

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JUL 06 2018

S.C. SUPREME COURT

Appeal from Charleston County  
Court of Common Pleas

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

Supreme Court Case No. 2018-000914

Clair Craver Johnson, Respondent,

v.

John Roberts, M.D., Petitioner.

And

Clair Craver Johnson, Respondent,

v.

Medical University of South Carolina, Petitioner.

**REPLY TO RETURN TO THE CERTIORARI PETITIONS**  
**BY JOHN ROBERTS, M.D.**

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1. By framing the question presented as she does—i.e., that “[t]his case presents the identical legal question posed before th[is] . . . Court in the pending appeal of *Virginia Marshall v. Kenneth Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016)”—Ms. Johnson underscores (if not outright concedes) the point made in Question/Argument III of Dr. Roberts’s petition. .... 1

2. Ms. Johnson’s rebuttal to Dr. Roberts’s preservation argument is unavailing. .... 2

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While believing, most respectfully, that the merit of his petition for a writ of certiorari is already adequately demonstrated therein, in further support of the said petition, Dr. Roberts<sup>1</sup> makes the following brief points in reply to Ms. Johnson's return:

### POINTS IN REPLY

1. **By framing the question presented as she does—i.e., that “[t]his case presents the identical legal question posed before th[is] . . . Court in the pending appeal of *Virginia Marshall v. Kenneth Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016)”<sup>2</sup>—Ms. Johnson underscores (if not outright concedes) the point made in Question/Argument III of Dr. Roberts's petition.**

For ease of reference, Question III in Dr. Roberts's petition is as follows: “[A]ssuming, *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* . . . 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*?” (Roberts Pet. p. 3 (original bold print omitted).) And, of course, as stated in his Argument III, Dr. Roberts contends that this question ought to be answered in the affirmative. (*See Id.* at p. 20.) Ms. Johnson's framing of the question presented (i.e., the question that she says is presented to this Court by the

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<sup>1</sup> This reply uses the same shorthand references as the petition (such as the reference “Dr. Roberts,” which, of course, refers to Petitioner John Roberts, M.D.).

<sup>2</sup> (Return p. 1.)

pending certiorari petitions) as being the very same as the question still (as of the date of this reply) before this Court for decision in *Marshall*<sup>3</sup> underscores (if not outright concedes) Dr. Roberts’s point that, “[u]nder 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*.”) (Roberts Pet. p. 20.)

**2. Ms. Johnson’s rebuttal to Dr. Roberts’s preservation argument is unavailing.**

First off, Dr. Roberts would clear up a point that Ms. Johnson appears to misapprehend. According to Ms. Johnson, “It is the Petitioners’ primary contention that [she] did not argue that each date of treatment is an occurrence to the circuit court and therefore did not preserve the argument on appeal . . . .” (Return p. 5.) Ms. Johnson is mistaken.

Dr. Roberts’s argument is not so much concerned with what Ms. Johnson did not argue to the circuit court below as it is with the difference between what Ms. Johnson argued below and what she later argued on appeal<sup>4</sup>—and the consequences of this difference under settled preservation principles. More fully set forth in his petition, this is Dr. Roberts’s preservation argument in brief:

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<sup>3</sup> (See Return p. 1.)

<sup>4</sup> Again, as noted in Dr. Roberts’s petition, even the Court of Appeals itself acknowledged that Ms. Johnson’s appellate argument was different from the argument she made to the circuit court. (See Roberts Pet. pp. 8–9.)

because the *only* argument Ms. Johnson made to the Court of Appeals was not an argument she had made to the trial court below, (1) her appellate argument, i.e., the only argument she made to the Court of Appeals, was not preserved for review; (2) any other argument was abandoned, having not been advanced to the Court of Appeals; and (3) in consequence, Ms. Johnson did not present any argument to the Court of Appeals on which the lower court could properly be reversed. (*See generally* Roberts Pet. pp. 6–11.)

In her counter-statement of the case, Ms. Johnson states as follows:

At the trial court hearing on the summary judgment motion . . . [her] counsel . . . unsuccessfully but expressly argued that each date of medical treatment was an individual tort. . . . It is clear that the argument [she] proffered . . . before the trial court was that each individual treatment should be looked at as a separate act of negligence for purposes of determining when the statute of repose begins. . . . [Ms. Johnson] has repeatedly and consistently argued, from the initial argument before the trial court through the appellate levels, that each individual medical treatment should be looked at separately to determine which treatment should properly be considered within the medical malpractice state of repose.

(Return p. 2.) Respectfully, Ms. Johnson is only half right. She is right about what she argued to the trial court—that individual treatments should be viewed as separate acts of negligence for the purpose of determining when the statute of repose began to run—but she is wrong about her having made this argument to the Court of Appeals.

According to Ms. Johnson, “[she] has consistently and emphatically argued that each individual treatment should be looked at separately for purposes of determining what is barred by the medical malpractice statute of repose.” (Return pp. 6–7.) That is simply not so. As more fully explained in Dr. Roberts’s petition,<sup>5</sup> the argument Ms. Johnson made to the Court of Appeals was not that individual treatments constituted individual torts that should be viewed as separates acts of negligence for the purpose of determining when the statute of repose began to run; indeed, it was very much the opposite: that individual treatments were not necessarily tortious at all and that the trial court erred in granting summary judgment not because it had failed to view each treatment as an individual act of negligence but because there existed a genuine/material question of fact as to when some number of individual treatments, though none of them alone necessarily negligent, came to “collectively” constitute negligence. (See 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); (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]

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<sup>5</sup> (See generally Roberts Pet. pp. 6–7.)

constitute negligence.”); J.A. at 575 (“[Ms. Johnson] contends that the *cumulative effect* of these [ECT] treatments constituted an independent tort . . . .”) (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.”.)

Lastly, like the Court of Appeals, Ms. Johnson misapprehends this Court’s decision in *Atlantic Coast Builders*.<sup>6</sup> That case actually supports Dr. Roberts’s contention that this appeal should have been decided in favor of Petitioners on preservation grounds. According to Ms. Johnson, in *Atlantic Coast Builders*, this Court established a “require[ment]” that an issue/argument must be deemed preserved unless it is “*clearly* unpreserved.” (Return p. 7 (“[Ms. Johnson’s] argument is preserved and, at the very least, is not clearly unpreserved, as required by the South Carolina Supreme Court in *Atlantic Coast Builders* . . . .”) (emphasis in original).) As explained in Dr. Roberts’s petition, the *Atlantic Coast Builders* Court established no such requirement. (See generally Roberts Pet. pp. 11-14.) While it is true that the *Atlantic Coast Builders* majority recognized, in *dicta*, that it “may be good practice for [an appellate court] to reach the merits of an issue

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<sup>6</sup> 398 S.C. 323, 730 S.E.2d 282 (2012).

when error preservation is doubtful,” the Court did so only in the process of making a more important point.<sup>7</sup> That point being that what is indeed “required” of an appellate court is its “adherence to settled principles” of issue preservation and “follow[ing] [of] our longstanding precedent [to] resolve the issue on preservation grounds when it clearly is unpreserved”<sup>8</sup>—as, most respectfully, should have been done by the Court of Appeals here.

### CONCLUSION

For the foregoing reasons (and, to the extent not inconsistent herewith, any others advanced by MUSC on reply), 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.

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<sup>7</sup> In this regard, Dr. Roberts would also note his Question/Argument I.D. about South Carolina precedent placing the burden on the appellant to demonstrate reversible error. (See Roberts Pet. pp. 14–15.)

<sup>8</sup> (*Id.* at pp. 13–14 (quoting *Atlantic Coast Builders*, 398 S.C. at 330, 730 S.E.2d at 285).)

Respectfully submitted,

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for John Roberts, M.D., hereby certify that the foregoing **REPLY TO RETURN TO THE CERTIORARI PETITIONS 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 July 2, 2018, properly posted for delivery to the following addressees:

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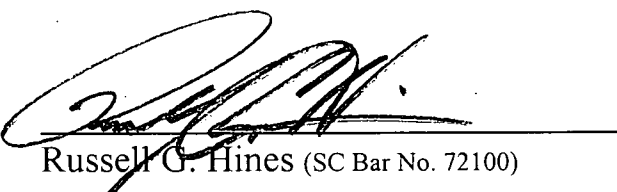
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