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

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SEP 19 2016

S.C. SUPREME COURT

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.

JOINT APPENDIX IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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Copies filed herewith:

Final Brief of Appellants

Final Brief of Respondents (Dr. Roane)

Final Brief of Respondents (Dr. Dodds)

Final Reply Brief

Record on Appeal

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2014-001833

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5403
Heard February 11, 2016 – Filed May 4, 2016

REVERSED AND REMANDED

Blake A. Hewitt and John S. Nichols, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; J. Edward Bell, III, of Bell Legal Group, of Georgetown; and C. Carter Elliott, Jr., of Elliott & Phelan, LLC, of Georgetown, all for Appellants.

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WILLIAMS, J.: In this medical malpractice case, Virginia and Todd Marshall (the Marshalls) appeal the circuit court's grant of summary judgment in favor of Dr. Kenneth A. Dodds; Charleston Nephrology Associates, LLC; Dr. Georgia Roane; and Rheumatology Associates, P.A. (collectively "Respondents"). The Marshalls argue the court erred in holding the statute of repose for a medical malpractice action begins to run after a medical professional's first alleged misdiagnosis. We reverse and remand.

FACTS/PROCEDURAL HISTORY

In February 2010, Virginia was diagnosed with Waldenström's macroglobulinemia—or lymphoplasmacytic lymphoma—a rare form of blood cancer. Prior to this diagnosis, Virginia was treated by two physicians, Dr. Dodds and Dr. Roane, both of whom she alleges committed medical malpractice by failing to diagnose her cancer on multiple occasions.

On September 15, 2004, Virginia visited Dr. Dodds, a nephrologist, after complaining of proteinuria, or increased protein levels in her urine. This visit marked the first time Dr. Dodds had evaluated Virginia since 1999. During this appointment, Dr. Dodds noted Virginia had a 24-hour urine test conducted on August 6, 2004, which revealed the protein levels in her urine were at 3.5 grams per day. At this point, Dr. Dodds did not order additional testing for Virginia's proteinuria. When Virginia visited Dr. Dodds again on November 14, 2004, she had no complaints and Dr. Dodds did not order additional testing for her proteinuria.

At a February 7, 2005 appointment, Dr. Dodds ordered that Virginia again receive a 24-hour urine test. On February 9, 2005, the test indicated Virginia's protein levels were at approximately 3.1 grams per day. Dr. Dodds did not order any further testing. During her last visit on September 5, 2005, Virginia's 24-hour urine test indicated the protein levels in her urine had increased to 4.2 grams per

day. Dr. Dodds continued treatment for proteinuria, but he did not administer any additional testing.

During the time she was seeing Dr. Dodds for her proteinuria, Virginia was also under the care of Dr. Roane, a rheumatologist. In 2000, Dr. Roane diagnosed Virginia with mixed connective tissue disease (MCTD) and treated her for the suspected MCTD from 2000 to 2007. On April 29, 2005, while Dr. Roane was continuing treatment for MCTD, Virginia presented symptoms including elevated sedimentation rates, enlarged lymph nodes, proteinuria, fever, and chills. At an appointment on September 29, 2005, a 24-hour urine test indicated Virginia's protein levels increased from 3.5 to 4.2 grams per day from the previous year. Dr. Roane, however, did not order further testing.

As a result of the alleged failures to diagnose Virginia's cancer during her treatments, the Marshalls pursued medical malpractice and loss of consortium actions against Dr. Dodds, Dr. Roane, and their respective practices. The Marshalls claimed Dr. Dodds was negligent in failing to recognize the signs and symptoms of elevated proteins in the urine and failing to order proper testing—including a urine protein electrophoresis test or a serum protein electrophoresis test—to determine if the type of protein in Virginia's urine was cancerous. Similarly, the Marshalls alleged Dr. Roane was negligent because she continued to misdiagnose Virginia's cancer as MCTD at the April 29, 2005 appointment. The Marshalls also claimed Dr. Roane failed to order further testing for Virginia's increased protein levels when she was no longer under the care of her nephrologist, Dr. Dodds, on and after the September 29, 2005 appointment.

On February 7, 2011, the Marshalls contemporaneously filed a notice of intent to file suit (NOI), two expert witness affidavits, and a summons and complaint against Dr. Dodds and Charleston Nephrology Associates, LLC. Subsequently, the Marshalls contemporaneously filed an NOI, an expert witness affidavit, and a summons and complaint against Dr. Roane and Rheumatology Associates, P.A. on April 8, 2011. The circuit court granted the Marshalls' motions to consolidate the two cases for purposes of discovery and trial.

After the parties participated in discovery, Respondents filed separate motions for summary judgment. Respondents argued the statute of repose for medical malpractice actions—section 15-3-545(A) of the South Carolina Code (2005)—barred the Marshalls' claims because they brought their action more than six years after Dr. Dodds and Dr. Roane's first alleged negligent omissions in failing to

diagnose her cancer. In their motion, Dr. Dodds and his practice asserted the alleged first misdiagnosis, on September 15, 2004, occurred more than six years prior to the commencement of the action against them. Likewise, Dr. Roane and her practice contended the Marshalls' own expert opined Virginia's cancer would have been discoverable by Dr. Roane as early as February 2002—nine years before the commencement of the malpractice action.

On May 1, 2014, the circuit court granted Respondents' motions for summary judgment, holding the Marshalls' complaints were untimely because the statute of repose began to run after the first alleged misdiagnoses by Dr. Dodds and Dr. Roane. In reaching its conclusion, the court found *Howell v. Zottoli*, 691 S.E.2d 564 (Ga. Ct. App. 2010), persuasive. In *Howell*, the Georgia Court of Appeals 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." 691 S.E.2d at 566. The circuit court found the Marshalls pled multiple failures by Dr. Dodds and Dr. Roane to diagnose Virginia's cancer that was likely present throughout the course of their treatment. Therefore, relying upon *Howell*, the court reasoned Dr. Dodds and Dr. Roane's subsequent misdiagnoses were merely a continuation of their first misdiagnoses, not distinct acts of negligence that could serve as new trigger points for the statute of repose.

The Marshalls filed a motion to alter or amend judgment, and the circuit court denied their motion in a Form 4 order on August 7, 2014. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Determining the proper interpretation of a statute is a question of law, and th[e appellate c]ourt reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

LAW/ANALYSIS

The Marshalls argue the circuit court erred in holding the statute of repose for their medical malpractice claims began to run after Dr. Dodds and Dr. Roane's first alleged misdiagnoses. We agree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The [General Assembly]'s intent should be ascertained primarily from the plain language of the statute." *Ex parte Cannon*, 385 S.C. 643, 655, 685 S.E.2d 814, 821 (Ct. App. 2009) (quoting *Georgia-Carolina Bail Bonds, Inc. v. Cty. of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003)). "Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2007). "If, however, the language of the statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose." *Ex parte Cannon*, 385 S.C. at 655, 685 S.E.2d at 821. "The construing court may additionally look to the legislative history when determining the legislative intent." *Id.*

"A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990)). "[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.* (quoting *First United Methodist Church*, 882 F.2d at 866).

In South Carolina, medical malpractice actions are governed by a six-year statute of repose. Subsection 15-3-545(A) 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.

(emphasis added). The statute's six-year period "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, 339–40, 380 S.E.2d 821, 821 (1989).

Because the statute of repose does not explicitly define "occurrence," we believe a review of the legislative history is instructive. Prior to the enactment of section 15-3-545(A), all personal injury actions were subject to a six-year statute of limitations, requiring such suits be brought within six years "after the cause of action shall have *accrued*." Code of Laws of S.C. § 10-102, -143(5) (1962) (emphasis added). Nevertheless, a jurisdictional split began to emerge concerning the definition of "accrued" in various state statutes of limitations in the context of medical malpractice. *See, e.g.*, *Gattis v. Chavez*, 413 F. Supp. 33, 38 (D.S.C. 1976) (providing a discussion on the jurisdictional split). Some courts retained the traditional view that "accrued" meant the time of the medical professional's alleged negligent act or omission, while others steadily began to hold that, pursuant to the "discovery rule," it meant when the plaintiff discovered or should have discovered the injury that arose from such negligence. *See id.*

In *Gattis*, the U.S. District Court for the District of South Carolina held that, if faced with the question, our supreme court would judicially adopt the discovery rule. 413 F. Supp. at 39. The following year, the General Assembly adopted the discovery rule with a newly created statute of limitations for medical malpractice actions. *See* Act No. 182, 1977 S.C. Acts 453 (stating the action 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"). However, because the discovery rule arguably would produce great uncertainty—allowing plaintiffs to bring actions against medical professionals at any time in the future—the General Assembly also created a statute of repose, barring all causes of action brought more than six years following an "occurrence." *See id.*; *see also Hoffman*, 298 S.C. at 341–42, 380 S.E.2d at 822–23 (noting other states enacted statutes of repose to curtail the "long tail" exposure to malpractice claims brought about by the discovery rule).

Based upon the legislative history of the statute of repose and our precedents, we find that "occurrence"—for purposes of the statute—means the time of an alleged negligent treatment, omission, or operation by a medical professional. *See, e.g.*, *O'Tuel v. Villani*, 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App. 1995) (holding the occurrence that triggered the statute of repose was on the date of the child's birth, when a physician failed to perform a caesarean delivery, not seven years later when the parents discovered the child had learning disabilities), *overruled on other grounds by I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 423 & n.12, 526 S.E.2d 716, 725 & n.12 (2000); *Johnson v. Phifer*, 309 S.C. 505, 507, 424 S.E.2d 532, 534 (Ct. App. 1992) (concluding the statute of repose barred a patient's claim against a dentist filed in 1990 when the alleged negligent treatment occurred from 1974 to 1977).

Consequently, 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. *See Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012) ("A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to [the] plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." (emphasis omitted) (quoting *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002))). Therefore, we hold 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[1]—the statute of repose does not bar the cause of action merely because the physician previously misdiagnosed the condition outside the repose period.

Turning to the facts of the instant case, the Marshalls concede they may not seek to impose liability on Dr. Dodds and Dr. Roane for negligent acts or omissions made outside the repose period. The Marshalls, however, alleged specific dates and appointments within the six-year repose period when Dr. Dodds and Dr. Roane failed to diagnose Virginia's cancer. The Marshalls' expert witnesses—Dr. Barry Singer and Dr. Robert Luke—opined that Dr. Dodds breached his duty of care at

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[1] *See* S.C. Code Ann. § 15-36-100(B) (Supp. 2015) (providing that a plaintiff in a professional negligence action "must file[,] as a part of the complaint[,] an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit").

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. Likewise, the Marshalls' other expert, Dr. Thomas Zizic, opined that Dr. Roane breached her duty of care at the April 29, 2005 appointment by prescribing potent immunosuppressants when Virginia did not have MCTD. Dr. Zizic also opined that Dr. Roane was negligent during and after the September 29, 2005 appointment—when Virginia was no longer under the care of Dr. Dodds—because she continued to misdiagnose Virginia's cancer as MCTD and was under a duty to perform further testing after learning Virginia's urine protein levels were elevated.

Additionally, the Marshalls properly alleged each element of their causes of action for medical malpractice: (1) Dr. Dodds and Dr. Roane owed a duty of care to Virginia; (2) they breached that duty in failing to diagnose her cancer; (3) Virginia suffered damages, including pain and suffering, lost wages, and medical expenses; and (4) Dr. Dodds and Dr. Roane's negligence proximately caused Virginia's damages. Therefore, we find the Marshalls' medical malpractice claims for alleged negligent acts occurring within six years of commencing the instant actions against Respondents are not barred by the statute of repose.

Nevertheless, Respondents contend Dr. Dodds and Dr. Roane's alleged subsequent misdiagnoses were merely a continuation of their first misdiagnoses, not new and independent negligent acts or omissions that "retrigger" the statute of repose. According to Respondents, South Carolina's statute of repose begins to run after a medical professional's first misdiagnosis. In making this argument, Respondents—like the circuit court—rely upon the Georgia Court of Appeals' decision in *Howell*.

In *Howell*, a patient was treated by a doctor in October 1996 after complaining of blood in his urine. 691 S.E.2d at 565. Although the patient never returned for in-office appointments, the doctor continued to provide him with several referrals and weight-loss prescriptions. *Id.* In 2001, the patient died of coronary heart disease, and his wife subsequently sued the doctor in 2003 for medical malpractice. *Id.* The decedent's wife alleged the doctor failed to properly diagnose and treat her husband's multiple cardiovascular risk factors present during the course of his care, including "morbid obesity, smoking, high cholesterol, diabetes, high blood pressure, and a family history of coronary heart disease." *Id.* The trial court, however, granted summary judgment in favor of the doctor, holding Georgia's five-year medical malpractice statute of repose barred her suit. *Id.*

On appeal, the Georgia Court of Appeals affirmed, finding Georgia's statute of repose—which is based upon when the negligent act causing the patient's injury occurred—began to run on the date of the doctor's first misdiagnosis of the decedent's condition. *Id.* at 566–67. In reaching its decision, the court relied upon the Supreme Court of Georgia's directive that, in cases of a misdiagnosis or failure to diagnose a continuing condition, "[t]he misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis." *Kaminer v. Canas*, 653 S.E.2d 691, 694 (Ga. 2007) (quoting *Frankel v. Clark*, 444 S.E.2d 147, 149 (Ga. Ct. App. 1994)).[2]

We find Respondents' interpretation of subsection 15-3-545(A) is unduly expansive and their reliance upon *Howell* is misplaced. *See Sloan*, 371 S.C. at 499, 640 S.E.2d at 459 (stating courts must not resort to subtle or forced construction to expand a statute's operation). Our statute of repose differs from Georgia's because it solely focuses on the time of the medical professional's negligent act or omission, not the patient's injury. A patient's damages in the case of a prior misdiagnosis discovered later with a proper diagnosis often include death, pain and suffering, lost wages, and medical expenses. Unlike the Supreme Court of Georgia, we find a patient's injury and ensuing damages in these situations are not the misdiagnosis itself, but rather are a *result* of the misdiagnosis. A misdiagnosis is simply the negligent act or omission that gives rise to the cause of action for malpractice. Therefore, we find *Howell* unpersuasive. Accordingly, we reject Respondents' argument and hold the circuit court erred in relying upon Georgia law to determine South Carolina's statute of repose begins to run after a medical professional's first misdiagnosis.

Respondents also argue our interpretation of South Carolina's statute of repose for medical malpractice actions would effectively be an adoption of the continuous treatment rule that was rejected by our supreme court in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). Under the continuous treatment rule, when a patient's illness or injury imposes upon his doctor a duty to continue treatment, the statutes of limitation and repose do not begin to run until the termination of the doctor's treatment. *Id.* at 135, 580 S.E.2d at 112. The continuous treatment rule is

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[2] In *Kaminer*, the court held Georgia's statutes of limitations and repose in most misdiagnosis cases "begin to run simultaneously on the date that the doctor negligently failed to diagnose the condition and, thereby, injured the patient." 653 S.E.2d at 694.

a tolling mechanism that our supreme court found would run afoul of the General Assembly's objective to limit liability with the medical malpractice statutes of limitations and repose. *Id.* at 138, 580 S.E.2d at 114. Our interpretation, however, is entirely consistent with *Harrison* because we are not suggesting the statute of repose is tolled until the termination of a physician's course of treatment. To the contrary, we hold the statute begins to run at the time of a medical professional's alleged negligent act or omission for which the plaintiff seeks to impose liability without regard to when the course of treatment ended.

In our view, the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for subsequent acts of negligence—even when they clearly constitute a breach of the standard of care—only because they failed to properly diagnose the patient's condition in the past. It is possible for a patient to continually present symptoms, or even new or worsening symptoms, that should alert the physician to perform additional testing or reevaluate a prior diagnosis. *See Kaminer*, 653 S.E.2d at 698 (Hunstein, J., dissenting) ("[I]t is possible for a doctor to misdiagnose a patient more than once in the course of treatment, where new or more severe symptoms would, under the relevant standard of care, require a reassessment of the initial diagnosis."). Under the rule advocated by Respondents, however, physicians—to be immune from suit—could simply point to a time outside the limitations period when they examined the patient and should have diagnosed the condition. We do not believe the General Assembly intended such a result when it enacted the statute of repose for medical malpractice actions. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (holding "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]").

CONCLUSION

Based on the foregoing analysis, we hold 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. Therefore, we reverse the circuit court's grant of summary judgment in favor of Respondents and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

LOCKEMY and MCDONALD, JJ., concur.

STATE OF SOUTH CAROLINA
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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

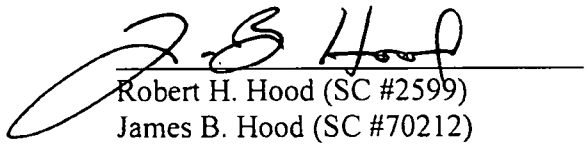
On a claim of negligence in failing to make a diagnosis over a course of treatment of a stable condition, the statute of repose begins to run on the date of the initial negligent act. In this case it began to run on September 15, 2004 when the Patient was first seen by Dr. Dodds, and expired before she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



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May 19, 2016

79773

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

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

Appellate Case No. 2014-001833
Circuit Court Case No. 2011-CP-10-0934

RECEIVED
JUN 03 2016
SC Court of Appeals

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 GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A., ***WITH SUGGESTION FOR REHEARING *EN BANC****

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COME NOW Respondents Georgia Roane, M.D., and Rheumatology Associates, P.A. (collectively referred to as "these Respondents" or "Roane"), by and through their undersigned counsel, and, pursuant to Rule 221, SCACR, hereby petition this Honorable Court for rehearing and reconsideration of this matter, which it decided via opinion filed May 4, 2016 (the "Subject Opinion")[1], reversing the circuit court's grant of summary judgment favor of these Respondents.[2]

SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 219(b), SCACR, these Respondents submit that the question addressed in the Subject Opinion—concerning the operation of the statute of repose for medical malpractice claims, S.C. Code Ann. § 15-3-545(A), specifically its operation with respect to claims related to diagnosis and treatment of a condition over a course of time—is of exceptional

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[1] Marshall v. Dodds, Op. No. 5403 (S.C. Ct. App. filed May 4, 2016) (Shearouse Adv. Sh. No. 18 at 54). In view of the date of filing of the Subject Opinion, the standard 15-day allotment of time for a petition for rehearing under Rule 221(a), and the timing of the instant petition, out of an abundance of caution, these Respondents note that, by order filed May 19th, the Court granted their motion for an extension of time, establishing June 3rd, i.e., today, as the deadline to petition for rehearing.

[2] The Subject Opinion also reversed the circuit court's grant of summary judgment in favor of Respondents Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC (collectively referred to as the "other Respondents"). The other Respondents are represented by separate counsel and have separately petitioned for rehearing.

importance to the bench and bar, and, in turn, the public, and therefore suggest rehearing *en banc*.[3]

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

Most respectfully, the Subject Opinion reflects that the Court overlooked or misapprehended the following material points.

1. **In Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), our Supreme Court rejected not only the *continuous treatment* rule, which was addressed in the Subject Opinion, but also the *continuing tort* rule, which the Subject Opinion did not address.**[4]

As explained in these Respondents' brief, the ***continuous treatment*** rule is not merely another name for the ***continuing tort*** rule, but a separate

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[3] Included below, among the material points these Respondents contend the Court overlooked or misapprehended, is the error preservation argument presented in their brief. (*See* Roane Br. at p. 1 [Counter-Statement of the Issues on Appeal, Issue II]; id. at pp. 15-19 [Argument II].) Please note that their suggestion for rehearing *en banc* is not intended to detract in any way from the persuasiveness—and potentially dispositive significance—of this argument, which they continue to zealously advance, and which would, of course, were the Court to agree with it, render unnecessary—indeed, improper—decision of this appeal on the merits.

[4] In Harrison, the ***continuing tort*** rule is sometimes referred to as the "continuing tort doctrine," the "doctrine of continuing tort," or the "continuous tort theory." *See* Id. at 139, 580 S.E.2d at 114. In this petition, it is consistently referred to as the "***continuing tort*** rule," with the words "continuing" and "tort" set off in bold, italicized print to help distinguish it from the different, though closely worded, "***continuous treatment*** rule," which is likewise, when referenced herein, set off via emphasized print for the purpose of distinction.

concept, which the Harrison Court separately addressed and separately rejected. 354 S.C. at 139, 580 S.E.2d at 114 ("Citing Georgia law, petitioner ***also*** argues the Court should adopt the ***continuing tort*** doctrine. We disagree.") (emphasis added). The Subject Opinion, however, only addresses Harrison's rejection of the ***continuous treatment*** rule, without discussing the necessary implications of its rejection of the ***continuing tort*** rule. *See* Marshall, *supra*, at p. 63 ("Respondents also argue our interpretation of South Carolina's statute of repose for medical malpractice actions would effectively be an adoption of the ***continuous treatment*** rule that was rejected by our supreme court in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003).") (emphasis added).

The Harrison Court began its discussion of the ***continuing tort*** rule explaining,

> 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) (emphasis added)).[5] It then observed that, under Georgia law, "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) (emphasis added)). "Thus," the 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 [the petitioner's] argument on the ***continuing tort***

[5] To underscore the point that the ***continuous treatment*** rule is different from the ***continuing tort*** rule, these Respondents note that, earlier in its opinion, when discussing the ***continuous treatment*** rule, the Harrison Court recited a different formulation of that different rule. Id. at 135, 580 S.E.2d at 112.

doctrine unavailing." Id. (emphasis added).[6]

Thus, in declining to adopt the ***continuing tort*** rule, our Supreme Court expressly endorsed and, indeed, employed the very "same reason[ing]" as that underlying Georgia's rejection of the ***continuing tort*** rule in the particular context of medical malpractice actions—again, the reason being that applying the rule in that context would nullify the legislative intent that the statute of repose abolishes any action with the passage of the prescribed number of years after the negligent or wrongful act or omission. Id. at 139, 580 S.E.2d at 114. By force of logic, with its rejection of the ***continuing tort*** rule, Harrison therefore stands for the following proposition, unaccounted for in the Subject Opinion: When any negligent act is of a continuing nature—that is to say, when, under appropriate circumstances, the law regards certain negligent conduct, even though continuing, as legally indistinct and indivisible, which may be the case even if injury is produced in varying degrees over a period of time—the statute of repose for all claims arising out of such an act begins to run right

[6] To be clear, by this point in its opinion the Court had already explained that the reason it rejected adoption of the ***continuous treatment*** rule was, "Put 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." Id. at 138, 580 S.E.2d at 114 (emphasis added); *see also* id. at 137, 580 S.E.2d at 113 (including the medical malpractice statute of repose in S.C. Code Ann. § 15-3-545(A) among "the statutes discussed above").

away, i.e., when it first occurs; to hold otherwise would frustrate the legislative intent. Now, with this in mind, let us consider, too, the established facts on which this appeal must be decided.

2. In view of the established facts on which this appeal must be decided,

(a) The Marshalls' claims arise out of a continuing tort;

(b) There is no room, neither within the appellate record nor the parameters staked out by the legal framework governing appellate review, for this Court to find, or otherwise base reversal of the circuit court upon, any supposed subsequent *acts* (plural) of negligence;

(c) The Subject Opinion is at odds with the Harrison Court's rejection of the *continuing tort* rule; and

(d) Indeed, Harrison alone, i.e., even without consulting out-of-state authority, supports the circuit court's summary judgment in favor of these Respondents and compels affirmance.

As also explained in these Respondents' brief, the Marshalls' appellate challenge is narrow in scope; their quarrel is solely about the law, not the facts, applied by the circuit court. They have not challenged the circuit court's view of their expert's testimony; they have taken no issue with that court's characterization of the negligence they allege; they have not argued that it in any way otherwise ran afoul of the summary judgment standard—for instance, by invading the province of the jury as to a genuine and material issue of fact or by failing to view the evidence in the light most

favorable to them.

With all of this uncontroverted—indeed, incontrovertible—the factual basis on which this appeal must be decided is firmly established,[7] and it includes the following:

- "[The Marshalls'] Complaint against [these Respondents] alleges that from 2000 until 2005, [Mrs.] Marshall was 'diagnosed and treated' by Dr. Roane for mixed connective tissue disease ('MCTD'). . . . ***Dr. Roane continued to treat [Mrs. Marshall] for***

[7] Of course, in noting that the Marshalls have not challenged the factual underpinning of the circuit court's ruling, these Respondents are not suggesting that there was a meritorious challenge to have been made. Indeed, besides being supported by the record, the correctness of the factual basis of the circuit court's ruling is underscored by the very lack of any appellate challenge to it by the Marshalls. Nonetheless, with no proper challenge thereto, the circuit court's ruling beyond reproach in this regard—shielding it not only from any late-breaking attack of the Marshalls, but also, most respectfully, from being undermined, expressly or impliedly, by this Court. *See* 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); 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 "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); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

MCTD until October 2007 and her treatment continued in accordance with this diagnosis." (R. p. 4 (emphasis added).)

- "[The Marshalls'] sole liability expert . . . , Dr. Thomas Zizic, M.D., testified that Dr. Roane breached the standard of care in 2002 and again in 2003 for failing to perform a proper work up that would have discovered [Mrs.] Marshall's cancer." (R. p. 5.)

- "February of 2002 . . . [is] the time at which Dr. Zizic opined that [Mrs. Marshall's] cancer could have been discovered had proper tests been ordered and conducted." (R. p. 8.)

- "[T]his Court finds that Dr. Zizic's own deposition testimony **draws *no distinction between the alleged failures in February of 2002 and those in 2005 going forward.***" (R. p. 9 (emphasis added).)

- "***The Court finds that what [the Marshalls] contend is a 'distinct event' in this case is nothing more than a continuation of the same course of treatment.***" (R. p. 9 (emphasis added).)

- "Importantly, these yearly exams which Dr. Zizic references are the same tests which he testified should have been conducted in 2002 and 2003." (R. p. 10.)

- "***Dr. Zizic's testimony fails to articulate any discernible difference in Dr. Roane's treatment from 2002 to 2007 which supports [the Marshalls'] arguments to this Court.***" (R. p. 10 (emphasis added).)

For the purpose of deciding this appeal, it is, therefore, conclusively established that there is no "discernable difference in Dr. Roane's treatment" of Mrs. Marshall during the entirety of the time period at issue, "no distinction between [Dr. Roane's] alleged failures [i.e., negligent conduct]," no "distinct event [i.e., no distinct subsequent act of negligence]," "nothing

more than a continuation of the same course of treatment." In other words, it is established that the Marshalls' claims arise out of a continuing tort and there is simply no room, neither within the appellate record nor the parameters staked out by the legal framework governing appellate review,[8] for this Court to find, or otherwise base reversal of the circuit court upon, any supposed ***subsequent acts (plural) of negligence***.

In the Subject Opinion, the Court expressed concern that "the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for ***subsequent acts of negligence***—even when they clearly constitute a breach of the standard of care—only because they failed to properly diagnose the patient's condition in the past." (Marshall, *supra*, at p. 63 (emphasis added).) Respectfully, aside from reflecting misapprehension of these Respondents' argument,[9] this concern is

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[8] *See, e.g.*, Watson, 407 S.C. at 452, 756 S.E.2d at 160, n. 9 ("'[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, 380 S.C. at 659-60, 670 S.E.2d at 701 (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error).

[9] These Respondents' position, like the circuit court's ruling, does not rely on a rule under which medical professionals escape liability for ***subsequent acts of negligence***—that is, a rule that would insulate subsequent acts (plural) which properly constitute distinct and divisible

surly of no moment here because, on this record, and as this matter has been presented to this Court, no act is—or can be—properly viewed as separate and distinct from the original act of negligence attributed to these Respondents.

In view of the immutable factual predicate of this case on appeal, coupled with the above-explained proposition (regarding when the statute of repose begins to run in cases of continuing torts) necessarily embedded in our Supreme Court's rejection of the ***continuous tort*** rule in Harrison, the Subject Opinion stands improperly at odds with Harrison's controlling precedent, which alone, i.e., even without consulting out-of-state authority, supports the circuit court's summary judgment in favor of Dr. Roane and compels affirmance.

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bases upon which to found a claim of negligence—nor, for that matter, as addressed below, is that the rule that prevailed in Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (Ga. Ct. App. 2010). The rule underlying summary judgment in favor of these Respondents applies only where the negligent conduct at issue is of a continuing nature and not properly viewed as distinct and divisible, because to treat it, as the Marshalls would like to do here, as distinct and divisible in spite of its continuing nature would nullify the legislative intent behind the statute of repose—such a rule, the Respondents maintain, is a direct and unavoidable corollary of the Harrison decision.

3. The Georgia statute of repose for medical malpractice claims is not materially different from its South Carolina counterpart, and the Georgia authority cited by the circuit court is harmonious with South Carolina and was properly instructive to that court in granting these Respondents summary judgment.

As explained also explained in these Respondents' brief, while Georgia precedent may have put a finer point on the issue (regarding commencement of the statute of repose in cases involving diagnosis and treatment of a condition over a period of time), it is nonetheless in line with our Supreme Court in Harrison.[10] Respectfully, the Court erred in finding the reliance of these Respondents and the circuit court to have misplaced upon the Georgia Court of Appeals' decision in Howell v. Zottoli.

Essential to the Court's finding was its view that South Carolina's "statute of repose differs from Georgia's because it solely focuses on the time of the medical professional's negligent act or omission, not the patient's injury. . . . Unlike the Supreme Court of Georgia, we find a patient's injury and ensuing damages in these situations are not the misdiagnosis itself, but rather are a *result* of the misdiagnosis." Marshall, *supra*, at p. 62 (emphasis in original).

First off, this is belied by a plain reading of the comparable Georgia

[10] Indeed, as is evident in the above analysis, the Harrison Court itself was entirely in sync with the Georgia cases it discussed.

statute, which, as recited in Howell, provides as follows:

> (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.
>
> ***(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.***
>
> (c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. ***Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.***

302 Ga. App. at 478, 691 S.E.2d at 565-66 (quoting O.C.G.A. § 9-3-71) (emphasis added)).[11]

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[11] For ease of reference and comparison, here is the pertinent language of the South Carolina statute:

> (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

Moreover, in the next breath, the Howell Court advises,

> Interpreting this statute, the Supreme Court of Georgia has held:
>
> > Under Georgia law, an action for medical malpractice must be brought within five years from the date on which the negligent or wrongful act or omission occurred. OCGA § 9-3-71(b). ***Unlike cases involving the medical malpractice statute of limitation, see OCGA § 9-3-71(a), our focus in this case is on the date or dates on which appellants may have committed acts of professional negligence. The test for determining when OCGA § 9-3-71(b)'s period of repose begins is based on the determination of when the negligent act causing the injury occurred.***

Id. at 478-79, 691 S.E.2d at 566 (quoting Schramm v. Lyon, 285 Ga. 72, 73(1), 673 S.E.2d 241 (2009) (emphasis added).

Analytically, the Georgia rule "in cases of misdiagnosis and mistreatment" that prevailed in Howell, providing that "the statute of repose begins to run on the date the initial misdiagnosis occurred[,]"[12] can be readily seen as a form of pragmatic recognition, in the form of an affirmative

---

of occurrence, or as tolled by this section.

S.C. Code Ann. § 15-3-545.

[12] Id. at 479, 691 S.E.2d at 566.

rule, in accordance with the logical imperative of the state's rejection of the ***continuing tort*** rule in actions for medical malpractice. In other words, recognition—by way of adopting a rule consistent with the prior rejection of a contrary rule—that in these particular types of cases, where a purported later negligent act "is merely the repeated failure to diagnose and treat a ***continuing*** though worsening condition[,]" the complained-of negligence is of a continuing nature and not properly considered distinct and divisible; because, were it to be so considered, it would nullify the operation of the statute of repose intended by the legislature, just as would application of the ***continuing tort*** rule in actions for medical malpractice. *See* Id. ("[A]lthough the focus of a statute of repose is generally the date of the alleged negligent act, a later negligent act cannot serve as the new starting point [i.e., ***in these Respondents' view***, a distinct and divisible 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.") (emphasis added to highlight the distinction between counsel's own commentary and the court's language)).

Georgia's law, statutory and decisional, is in line with that of South Carolina, and, though, as explained elsewhere, not essential to the award of summary judgment in these Respondents' favor, it was properly cited in

support thereof.

4. (a) **The Subject Opinion did not address these Respondents' argument, i.e., Argument II in their brief, that the Marshalls' appellate argument is not preserved for review, which, these Respondents most respectfully contend, is an argument that is dispositive of this appeal in their favor (indeed, it is dispositive of the entirety of this appeal in favor of all Respondents) and should be ruled upon by the Court.**

(b) **The Marshalls' argument is not preserved for appellate review, because it was not made to the circuit court in opposition to these Respondents' motion for summary judgment, but was made by the Marshalls, for the first time, in support of their motion for reconsideration of the circuit court's order granting summary judgment in favor of these Respondents.**

South Carolina's preservation requirements are "mandatory;"[13] indeed, the plain-error rule has been expressly rejected as "inconsistent with the law in South Carolina,"[14] and our appellate courts are affirmatively prohibited from addressing issues/arguments that are not properly preserved for review. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (granting a writ of certiorari to review the Court of Appeals' decision, affirming the decision in result only, and vacating the decision to the extent it addressed an issue that was not preserved, explaining, "Since

[13] Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).

[14] Rule 103, SCRE.

the issue . . . . was not preserved for review, it should not have been addressed.").[15] And Rule 220(b), SCACR, provides, in pertinent part, "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Id. at 23, 602 S.E.2d at 779-80. 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). And raising an argument for the first time via a motion asking the lower court to reconsider its decision is insufficient to preserve an argument for appellate review. Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("We find this issue is not

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[15] *See also* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 723-24 (2000) (explaining, "[A]s 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. . . . In contrast, different preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record.") (emphasis in original); id. at 422, 526 S.E.2d at 724 ("This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); cf. 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.

preserved. The issue first appears in Sonoco's motion seeking reconsideration of the circuit court's December 20, 2006 order. An issue may not be raised for the first time in a motion to reconsider.").

As noted above, in their own brief (more specifically, their statement of the case), the Marshalls acknowledge that they "did not file a memo opposing summary judgment;"[16] rather, they "gave [their] position during the hearing and in . . . follow-up letter[s] to the court." (Apps' Br. at 4.) Perhaps anticipating a preservation counter-argument, the Marshalls proceed to explain that "[t]he **gist** of the[ir] argument [(opposing summary judgment)] was that although all of this malpractice was in the same family, each deviation from the standard of care was its own claim with its own damages." (Id. (emphasis added).)

Most respectfully, the record reveals a rather stark contrast between the Marshalls' argument in opposing summary judgment and the Marshalls' argument in support of their motion for reconsideration—and, to be clear, these Respondents expressly challenged the Marshalls' motion in this regard below. (*See generally* R. pp. 174-203; R. pp. 405-406; R. pp. 407-416, 311-312, 320; R. pp. 417-418; R. pp. 151-154; R. pp. 171-173; R. pp. 161-170;

[16] To be clear, these Respondents' motion for summary judgment was expressly grounded upon the statute of repose for medical malpractice actions found in § 15-3-545(A). (R. p. 116.)

R. pp. 204-238.)

For instance, at the hearing on these Respondents' motion for summary judgment, the Marshalls argued—in the face of their own expert's testimony to the contrary[17]—that there was no malpractice before 2005. (*See generally* R. p. 193, line 8 – p. 196, line 17 (including the following argument by the Marshalls' counsel: "Judge . . . . You've heard many cases where doctors will say, well, I had this thing happen or this blood test going on but it wasn't until sometime later when you were able to correlate a history and it going on for a period of time where we really had the real reason to know that we should do something. . . . [I]t was the failure after '05 . . . that really is where the negligence occurred. . . . Judge, I believe, I personally believe and I think our experts . . . say that the negligence occurred after '05.").

At no time prior to their motion for reconsideration did the Marshalls argue the legislative text or intent of § 15-3-545(A) or for a narrow construction of this statute or upon the basis of any policy consideration favoring the construction of the statute that they argue on appeal. Indeed, the first mention by the Marshalls of this case presenting a "novel" issue of law as to "how the statute of repose is properly applied to a medical

[17] (*See* R. p. 312, line 25 – p. 313, line 5 and R. p. 320, lines 8-25; *see also* R. pp. 5-6, 9-10.)

malpractice case that involves a physician's repeated misdiagnosis of an illness" is in their motion for reconsideration. (R. p. 151; *see generally* R. pp. 174-203; R. pp. 405-406; R. pp. 417-418.)

The Marshalls' argument to this Court, which they did not raise to the circuit court for the first time until their motion for reconsideration (thus, improperly asking the circuit court to "reconsider" its decision on the basis of argument that they had not asked it to consider in the first place), is not preserved for appellate review, and cannot be allowed to undermine the circuit court's grant of summary judgment in favor of these Respondents. *See* Elam, 361 S.C. at 25, 602 S.E.2d at 780; I'On, 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; *see also* 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."); Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (applying the two-issue rule to circuit court orders).

Respectfully, the Court erred by not addressing this argument in the Subject Opinion and in not affirming the circuit court on this basis.

INCOPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN APPELLATE BRIEF

These Respondents do not intend to abandon (for any potential future consideration) any argument/analysis presenting in their previously filed appellate brief supporting affirmance of the circuit court's grant of summary judgment in their favor; therefore, out of an abundance of caution, besides making the above points, these Respondents incorporate their brief by reference herein and, thereby, reiterate the argument/analysis therein in support of this petition.

ADOPTION OF ARGUMENT/ANALYSIS IN OTHER RESPONDENTS' PETITION FOR REHEARING

To the extent not inconsistent herewith, these Respondents hereby join in and adopt as their own the argument/analysis presented by the other Respondents in support of their separately filed petition for rehearing.

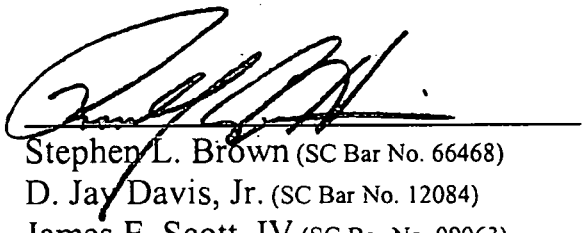
CONCLUSION

For the foregoing reasons, these Respondents ask this Honorable Court to grant this petition; rehear this matter (again, they suggest *en banc*), withdraw the Subject Opinion; and decide this appeal anew, affirming the circuit court's summary judgment in their favor.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

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Dated: 6/3/16

The South Carolina Court of Appeals

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

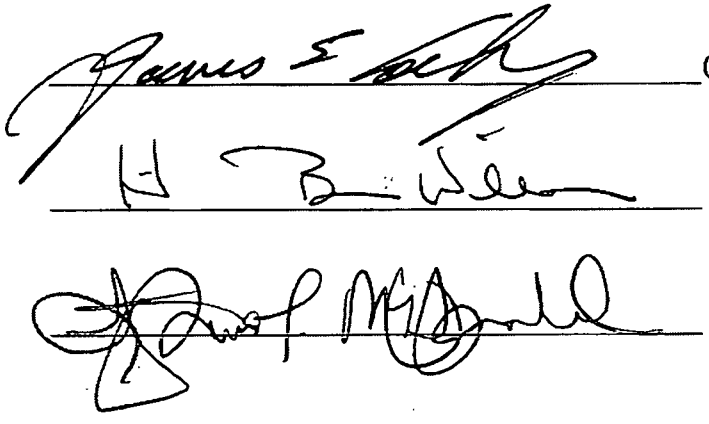
v.

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

Appellate Case No. 2014-001833

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



C. J.

J.

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The South Carolina Court of Appeals

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Re: Virginia Marshall v. Kenneth Dodds
Appellate Case No. 2014-001833

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has

been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

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