THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

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

Case No. 2011-CP-10-0934

On Petition for a Writ of Certiorari to the Court of Appeals

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

Supreme Court Case No. 2016-001936

Virginia L. Marshall and Todd W. Marshall,

Respondents,

v.

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

Petitioners.

REPLY BRIEF OF PETITIONERS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Dr. Roane would respectfully make the following points in reply to the Marshalls.

ARGUMENT IN REPLY

1. As explained in Dr. Roane's principal brief, it is already conclusively established that the Marshalls' claims arise out of a continuing tort and that there are no subsequent acts (plural) of negligence at issue—and the Marshalls do not argue otherwise.

In her principal brief, Dr. Roane explained that, for the purpose of deciding this appeal, it is already conclusively established that the Marshalls' claims arise out of a continuing tort and that there are no subsequent *acts* (plural) of negligence at issue. (*See generally* Roane Br. pp. 8-12.) Nowhere in their responsive brief do the Marshalls address—much less refute—this point. (*See generally* Marshall Br.)

2. Because it is already conclusively established that their claims arise out of a continuing tort and that there are no subsequent acts (plural) of negligence at issue, the Marshalls' argument fails of its essential factual premise.

According to the Marshalls, the Court of Appeals correctly reversed the trial court for these reasons: (a) it followed the statutory language; (b) it honored the legislative intent, (c) it upheld this Court's precedents, most notably *State v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015); and (d) it wisely found Georgia law to be unpersuasive. (*See generally Id.* at pp. 4-11.) An essential premise behind every one of these reasons, i.e., underlying the entirety of the Marshalls' argument, is that this is a case of "serial, repeated" *acts*

(plural) of negligence,[1] "a series of discrete wrongs." (*Id.* at p. 7; *see also id.* at p. 1 ("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."); *id.* at p. 4 ("The [medical malpractice] statute of repose does not grant immunity for serial, repeated negligence. . . . 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."); *id.* at p. 5 ("When read naturally [the repose provision of § 15-3-545(A)] 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.") (emphasis in original); *id.* at p. 6 ("It makes no sense to grant immunity for repeat malpractice."); *id.* at p. 7 ("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

[1] (*Id.* at p. 5 (original bold print omitted).)

'vitiated.'") (citing *Janssen*, 414 S.C. at 78, 777 S.E.2d at 199-200); *id.* at p. 9 ("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.") The problem with this, however, is that, again, as explained in Dr. Roane's principal brief, for the purpose of deciding this appeal it is already conclusively established that the Marshalls' claims arise out of a *continuing tort* and that there are *no* subsequent *acts* (plural) of negligence at issue, *no* "discrete," "independently actionable" wrongs. (*See generally* Roane Br. pp. 8-12.) In other words, the essential factual premise underlying the entirety of the Marshalls' argument is already conclusively established to be false. And, as noted in No. 1 above, nowhere in their responsive brief do the Marshalls address—much less refute—this point.

3. As explained in Dr. Roane's principal brief, the Court of Appeals overlooked or misapprehended the import of this Court's decision in *Harrison*[2]—and so too have the Marshalls.

In her principal brief, Dr. Roane explained that the continuous treatment rule and continuing tort rule are not one and the same but are, rather, separate concepts that the *Harrison* Court separately addressed and separately rejected. (Roane Br. pp. 5-6.) Citing *Harrison*, Dr. Roane also explained what the continuing tort rule is: a doctrine, adopted in Georgia, under which the statute of limitations for claims

[2] *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003).

arising out of a continued tortious act (i.e., a negligent or tortious act of a continuing nature that produces injury in varying degrees over a period of time) does not begin to run until the continued tortious act comes to an end. (*Id.* at p. 6.) And Dr. Roane further explained how the *Harrison* Court declined to adopt the continuing tort rule because, even in Georgia, the continuing tort rule was inapplicable to actions for medical malpractice since it would nullify the legislative intent behind that state's statute of repose, which was the very "same reason" that the *Harrison* Court also (as explained earlier in its opinion) rejected adoption of the continuing treatment rule; thus, to avoid nullifying the legislative intent behind our state's medical malpractice statute of repose, the *Harrison* Court declined to adopt both the continuous treatment rule and the continuing tort rule. (*Id.* at pp. 6-8.)

Accordingly, Dr. Roane identified the following proposition for which *Harrison* stands, and for which the Court of Appeals failed to account 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.*

(*Id.* at p. 8.) In other words, in the case of a continuing tort—which, as explained elsewhere, is conclusively established to be what we have here—even though continuing in nature and producing injury in varying degrees over a period of time, the tort is indivisible and cannot be fractionalized (as the Marshalls would here), and the whole of it dates back to its inception. Thus, Dr. Roane contends, the whole of the negligent conduct underlying the Marshalls' claims is indistinct and indivisible from that which they (the Marshalls) acknowledge to be "stale,"[3] and the Marshalls' (admitted) effort to "tailor [their] allegations so that they would satisfy the statute of repose"[4] is unavailing.

The Marshalls make but two points in challenge to the foregoing. First, they claim "*Harrison* described the continuing tort rule as a rule that *no* cause of action for negligence accrued until the end of a course of treatment." (Marshall Br. p. 9 (emphasis in original).) Though, in any event, it is unclear how this is supposed to undermine Dr. Roane's reasoning, the Marshalls are simply incorrect in this regard. As reflected above (and in Dr. Roane's explanation of *Harrison* in her principal brief), the continuing tort rule does not affect accrual of a cause of action but rather the running of the statute of limitations. And as for the Marshalls' second point, that *Harrison* affirmed a verdict for negligence occurring within the

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[3] (Return to Cert. Pets. p. 8.)

[4] (Marshall Br. [Ct. App.] p. 15.)

repose period,[5] this is of no moment because, as the *Harrison* Court itself made clear via footnote, the instant question was not before it. 354 S.C. at 140, 580 S.E.2d at at 115, n. 5 ("We note, however, if the action is one for medical malpractice, there is also the six-year statute of repose. *See* § 15-3-545. Consequently, it is unclear how this statute would interact with the seven years allowed by [S.C. Code Ann. §§] 15-78-110 and 15-3-40. In any event, because these questions have not been raised by the parties, they need not be resolved for disposition in the instant case.").

In this part of the Marshalls' brief, they also cite *Janssen* and charge that Dr. Roane must "deal with [it] and offer some explanation why she should get to lump multiple acts of negligence together but her patients should not have the same opportunity." (Marshall Br. [Sup. Ct.] p. 9.) Dr. Roane trusts that she has adequately dealt with *Janssen* elsewhere by showing that it is inapposite on account of the established facts on which this appeal must be decided, i.e., by showing—as, again, the Marshalls never actually dispute—that it is already conclusively established that their claims arise out of a *continuing tort* and that there are *no* subsequent *acts* (plural) of negligence at issue.

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[5] (*Id.*)

4. Again, although *Harrison* alone, i.e., even without consulting out-of-state authority, supports the trial court's summary judgment to Dr. Roane, Georgia's law, statutory and decisional, is in line with South Carolina's.

Dr. Roane would underscore the Marshalls' concession that the relevant statutory "language is virtually identical." (Marshall Br. p. 10.); *see also Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. . . . What a legislature says in the text of a statute is considered the best evidence of legislative intent or will.") (internal citations and quotation marks omitted). Also, as noted in Dr. Roane's principal brief, in *Howell v. Zottoli*, 302 Ga. App. 477, 691 S.E.2d 564 (Ga. Ct. App. 2010), a case which post-dates and discusses the *Kaminer*[6] decision cited by the Marshalls and the Court of Appeals, it was expressly observed that "[t]he test for determining when [Georgia's statutory] period of repose begins is based on the determination of when the *negligent act* causing the injury occurred." 302 Ga. App. at 479, 691 S.E.2d at 566 (emphasis added). Georgia does not, as the Marshalls contend, adhere to the view that "the *only* 'injury' in a repeat misdiagnosis case is the original misdiagnosis[;]"[7] rather, it distinguishes 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.,

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[6] *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691 (2007).

[7] (Marshall Br. p. 10 (emphasis added).)

negligent act), even though it may worsen over time, and that of a truly "'new' condition or injury" associated with a "subsequent negligent act." *Howell*, 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 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 she has explained elsewhere, Dr. Roane would again note that, in rejecting the continuous tort rule, the *Harrison* Court expressly

followed Georgia's lead.

5. Dr. Roane's error preservation argument is right.

In regard to her error preservation argument, Dr. Roane would respectfully note the rather obvious brevity and generality of the Marshalls' counterargument, which, Dr. Roane submits, is a function of the record leaving little (in point of fact, no) room for rebuttal. Simply put, the record shows that the Marshalls' argument to the trial court, i.e., their original argument in opposition to Dr. Roane's motion for summary judgment, before they moved for reconsideration, is just not the same as their argument to the Court of Appeals: The Marshalls' original argument was *fact* based; however, their appeal was/is based on supposed error in regard to points of *law* that were not originally raised. (*Compare* R. pp. 174-203 *and* 405-18 *with* Marshalls Br. [Ct. App.].)

More specifically, in their principal brief to the Court of Appeals, the Marshalls made three arguments. The first was the linchpin, and it was one of statutory construction, that § 15-3-545 "means what it says. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future." (Marshall Br. [Ct. App.] p. 6.) The second clarified that their position does not rely on the continuous treatment rule. (*Id.* at p. 10.) And the third criticized the trial court's citation to Georgia authority in support of its ruling because, according to the Marshalls, Georgia's medical malpractice statute of

repose operates differently than South Carolina's. (*Id.* at p. 13.) To see that the Marshalls' appellate arguments are not preserved for review one must simply look back upon the record to see that they (their appellate arguments) were not made to the trial court originally. Indeed, the Marshalls' counterargument does not really push back on this point other than perhaps to suggest that in some broad, general way their appellate arguments were voiced to the trial court originally—which, even so, would not have been sufficient to preserve them. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); *see also Janssen*, 414 S.C. at 60, 777 S.E.2d at 190 ("Janssen's 'continuing objection' at trial concerning the propriety of counsel's statements to the jury was limited to relevance, which is an entirely different basis than the inflammatory/unduly prejudicial argument that Janssen now advances on appeal. Thus, even generously construing Janssen's pre-trial objection as sufficient to preserve the objection, Janssen's claim is nonetheless procedurally barred from appellate review because Janssen argues a different basis on appeal than was argued at trial.") (citing *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal.").) And, in any event, the record is clear that, at no time prior to moving for reconsideration, did the Marshalls actually make the statutory construction

argument that is the cornerstone of their appeal.

ADOPTION OF OTHER ARGUMENT/ANALYSIS

To the extent not inconsistent herewith, Dr. Roane hereby joins in and adopts as her own the argument/analysis presented by the Other Petitioners in their briefing to this Court.

CONCLUSION

For the foregoing reasons (along with those set forth in her principal brief), Dr. Roane asks this Honorable Court to reverse the Subject Decision (of the Court of Appeals) and to affirm the summary judgment granted her by the trial court.

Respectfully submitted,
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