] The

[2] ROA 62, 69 - ¶8.]

Plaintiff Patient timely filed and served a Notice of Appeal. After briefing and oral argument, the Court of Appeals issued its order, reversing the Trial Court on May 4, 2016. [Jt. App. 1.]

As noted above, the Plaintiff Patient has pursued similar proceedings against Dr. Georgia Roane and Rheumatology Associates, P.A. [collectively referred to as Dr. Roane], based on medical treatment spanning from 2000 to 2007. The cases were consolidated – over Dr. Dodds' objection – for discovery and trial. [ROA 109, 1.] However, the Trial Court issued a separate order granting summary judgment to Dr. Roane on similar statute of repose grounds. The Plaintiff Patient appealed and submitted a single brief presenting an issue as to the statute of repose without relevant distinction as between the two sets of Defendants and the different diagnoses and courses of treatment. While the facts and law overlap in certain points, the time frames and medical treatments relevant as to each Physician are distinct and separate, and thus, they submitted separate briefs and they are submitting separate petitions for a writ of certiorari.

STATEMENT OF THE FACTS

Overview – The Importance of the Distinctions between the Diagnoses and Course of Treatment by Dr. Dodds and Dr. Roane

As described by the Plaintiff Patient: "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." [Appellants' Brief, p. 1] However, the facts are that the Plaintiff Patient was treated by Dr. Roane, a rheumatologist, from 2000 to 2007, for a diagnosed condition of undifferentiated connective tissue disease, an autoimmune disease. After having been diagnosed with Waldenström's in 2010, the Plaintiff Patient claims that Dr. Roane's original diagnosis was wrong and she failed to reevaluate the diagnosis to discover the cancer and change the treatment. The Plaintiff Patient states that her allegations against Dr. Dodds are "generally similar, but over a much shorter time period. .... 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." [Appellants' Brief, p. 2.] However, the Plaintiff Patient's characterization of a relationship between Dr. Roane's treatment for the autoimmune disease and Dr. Dodd's treatment for the proteinuria is inaccurate and inconsistent with her pleadings and the expert testimony elicited during discovery.

In her amended complaints, the Plaintiff Patient alleges that she was seen and treated by Dr. Dodds on February 7, 2005, February 9, 2005, September 12, 2005, and September 15, 2005, during which times his diagnosis was proteinuria and he prescribed a medication called Diovan. However, she strategically omitted the fact that she also had been seen and treated by Dr. Dodds in September 2004 for the same condition. Not coincidentally, the September 2004 dates are critical because they fall outside the six-year statute of repose that bars her claims for any alleged negligence by Dr. Dodds during the course of his treatment of her proteinuria from September 15, 2004 through September 15, 2005.

The Plaintiff Patient's Allegations as to Dr. Dodds

As alleged, the Plaintiff Patient underwent a 24-hour urine test as ordered by Dr. Dodds on February 7, 2005, which showed elevated protein in her urine of 3045 mg/day [3.1 g/day]. She was seen by Dr. Dodds on February 9, 2005, with a diagnosis of chronic proteinuria and treatment with medication/Diovan. She was advised to follow-up in six months for another 24-hour urine test. [ROA 63, 70 - ¶ 4.]

The Plaintiff Patient returned to Dr. Dodds for the scheduled follow-up in September 2005. She had a 24-hour urine test on September 12, 2005, which showed elevated protein in her urine of 4169.3 mg/day [4.2 g/day]. She last saw Dr. Dodds on September 15, 2005. [ROA 63, 70 ¶ 5.] The Plaintiff Patient was referred to another nephrologist in January 2010, and he ordered testing

to evaluate the type of protein in her urine, which showed a cancerous myeloma protein. She was referred to an oncologist in February 2010 who diagnosed her with lymphoplastmatic lymphoma.[3] [ROA 64, 71 - ¶ 7.]

The Plaintiff Patient alleged that the Waldenström's was present and should have been detected as early as February 9, 2005, and, that she could have been put on cancer treatment with Rituxan therapy immediately. She alleged that if her Waldenström's had been diagnosed in 2005, her prognosis would have been better and her life expectancy longer. [ROA 64, 71 - ¶ 8-9.]

The Facts as shown by the Medical History

The medical records show that the Plaintiff has a long history of chronic proteinuria dating back prior to 1999. She had been seen on a consult by Dr. Dodds in July 1999 when she was hospitalized by her treating physician with a diagnosis of acute renal failure and interstitial nephritis, during which time her protein levels were as high as 6.1g/per day. She was treated with steroids and her condition resolved. A renal biopsy was performed which did not show any cause for her condition. Later in 2000, her treating physician ordered a serum protein electrophoresis ("SPEP") test that was negative for signs of cancer. [ROA 240.]

Although the Patient continued to have proteinuria after 1999/2000 hospitalization, her condition was stable and it did not substantially change. [ROA 242, 294.] Dr. Dodds did not see the Patient again until 2004-2005. Meanwhile, Dr. Roane, the rheumatologist, had diagnosed the Patient in 2000 as having undifferentiated/mixed connective tissue disease with nephritic syndrome, and she was being treated with medications.

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[3] She has a rare form of non-Hodgkin's blood cancer known as Waldenström's. It is not curable. Dr. Singer testified that there is no evidence that the failure to diagnose Waldenström's in 2004 has led to any complications. [ROA 329:8-14.]

While the medical records confirm, as alleged in the amended complaint, that the Plaintiff Patient was treated by Dr. Dodds again in February and September 2005 for her chronic proteinuria, she seeks to avoid the fact that her course of treatment with Dr. Dodds actually began in September 2004. The medical records show that the Patient had a history of elevated protein in her urine, and when she had a 24-hour urine test on August 6, 2004, which revealed protein levels of 3.5 g/day, she requested that Dr. Roane refer her to Dr. Dodds to treat the proteinuria. Dr. Dodds was not asked to confirm or evaluate Dr. Roane's underlying diagnosis. [ROA 245. See also ROA 257.]

The Patient was seen by Dr. Dodds on September 15, 2004, and he prescribed Diovan to treat her proteinuria. 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. See also ROA 385.]

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, 345.] In 2010, Patient had a new internist (Dr. Honney) who wanted her to have an updated evaluation of her proteinuria so she was referred to Dr. Pride, a nephrologist with the practice group from which Dr. Dodds had retired in

2008. She had a 24-hour urine test -- for the first time since September 2005 -- and her protein levels had risen dramatically to 9.1 g/day (9077 mg/day). [ROA 345.]

The Plaintiff Experts' Opinions[4]

In accordance with §15-79-125 and §15-36-100, the Plaintiff Patient had submitted expert affidavits from Dr. Barry Singer, an oncologist/hematologist, and Dr. Barry Luke, a nephrologist.

Dr. Singer opined in his affidavit 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). He opined in his affidavit that it was medical negligence to fail to order the testing to determine the type of protein in her urine. [ROA 382 ¶4-6.]

Dr. Robert Luke opined in his affidavit that Dr. Dodds breached a standard of care in February 2005 by failing to order UPEP/SPEP testing and by continuing her on Diovan. He also echoed Dr. Singer's opinion that there was cancerous protein present in her urine in 2005 and cancer would have been detected is Dr. Dodds had performed the UPEP/SPEP testing beginning in 2005. [ROA 385.]

In striking contrast to the opinion in the affidavit filed with the pleading, Dr. Singer testified in his deposition that if the UPEP/SPEP testing had been done in 2004, it would have shown her Waldenström's, and that Dr. Dodds failed to diagnose her then:

> Q: We established earlier that you're aware that Mrs. Marshall saw Doctor Dodds in September of 2004?
>
> A: Yes, sir.
>
> Q: And it would be your testimony that she had cancerous protein in her urine at that time as well?

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[4] Petitioners do not concede to the opinions offered by the Plaintiff's medical experts; however, those opinions must be accepted as true at the summary judgment stage.

A: I believe she did.

Q: And it would be your opinion that Doctor Dodds failed to diagnose the cancerous protein at that time as well?

A: Yes, sir.

[ROA 330:20-331:6. See also ROA 323:8-324:1, 337:17-23.] Dr. Singer could not offer any explanation as to why he did not include his opinion about September 2004 in his affidavit. [ROA 331:8-16.] He also testified that each of the four times that Doctor Dodds saw the Patient, her proteinuria was relatively stable. [ROA 340:15-20.]

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. ROA 249:7–12.] He also testified that Dr. Dodds breached the standard of care during the September 2004 visit:

- his "principal complaint" of Dr. Dodds' treatment was "the first two visits were enough to indicate other actions" [ROA 284:6-7];
- "during the first two visits, he was outside the standard of care without following up for the diagnosis of the proteinuria" [ROA 284:24-285:1]; and
- "the first two visits were enough information for further studies to be done, I think that's the main evidence." [ROA 286:7-9.]

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.] As of 2011, the Patient was stable and functional with no complications or organ failure. [ROA 328, 329, 339.] Thus, even with the alleged delayed diagnosis, she has survived past the average life expectancy.

THE APPLICABLE LAW

A. The Statute of Repose ~ §15-3-545(A)

As specifically applies to medical malpractice actions, S.C. Code Ann. § 15-3-545 provides for a three-year statute of limitation and a six-year statute of repose:

> (A) In any 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 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***. (Emphasis added.)

The statute of limitations is a matter of procedure that operates as a defense to limit the remedy available from an existing cause of action, while the statute of repose creates a substantive right to be free from liability. Langley v. Pierce, 313 S.C. 401, 403-404, 438 S.E.2d 242, 243 (1993) (citing First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865–866 (4th Cir.1989)). "[T]he statute of repose portion of section 15–3–545(A) is substantive law, unlike a statute of limitations, which is procedural law." Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citing Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006)).

While the three-year limitation period begins to runs from the date of discovery, the six-year statute of repose 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); O'Tuel v. Villani, 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App. 1995) overruled by on other grounds; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

B. The Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537 (1991); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the nonmoving party "may not rest upon the mere allegations or denials of his pleading." Rule 56(e), S.C.R.C.P. Instead, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Id. Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of repose. See Kerr, 678 S.E.2d at 811. An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

ARGUMENT

THE PLAINTIFFS' MEDICAL MALPRACTICE CLAIMS ARE BARRED BY THE STATUTE OF REPOSE, S.C. CODE ANN. §15-3-545(A) BECAUSE THE SIX-YEAR PERIOD BEGAN TO RUN ON SEPTEMBER 15, 2004 WHEN DR. DODDS FIRST FAILED TO ORDER THE TESTING THAT ALLEGEDLY WOULD HAVE REVEALED HER WALDENSTRÖM'S.

A. The Court of Appeals overlooked or misapprehended that the medical evidence and expert opinions present a claim for a continued misdiagnosis over a course of treatment from September 2004 through September 2005, not a series of separate negligent acts at each of the office visits with Dr. Dodds.

As described by the Plaintiff Patient herself, this is not a case that involves only allegations of one interaction between the patient and physician but of continued misdiagnosis and improper

treatment over a course of time. [Appellants' Brief, p. 2.] While she concedes that the original alleged misdiagnosis in September 2004 falls outside of the repose period, the Plaintiff Patient argues that Dr. Dodds committed a series of negligent acts at each visit that created a series of deadlines, and she is entitled to pursue claims for the negligent acts at the February and September 2005 visits. However, 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 misdiagnosis at the subsequent visits were simply the continuation of the initial misdiagnosis:

> While [Patient] did subsequently visit [Dr. Dodds] for treatment on February 9, 2005 and was not diagnosed with cancer, this later alleged misdiagnosis cannot serve as the starting point for the statute of repose and is not a 'separate and independent act' of negligence as claimed by Plaintiffs. [ROA 23.]

In reversing the Trial Court, the Court of Appeals focuses on the allegations that Dr. Dodds failed to correctly diagnose her condition at subsequent appointments on the dates in February and September 2005 within the repose period. In so doing, the Court of Appeals overlooked or misapprehended the undisputed facts regarding the diagnosis and course of treatment by Dr. Dodds as shown in the medical records and the expert medical opinions from the Plaintiff's own experts.

Over the course from September 15, 2004, through February 2005, and until her last visit with Dr. Dodds on September 15, 2005, she was diagnosed with and treated for the same condition – proteinuria. As established by the Plaintiff's own expert, she had the cancer during that same time period, which could have been diagnosed as early as the September 15, 2004, if Dr. Dodds ordered a UPEP/SEP test. However, the Plaintiff Patient purports to pursue only a claim for the allegedly negligent failure to test her on the February 9, 2005, and subsequent visits in September 2005. In accepting the Plaintiff Patient's theory that each visit constitutes a different occurrence of malpractice that triggers a different repose period, Court of Appeals overlooked or

misapprehended that each of her 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.

The Court of Appeals expresses concerns that "the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for subsequent acts of negligence." [Jt. App. 10.] However, that concern is not supported by the evidence as to Dr. Dodds' care and treatment of the Plaintiff Patient. There is no evidence 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 Petitioner 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. The bottom line is that Plaintiff's argument about separate acts of negligence is factually and legally inconsistent with her own description of this case as involving a continued misdiagnosis and improper treatment over a course of time. The Plaintiff Patient asserts that she has focused her claims and tailored her allegations to stay in the statute of repose. [Appellants' Brief, p. 15.] However, her "tailored" –

if not contrived -- assertions of selective claims for separate acts of negligence cannot be logically reconciled with her concession that the first malpractice occurred outside the six-year period of repose and her argument that Dr. Dodds kept breaching the standard of care and continued committing malpractice.

B. The Court has overlooked or misapprehended the Legislative purpose for enacting §15-3-545, as recognized in the Supreme Court's prior rulings on the statute of repose.

Since the passage of Section 15-3-545, this Court has upheld the statute of repose in the face of equal protection and due process challenges and repeatedly rejected other challenges that would extend or avoid the six-year period of repose. 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).

In Langley v. Pierce, the Court rejected an argument that the general tolling provisions of § 15–5–30 might toll the medical malpractice statute of repose.[5] 438 S.E.2d at 243 (holding statute of repose was not tolled by the doctor's absence from the state). In so holding, this Court noted "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." 438 S.E.2d at 243 (citations omitted). The Court has also rejected an argument

[5] The only tolling allowed for a medical malpractice action is the specific provision of §15-3-545(D) dealing with minors.

that the statute of repose did not apply to medical malpractice actions against government entities under the Tort Claims Act. Kerr, 678 S.E.2d at 810.

The Court has also refused to adopt the continuous treatment rule ("the doctrine of continuing tort") that would have a malpractice cause of action for a continuous course of treatment accrue at the termination of his physician's treatment of the plaintiff patient. Harrison v. Bevilacqua, 354 S.C. 129, 133, 580 S.E.2d 109, 111 (2003).[6] "[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 Court again noted --- with added 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.* (citations omitted).

While acknowledging this Court's ruling in Harrison, the Court of Appeals reasons that its decision is consistent because they do not hold that the statute of repose is tolled until the termination of the course of treatment. [Jt. App. 10.] However, the Court of Appeals' holding has effectively created a continuous trigger rule, that exposes a physician 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.

The Court of Appeals 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

[6] The Court considered and discussed the continuous treatment doctrine in Preer v. Mims, 323 S.C. 516, 520, 476 S.E.2d 472, 474 (1996), but the Court did not at that time decide whether to adopt the continuous treatment doctrine because the doctrine would not have saved the plaintiff's claim under the facts of that case.

– 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).

In the final analysis, the Court of Appeals' opinion is inconsistent with the Legislature's core purpose for the statute of repose and cannot be reconciled with any of the Court's opinions as discussed above. Each time the Court has addressed issues involving this statute of repose, the Court has consistently applied and construed §15-3-545(A) to best serve the important public policies underlying the legislative intent for the statute of repose. The Court of Appeals' new rule for misdiagnosis claims would not serve the Legislature's legitimate purpose of reducing health care providers' exposure to liability to insure the continued delivery of reasonable health care services. Rather, the adoption of such a rule that creates a series of repose periods with each failure to correctly diagnose a condition over the course of treatment would upset the economic balance struck by the legislative body and run afoul of the absolute limitations policy set by the Legislature.

As this Court discussed in Preer v. Mims, the application of the statute of repose is "relatively easy" to apply when the alleged malpractice consists of a single identifiable act, but application of the statute is more difficult where the alleged malpractice "consists of a course of conduct, a series of negligent acts, or a continuing impropriety of treatment." 476 S.E.2d at 473 (citations omitted). This Court noted that in such "difficult" situations, the continuous treatment rule could preserve a patient's claim from a statute of repose bar, and specifically refused to adopt the continuous treatment rule.

The Court of Appeals' ruling leaves a physician proverbially "on the hook" for the entire period of treatment based on a misdiagnosis and thwarts the legislative intent to set an absolute time limit on a physician's liability. On the medical records and Plaintiff's own medical expert opinions in this case, the Patient should not be allowed to pursue her claims of misdiagnosis piecemeal. Rather, the statute of repose on any claims for the alleged misdiagnosis by Dr. Dodds during the course of treatment from September 2004 through September 2005, began to run at the first visit, and accordingly, all her claims are barred by the statute of repose.

C. The Court of Appeals improperly rejected or misapprehended the well-reasoned authority from Georgia.

In holding that the statute of repose began to run on the date of the first visit in September 2004, the Trial Court relied, in part, upon the holding of the Georgia Appellate Courts that 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 begins to run on the date of the initial negligent act. Kaminer v. Canas, 282 Ga. 830, 831, 653 S.E.2d 691, 693 (2007); Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (2010). The Court of Appeals held that the Trial Court erred in relying upon these opinions because the Georgia Courts' reasoning is unsound and inconsistent with South Carolina precedent to the extent that it focuses on the original misdiagnosis as the only injury. [Jt. App. 9.] However, the Georgia Appellate Courts' decisions stand firmly on sound reasoning and important public policy fully consistent with our statute and caselaw.

Georgia has a two-year statute of limitations and a statute of repose of only five years. Ga. Code Ann. § 9-3-71. The statute of limitations period commences on the occurrence of an injury: "(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred." However, the statute of repose runs from the occurrence of the

negligent act: "(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."

Like the South Carolina Supreme Court, the Georgia Supreme Court also has refused to adopt the continuous treatment rule. Young v. Williams, 274 Ga. 845, 560 S.E.2d 690 (2002). Notably, the South Carolina Supreme Court looked to, and relied upon Georgia precedent in rejecting the continuing treatment/continuous tort theory for the reason that it would nullify legislative intent. *See* Harrison v. Bevilacqua, 580 S.E.2d at 114 (citing Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga.App. 452, 504 S.E.2d 514, 521 (1998); *see also* Young v. Williams, 274 Ga. 845, 845, 560 S.E.2d 690, 691 (2002) (refusing to adopt doctrine of "continuous treatment" in medical malpractice cases involving misdiagnosis).

In Kaminer v. Canas, the Georgia Supreme Court was presented with the question of "if a plaintiff in a misdiagnosis case presents with additional or significantly increased symptoms of the same misdiagnosed disease, the medical malpractice statute of limitations and statute of repose do not bar the plaintiff's claims?" 653 S.E.2d at 693. The Georgia Court held that the statute of repose begins to run on the date of the initial misdiagnosis and failure to treat if the disease existed on that date. There, the patient suffered from AIDS which was misdiagnosed and went untreated for years, but the Court held that even though misdiagnosis and failure to treat occurred each time the patient reappeared for treatment, the statute of repose began to run on the date the initial misdiagnosis occurred. The plaintiff contended that he was reinjured when he developed additional and significantly increased symptoms of his misdiagnosed condition. The Court reasoned, however, that any subsequent failure to diagnose and treat him for AIDS did not inflict any new injury on him. *Id.* at 695. While the statute of repose generally begins to run on the date

of the alleged negligent act, a later negligent act does not start a new repose period where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition. Howell v. Zottoli, 691 S.E.2d at 566 (discussing Kaminer).

In Howell v. Zottoli, the defendant physician had treated the plaintiff patient over the course of years for various matters from 1996 through the time of his death in 2001 from coronary artery disease, and although the patient manifested several cardiovascular risk factors, the physician did not diagnose decedent as a high risk for coronary artery disease and did not counsel him on nor treat him for the deadly condition. The Court held that his claim was barred by the statute of repose because the condition and injury continued uninterrupted from the time the physician first diagnosed and treated him:

> Rather, as testified to by [plaintiff's] own expert, the undisputed evidence showed that the cardiac disease and attendant vascular damage had occurred and existed when the decedent began smoking cigarettes, which The condition or injury of damage to his vascular system did not become "new" over the years; rather, it simply worsened and eventually resulted in his demise, as in *Kaminer*. Because the condition or injury was already existing, the rule regarding diagnosing and treating the condition applied, not the rule regarding warning the decedent about a condition in the future. Thus, the statute of repose began to run from the date of the first misdiagnosis and mistreatment.

691 S.E.2d at 567.

As discussed in Howell, the Georgia Supreme Court has recognized a "subsequent" or "new injury" exception that recognizes a new repose period may be triggered if/when the misdiagnosed condition leads to a new condition, but it is limited to cases in which the patient's injury arising from the misdiagnosis occurs subsequently, as when a condition left untreated because of the misdiagnosis, leads to the development of a new, more debilitating or less treatable condition. Cleaveland v. Gannon, 288 Ga.App. 875, 655 S.E.2d 662 (2007), *aff'd* 284 Ga. 376, 377, 667 S.E.2d 366, 368 (2008); *see also* Amu v. Barnes, 283 Ga. 549, 662 S.E.2d 113 (2008).

Under such "new injury" exception, the repose period is not "retriggered" by pain or economic loss that the patient suffers due the misdiagnosis, but by the subsequent development of another condition. The Georgia Court reasoned that "the deleterious result of a doctor's failure to arrive at the correct diagnosis in these cases is not pain or economic loss that the patient suffers beginning immediately and continuing until the original medical problem is properly diagnosed and treated. Rather, the injury is the subsequent development of the other condition. 667 S.E.2d at 368.[7]

On the medical record and expert opinion evidence in this case, the Plaintiff Patient did not develop any other condition to retrigger the six-year period of repose. She had proteinuria for which she was treated, and she had undiagnosed cancer during that same time. As the Trial Court correctly held, the statute of repose was triggered on September 15, 2004; and thus, her claims are barred.

D. The statute of repose does not restart if the patient later incurs additional damages during the course of treatment.

Plaintiff Patient argues that "it does not matter if the injury is new. What matters is whether the new occurrence causes the plaintiff to incur additional damages," citing to Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693 (2012). [Appellants' Brief, p. 15.] However, the Grier opinion does not address any issue related to the statute of repose. It simply held that "nothing in section 15–79–125(A) requires that an expert affidavit in a medical malpractice action submitted pursuant to section 15–36–100(B) contain an opinion regarding causation." *Id.* at 698.

Plaintiff Patient claims that each time Dr. Dodds failed to reach a correct diagnosis she suffered a continued disease and additional pain and suffering, and additional expenses. However,

[7] There also is an addition element of the new injury exception; namely, the patient "must also remain asymptomatic for a period of time following the misdiagnosis and mistreatment." Amu v. Barnes, 662 S.E.2d at 113; Howell v. Zottoli, 691 S.E.2d at 567.

nothing in any of the statute of repose opinions supports any argument that additional damages for a continued disease restarts the clock for a new six-year period. To the contrary, the statute of repose runs from the date of occurrence. O'Tuel v. Villani, 455 S.E.2d at700 (the date of "occurrence" was the date of the child's delivery when the physician allegedly committed negligence in failing to perform a caesarean delivery). In a statute of repose opinion from the Court of Appeals in Shadwell v. Craigie, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004), the plaintiff patient brought a medical malpractice action against a physician for failing to inform her of certain laboratory test results that indicated she had kidney trouble, but the Court held that it was barred by the statute of repose because the "occurrence" happened when the physician failed to inform him within a reasonable time after learning the results.

All the additional damages sought by the Plaintiff Patient in this case are related to the alleged failure to diagnose her cancer. There is no expert opinion evidence that she has developed any new condition. To the contrary, her expert testified that Waldenstrom's is incurable, and that she has not suffered any complications from failure to diagnose it any earlier; in fact, she has outlived the average life expectancy of Waldenström's patients. So just as the plaintiff in Kaminer could not make any claim that he suffered any pain or economic loss other than that proximately caused by his unchanged AIDS condition which claim was barred, the Plaintiff Patient here has no claim that she suffered any pain or economic loss other than that proximately caused by her undiagnosed Waldenström's -- which claim also is barred.

CONCLUSION

Dr. Dodds treated the Plaintiff Patient for proteinuria over the course of a year -- beginning on September 15, 2004, through September 15, 2005. According to the opinion testimony of the Plaintiff's own experts, she had Waldenström's during that entire course of treatment, which would have been diagnosed and properly treated if Dr. Dodds had ordered the proper tests.

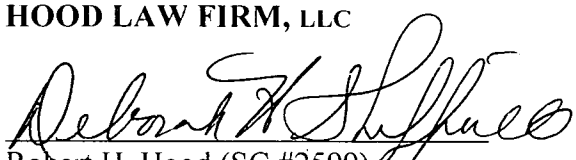
On such a claim of negligence in making a diagnosis and treatment of a condition over a course of time, the statute of repose begins to run on the date of the initial negligent act. In this case it began to run on September 15, 2004 and expired before she commenced her legal proceeding against Dr. Dodds on February 7, 2011.

Contrary to the Plaintiff's contentions, the alleged negligence in failing to order the tests at the time of each office visit does not constitute separate occurrences that trigger separate periods of repose. Similarly, she cannot 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 to the Petitioners 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 Petitioners Kenneth A. Dodds, M.D. and Charleston Nephrology Associates, LLC respectfully request that this Court grant the writ to review the Court of Appeals' decision and affirm the summary judgment granted to them by the Trial Court.

Respectfully submitted,

HOOD LAW FIRM, LLC



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September 19, 2016

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Charleston County
Court of Common Pleas

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

S.C. Ct. App. Opinion No. 5403 --Ct. App. No. 2014-001833

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

v.

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

Certificate of Service

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

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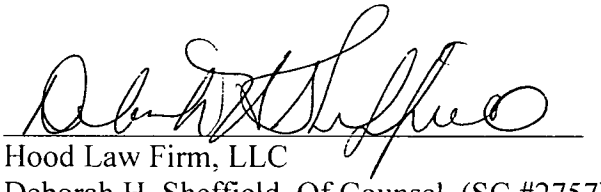

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