THE STATE OF SOUTH CAROLINA
IN THE 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

On Writ of Certiorari to the Court of Appeals
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 BRIEF OF PETITIONER JOHN ROBERTS, M.D.

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While believing, most respectfully, that the merit of his position is already adequately demonstrated in his principal brief, in further support of thereof, Dr. Roberts[1] makes the following brief points in reply to Ms. Johnson's brief:

ARGUMENT IN REPLY

1. Ms. Johnson's rebuttal to Dr. Roberts's preservation argument is unavailing.

(a) In regard to the established preservation rules that are applicable to this case (rules which the Court of Appeals erred in failing to apply), it is Ms. Johnson, not Dr. Roberts, whose focus is misplaced.

According to Ms. Johnson, "the predominant preservation rule" is expressed in the following language from *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187, 189 (1939): "'[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.'" (Johnson Br. p. 4.) And, again according to Ms. Johnson, "[r]ather 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 [Ms. Johnson's] argument before the trial court was not specifically detailed before the Court of Appeals." (*Id.*)

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[1] This reply brief uses the same shorthand references as the principal brief that preceded it (such as the reference "Dr. Roberts," which, of course, refers to Petitioner John Roberts, M.D.).

First off, Dr. Roberts must make clear that his argument is not, as Ms. Johnson asserts, that her argument to the trial court was not "specifically detailed" to the Court of Appeals. Rather, as fully explained in his principal brief, Dr. Roberts maintains that her argument to the trial court *was not made* to the Court of Appeals. (*See generally* Roberts Br. pp. 5–8.) Moreover, it is, most respectfully, Ms. Johnson, not Dr. Roberts, whose focus on established preservation rules is misplaced. Indeed, Ms. Johnson entirely overlooks other, equally established and important rules—set forth and analyzed in Dr. Roberts's principal brief[2]—under which her appeal fails on preservation grounds, as the Court of Appeals should have found.

(b) Contrary to Ms. Johnson's assertion, Dr. Roberts did not "summarily argue[] . . . that 'Ms. Johnson's appellate argument is different from the argument she presented to the circuit court.'"[3]

Contrary to Ms. Johnson's assertion, Dr. Roberts's principal brief clearly shows—with detailed record support—the difference between what Ms. Johnson argued to the circuit court and what she argued on appeal. (*See generally* Roberts Br. pp. 5–8.) Moreover, as is noted in Dr. Roberts's brief (but goes unacknowledged by Ms. Johnson), even the Court of Appeals itself recognized the

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[2] (*See generally Id.* pp. 7–11.)

[3] (Johnson Br. p. 4.)

difference in Ms. Johnson's appellate argument from what she argued below. (*See* Roberts Br. p. 8; *see also* J.A. at 626.)

(c) Contrary to Ms. Johnson's assertion, Dr. Roberts has answered the question, "[I]f [Ms. Johnson] did not clearly make [her] argument to the Court of Appeals, then how did the Court of Appeals understand [her] argument enough to have it form the foundation of its opinion?"[4]

Indeed, the Court of Appeals itself answered this question when, at the outset of its analysis, it referred back to the record of Ms. Johnson's argument to the circuit court. (J.A. at 625.) Just because the Court of Appeals could find this earlier argument in the record of the proceedings below, does not mean that it was actually properly made to the Court of Appeals—and, of course, as explained in Dr. Roberts's principal brief, it was not properly made to the Court of Appeals.

Again, the crux of Dr. Roberts's preservation argument is the *difference* between what Ms. Johnson argued to the circuit court and what she later argued for the first time on appeal—and the consequences of this difference under settled preservation principles. And to be clear, 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: Her only argument to the Court of Appeals was that individual treatments were not

[4] (Johnson Br. p. 5.)

necessarily tortious at all and that the circuit 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 generally* J.A. 568, 570–77.)

More fully set forth in his principal brief, this is Dr. Roberts's preservation argument in short: 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 actually present any argument to the Court of Appeals on which the circuit court could properly be reversed. It was only through error—by (a) failing to recognize that Ms. Johnson only made one argument on appeal, (b) failing to apply established preservation rules under which Ms. Johnson's appellate argument clearly is unpreserved, (c) misapprehending this Court's decision in *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012), and (d) issuing a decision irreconcilable with South Carolina precedent placing the

burden on the appellate to demonstrate reversible error[5]—that the Court of Appeals used an argument that Ms. Johnson had not actually made to it to form the foundation of its opinion.

CONCLUSION

For the foregoing reasons, as well as, of course, those contained in its principal brief (including its adoption of MUSC's argument/analysis, if any, on reply), Dr. Roberts asks this Honorable Court to reverse the Subject Decision and to affirm the circuit court's grant of summary judgment.

Respectfully submitted,
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[5] (*See generally* Roberts Br. pp. 5–15.)

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioner John Roberts, M.D., hereby certify that the foregoing **REPLY BRIEF OF PETITIONER 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 December 31, 2018, properly posted for delivery to the following addressees:

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