

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

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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.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

| | |
|---|----|
| Table of Authorities | ii |
| Counter-Statement of Question Presented | 1 |
| In a medical malpractice case where there is evidence doctors breached the standard of care on multiple occasions, did the Court of Appeals correctly hold each breach triggers the statute of repose; resulting in recent breaches being actionable even though older breaches are barred? | |
| Introduction | 1 |
| Statement of the Case | 1 |
| Arguments | 4 |
| A. The statute of repose does not grant immunity for serial, repeated negligence. The Court of Appeals followed the statute’s language, honored the statute’s purpose, and upheld this Court’s precedents | 5 |
| i. The decision of the Court of Appeals follows the statute’s language and purpose | 5 |
| ii. The decision of the Court of Appeals honors this Court’s precedents | 6 |
| iii. There remain unanswered questions with respect to the statute of repose but the Court need not consider those questions here | 7 |
| B. Cases from other jurisdictions aptly explain why a ruling in the Marshalls’ favor does no violence to South Carolina’s rejection of the “continuous treatment rule” | 8 |
| C. Dr. Roane’s error preservation argument is wrong. The record plainly discloses the Marshalls repeatedly told the circuit court they were only suing for negligence that happened within the unexpired repose period | 11 |
| Conclusion | 12 |

TABLE OF AUTHORITIES

| | |
|---|---------|
| <i>Grier v. AMISUB</i> , 397 S.C. 532, 725 S.E.2d 693 (2012) | 11 |
| <i>Harrison v. Bevilacqua</i> , 354 S.C. 129, 580 S.E.2d 109 (2003) | 6, 8, 9 |
| <i>Hoffman v. Powell</i> , 298 S.C. 338, 380 S.E.2d 821 (1989) | 5, 6 |
| <i>Kerr v. Richland Memorial Hospital</i> , 383 S.C. 146, 678 S.E.2d 809 (2009) | 6 |
| <i>Langley v. Pierce</i> , 313 S.C. 401, 438 S.E.2d 242 (1993) | 6 |
| <i>O'Tuel v. Villani</i> , 318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995) | 6 |
| <i>Shadwell v. Craigie</i> , 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004) | 6 |
| <i>State v. Ortho-McNeil-Janssen Pharmaceutical</i> , 414 S.C. 33, 777 S.E.2d 176 (2015) | 7, 9 |
| (Other Jurisdictions) | |
| <i>Aryeh v. Canon Bus. Solutions</i> , 292 P.3d 871 (Cal. 2013) | 7 |
| <i>Benge v. Davis</i> , 553 A.2d 1180 (Del. 1989) | 7 |
| <i>Cunningham v. Huffman</i> , 609 N.E.2d 321 (Ill. 1993) | 7 |
| <i>Howell v. Zottoli</i> , 691 S.E.2d 564 (Ga. Ct. App. 2010) | 10 |

Jones v. Speed,
577 A.2d 64 (Md. 1990) 9

Kaminer v. Canas,
653 S.E.2d 691 (Ga. 2007) 10

King v. Sullivan,
961 S.W.2d 287 (Tex. Ct. App. 1997) 9

Statutes & Other Authorities

S.C. Code Ann. § 15-3-545 (2005) 1, 5

COUNTER-STATEMENT OF QUESTION PRESENTED

In truth this case poses a single question which is:

In a medical malpractice case where there is evidence doctors breached the standard of care on multiple occasions, did the Court of Appeals correctly hold each breach triggers the statute of repose; resulting in recent breaches being actionable even though older breaches are barred?

INTRODUCTION

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

STATEMENT OF THE CASE

The Court of Appeals accurately explained this case's basic facts. (App.pp.2-4). Virginia Marshall has blood cancer. (App.p.2). A routine test disclosed the cancer in 2010 and after learning of her diagnosis Mrs. Marshall sued two doctors and their practices claiming the doctors failed to discover the cancer at various times in 2005 and 2006. (R.pp.32-33, 48-49). These physicians treated Mrs. Marshall during this period for high protein levels in her blood and urine. (R.pp.32-33, 48-49). Mrs. Marshall's husband filed consortium claims against both physicians and their practices. (R.pp.35-36, 53).

The Marshalls filed the lawsuits in 2011. (R.pp.31, 38). The suits were consolidated for discovery and trial. (R.pp.1-2).

Petitioners obtained summary judgment by convincing the circuit court the six-year statute of repose foreclosed the Marshalls' lawsuit because the Marshalls' experts had identified breaches of the standard of care occurring prior to 2005 and more than six-years before the suits began. The Marshalls' experts had also identified breaches of the standard of care in 2005 and afterwards, but the circuit court used each physician's first act of negligence as the measuring act, (R.pp.7-9, 18); specifically noting at one point that it did not matter whether Mrs. Marshall had different symptoms during various office visits or whether her condition worsened over time. (R.p.9). The circuit court viewed judicial decisions from Georgia as supporting its holding. (R.pp.10-11, 18-20).

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

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

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

Petitioners supported their motions with memos; in the case of Dr. Roane and her practice, submitted the day of the March 3, 2014 hearing, in the case of Dr. Dodds and his practice, submitted two days later. (R.pp.118-126, 141-149). Dr. Dodds' post-hearing memo was the first time Georgia law was mentioned. (R.p.145). Dr. Roane raised Georgia law in a post-hearing letter. (R.p.409). Even though the Marshalls' experts identified multiple acts

of malpractice, Petitioners said the first misdiagnosis was the key because this was all a “continuation” of the same misdiagnosis/course of treatment. (R.pp.146, 409).

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

The decision of the Court of Appeals contains three holdings.

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

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

Third, the Court of Appeals rejected the argument that its decision violated the statute of repose’s purpose, explaining the statute was not being “tolled” during Mrs. Marshall’s

treatment. (App.p.10). The statute of repose is linked to negligent acts or omissions. The Marshalls won because they identified negligent acts within six years of this lawsuit.

ARGUMENT

There are two reasons this Court should affirm the Court of Appeals.

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

Second, the Court of Appeals wisely rejected Georgia law as unpersuasive. Georgia's approach is unsound in its own right and is based on "a time of injury" analysis that is inconsistent with South Carolina law. No other state appears to have favorably cited Georgia's "first date of misdiagnosis/a misdiagnosis is a single injury" rule, but other states follow the Marshalls' proposed rule. Some of these states even share South Carolina's rejection of the "continuous treatment rule"—a tolling rule with no relevance here. The reason other states follow the rule the Marshalls are advancing is obvious: it makes zero sense to aggregate multiple instances of malpractice together and insulate repeated breaches of the standard of care from liability. The statute of repose is not a license to keep committing malpractice.

At bottom this case is about whether the statute of repose means what it says. The statute does not talk about the "first" occurrence of malpractice or "a new chain" of malpractice. The circuit court's reasoning was not faithful to the statute's language. The repose period extends six years into the future every time a physician commits malpractice. The Court of Appeals was right to reverse. This Court should affirm that decision.

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

The circuit court granted summary judgment because it believed the statute of repose bars any lawsuit after six years passes from the first occurrence of a physician's negligence, regardless of whether a physician breached the standard of care on later occasions. (R.pp.7-9, 18). The Court of Appeals properly reversed, issuing a decision that follows the statute's language, implements the statute's purpose, and honors this Court's precedents.

- i. The decision of the Court of Appeals follows the statute's language and purpose.

The repose provision in section 15-3-545(A) explains that a medical malpractice lawsuit must begin no later than "six years from date of occurrence, or as tolled by this section." When read naturally this means whenever there is an occurrence of malpractice the repose period for that malpractice extends six years into the future. It follows by logical extension that there are multiple repose periods when there are multiple occurrences of malpractice. The legislature could easily have written a statute requiring a plaintiff to file suit within six years of the *first* occurrence of malpractice. It did not.

The decision of the Court of Appeals honors the statute's purpose. The statute of repose is a rule of closure, existing because the discovery rule's unlimited application would create indefinite exposure for a physician. If a physician's malpractice took 30 years to cause an injury, the discovery rule would allow a lawsuit as long as the suit was filed within three years of the injury's discovery. The statute of repose prevents this from happening, as this Court acknowledged in *Hoffman v. Powell* and as the Court of Appeals cited here. (App.p.6)

(citing *Hoffman*, 298 S.C. 338, 340-41, 380 S.E.2d 821, 822 (1989)). The statute allows a physician to rest after a legislatively-determined period of time passes from treatment, but nothing suggests the legislature intended to grant a physician immunity for recent acts of malpractice. There is a difference between a reasonable rule of closure and a rule that provides amnesty for ongoing negligence. It makes good sense to grant closure when years have passed since treatment. It makes no sense to grant immunity for repeat malpractice.

- ii. The decision of the Court of Appeals honors this Court's precedents.

The decision of the Court of Appeals honors this Court's precedents. The Court of Appeals cited the prominent precedents in its decision. *Hoffman v. Powell* was a constitutional challenge to the statute of repose and does not contain any support for the proposition that the first act of negligence triggers the repose period for subsequent acts of negligence. 298 S.C. at 340-342, 380 S.E.2d at 822-823. *Harrison v. Bevilacqua* rejected the continuous treatment rule; a rule providing that when a patient is being continually treated by a doctor, *none* of the deadlines for any malpractice claim start running until the doctor's course of treatment is over. 354 S.C. 129, 138, 580 S.E.2d 109, 113 (2003). The Court of Appeals cited both *Harrison* and *Hoffman*, (App.pp.6, 9-10), and as Mrs. Marshall's briefs to the Court of Appeals explained, there is no South Carolina case supporting the view that the first act of malpractice is the measuring act for all acts of malpractice. Several decisions address the statute of repose: *O'Tuel v. Villani*, *Kerr v. Richland Memorial Hospital*, *Shadwell v. Craigie*, and *Langley v. Pierce* were cited below. (R.pp.121-123, 143-145). None of them support the circuit court's reasoning. (Appellants' Brief, pp.8-10).

This Court need look no further than its own precedent for an explanation why the circuit court's approach is erroneous. This Court has recognized that when a case presents a series of discrete wrongs that would each be independently actionable, a defendant's claim to repose, which means rest, is "vitiating." *State v. Ortho-McNeil-Janssen Pharmaceutical*, 414 S.C. 33, 78, 777 S.E.2d 176, 199-200 (2015). Fixing the deadlines on the first instance of misconduct when there is repeated wrongdoing would allow "parties engaged in long-standing malfeasance [to] obtain immunity in perpetuity from suit even for recent and ongoing malfeasance." *Id.* (quoting *Aryeh v. Canon Bus. Solutions*, 292 P.3d 871, 880 (Cal. 2013)). Petitioners do not mention the *Janssen* decision in their briefs.

- iii. There remain unanswered questions with respect to the statute of repose but the Court need not consider those questions here.

The rule the Marshalls are proposing does not answer all conceivable questions about the statute of repose. It is possible to argue over the precise meaning of terms like "treatment," "omission," and "occurrence." Must "treatment" consist of a single act, or can a series of related acts constitute a single instance of treatment as Illinois has held? *Cunningham v. Huffman*, 609 N.E.2d 321, 324-326 (Ill. 1993). Do treatment, omission, and occurrence require an "act" like a procedure or consultation—something more than a patient's mere reliance on a past diagnosis—as Delaware has held? *Benge v. Davis*, 553 A.2d 1180, 1185 (Del. 1989). It is impossible to imagine the varying sets of facts and arguments that could test how the statute of repose applies to cases at the margins.

Fortunately this case does not fall anywhere close to the margins. This case does not present difficult questions and it does not warrant anything more than the narrow ruling the

Court of Appeals issued. Here, there is straightforward expert testimony that Petitioners repeatedly breached the standard of care. Mrs. Marshall's expert says it was negligent for Dr. Dodds to continue Mrs. Marshall's medicine after her protein level stayed the same and then increased instead of getting cut by 40%. (R.p.254). The salient question for the statute of repose is "when did that act of negligence occur?" and the answer is obvious—it occurred in February and September of 2005 when Dr. Dodds saw these test results after starting Mrs. Marshall on the protein-slashing medicine in September of 2004. (R.p.256). A different expert says Dr. Roane breached the standard of care by not giving Ms. Marshall a complete "workup" after Mrs. Marshall quit seeing Dr. Dodds. (R.pp.398-399). That act of negligence plainly occurred when Mrs. Marshall went back to Dr. Roane in September of 2005 and January of 2006 after Mrs. Marshall quit seeing Dr. Dodds. *Id.*; see also (R.pp.363-364). The Marshalls filed lawsuits in February and April of 2011, within six years of these acts of negligence. (R.pp.31, 38). That should be the end of the analysis.

B. Cases from other jurisdictions aptly explain why a ruling in the Marshalls' favor does no violence to South Carolina's rejection of the "continuous treatment rule."

Both of the circuit court's orders discuss a doctrine known as the "continuous treatment rule" or the "continuous tort rule." See (R.pp.8-9, 17-18). The Court declined to adopt this doctrine in *Harrison v. Bevilacqua* because tolling the limitations and repose deadlines would run afoul of the statute's language and purpose. 354 S.C. at 138, 580 S.E.2d at 113. The circuit court viewed *Harrison* as indicating the statute of repose is supposed to be applied "strictly." (R.p.18). Petitioners say the decision of the Court of Appeals is inconsistent with *Harrison*.

Other jurisdictions have recognized that the Marshalls' approach is different from the continuous treatment rule. The highest court in Maryland addressed this directly, explaining the continuous treatment rule was "lifeless in Maryland" and nothing prevented the plaintiffs from holding a physician accountable for acts of negligence occurring within the repose period. *Jones v. Speed*, 577 A.2d 64, 67-68 (Md. 1990). There, as here, the case involved alleged failure to diagnose cancer on multiple occasions. Texas has a similar decision. *King v. Sullivan*, 961 S.W.2d 287, 290-292 (Tex. Ct. App. 1997). There, as here, the plaintiff's expert identified "separate, date-certain breaches." *Id.* at 292.

Dr. Roane believes South Carolina has already rejected the Marshalls' rule, deeming the "continuous tort rule" to be different than the "continuous treatment rule." It is difficult to square Dr. Roane's argument with *Harrison* for two reasons. First, *Harrison* described the continuing tort rule as a rule that *no* cause of action for negligence accrues until the end of a course of treatment. 354 S.C. at 139, 580 S.E.2d at 114. Second, *Harrison* affirmed a verdict for the negligence occurring within the repose period, albeit a symbolic verdict of \$1. *Id.* at 140, 580 S.E.2d at 115. Dr. Roane must also deal with *Janssen* and offer some explanation why she should get to lump multiple acts of negligence together but her patients should not have the same opportunity. *Janssen* correctly explains a defendant's claim to repose is "vitiating" when a case presents a series of discrete wrongs. 414 S.C. at 78, 777 S.E.2d at 199-200.

Petitioners' true argument is that there are no discrete wrongs here; they think the Marshalls' have suffered only one cumulative wrong and may not dissect this wrong into parts that are not time-barred. This is the approach the state of Georgia follows. The

Georgia Supreme Court held, in a 4-3 decision, that the only “injury” in a repeat misdiagnosis case is the original misdiagnosis. *Kaminer v. Canas*, 653 S.E.2d 691, 695 (Ga. 2007). The court acknowledged repeated breaches of the standard of care “may well constitute new and separate instances of professional negligence,” *id.*, but despite this recognition, the majority held Georgia’s deadline statutes are not ultimately tied to the occurrence of a negligent act or omission but are tied to the date of the injury; in a misdiagnosis case, the date of the original misdiagnosis. See 653 S.E.2d at 695.

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

The dissent in *Kaminer* explains why this view is wrongheaded: each time a medical condition is wrongly misdiagnosed, the patient—at a minimum—has to pay additional money for the wrong medical treatment, suffer additional stress and anxiety while the true disease goes unchecked or gets worse, and these are further invasions of the plaintiff’s rights tied directly to the additional breaches of the standard of care. *Id.* at 698-99. A member of the Georgia Court of Appeals has called that state’s body of precedent confusing and difficult to apply. 691 S.E.2d at 568. The Marshalls were unable to locate any instance where Georgia’s decisions have been favorably cited outside that jurisdiction.

South Carolina law has not typically tied a negligence claim to whether the plaintiff can prove a “new” injury. The law requires a defendant’s negligence cause “damages.” (Appellants’ Brief, pp.14-15) (citing *Grier v. AMISUB*, 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012)). The Marshalls’ rule gives maximum effect to the statute of repose’s legitimate application, is consistent with South Carolina’s precedent, and is supported by decisions in other jurisdictions. To the extent Georgia’s rule applies outside the scenario of a “cumulative wrong” when there is only a single injury, Georgia’s approach is mistaken and South Carolina should not follow suit.

C. Dr. Roane’s error preservation argument is wrong. The record plainly discloses the Marshalls repeatedly told the circuit court they were only suing for negligence that happened within the unexpired repose period.

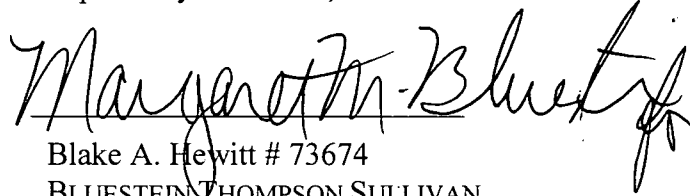
The Marshalls’ argument has been in this lawsuit since the lawsuit’s inception. The very first pleadings alleged repeated failures to properly monitor Mrs. Marshall’s elevated protein levels and repeated failures to change course in the face of persisting and non-responsive symptoms that occurred within the repose period. Noone hid the history that was outside the deadline. The pre-suit affidavits set out Mrs. Marshall’s full treatment history. (R.pp.388-391, 397-402).

After the summary judgment hearing the Marshalls wrote the circuit court letters explaining it did not matter whether there were acts of negligence that occurred outside the repose period because they were only suing for negligence that happened within the deadline. (R.pp.405-406, 417-418). They made the same argument on rehearing, (R.p.208, line 13 - p.211, line 8), and are making the same argument now.

CONCLUSION

Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. The Court of Appeals was right to reverse. This Court should affirm that reversal.

Respectfully submitted,



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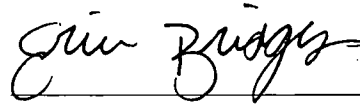
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The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioners with a copy of the *Brief of Respondents* by mailing copies of the same by United States Mail with first class postage prepaid to the following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

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A handwritten signature in cursive script that reads "Erin Bridges". The signature is written in dark ink and is positioned above a horizontal line.

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November 6, 2017