THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Op. No. 5403 (S.C. Ct. App. filed May 4, 2016)
Appellate Case No. 2016-001936

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.

RETURN TO THE CERTIORARI PETITIONS

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

J. Edward Bell, III # 631
BELL LEGAL GROUP
P.O. Box 2590
Georgetown, SC 29442

C. Carter Elliott, Jr. # 12954
ELLIOTT & PHELAN
P.O. Box 1405
Georgetown, SC 29442

Attorneys for Respondents

Other Counsel of Record:

Stephen L. Brown
Russell G. Hines
P.O. Box 993
Charleston, SC 29402
(843) 720-5488
Attorneys for Petitioners Roane & Rheumatology Associates

James B. Hood
Deborah H. Sheffield
P.O. Box 1508
Charleston, SC 29402
(843) 577-4435
Attorneys for Petitioners Dodds & Charleston Nephrology Associates

INDEX

QUESTION PRESENTED

This case poses a single question:

> In a medical malpractice case where doctors breached the standard of care on multiple occasions, should the Court deny certiorari when the Court of Appeals correctly held each breach triggers the statute of repose and that recent breaches can be actionable even though older breaches are stale?

INTRODUCTION

In South Carolina, a statute of repose precludes a medical malpractice lawsuit unless the plaintiff files suit within six years of the treatment, omission, or operation giving rise to the claim. S.C. Code Ann. § 15-3-545(A) (2005). Here, the Court of Appeals correctly held that when an expert opines a physician committed malpractice on multiple occasions, the repose period for the first act of malpractice does not bar claims for all subsequent acts of malpractice as long as the plaintiff files suit within six years of those subsequent acts.

COUNTER-STATEMENT OF THE CASE

The Court of Appeals accurately explained this case's basic facts. (App.pp.2-4). Virginia Marshall has blood cancer. (App.p.2). After a routine test disclosed the cancer in 2010, Mrs. Marshall sued two doctors and their practices, claiming the doctors failed to discover the cancer at various times in 2005 and afterwards. (R.pp.32-33, 48-49). Mrs. Marshall's husband filed consortium claims. (R.pp.35-36, 53). The suits began in 2011, (R.pp.37, 54), and were consolidated later. (R.pp.1-2).

The defendants obtained summary judgment by convincing the circuit court the six-year statute of repose foreclosed the Marshalls' lawsuit because the Marshalls' experts had

identified breaches of the standard of care occurring prior to 2005 and more than six-years before this suit began. The Marshalls pointed out that these experts had also identified breaches of the standard of care in 2005 and afterwards, but the circuit court used each physician's first act of negligence as the measuring act, (R.pp.7-9, 18); specifically noting at one point that it did not matter whether Mrs. Marshall had different symptoms during various visits or whether her condition worsened over time. (R.p.9). The circuit court also viewed judicial decisions from Georgia as persuasive. (R.pp.10-11, 18-20).

The Marshalls filed a motion for reconsideration, (R.pp.151-154), which the circuit court denied. (R.p.25). The Court of Appeals unanimously reversed. (App.pp.1-10).

The parties' arguments have been fairly consistent throughout this case's life span.

The defendants filed separate summary judgment motions based on the statute of repose. (R.pp.106-108, 115-117). Both motions claimed the suit was barred because the Marshalls' experts opined the cancer should have been discovered prior to 2005, notwithstanding these experts' additional opinions the cancer should have been discovered at various points during 2005 and after.

The defendants supported their motions with memos; in the case of Dr. Roane and her practice, submitted the day of the March 3, 2014 hearing, in the case of Dr. Dodds and his practice, submitted two days later. (R.pp.118-126, 141-149). Dr. Dodds' post-hearing memo was the first time Georgia law was mentioned. (R.p.145). Dr. Roane raised Georgia law in a post-hearing letter. (R.p.409). Even though the Marshalls' experts identified multiple acts of malpractice, the defendants said the first misdiagnosis was the key because this was all a "continuation" of the same misdiagnosis/course of treatment. (R.pp.146, 409).

The Marshalls did not file a memo, presenting their arguments instead at the hearing and in two post-hearing letters. The Marshalls argued it did not matter if the defendants could point to an early act of malpractice outside the repose period. (R.p.406). The Marshalls explained they were not seeking to sue for any negligence that was more than six years old. (R.pp.405-406). The Marshalls detailed why it was important for the later malpractice to be independently actionable: What the defendants call a "stable" medical condition should have been alarming because Mrs. Marshall was taking serious drugs that should have significantly altered the abnormal level of protein in her blood. (R.pp.417-418). The Marshalls' malpractice allegations relied on the passage of time.

The decision of the Court of Appeals contains three holdings.

First, the Court of Appeals held that when an expert opines a physician breached the standard of care by failing to make a proper diagnosis within the six-year repose period, the statute of repose does not bar the plaintiff's malpractice claim merely because the physician made a prior misdiagnosis of the same condition, outside the repose period. (App.p.7).

Second, the Court of Appeals held the circuit court erred in relying on Georgia law because Georgia ties its misdiagnosis deadlines to its view of what constitutes the plaintiff's "injury." (App.p.9). The Court of Appeals viewed this as inconsistent with South Carolina's statute, which is tied to the time of a physician's negligent act or omission. *Id.*

Third, the Court of Appeals rejected the argument that its decision violated the statute of repose's purpose, explaining the statute was not being "tolled" during Mrs. Marshall's treatment. (App.p.10). The statute is linked to negligent acts or omissions. The Marshalls won because they identified acts of malpractice within the last six years.

ARGUMENTS

There are three reasons the Court should deny the petitions.

First, denial is prudent. A remand for trial would develop a full record, might avoid future appeals, and would prevent delay during which Mrs. Marshall's health could deteriorate. It is not necessary for the Court to speak now.

Second, the Court of Appeals followed the statute's language, honored the statute's purpose, and upheld this Court's precedents. The statute of repose does not grant immunity for serial, repeated negligence. The decision of the Court of Appeals is correct.

Third, the Court of Appeals wisely rejected Georgia law as unpersuasive. Georgia's approach is unsound in its own right and relies on "a time of injury" analysis that is inconsistent with South Carolina law. The Court of Appeals rightly remanded for trial.

A. Denying certiorari is prudent when a remand would develop a full record, might avoid future appeals, and will prevent delay during which Mrs. Marshall's health could deteriorate.

This Court's discretionary powers are typically exercised when there is a compelling need for the Court to speak. This finds expression in Rule 242(b), SCACR, which explains a writ of certiorari will be granted only when there are "special and important reasons."

There are no special and important reasons here. All the Court of Appeals has done is remand this case for trial. There is no final judgment. Nobody has been found liable for damages. Indeed, there is no finding anyone has suffered an injury. We must presume Mrs. Marshall was injured and that her doctors' conduct fell below the standard of care, but nobody has found these things occurred. Facts are not found on summary judgment.

This demonstrates the limited nature of the court's holding: All the Court of Appeals has done is declare that the first act of a physician's negligence does not automatically establish the repose period for all acts of negligence. The decision is comparable to this Court's decision in *Hardee v. Bio-Medical Applications*, which recognized South Carolina law imposes a duty of care in certain circumstances while also explaining the Court was not necessarily holding the duty of care applied in that case. 370 S.C. 511, 516 n.3, 636 S.E.2d 629, 631-32 n.3 (2006). Like the Marshalls' case, *Hardee* was decided on summary judgment. The salient facts had yet to be conclusively established.

There is no downside to denying certiorari so this trial can proceed. Trial provides the opportunity to develop a complete record, solidifying the truth (or falsity) of Petitioners' claims that there were no distinct acts of malpractice and that Mrs. Marshall suffered no damages. And if Petitioners prevail at trial—as they seem to insist they will—this Court's review will be unnecessary. The parties could also settle the case, avoiding further proceedings. If the case does not settle, denying certiorari now would further the policy of avoiding piecemeal appeals. See *Morrow v. Fundamental*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015) (acknowledging this policy). After the case proceeds to final judgment, the parties would be able to litigate any appeal against the backdrop of a full record.

Most importantly, denying certiorari prevents further delay during which Mrs. Marshall's health could deteriorate. Dr. Dodds makes much of the fact that as of 2011, Mrs. Marshall had no organ failure and had outlived this cancer's average four or five year life expectancy. That strikes the Marshalls as a reason to have the trial sooner, not later.

For these reasons, prudence favors denying the petitions and remanding for trial.

B. The statute of repose does not grant immunity for serial, repeated negligence. The Court of Appeals followed the statute's language, honored the statute's purpose, and upheld this Court's precedents.

The circuit court granted summary judgment because it believed the statute of repose bars any lawsuit after six years passes from the first occurrence of a physician's negligence, regardless of whether a physician breached the standard of care on multiple occasions. The Court of Appeals properly reversed, issuing a decision that follows the statute's language, the statute's purpose, and this Court's precedents.

The decision of the Court of Appeals follows the statute's language. The "repose" provision in section 15-3-545(A) explains that a medical malpractice lawsuit must begin no later than "six years from date of occurrence, or as tolled by this section." This means whenever there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. It follows by logical extension that when there are multiple occurrences of malpractice, there are multiple repose periods.

The decision of the Court of Appeals honors the statute's purpose. The statute of repose is a rule of closure, existing because the discovery rule's unlimited application would create indefinite exposure for a physician. If a physician's malpractice took 30 years to manifest in an injury, the discovery rule would allow a lawsuit as long as the plaintiff initiated the suit within three years of the injury's discovery. The statute of repose prevents this from happening, as the Court acknowledged in *Hoffman v. Powell*, and as the Court of Appeals cited in its decision here. (App.p.6) (citing *Hoffman*, 298 S.C. 338, 340-41, 380 S.E.2d 821, 822 (1989)). The statute allows a physician to rest after a legislatively-

determined reasonable period of time, but nothing suggests the legislature intended to grant a physician rest from subsequent acts of malpractice. The Court of Appeals correctly recognized that there is a difference between a rule of closure and a rule that provides immunity when a physician keeps breaching the standard of care.

The decision of the Court of Appeals honors this Court's precedents. Indeed, the court cited the prominent precedents in its decision. *Hoffman v. Powell* was a constitutional challenge to the statute of repose and does not contain any support for the proposition that the first act of negligence triggers the repose period for subsequent acts of negligence. 298 S.C. 338, 380 S.E.2d 821 (1989). *Harrison v. Bevilacqua* rejected the continuous treatment rule; a rule providing that when a patient is being continually treated by a doctor, *none* of the deadlines for any malpractice claim start running until the doctor's course of treatment is over. 354 S.C. 129, 138, 580 S.E.2d 109, 113 (2003). The Court of Appeals cited both *Harrison* and *Hoffman*, (App.pp.6, 9-10), and as Mrs. Marshall's briefs to the Court of Appeals explained, there is no South Carolina case—none—supporting the view that the first act of malpractice is the measuring act for all acts of malpractice. Several decisions address the statute of repose: *O'Tuel v. Villani*, *Kerr v. Richland Memorial Hospital*, *Shadwell v. Craigie*, and *Langley v. Pierce* were cited below. (R.pp.121-123, 143-145). None of them support the circuit court's reasoning. (Appellants' Brief, pp.8-10).

Indeed, this Court has explained why the circuit court's approach is erroneous. This Court has recognized that when a case presents a series of discrete wrongs that would each be independently actionable, a defendant's claim to repose, which means rest, is "vitiated." *State v. Ortho-McNeil-Janssen Pharmaceutical*, 414 S.C. 33, 78, 777 S.E.2d 176, 199-200

(2015). This is because fixing the deadlines on the first instance of misconduct when there is repeated wrongdoing would allow "parties engaged in long-standing malfeasance [to] obtain immunity in perpetuity from suit even for recent and ongoing malfeasance." *Id.* (quoting *Aryeh v. Canon Bus. Solutions*, 292 P.3d 871, 880 (Cal. 2013)).

Petitioners wrongly refuse to accept that there is a material difference between this principle from *Janssen* and the "continuous treatment/continuous tort" rules. The latter rules are rules of tolling that take a series of negligent acts and treat them as a cumulative event for the purpose of deadlines. The record conspicuously discloses Mrs. Marshall is not pursuing that approach: she is not suing over stale malpractice or for outdated damages. Mrs. Marshall is pursuing the same approach this Court acknowledged in *Janssen*.

The irony is that it is Petitioners, not Mrs. Marshall, who seek cumulative treatment for several acts of malfeasance. Petitioners seek to insulate repeat wrongdoing from liability by lumping multiple acts of malpractice together under the label "continuous." That view finds no support in the statute's language, the statute's purpose, or this Court's precedents.

C. The Court of Appeals wisely rejected Georgia law as unpersuasive. Georgia's approach is unsound and relies on "a time of injury" analysis that is inconsistent with South Carolina law.

If this lawsuit was brought in the state of Georgia, the Marshalls would lose unless they were able to convince the Supreme Court of Georgia to overturn its precedent. The Georgia court previously reasoned, in a 4-3 decision, that the only "injury" in a repeat misdiagnosis case is the original misdiagnosis. *Kaminer v. Canas*, 653 S.E.2d 691, 695 (Ga. 2007). Oddly, the court acknowledged that repeated breaches of the standard of care "may

well constitute new and separate instances of professional negligence." *Id.* Despite this, the majority held Georgia's deadline statutes are no longer triggered by the occurrence of a negligent act or omission, instead the deadlines are tied to the date of the injury; in a misdiagnosis case, the date of the original misdiagnosis. See 653 S.E.2d at 695.

Petitioners make much of the similarity between Georgia's statutory language and the language of South Carolina's statute of repose. The Marshalls concede the point—the language is virtually identical. But the *Kaminer* decision makes it plain that Georgia's analysis *is not* tied to the statute's language and whether there are multiple occurrences of negligence. Georgia acknowledges there are multiple occurrences but is adamant that there is only one "injury." See also *Howell v. Zottoli*, 691 S.E.2d 564, 566-67 (Ga. Ct. App. 2010)

The dissent in *Kaminer* explains why this view is wrong: each time a medical condition is wrongly misdiagnosed, the patient has to pay additional money for the wrong medical treatment, suffer additional stress and anxiety while the true disease goes unchecked or gets worse, and these are further invasions of the plaintiff's rights that are directly tied to the additional breaches of the standard of care. *Id.* at 698-99. And, as the Marshalls wrote in their brief to the Court of Appeals, South Carolina law has not typically tied a negligence claim to whether the plaintiff can prove a "new" injury. The law requires that a defendant's negligence cause "damages." (Appellants' Brief, pp.14-15).

If Mrs. Marshall's expert is right that it was negligent for Dr. Dodds to continue Mrs. Marshall's medicine after her protein level stayed the same, and then increased, instead of getting cut by 40%, (R.p.254), the salient question for the statute of repose is "when did that act of negligence occur?" It obviously occurred in February and September of 2005, when

Dr. Dodds saw these results after starting Mrs. Marshall on the drug in September of 2004. (R.p.256). If Mrs. Marshall's expert is right that Dr. Roane breached the standard of care by not giving Ms. Marshall a complete "workup" after Mrs. Marshall quit seeing Dr. Dodds, (R.pp.398-399), the salient question is when did that act of negligence occur? Again, it plainly occurred when Mrs. Marshall went back to Dr. Roane in September of 2005 and January of 2006 after Mrs. Marshall quit seeing Dr. Dodds. *Id.*; see also (R.pp.363-364). With the utmost respect for the Georgia court, its approach is misguided and is not helpful here. There is no lucid justification why these breaches should not be actionable.

CONCLUSION

There is no need to review this case now, and in any event, the decision of the Court of Appeals is correct. As this Court explained in *Janssen*, statutes of repose do not grant immunity for serial, repeated negligence. This Court should deny the petitions and remand this case for trial.

Respectfully submitted,

October 26, 2016

Blake A. Hewitt
John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Respondent

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioners with a copy of the *Return to the Petitions for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

James B. Hood, Esquire
Robert H. Hood, Esquire
Deborah H. Sheffield, Esquire
Hood Law Firm, LLC
P.O. Box 1508
Charleston, SC 29402

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

James E. Scott, IV, Esquire
D. Jay Davis, Jr., Esquire
Perry M. Buckner, IV, Esquire
Stephen L. Brown, Esquire
Russell G. Hines, Esquire
Young Clement Rivers
P.O. Box 993
Charleston, SC 29402

October 26, 2016
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC