THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis Jr., Circuit Court Judge

Case No. 2012-CP-10-03114

Charles E. Baker Sr., Appellant,

v.

Medical University of South Carolina, Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **Should the trial court's grant of summary judgment in favor of Respondent be affirmed because Appellant has not demonstrated reversible error, i.e., because Mr. Baker has not met the legal burden which he must meet in order to successfully upset the result below on appeal to this Court?**

II. **Assuming, *arguendo*, it is proper for the Court to reach them (putting aside, for the moment, the threshold question of the sufficiency of Mr. Baker's appellate challenge, i.e., Issue I), should the trial court's grant of summary judgment in favor of Respondent be affirmed on the merits?**

   A. **Did the trial court correctly hold that the Non-Treatment Claim (defined below) was barred by the applicable statute of repose, S.C. Code Ann. § 15-3-545(A)?**

   B. **Did the trial court correctly hold that the Improper Drilling Claim (defined below) was barred by the applicable statute of limitations, S.C. Code Ann. § 15-78-110?**

STATEMENT OF THE CASE

Mr. Baker[1] visited MUSC's[2] Dental Faculty Practice on a number of occasions between 1998 and 2010. (Summ. J. Hr'g Tr. p. 8:22-23.) He filed this malpractice suit on May 11, 2012. (*See* Summons; Compl. p. 1.) Ultimately, his theory of MUSC's liability was premised on two allegations of professional negligence: (1) that MUSC had failed to treat his periodontal disease (the "Non-Treatment Claim") and (2) that an MUSC dentist had improperly drilled out a

[1] "Mr. Baker" refers, of course, to Plaintiff/Appellant, Charles E. Baker Sr.

[2] "MUSC" refers, of course, to Defendant/Respondent, Medical University of South Carolina.

filling from one of his teeth (the "Improper Drilling Claim"). (*See generally* Summ. J. Hr'g Tr. pp. 8:15-10:25.)

Pointing to evidence showing that the Non-Treatment Claim dated back to 2004 and the Improper Drilling Claim to 2007, MUSC moved for summary judgment, arguing that the Non-Treatment Claim was barred by the applicable statute of repose, § 15-3-545(A), and the Improper Drilling Claim by the applicable statute of limitations, § 15-78-110. (Def.'s Mot. Summ. J. filed December 1, 2014.) The trial court agreed, the Honorable R. Markley Dennis Jr. presiding—hearing MUSC's motion on January 15, 2015; granting it via formal order filed February 2, 2015; and denying Mr. Baker's motion for reconsideration by order filed May 6, 2015. (Tr. of Summ. J. Hr'g held Jan. 15, 2015; Form 4 Granting Def. Summ. J.; Formal Order Granting Def. Summ. J.; Form 4 Den. Pl.'s Mot. for Recon.)

This appeal follows.

ARGUMENT

I. The trial court's grant of summary judgment in favor of MUSC should be affirmed because Mr. Baker has not demonstrated reversible error, i.e., because Mr. Baker has not met the legal burden which he must meet in order to successfully upset the result below on appeal to this Court.

An appealed order comes to the appellate court with a presumption of correctness, and the burden is on the appellant (Mr. Baker here) to demonstrate

reversible error. *McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (citing *Weaver v. Recreation Dist.*, 328 S.C. 83, 88, 492 S.E.2d 79, 82 (1997) and *Ehlke v. Nemec Constr. Co.*, 298 S.C. 477, 481, 381 S.E.2d 508, 510 (Ct. App. 1989)). While the appellate court is "obliged to reverse when error is called to [its] attention, . . . [it is] not in the business of figuring out on [its] own whether error exists." *Id.* (quoting *Harris v. Campbell*, 293 S.C. 85, 87, 358 S.E.2d 719, 720 (Ct. App. 1987)); *see also 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); 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.").

Issues not argued in an appellant's principal brief are deemed abandoned and will not be considered on appeal;[3] and they may not be raised via reply brief, either. *Cont'l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 811 n. 2 (Ct. App. 1997). Even where some reference is made to an issue in the brief, where no

[3] *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); *see, e.g., Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 n. 3 (2003) ("Since County failed to argue this issue in the body of its brief, the issue is deemed abandoned.").

authority is cited and argument is conclusory, the issue is deemed abandoned. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); *see also Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."). And an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

Mr. Baker's brief simply does not meet the standard required to upset the trial court's grant of summary judgment to MUSC. It does not actually cite any legal authority,[4] and it does not actually set forth any substantive argument in challenge to the trial court's holding—essentially, it consists of nothing more than unwarranted personal attacks against MUSC's counsel and MUSC employee Dr. Ted McGill and a recitation of alleged damages. (*See generally* App's Br.)

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[4] The only citations to legal authority in Mr. Baker's brief come from Form 13, Brief of Appellant, in Appendix C of the Appendices to Part II of the South Carolina Appellate Court Rules. As stated in that form, and copied verbatim in Mr. Baker's brief, "The authorities cited are fictitious and intended to show the form of citation only." (*See* App's Br. at "Page #4".) Likewise, the issues, statement of the case, facts, and arguments on "Page #6" and "Page #7" of Mr. Baker's brief are all copied from Form 13 and have no relevance to the instant case. (*Id.* at "Page #6" and "Page #7".)

II. Assuming, *arguendo*, it is proper for the Court to reach them (putting aside, for the moment, the threshold matter of the insufficiency of Mr. Baker's appellate challenge, i.e., Argument I), the trial court's grant of summary judgment in favor of MUSC should be affirmed on the merits.

A. The trial court correctly held that the Non-Treatment Claim was barred by the applicable statute of repose, § 15-3-545(A).

The applicable statute is § 15-3-545, titled "Actions for medical malpractice,"[5] and its six-year repose provision, found in subsection (A), "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Harrison v. Bevilacqua*, 354 S.C. 129, 137-38, 580 S.E.2d 109, 113 (2003) (quoting *Hoffman v. Powell*, 298 S.C. 338, 339-40, 380 S.E.2d 821, 821 (1989)).

Section 15-3-545(A) provides as follows:

> In any action, other than actions controlled by subsection (B)[[6]], 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

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[5] *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 147, 678 S.E.2d 809, 810 (2009) (holding that the statute of repose in § 15-3-545(A) applies to government entities, like MUSC here, covered by the South Carolina Tort Claims Act).

[6] Subsection (B) is irrelevant here as it applies only "[w]hen the action is for damages arising out of the placement and inadvertent, accidental, or unintentional leaving of a foreign object in the body or person of any one or the negligent placement of any appliance or apparatus in or upon any such person by any licensed health care provider acting within the scope of his profession by reason of any medical, surgical, or dental treatment or operation."

> treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, *not to exceed six years from date of occurrence*, or as tolled by this section.[7]

According to Mr. Baker's own expert, Dr. Stanton S. Goldstein, on examination by Mr. Baker's own counsel, the Non-Treatment Claim was based on MUSC's (alleged) complete failure to address Mr. Baker's periodontal disease—a failure which Dr. Goldstein expressly dated back to Mr. Baker's visit to MUSC in April of 2004:

> [Q]: Let me back up. The April '04 visit, what was that for?
> [A]: (Reading) It was a consultation. Patient concerned about cantilever bridge. Looks like 3/4, discussed options, recommend extraction of 3, then fixed bridge from 2 to 6. Referred to Dr. Tabor.
> [Q]: Is there any mention of the patient having treatment for periodontal disease?
> [A]: There's no mention of that. No.
> [Q]: Any recommendations or notations in '04?
> [A]: No.
> [Q]: Okay. In your opinion, then, if he had the periodontal disease in '02, would he still have it in 04'?
> [A]: Most likely. Yes.

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[7] The tolling provision of § 15-3-545, subsection (D), is not applicable here. *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) ("Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion of the phrase 'or as tolled by this section' in subsection (A) clearly indicates that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)) (emphasis in original).

[Q]: Okay. But yet it's not mentioned in these records from MUSC?
[A]: No. It's not.
[Q]: And that's '04?
[A]: Correct?
[Q]: *If he had the periodontal disease in '02 and it still persists in '04 but it's not documented nor is it recommended for any kind of treatment, is that normal practice?*
[A]: *I would say not.*
[Q]: *Is that a breach, so to speak, of a standard, medical standards or dental standards?*
[A]: *If there's a gap of two years, patient comes back for a new evaluation, it should be stated. It seems to be a breach of the standard of care. Yes.*

(Exhibit B-1 to Def.'s Mem. Supp. Summ. J. [Dr. Goldstein Dep.] Tr. pp: 83:19-85:3 (emphasis added).) Dr. Goldstein also testified as follows:

[Q]: And it's your belief that Dr. McGill should have rediagnosed him with periodontal disease in 2007? That's your chief complaint?
[A]: That's my chief complaint?
[Q]: Yes, sir.
[A]: I believe he should have reevaluated the periodontal situation for Mr. Baker in *both 2004 and 2007*. But there's no indication that he did so.

(Exhibit B-2 to Def.'s Mem. Supp. Summ. J. [Dr. Goldstein Dep.] Tr. p: 95:13-22 (emphasis added).)

On the record before it, the trial court correctly found—and, in any event, Mr. Baker has *not challenged*[8]—that "Dr. Goldstein's testimony *did not distinguish*

[8] *Soden*, 333 S.C. at 566, 511 S.E.2d at 378 (an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance.").

any alleged failures that supposedly occurred in April of 2004 from those alleged failures that supposedly occurred [thereafter];" that "any and all criticism[s] of MUSC's lack of periodontal treatment of [Mr. Baker] are *identical* in that the sole criticism asserted [is] the repeated failure to treat [Mr. Baker's] advancing periodontal disease in any manner;" and that Mr. Baker "may *not* legitimately assert that any 2007 was a 'separate and distinct' occurrence of negligence[]" for, "[q]uite conversely, Dr. Goldstein testified that the 2007 failure to treat [Mr. Baker's] periodontal disease was *no different* than 2004." (Order Granting Summ. J. pp. 4, 7 (emphasis added).) Moreover, the trial court correctly observed that, having been rejected by our Supreme Court in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109, both the so-called "continuing treatment" and "continuous tort" rules were unavailing to Mr. Baker and that, on this record, the Non-Treatment Claim, based as it was on alleged negligence which had occurred in 2004 and which could not be viewed as separate and distinct at any time thereafter, had become barred by the six-year repose provision in § 15-3-545(A) by the time Mr. Baker filed this suit some eight years later in 2012. (*See generally* Order Granting Summ. J. pp. 5-7.)

Although not raised by Mr. Baker—and therefore, in accordance with the authorities cities in Argument I above, unavailing to him in this appeal in any event—MUSC is compelled to address this Court's fairly recent decision in

Marshall v. Dodds, 417 S.C. 196, 209, 789 S.E.2d 88, 94 (Ct. App. 2016), wherein the Court reversed the trial court, holding it had "erred in finding the statute of repose for medical malpractice actions begins to run after a medical professional's first alleged misdiagnosis." Respectfully, *Marshall* was incorrectly decided and does not support affirmance here.

The *Marshall* Court overlooked or misapprehended the import of our Supreme Court's rejection of the *continuing tort* rule in *Harrison*. In *Harrison*, the Supreme Court rejected not only the *continuous treatment* rule but also the *continuing tort* rule. The *continuing tort* rule is not merely another name for the *continuous treatment* rule; rather, it is a separate 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 *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)). 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 *Harrison* 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* doctrine unavailing." *Id.* (emphasis added).[9]

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

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[9] To be clear, by this point in its opinion the *Harrison* 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 § 15-3-545(A) among "the statutes discussed above").

malpractice actions—again, the reason being that applying the rule in this 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 *Marshall*: 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. Applied to the circumstances of the Non-Treatment Claim, based as it was on alleged negligence which had occurred in 2004 and which could not be viewed as separate and distinct at any time thereafter—as correctly found by the trial court, and, in any event, as has gone unchallenged by Mr. Baker and thus become the law of the case, as explained above[10]—this proposition, necessarily

[10] In other words, on this record, it is established that the Non-Treatment Claim arises 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, for this Court to find, or otherwise base reversal of the trial court upon, any supposed subsequent act*s* (plural) of negligence. The *Marshall* Court expressed concern that "the first misdiagnosis rule . . . would allow medical professionals to escape liability for subsequent acts of negligence—even

embedded in our Supreme Court's rejection of the *continuous tort* rule in *Harrison*, supports the trial court's grant of summary judgment pursuant to the six-year repose provision in § 15-3-545(A). To conclude otherwise would be improperly at odds with *Harrison's* controlling precedent.

B. The trial court correctly held that the Improper Drilling Claim was barred by the applicable statute of limitations, § 15-78-110.

According to Mr. Baker, in 2007,[11] while acting in the course and scope of his employment with MUSC, Dr. Ted McGill, after having delivered a bridge to certain of Mr. Baker's upper teeth, improperly drilled into one of his lower, opposing wisdom teeth. (*See* Compl. ¶ 4; Exhibit A-1 to Def.'s Mem. Supp. Summ. J. [Pl.'s Dep.] Tr. pp. 91:8-93:6.) Mr. Baker was clear that he (Mr. Baker) knew he had a problem immediately, that the alleged improper drilling caused him instant pain and discomfort, that he notified Dr. McGill of the same immediately, and that he continually informed him of continued pain and discomfort in that same area on his next "four or five" subsequent visits in 2007 to MUSC. (*See* Compl. ¶ 4; *see also*, Exhibit A-2 to Def.'s Mem. Supp. Summ. J. [Pl.'s Dep.] Tr.

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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." 417 S.C. at 208, 789 S.E.2d at 94. This concern is of no moment here because on this record no act can be properly viewed as separate and distinct from the original act of negligence in 2004.

[11] (*See* App's Br. at "Page 3" (referring to the incident underlying the Improper Drilling Claim: "My injury happened AUGUST 3rd 2007 . . . .") (capitalization in original).)

pp. 98:23-99:24, p. 101:8-25.) There is no question that the alleged incident giving rise to the Improper Drilling Claim occurred in 2007 and that Mr. Baker had voiced the last of his alleged complaints of associated pain to Dr. McGill by no later than January of 2008, nearly four and half years prior to the commencement of this lawsuit in May of 2012.

A two-year statute of limitations applies here. Section 15-78-110 (requiring actions brought pursuant to the Tort Claims Act to be commenced within two years after the date the loss was or should have been discovered). Under the discovery rule, the statute of limitations begins to run from the date the plaintiff knew or should have known that, by the exercise of reasonable diligence, a cause of action exists. *Holmes v. National Service Industries, Inc.*, 395 S.C. 305, 717 S.E.2d 751 (2011); *see also Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 68 S.E.2d 645, 647 (1996) (For purpose of the discovery rule, "the fact that the injured party may not comprehend the full extent of the damage is immaterial.").

Here there is no question that Mr. Baker had actual, immediate knowledge of the alleged wrongful conduct underlying the Improper Drilling Claim. The trial court correctly determined that, even viewing the evidence in the light most favorable to Mr. Baker, the applicable two-year statute of limitations under § 15-78-110 had run by January of 2010 at the latest, rendering the Improper Drilling Claim (not brought until this action was filed in 2012) untimely.

CONCLUSION

For the foregoing reasons, as well as, in accordance with Rule 220(c), SCACR, for any other reasons which may appear in the record, to include specifically, but without limitation, any which may appear in the trial court's order granting summary judgment (the same being hereby incorporated herein by reference), MUSC asks this Court to affirm the trial court's grant of summary judgment in its favor.

Respectfully submitted,
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Dated: 7/17/17

THE STATE OF SOUTH CAROLINA
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Appeal from Charleston County
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R. Markley Dennis Jr., Circuit Court Judge

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent, hereby certify that the **INITIAL BRIEF OF RESPONDENT** and **RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on July 17, 2017, properly posted for delivery to the following addressees:

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Respectfully submitted,

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July 17, 2017

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Re: Charles E. Baker, Sr. vs. Medical University of South Carolina
Appellate Case No. 2015-001300
Case No.: 2015-001300
Claim No.: I.R.F. File No.: 84905
YCR File: 2235-20120413

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Brief of Respondent, the original and one (1) copy of Respondent's Designation of Matter to be Included in the Record on Appeal and the original and one (1) copy of the Proof of Service of same. Please file the originals and return court-stamped copies to me in the enclosed envelope.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

Enclosures
Cc: Charles E. Baker, Sr.

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