

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

R. Markley Dennis, Jr., Circuit Court Judge

Circuit Court Cases No. 2012-CP-10-2867 and 2011-CP-10-8313

Opinion No. 5535 (S.C. Ct. App. filed February 7, 2018)
Court of Appeals Case No. 2015-001463

Clair Craver Johnson, Respondent,

v.

John Roberts, M.D., Petitioner.

And

Clair Craver Johnson, Respondent,

v.

Medical University of South Carolina, Petitioner.

PETITION FOR A WRIT OF CERTIORARI
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PROLOGUE

We reiterate this Court’s longstanding principle of error preservation. “Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule.” . . . The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.

—The Supreme Court of South Carolina¹

¹ *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532–33, 564 S.E.2d 322–23 (2001) (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 65 (1999)).

CERTIFICATION OF COUNSEL

By and through his undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Petitioner John Roberts, M.D. (“Dr. Roberts”), certifies that the Court of Appeals filed its opinion in this case (the “Subject Decision”) on February 7, 2018 (J.A.² at 622–28); that he timely petitioned for rehearing, including in his petition a suggestion for rehearing en banc (J.A. at 629–54); and that his petition has been finally ruled on, the Court of Appeals denying it by order filed April 18, 2018, rejecting his suggestion for rehearing en banc. (J.A. at 671–74.)

² As reflected in the above caption, Dr. Roberts is one of two petitioners in this matter (collectively, the “Petitioners” or the “Defendants”). Petitioner Medical University of South Carolina (“MUSC”) is represented by separate counsel and is separately petitioning for a writ of certiorari; however, Petitioners are submitting a Joint Appendix (“J.A.”).

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in finding that “[Ms. Johnson³] . . . preserved her [appellate] arguments . . . and . . . adequately appealed the circuit court’s order”⁴ and not deciding this appeal in favor of Petitioners on preservation grounds?
- A. Did the Court of Appeals fail to recognize that Ms. Johnson only made one argument on appeal?
- B. Did the Court of Appeals fail to apply established preservation rules under which Ms. Johnson’s appellate argument clearly is unpreserved?
- C. Did the Court of Appeals misapprehend this Court’s decision in *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012)?
- D. Is the Subject Decision irreconcilable with South Carolina precedent placing the burden on the appellant to demonstrate reversible error?
- II. Assuming, *arguendo*, the Court of Appeals did not err in reaching the merits, did it err in finding reversible error in the circuit court’s grant of summary judgment and upsetting the circuit court’s conclusion that Ms. Johnson’s claims are barred by the medical malpractice statute of repose in S.C. Code Ann. § 15-3-545(A)?
- III. Again, assuming, *arguendo*, the merits are properly reached in deciding this appeal, in light of the Court of Appeals’ reliance on its prior decision in *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016), *cert. granted*, August 23, 2017, and that case’s pendency before this Court on writ of certiorari, should the Court grant the instant certiorari petitions or at least hold them in abeyance pending its decision in *Marshall*?

³ “Ms. Johnson” is, of course, Respondent, Clair Craver Johnson.

⁴ (J.A. at 652.)

STATEMENT OF THE CASE

In November 2011, Ms. Johnson filed a medical malpractice lawsuit against MUSC and a notice of her intent to file a second such suit against Dr. Roberts. In May 2012, Ms. Johnson did indeed file suit against Dr. Roberts,⁵ and the parties consented to the circuit court's consolidation of the two cases.

Both cases involve allegations of professional negligence relating to Ms. Johnson's treatment with electroconvulsive therapy ("ECT") at MUSC on a number of occasions while she was also under the care of her private psychiatrist Dr. Roberts for certain mental health problems. The alleged negligence dates back to at least 2003, when the course of treatment via ECT (which continued periodically until 2008) was commenced. According to Ms. Johnson, the ECT was involuntary and improper and caused her damages, including loss of memory and exacerbated mental impairment. (*See generally* R. pp. 10–17, 22–30.)

After a period of discovery, both Defendants moved for summary judgment, contending Ms. Johnson's claims were time-barred under § 15-3-545(A). (R. pp. 52–190.) The motions were heard in the circuit court on January 9, 2014, the Honorable R. Markley Dennis, Jr., presiding. (R. pp. 191–207.) The court granted summary judgment in Defendants' favor by order filed February 4, 2014, and

⁵ Ms. Johnson's operative complaint against Dr. Roberts is her amended complaint dated May 15, 2012. (R. pp. 10–13.)

thereafter denied Ms. Johnson's motion for reconsideration. (R. pp. 209–220, 310–11.) Ms. Johnson appealed.

As stated above, the Court of Appeals filed the Subject Decision on February 7, 2018, reversing the circuit court. (J.A. at 622–28). Dr. Roberts timely petitioned for rehearing, suggesting rehearing en banc (J.A. at 629–54), as did MUSC. (J.A. at 655–70.) The instant petition timely follows the Court of Appeals' denial of rehearing by order filed April 18, 2018. (J.A. at 671–74.)⁶

⁶ In this regard, Dr. Roberts would note that, by orders filed May 21, 2018, the Court extended the time for Petitioners to serve and file their respective petitions for a writ of certiorari and the Joint Appendix until May 25, 2018.

ARGUMENT

- I. The Court of Appeals erred in finding that “[Ms. Johnson] . . . preserved her [appellate] arguments . . . and . . . adequately appealed the circuit court’s order” and not deciding this appeal in favor of Petitioners on preservation grounds.**
- A. The Court of Appeals failed to recognize that Ms. Johnson only made one argument on appeal.**

The Subject Decision is worded as if Ms. Johnson presented the Court of Appeals with multiple appellate arguments. (*See generally* J.A. at 622–28 (making reference to Ms. Johnson’s “arguments,” plural).) As both Petitioners pointed out in their appellate briefs, however,⁷ Ms. Johnson only made one argument on appeal, and it is this: *that the circuit court erred in granting summary judgment in favor of Respondents on the basis of the repose provision in § 15-3-545(A) (i.e., the medical malpractice statute of repose) because there existed a material issue of fact as to when (i.e., at what point in time) Ms. Johnson’s treatment with ECT constituted negligence.* (*See* J.A. at 568 (stating one argument and identifying “the error” on the part of the circuit court as “being that [ECT] did not cause identifiable injury to Ms. Johnson until no earlier than 2009-2010 thereby triggering a three year period in which to initiate a claim pursuant to S.C. Code Ann. § 15-[3-]545(A)”) (emphasis omitted); J.A. at 570 (stating one issue and identifying “the error” on the part of the circuit court the same as quoted above);

⁷ (*See generally* J.A. at 586–90, 604–05.)

J.A. at 571 (“[Ms. Johnson] contends that the evidence of the date triggering the statute of repose is *not a question of law* for the Court *but is one of fact.*”) (emphasis added); J.A. at 574 (“Given testimony that [Ms. Johnson] first experienced problems with [ECT] in 2009 *a jury issue is present* over the timeliness of these actions. The issue is not whether use of [ECT] is negligent from the first treatment but at what point (number and timing and type of [ECT]) does use of [ECT] constitute negligence.”) (emphasis added); J.A. at 576 (“*A fact issue* over when [ECT] could have been found to have caused permanent brain damage is present and requires action by a *jury.*”) (emphasis added); J.A. at 576–77 (“[T]he presence of eighty-six (86) acts over a period beginning on December 2, 2009 and running to and including June 26, 2008, each of which may not be characterized an act of negligence but collectively at some point can be so characterized . . . cannot be determined by the Court as a matter of law.”); J.A. at 577 (“A fact issue as to **when** Clair Johnson allegedly sustained injuries [is] present in this action Ms. Johnson was treated for her condition by [ECT] from 2003 to 2008 and the question is unresolved as to when and whether the use of [ECT] caused her permanent mental issues.”) (emphasis in original).)

B. The Court of Appeals failed to apply established preservation rules under which Ms. Johnson’s appellate argument clearly is unpreserved.

The Subject Decision does not actually address any of the established rules of preservation. Indeed, only one authority is cited in this regard, this Court’s decision in *Atlantic Coast Builders*, 398 S.C. 323, 730 S.E.2d 282, and essentially, this is the proposition for which it is cited: Ms. Johnson’s argument is preserved because (in the Court of Appeals’ view, at least) it is not clearly unpreserved. (*See* J.A. at 652.) Dr. Roberts will address why he believes the court misapprehended *Atlantic Coast Builders, infra*, but he would first draw attention to the established preservation rules that the Court of Appeals failed to apply—and under which it is indeed clear that Ms. Johnson’s argument is unpreserved.

As the Court of Appeals itself acknowledged in the Subject Decision, Ms. Johnson’s appellate argument is different from the argument she presented to the circuit court. (*See* J.A. at 652 (“The factual theory [Ms. Johnson] presented to the circuit court is not identical to the factual theory she argues here.”));⁸ *see also id.*

⁸ To be clear, in no way does the court’s use of the language “not identical to the factual theory” diminish Ms. Johnson’s preservation problem. As a practical matter, the court’s language is merely another way of saying her appellate argument is *different* from what she argued below, which, as further explained, *infra*, is plainly contrary to establish preservation rules. Moreover, in this particular case, as explained in I.A. above, the new “factual theory” on which Ms. Johnson’s argument is premised cannot possibly be deemed immaterial here, where her sole argument on appeal is about the supposed existence of a *factual* question—her new “factual theory” is a new argument entirely.

(stating, “[Ms. Johnson’s] statement of issues on appeal is broad enough to encompass *the argument she presents to this court . . .*,” and, thus, necessarily implying that the argument she presented below is not “the argument she present[ed] to [the Court of Appeals]”) (emphasis added). This alone renders Ms. Johnson’s argument clearly unpreserved and requires that her appeal be decided (against her and in favor of Petitioners) on preservation grounds because, under South Carolina law, where an issue or argument is not preserved, it is error for an appellate court to reach the merits—the court *must* decide the matter on preservation grounds. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (instructing that South Carolina’s preservation requirements are “mandatory”); *see also id.* at 23, 602 S.E.2d at 779 (“[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration.”); *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 479 n. 5 (2012) (“Preservation in South Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached.”) (citing *State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed)); *see also Elam*, 361 S.C. at 24, 602 S.E.2d at 780 (“South Carolina

appellate courts do not recognize the ‘plain error rule,’ under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party.”); *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420–22, 526 S.E.2d 716, 723–24 (2000) (explaining, “as 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[,] . . . [but] [a]n appellate court may not, of course, *reverse* for any reason appearing in the record.”) (emphasis in original).

Accordingly, because Ms. Johnson’s appellate argument is different from her argument to the circuit court, the circuit court, of course, did not rule on it; therefore, her appellate argument is unpreserved pursuant to the established requirement that, to be preserved, all issues and arguments must be raised to and ruled on below. *Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80 (“Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.”); *see also Kennedy*, 349 S.C. at 532–33, 564 S.E.2d 322–23 (“South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.”). Moreover, because this new argument was Ms. Johnson’s *only* appellate argument, she never actually presented any challenge to what the circuit court *did* rule on; therefore, the circuit court’s ruling is the law of the case, any potential challenge thereto is abandoned, and affirmance of the circuit court’s summary

judgments is mandated under the two-issue rule. *See 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.”); *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); *Anderson v. S.C. Dep’t of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (noting that the two-issue rule is applicable to circuit court orders); *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).

C. The Court of Appeals misapprehended this Court’s decision in *Atlantic Coast Builders*: that case actually supports Dr. Roberts’s contention that this appeal should have been decided in favor of Petitioners on preservation grounds.

As noted above, the Court of Appeals’ preservation analysis relies on a single legal authority: *Atlantic Coast Builders*. (See generally J.A. at 651–52.) Citing *Atlantic Coast Builders*, the court states, “Our supreme court has cautioned that issue preservation ‘is not a ‘gotcha’ game aimed at embarrassing attorneys or

harming litigants.”” (*Id.* at 5 (citing *Atlantic Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285) (emphasis added by the *Court of Appeals*, i.e., this emphasis was *not* in *this Court’s* opinion).) Respectfully, the court misapprehended *Atlantic Coast Builders*.

The Subject Decision isolates the “‘gotcha’ game” language and does not place it in proper context. In context, it is clear that the *Atlantic Coast Builders* majority was actually making a very different point (indeed, pretty much the opposite point) than that reflected in the Subject Decision.

Explaining its disagreement with Chief Justice Toal (who, as she stated in a separate opinion—to which, it should be noted, she was the lone subscriber—that she *would* reach the merits of the appellant’s arguments) and why it *could not* do so because they were unpreserved, the *Atlantic Coast Builders* majority stated as follows:

The Chief Justice would not find that the two-issue rule applies in this case. The thrust of her argument is that the master’s order does not award damages for unjust enrichment, correctly noting that the actual expenditures made by Atlantic are not a proper measure for unjust enrichment. Thus, in her view, the master did not enter judgment in favor of Atlantic on its unjust enrichment claim and no unappealed theory of liability exists to trigger the two-issue rule.

However, our review of the record shows the master intended to award damages for all causes of action, including unjust enrichment. In fact, he went so far as to specifically state he was excluding certain expenditures

from his award because they did not unjustly enrich Lewis. While his calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case. Therefore, the master awarded damages to Atlantic based on a theory of unjust enrichment, and because the master made this alternate finding of liability from which Lewis did not appeal, the two-issue rule bars us from considering Lewis's arguments regarding negligent misrepresentation and breach of contract.

In the Chief Justice's view, applying the two-issue rule to this case is an "over-zealous application" of our long-standing error preservation rules because she does not believe the rule's application is clear. We certainly share her concerns about a hypertechnical application of a procedural bar to appellate arguments, *but error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that we do not reach issues which were not ruled upon by the trial court. We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us.* In fact, a rule which would permit such an "appeal by consent" is contrary to the very core of our preservation requirement

Nevertheless, *these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it.* This is so regardless, to use the Chief Justice's terms, of the "life-blood litigant or criminal defendant" before us. However, *this is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function.* While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, *we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.*

Here, we do not believe the existence of this procedural bar is questionable and would place no weight on the fact that neither the parties nor the court of appeals raised it. Therefore, the two-issue rule precludes our consideration of Lewis's arguments.

398 S.C. at 329–30, 730 S.E.2d at 285 (emphasis added).

Contrary to the view endorsed by the Subject Decision, the majority in *Atlantic Coast Builders* did not at all “caution[]” that preservation rules are not a “gotcha game;” rather, it underscored the importance of these rules, that they should not be looked at as a mere “gotcha game,” “but rather . . . [as] settled principles that serve an important function” that should consistently be applied by the appellate court where they applicable—even in cases (unlike the instant case) where they were not raised by the parties themselves.

D. The Subject Decision is irreconcilable with South Carolina precedent placing the burden on the appellant to demonstrate reversible error.

Respectfully, reading *Atlantic Coast Builders* in the context provided above shows that the language cited by the Court of Appeals in the Subject Decision about it perhaps being good practice to reach the merits of an issue/argument when preservation is “doubtful” is at best *dicta*. Even assuming, *arguendo*, the Subject Decision is correct in finding that Ms. Johnson's argument was neither clearly preserved nor clearly unpreserved, the Court of Appeals' decision to reach the merits in such a situation is nonetheless irreconcilable with established precedent

according presumptive validity to an appealed order and placing an affirmative burden on the appellant to preserve and present sufficient appellate argument to demonstrate reversible error. *See, e.g., 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).

II. Assuming, *arguendo*, the Court of Appeals did not err in reaching the merits, it erred in finding reversible error in the circuit court’s grant of summary judgment and should not have upset the circuit court’s conclusion that Ms. Johnson’s claims are barred by the medical malpractice statute of repose in § 15-3-545(A).

The Court of Appeals overlooked/misapprehended the premise of Ms. Johnson’s argument about the supposed “cumulative effect” of ECT. (*See* J.A. at 574 (“The issue is not whether use of [ECT] is negligent from the first treatment but at what point . . . does use of [ECT] constitute negligence.”); J.A. at 575 (“[Ms. Johnson] contends that the *cumulative effect* of these [ECT] treatments constituted an independent tort”) (emphasis added).) This idea of divorcing cumulative

effect from causative origin is not only illogical but also contrary to § 15-3-545(A).⁹

The court overlooked/misapprehended Ms. Johnson's conflation of the date of accrual of a cause of action¹⁰ with the date of occurrence under § 15-3-545(A). As observed in *Langley v. Pierce*, however, in effecting the economic balance struck by the legislative body, "[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." 313 S.C. 401, 404, 438 S.E.2d 243, 244 (1993) (emphasis added) (citation omitted).

Moreover, in *Harrison v. Bevilacqua*, this Court "declin[ed] to adopt the continuous treatment rule or the doctrine of continuing tort." 354 S.C. 129, 141, 580 S.E.2d 109, 115 (2003). Quoting its prior decision in *Preer v. Mims*, the

⁹ In pertinent part, § 15-3-545(A) provides as follows:

In any action . . . 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 of occurrence, or as tolled by this section.

¹⁰ See *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004) ("A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.") (citation omitted).

Harrison Court summarized the “continuous treatment rule” as follows:

“The so-called ‘continuous treatment’ rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient’s illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated-unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.”

Id. at 135, 580 S.E.2d at 112 (quoting *Preer*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)).

The *Harrison* Court then explained that—notwithstanding numerous policy considerations supporting adoption of the rule—“the continuous treatment rule should not be judicially adopted,” because, “[p]ut 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 above¹¹.” *Id.* at 136–38, 580 S.E.2d at 112–13; see also *Epstein v. Brown*, 363 S.C. 372, 378, 610 S.E.2d 816, 819 (2005) (“Notwithstanding the very legitimate policy rationales in favor of

¹¹ Among “the statutes discussed above,” was, of course, the medical malpractice statute of repose in § 15-3-545(A). *Id.* at 137-38, 580 S.E.2d at 113 (explaining, “[t]he primary argument against adoption of the continuous treatment rule is that it offends the clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose;” then expressly citing the repose provision in § 15-3-545(A) and noting the “economic balance struck by the legislative body” in enacting such a statute of repose) (citations omitted).

adoption of a continuous treatment rule, we declined to adopt it, finding the Legislature has set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability”) (citing *Harrison*, 354 S.C. at 136–37, 580 S.E.2d at 113).

The *Harrison* Court next addressed—and rejected—Harrison’s additional argument that it should adopt the “continuing tort doctrine.” *Id.* at 139, 580 S.E.2d at 114 (“Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree.”). It explained,

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)).

Having explained the continuing tort theory, the *Harrison* Court further explained that, in Georgia, “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)). “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 [Harrison’s] argument on the *continuing tort doctrine* unavailing.” *Id.* (emphasis added).

Ms. Johnson’s claims, which arise out of a course of treatment initiated in 2003 but were not pursued via legal action until more than six years thereafter, are barred by the medical malpractice statute of repose in §15-3-545(A). Her argument to the contrary is incompatible with that statute (or rather, more specifically—and most importantly—the legislative intent reflected thereby¹²), while the circuit court’s analysis faithfully adheres to the overriding responsibility of ascertaining and effectuating the legislature’s intent.

¹² Of course, “[i]t is well-established that ‘[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.’” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 696 (2012) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). And, with respect to statutes of repose, our Supreme Court has recognized that they are “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.” *Langley*, 313 S.C. at 404, 438 S.E.2d at 244 (emphasis in original).

III. Again, assuming, *arguendo*, the merits are properly reached in deciding this appeal, in light of the Court of Appeals' reliance on its prior decision in *Marshall* and that case's pendency before this Court on writ of certiorari, the Court should grant the instant certiorari petitions or at least hold them in abeyance pending its decision in *Marshall*.

In regard to the merits, the Subject Decision hinged on *Marshall*, 417 S.C. 196, 789 S.E.2d 88, a case which is, as indeed the Court of Appeals recognized in the Subject Decision, presently before this Court on writ of certiorari granted August 23, 2017. Under the circumstances, to the extent the merits need be reached to decide this appeal, the Court should grant the instant certiorari petitions or at least hold them in abeyance pending its decision in *Marshall*.

ADOPTION OF MUSC'S ARGUMENT/ANALYSIS

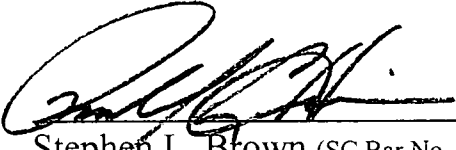
To the extent not inconsistent herewith, Dr. Roberts hereby joins in and adopts as his own the argument/analysis presented by MUSC in support of its separately filed petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, Dr. Roberts asks this Honorable Court to review the Subject Decision via issuance of a writ of certiorari to the Court of Appeals, to reverse the Subject Decision, and to affirm the circuit court's grant of summary judgment.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____


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Charleston, South Carolina

Dated: _____

5/25/18

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

MAY 30 2018

Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

R. Markley Dennis, Jr., Circuit Court Judge

Circuit Court Cases No. 2012-CP-10-2867 and 2011-CP-10-8313

Opinion No. 5535 (S.C. Ct. App. filed February 7, 2018)
Appellate Case No. 2015-001463

Clair Craver Johnson, Respondent,

v.

John Roberts, M.D., Petitioner.

And

Clair Craver Johnson, Respondent,

v.

Medical University of South Carolina, Petitioner.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for John Roberts, M.D., hereby certify that the foregoing **PETITION FOR A WRIT OF CERTIORARI BY JOHN ROBERTS, M.D.** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 25, 2018, properly posted for delivery to the following addressees:

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Respectfully submitted,

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Dated: 5/25/18