THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5403 (S.C. Ct. App. filed May 4, 2016)

Appellate Case No. ~~2014-001833~~ 2016-001936

Circuit Court Case No. 2011-CP-10-0934

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.

PETIONERS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A.'S, REPLY TO RESPONDENTS' RETURN TO THE CERTIORARI PETITIONS

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Most respectfully, Dr. Roane would make the following points in reply to the Marshalls' Return to the Certiorari Petitions (the "Return").[1]

ARGUMENT

1. Regarding the Marshalls' Argument A: According to the Marshalls, "There are three reasons [why] the Court should deny the petitions." (Return p. 4.) Notably—indeed, quite tellingly—the reason they advance foremost has nothing to do with the merits of either petition; rather, it is an appeal to "prudence," which, they say, "favors denying the petitions and remanding for trial." (Id. at p. 5.) In other words, they urge the Court to go ahead and ignore the merits altogether.

They (the Marshalls) suggest that a trial would develop a full record; however, further development of the record is not only unnecessary but also improper at this procedural juncture. As explained in Dr. Roane's petition, the factual basis on which this appeal *must* be decided has already been conclusively established. (Roane Pet. pp. 10-14.) *This* is the law of the case: There is no "discernable difference in Dr. Roane's treatment" of Mrs. Marshall during the

[1] In this reply, as in their petition for a writ of certiorari, Petitioners-Defendants Georgia Roane, M.D., and Rheumatology Associates, P.A., are collectively referred to in the singular as "Dr. Roane." Likewise, Plaintiff-Respondent Virginia L. Marshall is referred to as "Mrs. Marshall;" the "Marshalls" refers to Mrs. Marshall and her husband, Plaintiff-Respondent Todd W. Marshall, collectively.

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." (R. pp. 9-10.) True, as the Marshalls note, "Facts are not *found* on summary judgment,"[2] but a determination is made by the trial court as to whether any triable issues of fact exist. See, e.g., Cunningham v. Anderson County, 414 S.C. 298, 301-02, 778 S.E.2d 884, 886 (2015) ("'The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.' . . . When determining whether any triable issues of fact exist, the Court views the evidence and all reasonable inferences that may be drawn in the light most favorable to the non-moving party.") (citations omitted). Here, the trial court determined there were no triable issues of fact, and the Marshalls have never asserted any error in this regard—indeed, while they suggest, as a matter of "prudence," that a trial would develop a full record, their Return never actually challenges **Argument I.B.** in Dr. Roane's petition, regarding the established facts on which this appeal must be decided.

The Marshalls also suggest that trial might avoid future appeals, but candidly, this is illogical. If the Court were to grant the petitions, reverse the Court of Appeals, and affirm the trial court's summary judgments—as all petitioners now

[2] (Return p. 4 (emphasis added).)

asks—the litigation would be over.

The Marshalls note Mrs. Marshall's health as another reason for the Court to deny the petitions and "have the trial sooner, not later." (Return p. 5; id. ("Most importantly, denying certiorari prevents further delay during which Mrs. Marshall's health *could* deteriorate." (emphasis added).) While, of course, we are not without sympathy in this regard, it is not a proper basis on which to deny the petitions. Obviously, it does not undermine them on their merits. If anything, this could perhaps be relevant to a motion to expedite this matter, which, as yet, has not been made—and was not made in the Court of Appeals.

As for the Marshalls' self-serving contention that "[t]here is no downside to denying certiorari so this trial can proceed," it quite obviously ignores Dr. Roane's legitimate interest in the prompt conclusion of this matter in her favor—and without, should the Court find her instant petition to be meritorious, unnecessary trial and/or other, future appellate proceedings. Also, of course, as noted in Dr. Roane's cert petition, beyond furthering the interests of justice by correcting error in this particular case, in view of the Court's law-giving function and the importance of the subject matter involved here—concerning the operation of the statute of repose for medical malpractice claims, specifically in regard to claims related to diagnosis and treatment of a condition over a course of time—the

Court's review of the Subject (published) Decision[3] is all the more compelled in furtherance of the broader interest of the bench and bar—and, ultimately, the public.

2. Regarding the Marshalls' Argument B: According to Mrs. Marshall, she "is perusing the same approach this Court acknowledged in [State v. Ortho-McNeil-Janssen Pharmaceutical, 414 S.C. 33, 777 S.E.2d 176 (2015)]." (Return p. 8.) Referring to the Janssen decision, Mrs. Marshall says, "This Court . . . 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.'" (Id. at p. 7 (emphasis added).) As has been stated (above and in Dr. Roane's petition), however, "a series of discrete wrongs" is *not* what we have here: Here, 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." (R. pp. 9-10.) Moreover, as explained in Dr. Roane's petition, by its rejection of the ***continuing tort*** rule, Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), stands for the following

[3] The "Subject Decision" is, of course, Marshall v. Dodds, Op. No. 5403 (S.C. Ct. App. filed May 4, 2016). (J.A. at 1-10.)

proposition, unaccounted for in the Subject Decision: *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 away, i.e., when it first occurs; to hold otherwise would frustrate the legislative intent.* This proposition is also unaccounted for in the Marshalls' Return. The negligent conduct that Mrs. Marshall alleges is indistinct and indivisible from that which she acknowledges to be "stale;"[4] consequently, her effort to distinguish/divide it is unavailing.

3. **Regarding the Marshalls' Argument C:** In this regard, Dr. Roane would underscore the Marshalls' concession that the relevant statutory "language is virtually identical." (Return p. 9.) Also, as noted in Dr. Roane's petition, in Howell v. Zottoli, a case which post-dates and discusses Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007), it was expressly observed that "[t]he 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." 302 Ga. App. 477, 479, 691 S.E.2d 564, 566 (Ga. Ct. App. 2010) (emphasis added). The Georgia cases do not, as the Marshalls contend, rely on the view that "the *only*

[4] (Return p. 8.)

'injury' in a repeat misdiagnosis case is the original misdiagnosis[;]"[5] rather, they distinguish between injury associated with the failure to diagnose and treat a patient's condition on the date of the first misdiagnosis and mistreatment (i.e., negligent act), even though it may worsen over time, and that of a truly "'new' condition or injury" associated with a "subsequent negligent act." Id. at 481, 692 S.E.2d at 567 ("Here, the only 'new' condition or injury asserted by Howell was the death of the decedent. But no subsequent negligent act occurred after the development of this new condition, for the patient was already dead and no longer receiving medical services. Rather, as testified to by Howell's own expert, the undisputed evidence showed that the cardiac disease and attendant vascular damage had occurred and existed when the decedent began smoking cigarettes, which condition and injury continued uninterrupted from the time Dr. Zottoli first diagnosed and treated him. The condition or injury of damage to his vascular system did not become 'new' over the years; rather, it simply worsened and eventually resulted in his demise, as in *Kaminer*. Because the condition or injury was already existing, the rule regarding diagnosing and treating the condition applied, not the rule regarding warning the decedent about a condition in the future. Thus, the statute of repose began to run from the date of the first misdiagnosis and mistreatment. . . . [T]he statute of repose here did not begin to

[5] (Return p. 8 (emphasis added).)

run anew from a negligent act that occurred after the development of a new condition or injury, but, as in *Kaminer*, ran from the initial date of misdiagnosis and failure to treat."). Lastly, as explained in Dr. Roane's petition, in rejecting the ***continuous tort*** rule, the Harrison Court expressly followed Georgia's lead.

4. The Return does not address—and, therefore, in no way refutes—Argument II in Dr. Roane's petition regarding issue preservation.

CONCLUSION

For the foregoing reasons, and those set forth in her petition, Dr. Roane asks this Honorable Court to review the Subject Decision via issuance of a writ of certiorari to the Court of Appeals and affirm the summary judgment granted by the trial court.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 11/21/16

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioners-Defendants Georgia Roane, M.D., and Rheumatology Associates, P.A., do hereby certify that I have served **PETIONERS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A.'S, REPLY TO RESPONDENTS' RETURN TO THE CERTIORARI PETITIONS** on all other parties of record by depositing a copy of the same in the United States Mail, postage prepaid, on November 21, 2016, addressed as follows to their counsel of record:

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