

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

The Honorable 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

On Writ of Certiorari to the Court of Appeals
South Carolina 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.

BRIEF OF RESPONDENT

Jonathan Blake Asbill, Esquire
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091; Fax (803) 779-3423
jasbill@brblegal.com File No.: 10517.2
Attorney for Clair Craver Johnson

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STATEMENT OF ISSUES ON APPEAL

- I. **Did the Court of Appeals correctly find that Respondent’s argument was not clearly unpreserved such that it could reach the merits of the trial court’s decision?**

- II. **In a medical malpractice case where doctors breached the standard of care on multiple occasions, did the Court of Appeals correctly hold that each breach triggers the statute of repose and that recent breaches can be actionable even though older breaches are stale?**

COUNTER-STATEMENT OF THE CASE

This is a medical malpractice action that originates from the undisputed fact that the Respondent was ordered by her medical providers, the Petitioners, to undergo eighty-six (86) rounds of electroconvulsive therapy (“ECT”) in which electrical current was directed straight into the Respondent’s brain, resulting in a wide variety of medical impairments. J.A. pp. 568-578. The medical treatments began in December 2003 and continued until June 2008. J.A. p. 572. The Respondent originally filed actions against the Petitioners separately in November 2011 and April 2012, respectively, before having the cases consolidated before the trial court. J.A. p. 575. The Petitioners moved for summary judgment on October 31, 2013, arguing that the Respondent’s “claims are time-barred by the three-year statute of limitations and/or statute of repose for medical malpractice actions set forth in S.C. Code Ann. § 15-3-545(A).” J.A. p. 54. At oral argument for the summary judgment motion, the trial court commented at the outset that “on its face, [Petitioners’ motion] appears to be a slam-dunk. We know that.” J.A. pp. 195-196. In response, counsel for the Respondent expressly argued that each date of medical treatment was an individual tort:

THE COURT: Be happy to hear from you. Tell me why those cases just don’t say what I think that they say.

MR. RAVENEL: My observation about those cases and their applications to the facts of this case are – it’s an unusual case in that this lady received electroconvulsive shock therapy eighty-six times over a several years period of time –

2003 to 2008. Each time she received that, it was a blow to her head, a tort. Each one, --

THE COURT: I hear --

MR. RAVENEL: -- standing alone.

J.A. p. 198. The trial court expressly acknowledged that Respondent had made the argument that each individual treatment was a separately actionable tort when it responded: “[b]ut really this case, it seems to be governed by the repose situation . . . As you [Respondent] stated, each time she received one, it’s another tort, in theory.” J.A. p. 203. Countering the Respondent’s argument before the trial court, the Petitioners argued that “[o]ur position is that the six years starts from the first allegation of medical negligence.” J.A. p. 201. The trial court ultimately adopted the Petitioners’ argument and granted summary judgment to the Petitioners in February 2014 on the basis that the six-year statute of repose¹ had expired on the Respondent’s claims. J.A. pp. 211-222. The trial court held in its summary judgment ruling that the statutory “occurrence” for purposes of determining the beginning of the six-year statute of repose timeframe was “the date of the onset of treatment.” J.A. p. 216.

After the Respondent’s Rule 59(e), SCRCPP, Motion for Reconsideration was denied, the Respondent appealed to the South Carolina Court of Appeals, arguing in her final brief that “[a]ppellant contends that even protection of the medical community cannot justify defining date of occurrence as the date of the initial electroconvulsive treatment. . . . There is evidence from which one could conclude that her damages occurred less than six (6) years from the date of the alleged negligence and within three (3) years of the malpractice alleged to have caused the injury.” J.A. pp. 576-577. The Court of Appeals ultimately reversed the grant of summary judgment, holding that the allegations in the present case were “indistinguishable” from the

¹ Codified as S.C. Code Ann. § 15-3-545(A) (2005).

precedential case of *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016), *reh'g denied* (Aug. 19, 2016) *cert. granted* (August 22, 2017). In *Marshall*, the Court of Appeals held as a matter of law that “[i]n our view, the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for subsequent acts of negligence, even 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.” J.A. p. 628. Thus, the Court of Appeals held in *Marshall* that the term “occurrence,” as used in Section 15-3-545(A), means the time of an alleged negligent treatment, omission, or operation by a medical professional. J.A. p. 628. Relying on this definition, the Court of Appeals reversed the trial court in this case, holding that each ECT treatment within the six-year statute of repose was actionable. J.A. p. 628. The Petitioners requested a rehearing on the ruling which was denied by the Court of Appeals on April 18, 2018. J.A. pp. 629-74. The Petitioners then appealed the decision on the grounds that the Court of Appeals erred in finding that the issues were properly preserved and, even if they were preserved, the interpretation of the word “occurrence” was incorrect.

ARGUMENT

I. The Court of Appeals correctly reached the merits of the case because the issues on appeal were properly preserved.

Petitioners incorrectly contend that Respondent’s appellate arguments differ from the arguments presented to the trial court, rendering the argument unpreserved. To the contrary, Ms. Johnson’s appellate arguments are properly preserved and consistent with the arguments presented to the trial court.

A. The Court of Appeals was correct in finding the issues on appeal to have been preserved because the Respondent’s argument was fairly and properly raised at each stage of review.

“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). “[A]ll that this Court has ever required is that the questions presented for its decision first have been fairly and properly raised in the lower court and passed upon by that Court.” *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 189 (1939). The Petitioners’ briefs do not focus on this foundational rule of preservation, because the trial court clearly and unequivocally understood the argument that Respondent was making that each individual treatment was actionable as a separate tort/occurrence, as indicated when the trial court commented to Respondent’s counsel: “[a]s you [Respondent] stated, each time that she received [ECT], it’s another tort, in theory.” J.A. at 203. If the fundamental rule of preservation is that the trial court have understood and ruled upon the argument in question, then there can be no doubt that the trial court indisputably understood the argument that Respondent was making that each treatment was separately actionable under the medical malpractice statute of repose when the trial court decided to rule in Petitioners’ favor.

Rather than focusing their argument on the predominant preservation rule that asks whether the trial judge understood and ruled upon the argument in question, the preservation argument proffered by the Petitioners before the Supreme Court is that Respondent’s argument before the trial court was not specifically detailed before the Court of Appeals. Petitioner Roberts summarily argues on Page 8 of his brief before the Supreme Court that “Ms. Johnson’s appellate argument is different from the argument she presented to the circuit court.” Respondent disagrees with this contention on its face, as the Respondent’s brief to the Court of Appeals expressly argued that it was improper for the trial court to determine the statutory date of occurrence as the first date of treatment. *See* J.A. p. 576 (“[a]ppellant contends that even protection of the medical

community cannot justify defining date of occurrence as the date of the initial electroconvulsive treatment”). More importantly, as simply as it can be stated, the Court of Appeals clearly understood the statutory “occurrence” argument Respondent was making as the Respondent’s argument constituted the crux of the Court of Appeals’ decision. Throughout the Petitioners’ detailed preservation arguments in their briefs, this simple, logical question is never addressed – if the Respondent did not clearly make its argument to the Court of Appeals, then how did the Court of Appeals understand Respondent’s argument enough to have it form the foundation of its opinion?

The Court of Appeals, having reviewed the Respondent’s brief, obviously understood the contention that Respondent was making that it was improper for the trial court to hold that the statutory “occurrence” in interpreting the statute of repose was the first date of treatment. Respondent must make it clear before the Supreme Court that this contention was, quite literally and exactly, argued in the Respondent’s brief to the Court of Appeals. *See* J.A. p. 576 (“[a]ppellant contends that even protection of the medical community cannot justify defining date of occurrence as the date of the initial electroconvulsive treatment”). Respondent is unable to locate within any of the case law cited by the Petitioners in their briefs the proposition that the Respondent’s argument is not preserved when both the trial court and the Court of Appeals clearly understood the Respondent’s argument and ruled upon it. This is because the Petitioners’ argument is simply not the law with regards to preservation in South Carolina.

This Court acknowledged in *Atlantic Coast Builders v. Lewis* that preservation issues should be resolved “on preservation grounds when it *clearly* is unpreserved.” 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (emphasis added). When it is unclear whether an issue has been preserved, a court should err on the side of preservation. *See Atlantic Coast Builders*, 398 S.C. at

330, 730 S.E.2d at 285 (“[I]t may be good practice for us to reach the merits of an issue when error preservation is doubtful”); *Id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part)(“[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.”). Petitioner Roberts argues in Pages 12-13 of his brief that Respondent and the Court of Appeals completely misconstrue *Atlantic Coast Builders* and that it actually helps the Petitioners’ position. Respondent disagrees and believes the Supreme Court will understand that, in *Atlantic Coast Builders*, the appellant, Lewis, “appealed only the findings of liability for negligent misrepresentation and breach of contract, not unjust enrichment[,]” thus creating an undoubtedly clear ground for preservation based on the fact that an entire cause of action was not appealed from the trial court. *See Atlantic Coast Builders*, 398 S.C. at 328, 730 S.E.2d at 285. In such a situation, clearly there is a preservation issue, unlike in this case. In the present case, summary judgment was issued on one ground, the medical malpractice statute of repose, and that statute and the corresponding issue of when an occurrence begins were expressly appealed and ruled upon by the Court of Appeals. Respondent contends the Court of Appeals correctly applied the law from *Atlantic Coast Builders* that preservation issues should be resolved unless it clearly is unpreserved, as it was in *Atlantic Coast Builders*. Respondent contends the statute of repose and occurrence issues were not only clearly unpreserved but furthermore were expressly and unequivocally preserved throughout the appeal process.

B. The arguments presented to the trial court and the Court of Appeals are alike.

The Petitioners’ contend that Respondent did not argue that each date of treatment is an occurrence to the trial court and therefore did not preserve the argument on appeal. However, the record is littered with evidence to the contrary. At the hearing before the trial court, counsel for

Ms. Johnson argued that “[e]ach time she received [an ECT treatment], it was a blow to her head, a tort.” J.A. at 198. In her brief to the Court of Appeals, Respondent’s argument remained the same. *See* J.A. at 576-77 (“Appellant contends that even protection of the medical community cannot justify defining date of occurrence as the date of the initial electroconvulsive treatment... There is evidence from which one could conclude that her damages occurred less than six (6) years from the date of the alleged negligence and within three (3) years of the malpractice alleged to have caused the injury.”). Respondent’s arguments are, at a minimum, not *clearly* unpreserved, as required by the South Carolina Supreme Court in order to dismiss an appeal. *See Atlantic Coast Builders*, 398 S.C. at 330, 730 S.E.2d at 285.

Respondent has repeatedly and consistently argued the trial court erred in holding that the initial date of treatment was the statutory “occurrence” in its summary judgment order. The same arguments were made by Respondent before the trial court and the Court of Appeals. This Court must recognize that the Petitioners moved for summary judgment alleging that Respondent’s claims were time-barred by the three-year statute of limitations and the six-year statute of repose under Section 15-3-545(A). *See* J.A. at 54; J.A. at 75 (Petitioners’ Motions for Summary Judgment). During the hearing on the motions, arguments were made regarding the statute of limitations and the statute of repose. *See* J.A. at 195 (“[Petitioners’] position primarily is just the timeliness of [Respondent’s] complaint under both the statute of repose and the statute of limitations under Section 15-3-545.”); J.A. at 201. In granting summary judgment, the trial court only ruled on the issue of the applicability of the statute of repose and said nothing regarding the statute of limitations. *See* J.A. at 212 (holding in the circuit court order that “the Court finds [Respondent’s] medical malpractice claims are barred pursuant to the applicable statute of repose.”). Counsel for the Respondent argued before the trial court at the summary

judgment hearing on both the statute of limitations and the statute of repose defenses, which is why there are many overlapping statements in the trial court transcript record as to statute of limitations and statute of repose defenses. Nonetheless, the trial court clearly took notice of, and ruled on, Respondent's argument that each treatment constituted an individual tort for purposes of establishing the date when the statute of repose began to run. *See* J.A. at 203 ("As you [Respondent] stated, each time that she received one, it's another tort, in theory").

As the Court of Appeals noted in its opinion reversing the trial court, the record clearly supports the notion that the trial court judge believed the first date of treatment to be the only occurrence and each subsequent treatment was not an individual tort. *See* J.A. at 216 ("[Ms. Johnson] was required to bring the [suit] against MUSC no later than December 10, 2009, six years from the date of the onset of treatment."). Respondent has consistently and emphatically argued that it is improper to look at the initial date of treatment within a multi-year, series of treatments as the trigger date for the running of the statute of repose. Respondent's argument is preserved and, at the very least, is not *clearly* unpreserved, as required by this Court in *Atlantic Coast Builders*, 398 S.C. at 330, 730 S.E.2d at 285.

II. The Court of Appeals correctly found that there was evidence that Respondent's injuries occurred during treatment administered during the six-year statute of repose in § 15-3-545(A) thereby reversing the trial court's decision.

The trial court granted summary judgment in reliance on the date the electroconvulsive therapy ("ECT") first commenced as the date of the statutory "occurrence" that triggered the running of the six-year statute of repose under S.C. Code Ann. § 15-3-545(A) (2005). The Court of Appeals found this case to be indistinguishable from *Marshall v. Dodds* and correctly applied its prior holding that a separate statute of repose is triggered with each negligent act or omission.

The *Marshall* holding did not create a new, laborious test for determining how to apply the medical malpractice statute of repose. Indeed, the Petitioners' argument, which seeks to

improperly consolidate eighty-six (86) ECT treatments spanning nearly a decade into a single date, would be unnecessarily difficult to implement at the trial court level. Such a rule would require trial courts to somehow determine when treatments are sufficiently interconnected such that the first treatment date triggers the statute of repose for all treatments. Under the Petitioners' argument, there is no standard that clearly delineates when treatments should be grouped together as an "occurrence," regardless of how long the treatment period lasted, or when they should be treated separately, each having their own statute of repose. Such a rule is unwieldy and poses the risk that inconsistent outcomes will be reached.

The holding in *Marshall*, on the other hand, is a more logical and flexible mechanism for applying the legislative intent behind the statute of repose. Simply stated, because each date of treatment is a separate "occurrence" under *Marshall*, all the trial court has to do on a summary judgment ruling is determine if the treatments at issue occurred within six (6) years preceding the filing of the lawsuit. That is a far simpler and more logical mechanism for implementing the statute of repose than attempting to shoehorn medical treatments spanning potentially decades into a single date. The sum result of the Petitioners' argument is that medical professionals are rewarded with legal immunity for being repeatedly negligent simply because their negligence spanned a term greater than six (6) years preceding the filing of the lawsuit. Surely this grossly inequitable result is not what the legislature intended when it enacted Section 15-3-545(A). Accordingly, the Court of Appeals properly reversed the trial court because there was evidence that Respondent's injury resulted from treatments that occurred within the six years prior to her filing suit. Therefore, Ms. Johnson's claim is not barred.

A. The Court of Appeals' decision in the present case and in *Marshall* is consistent with the plain language² of the statute and South Carolina precedent.

The Court of Appeals appropriately relied on its ruling in *Marshall*. In *Marshall*, a woman began treatment with two doctors in 2000 and 2004 and was later diagnosed with a rare form of blood cancer. *Marshall*, at 199, 789 S.E.2d at 89. She sued the two doctors for malpractice alleging they failed to diagnose her cancer sooner. *Id.* at 200, 789 S.E.2d at 90. The Court of Appeals overruled the trial court's grant of summary judgment and held that "the statute begins to run at the time of a medical professional's alleged negligent act or omission for which the plaintiff seeks to impose liability without regard to when the course of treatment ended." *Id.* at 208, 789 S.E.2d at 94. The Court of Appeals' heavy reliance on its holding in *Marshall* is appropriate because "[t]he allegations in this case are indistinguishable from *Marshall*." J.A. at 628. It logically follows that facts that are indistinguishable from one another produce indistinguishable legal outcomes.

The plain language of S.C. Code Ann. Section 15-3-545(A) is consistent with the Court of Appeals' decision in *Marshall*. The statute of repose requires that a medical malpractice claim be brought within six years of the date of the occurrence³. Each administration of ECT

² *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. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

³ Section 15-3-545(A) provides:

In any action, other than actions controlled by subsection (B), 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.

constitutes an “occurrence”⁴ therefore triggering a separate statute of repose for each ECT treatment. Splitting the occurrences that fall within the repose period from those that fall outside the repose period is consistent with the legislative intent of the statute. A statute of repose affords a physician the right “to be free from liability after a legislatively-determined period of time.” *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993). Without a repose period, a doctor who committed malpractice thirty years ago could be liable for injuries that had only recently manifested in the patient so long as the suit was brought within three years of discovery of the injuries. The six-year repose period is “an outer limit beyond which a medical malpractice claim is barred” in an effort to prevent this scenario and further the statute’s legislative intent.⁵ *Langley*, 313 S.C. at 403, 438 S.E.2d at 243 (quoting *Hoffman v. Powell*, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (1989)). Yet, there is no legal precedent to suggest that a physician has the right to be free from subsequent mistreatments when the initial mistreatment is outside the repose period. Petitioners’ rule they urge this Court to adopt would be an interpretation of the statute that would produce an absurd result in contravention of the plain meaning and legislative intent behind the statute: serially negligent physicians would be protected from liability and even encouraged to continue their negligence for at least six years. *See e.g. Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (stating “We will reject a statutory

⁴ The *Marshall* court defined “occurrence” as the “time of an alleged negligent treatment, omission, or operation by a medical professional.” *Marshall*, 417 S.C. at 204-05, 789 S.E.2d at 92. In *Marshall*, each failure to diagnose or misdiagnose cancer was an occurrence. *Id.* at 205-06, 789 S.E.2d at 92.

⁵ “The statute of repose ... bears a rational relationship to a legitimate legislative objective: reduction of liability exposure and, thereby, fostering the delivery of quality health care services.” *Hoffman*, 298 S.C. at 340, 380 S.E.2d at 822; *see also Langley*, 313 S.C. at 404, 438 S.E.2d at 244 (“[S]tatutes of repose are based upon considerations of the economic best interests of the public as a whole....”).

interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.”) Accordingly, contrary to Petitioners’ contention that “divorcing⁶ cumulative effect from causative origin” is illogical and contrary to the statute, a six-year repose period for each occurrence is aligned with the legislative intent of the statute. So long as competent, admissible expert testimony can be proffered detailing the causative effect of treatments that occurred within the six (6) years preceding the filing of the lawsuit, it should not be the province of attorneys to step into the shoes of expert witnesses and state that it is *per se* impossible for such testimony to be proffered. To the extent it truly is impossible to separate the treatments in certain instances, the trial judges of this state are well-equipped to handle such expert challenges on a case-by-case basis as they already do in accordance with their expert testimony gate-keeper functions under the South Carolina Rules of Evidence.

Moreover, the “divorcing” of the treatments is consistent with this Court’s holding in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). In *Harrison*, this Court specifically rejected the adoption of the continuous treatment rule because doing so would “run afoul of the absolute limitations policy” clearly set forth by the Legislature in Section 15-3-545. 354 S.C. at 138, 580 S.E.2d at 114. It is worth noting that *Marshall* did not suggest tolling the statute of repose until the end of a physician’s treatment. Instead, *Marshall* held that the statute of repose begins to run at the time of a physician’s negligent act or omission regardless of when the treatment ended. This ruling is consistent with *Harrison*’s rejection of the continuous treatment rule as no treatments beyond the six years from the filing date are actionable.

⁶ Petitioner incorrectly phrases Ms. Johnson’s arguments as “divorcing cumulative effect from causative origin...” J.A. at 641-42.

B. The Court of Appeals' decision in the present case and in *Marshall* is not an adoption, direct or indirect, of the continuous treatment rule.

Petitioners have repeatedly attempted to characterize Respondent's argument as simply another form of the continuous treatment rule. If Respondent were indeed arguing for the continuous treatment rule, it would certainly benefit Petitioners as the continuous treatment rule is expressly forbidden by *Harrison*. Unfortunately for Petitioners, the argument proffered by Respondent is fundamentally different from the continuous treatment rule in every respect. The continuous treatment rule is a plaintiff-friendly rule that attempts to shoehorn medical treatments spanning beyond six years into a single statutory date of occurrence when the final treatment occurred within the repose period. That is not, in any way, what the Respondent has argued for at any point during this case. The Respondent has argued, and continues to argue, that each treatment is a separate occurrence, meaning the treatments that occurred within the six (6) years preceding the filing of the lawsuit must be adjudicated by the jury, while the treatments that occurred outside the six (6) years preceding the filing of the lawsuit should be dismissed. The Respondent's argument is premised on bifurcation at the six-year mark preceding the filing of the lawsuit, in accordance with *Marshall*, and Respondent's argument simply bears no commonality to the continuous treatment rule, despite the repeated attempts by the Petitioners to align Respondent's argument with the expressly rejected continuous treatment rule.

As the Court of Appeals properly noted in its opinion, Respondent concedes that the continuous treatment rule is unavailable.⁷ Ironically, however, it is Petitioners who are asserting the application of an inverse version of continuous treatment rule to bar Ms. Johnson's claims,

⁷ Respondent has conceded on several occasions that the continuous treatment rule does not apply. *See* J.A. at 199 (acknowledging that the continuous treatment rule "is not available to [Ms. Johnson]"); J.A. at 577 (stating that Ms. Johnson "has not sought the application of [the continuous treatment rule] to her facts").

also known as the “first misdiagnosis rule” referenced in *Marshall*. Petitioners contend that ECT was first administered in 2003 and the eighty-five following ECT treatments were given during the continuous course of treatment. Therefore, as Petitioner would have it, there is only one statute of repose which was triggered by the initial ECT treatment and it ran in 2009. In essence, Petitioners advocate for a “reverse continuous treatment” rule that combines the multiple treatments of ECT into one occurrence with only one statute of repose that commences at the first treatment.⁸ The Petitioners’ argument would permit physicians to escape liability for subsequent negligent acts falling within the repose period simply by pointing to a negligent act or omission that occurred outside the repose period. This is a manner that is inconsistent with the statute’s intent.

The ruling of the Court of Appeals in this case and in *Marshall* is in concert with a holding by the highest appellate court in Maryland in *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (Md. 1990). In this case, the Maryland Court of Appeals was faced with a similar fact pattern as here: the plaintiff alleged the defendant, Dr. Speed, was negligent in his initial treatment of her in 1975 and subsequent treatments up until 1985 for failing to diagnose her brain tumor. *Id.* at 253, 577 A.2d at 65. The plaintiff brought suit in 1986, and, at the time, Maryland had a five year statute of repose. *Id.* at 255, A.2d at 66. The defendant, just as the Petitioners here, argued her claim was barred because the initial treatment was outside of the statute of repose window and all subsequent treatments should be attached to it. *Id.* at 255, 577 A.2d at 67. Maryland, like South Carolina, did not follow the continuous treatment rule. *Id.* The plaintiff argued that the treatments within the five year window should be actionable while the defendant argued that

⁸ At the motion hearing before the circuit court, it was Petitioner who argued that “the six years starts from the first allegation of medical negligence” therefore the statute of repose “started in ’02, so it probably expired in ’08 or ’09.” J.A. at 201.

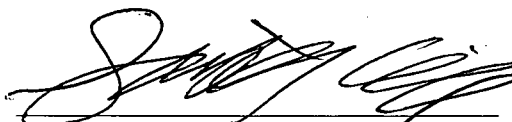
such a rule would “resuscitate” the continuous treatment rule. *Id.* at 257-58, 577 A.2d at 67-68. To this point, the Maryland Court of Appeals concluded, just as our Court of Appeals has, that “[plaintiff] will not be able to hold Dr. Speed responsible for acts of negligence that occurred more than five years before. . .the date [plaintiff] filed [her] claim. *The continuous treatment rule remains lifeless in Maryland.*” *Id.* (emphasis added). The claims within the five year window were held actionable. *Id.* at 261, 577 A.2d at 70.

The Maryland Court of Appeals wisely recognized that allowing incidents of negligence that occur within the repose window to move forward is not an implicit adoption of the continuous treatment rule. The court noted that any damages that resulted from non-actionable negligence (the “cumulative effect” as the Petitioners have labeled it) would be fact issues for plaintiff to prove and for the trier of fact to sort out. *Id.* The holding by the South Carolina Court of Appeals likewise does not “resuscitate” the continuous treatment rule. The continuous treatment rule remains “lifeless” in South Carolina, and the ruling in *Harrison* is alive and well. The rule advocated by the Petitioners, however, would insulate medical negligence occurring within the repose window from suit because it is part of a pattern of negligence outside the repose window. Such a rule would encourage serial malpractice by healthcare providers in order to cross the six year “finish line” and avoid liability. If the spirit of this Court’s prior decision in *Harrison* is to follow the strict lettering of the statute of repose, then surely aggregating treatments that could have occurred months or days before a lawsuit was filed with a date occurring outside the six-year period preceding the lawsuit simply because a doctor was repeatedly negligent is not what the legislature intended when it adopted Section 15-3-545(A). Respondent urges this Court to not adopt the Petitioners’ argument.

CONCLUSION

Based on the foregoing, Respondent contends that a strict and proper interpretation of the medical malpractice statute of repose (S.C. Code Ann. § 15-3-545(A)) mandates that treatments that were provided within six years preceding the filing of the lawsuit should be adjudicated by a jury without regard to the fact that treatment provided earlier might have been negligent as well. The statute of repose cannot be used as a shield premised on streams of negligence that extend beyond the statute of repose period. Respondent respectfully requests the South Carolina Supreme Court affirm the decision of the South Carolina Court of Appeals. This case should be remanded for trial.

Respectfully submitted,



Jonathan Blake Asbill, Esquire
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091; Fax (803) 779-3423
Attorneys for the Respondent Clair Craver Johnson

December 18, 2018

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

DEC 19 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge Charleston County

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

South Carolina 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

PROOF OF SERVICE

I, Jonathan Blake Asbill, of Baker, Ravenel & Bender, L.L.P., counsel for Clair Craver Johnson, hereby certify that I have, on this 19th day of December 2018, hereby certify that the foregoing Brief of Respondent was served on all other parties to this matter by depositing same in the United States Mail, postage pre-paid and return address clearly indicated on said envelope to counsel at the following addresses:

Stephen L. Brown, Esquire
D. Jay Davis, Jr., Esquire
James E. Scott, IV, Esquire
Russell G. Hines, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
Phone: (843) 720-5406
jdavis@ycrlaw.com; jscott@ycrlaw.com;
sbrown@ycrlaw.com; rhines@ycrlaw.com
Attorneys for John Roberts, M.D.

William Peele Early, Esquire
Joseph C. Wilson, IV, Esquire
Pierce Sloan Wilson Kennedy
& Early, LLC
P.O. Box 22437
Charleston, SC 29413
Phone (843) 722-7733
Email: willearly@phsm.net
*Attorneys for The Medical University of
South Carolina*

Respectfully submitted,


Jonathan Blake Asbill, Esquire
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091; Fax (803) 779-3423
cravenel@brblegal.com File No.: 10517.2
Attorneys for Clair Craver Johnson