

**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

C.A. No. 2011-CP-10-0934
App. No. 2016-001936
Opinion No. 27873, filed March 27, 2019

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.

**PETITION FOR REHEARING
ON BEHALF OF PETITIONERS KENNETH A. DODDS, M.D.
AND CHARLESTON NEPHROLOGY ASSOCIATES, LLC**

By its opinion filed March 27, 2019, a majority of this Court (3-2) has effectively created an incongruity in the law that disregards the clear legislative intent to provide absolute time limits on liability of health care providers and the well-settled precedent that has heretofore consistently interpreted and enforced the statute of repose to sustain the public policy that undergirds that legislative intent. The Majority's opinion also has effectively created an irreconcilable inconsistency with the established precedent that long ago rejected the continuous treatment doctrine that would postpone the running of the statute of limitation until after a healthcare professional has stopped treating the patient for the condition at issue. These Petitioners

respectfully request a rehearing to ask this Court to reconsider the serious implications of this new ruling and the disruption of the established precedent pertaining to medical malpractice claims arising from an alleged misdiagnosis of a single condition and the related continuous course of treatment of that condition.

Factual Background

The medical history and the expert testimony have been fully recounted in the briefs filed in the Appellate Courts. For context of this Petition, the Petitioners would recap the following key facts. The Plaintiff Patient was treated by Dr. Dodds over the course of a year from September 2004 through September 2005, on a referral from co-Defendant Dr. Roane. More specifically, Dr. Dodds first saw the Patient on September 15, 2004, at which time he made a diagnosis of proteinuria and prescribed medication; thereafter, Plaintiff was seen by Dr. Dodds for follow-up visits for the same condition on November 11, 2004, February 9, 2005, and September 15, 2005, but she never returned for any further follow-up visits as recommended. Almost five years later, when the Patient was referred to an oncologist in February 2010, she was diagnosed with lymphoplasmatic lymphoma, a non-Hodgkin's blood cancer known as Waldenström's macroglobulinemia.

In this medical malpractice action, Plaintiff Patient's expert opines that Dr. Dodds was negligent in misdiagnosing the Plaintiff's condition in September 2004 as well as failing to recognize his misdiagnosis in 2005. However, Plaintiff Patient carefully crafted her complaint and only alleges negligence by Dr. Dodds in regards to the 2005 visits which fall within the six-year statute of repose. The Circuit Court granted summary judgment to Dr. Dodds, ruling that the claims against him are barred by the statute of repose which began to run on September 15, 2004, when Dr. Dodds first saw the Patient based on her own expert's testimony that her Waldenström's could have and should have been diagnosed by testing at that time. On appeal, the Court of

Appeals reversed and remanded the case for trial, holding that the statute of repose did not begin to run after the first misdiagnosis. Marshall v. Dodds, 417 S.C. 196, 789 S.E.2d 88, 92 (Ct. App. 2016). This Court granted a writ of certiorari, and now has affirmed, holding the Plaintiff Patient’s claims for negligent acts that occurred within the six-year repose period are timely. So, while any claims of negligence at the 2004 visits are barred, the Patient can attempt to prove specific acts of negligence at the 2005 follow-up visits.

These Petitioners seek a rehearing, asking the Court to reconsider how its decision conflicts with the rejection of the continuous treatment rule in Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 114 (2003), and contravenes Legislature’s clear intent that S.C. Code § 15-3-545(A) provide limitations of liability to serve an important public policy. The Petitioners also urge the Court to consider the difficulties, if not impossibilities, of the trial logistics in effectively defending allegations of negligence isolated as to only the visits within the statute of repose period.

I. Contravention of Legislative Intent that Frustrates Public Policy

In 2015, this Court addressed the statute of repose, § 15-3-545, clearly declaring that: “A statute of repose is 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.” Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 411 S.C. 557, 560, 769 S.E.2d 847, 848–49 (2015) (quoting Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006)). The Court also stated that the statute of repose “creates a substantive right in those protected to be free from liability after a legislatively determined period of time.” Id. Ultimately, the Court refused to subject the defendant physician to liability in an indemnification action for medical malpractice after the legislatively proscribed six-year statute of repose expired because “[s]uch a result would be fundamentally at odds with the language and manifest purpose of the

statute of repose.” *Id.* at 850. Likewise, to impose liability on Dr. Dodds for alleged malpractice for the misdiagnosis of the Patient’s condition on the facts of this continuous course of treatment is fundamentally at odds with the language and manifest purpose of the statute of repose.

The Majority expresses the view that: “We fail to see the logic in preventing an aggrieved party from seeking redress for acts that occurred within the repose period. It can hardly be said that the acts of negligence alleged here that occurred within the repose period constitute “long-forgotten” acts or omissions.” The Court further states: “We find it wholly inconsistent to immunize serial malpractice under the guise that the legislature intended an ‘absolute time limit’ when the acts for which the Marshalls seek to recover fall within such time constraints.” The Petitioners respectfully submit that the Majority’s focus on these points is amiss to the extent that the Court previously has refused to soften the harsh and unfair consequences of the legislatively mandated limits on liability, as in Hoffman v. Powell, where the Court upheld and enforced the statute of repose by barring a potential claim before a plaintiff even had knowledge that an injury has been inflicted. 380 S.E.2d at 822.

II. The Conflict with *Harrison v. Bevilacqua*

The Appellate Courts’ new ruling in this case also creates an irreconcilable conflict with the Court’s established precedent rejecting the continuous treatment doctrine, Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 114 (2003). The Majority rejects the notion that its ruling is inconsistent with the refusal to adopt the continuous treatment doctrine in Harrison by drawing a distinction between the statute of repose and the statute of limitations with the explanation that:

Many courts across the country have dealt with the continuous treatment rule, but because it is a tolling mechanism, it typically appears in a statute of limitations analysis. Because our focus today is to ascertain only when the negligence occurred, the doctrine is not implicated.

In one respect the legal concepts are different: “A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time.” Capco of Summerville, Inc. v. J.H. Gayle Const. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). However, the Majority fails to consider that the “statute of repose” at issue is one provision of the comprehensive statute, codified in S.C. Code § 15-3-545, that includes a three-year statute of limitation, codifies a discovery rule, and sets an absolute outer limit of six years – “the statute of repose.”¹ Hoffman v. Powell, 298 S.C. 338, 339, 380 S.E.2d 821, 821 (1989). Moreover, beyond the distinctions in legal theory lies a central, common legislative purpose to reduce liability exposure to serve the important public policy of fostering the delivery of quality health care services. Id. at 822.

While the question on appeal in Harrison v. Bevilacqua involved the application of the statute of limitations², the Court discussed the implications of the medical malpractice statute of repose and its legislative purpose in refusing to adopt the continuous treatment rule. 580 S.E.2d at 114. The Court stated that the “statute of repose is an absolute time limit not tolled for any reason,” and concluded that application of the continuous treatment rule would infringe on the absolute limitation set by the Legislature: “Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set....” Id.

¹ “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 ... shall 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.”

² S.C. Code § 15–78–110, of the Tort Claims Act, was applied to the malpractice allegations against the State Hospital because the defendant was the Department of Mental Health.

In this case, the Majority reasons that the rejection of the continuous treatment “tolling” doctrine in Harrison does not require that multiple acts of malpractice be aggregated as part of a “first diagnosis rule” to impose the statute of repose as a bar. Petitioners maintain that the two concepts are mirror images that both impact the important public policy that underlies the statute of limitations and the statute of repose. The Majority’s ruling allowing the Plaintiff to “split” the continuous course of treatment into separate claims for each follow-up visit is wholly inconsistent with the six-year repose period in § 15-3-545 and offends clear legislative policy. *See* 580 S.E.2d at 113.

III. The Impossibilities/Impracticalities of Legal Dilemmas and Trial Logistics for Isolating the Claims as to Each Visit

As noted above, the Petitioners ask the Majority to contemplate how difficult, if not impossible, it will be in managing the trial to effectively defend against negligence claims focused only on the February and September 2005 visits. The Patient came to Dr. Dodds on referral from Dr. Roane for treatment of proteinuria -- a single course of treatment for a single condition. This case has already been through extensive discovery and the medical evidence and expert opinions present a claim for a continued misdiagnosis over a course of treatment from September 2004 through September 2005, not a series of separate negligent acts at each of the office visits with Dr. Dodds. Yet, the Majority has held that while any claims of negligence at the 2004 visits are barred, but the Patient still can attempt to prove specific acts of negligence at the 2005 follow-up visits.

Has the Court contemplated how that can possibly be litigated at trial? How do the parties isolate the allegations of misdiagnosis at the initial visit that are barred by the statute of repose from the alleged later acts of negligence at the follow-up visits? The Court cannot reasonably expect the parties to literally and/or figurately redact the medical records of all acts before the

trigger date. It would disregard the actual Patient's documented medical history as well as basic medical standards of care to judge a diagnosis in isolation from any medical history prior to the statute of repose cut-off date.

Plaintiff's expert has already testified as to his opinions about Dr. Dodds' alleged negligence in 2004, opining that she had the cancer during that entire time period, which could have been diagnosed as early as the September 15, 2004 visit. Each of Plaintiffs' experts opined that Dr. Dodds should have performed the same additional test that would have detected her cancer at the first visit on September 15, 2004. How can defense counsel effectively cross examine the experts about their opinions on the standard of care and alleged breaches without addressing the 2004 visits? Similar questions will arise as to how the parties will dissect the proximate cause issues because the Plaintiff's experts could not identify that any new condition developed or that the failure to diagnose in September 2004 was any different or caused any separate/distinct change in her condition or prognosis.

In addition to the strategy dilemmas, the Court's ruling undoubtedly will prompt related evidentiary questions about limiting evidence about the 2004 visits. There will be questions about how to charge the jury on what they can and can't consider as a basis for imposing liability. There will need to be special interrogatories on the verdict form. These types of quandaries and dilemmas are just a sampling of complications that the Court's ruling will create.

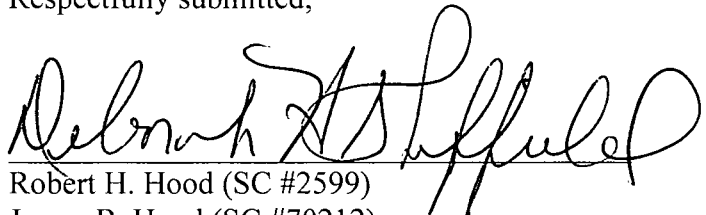
CONCLUSION

In the final analysis, the Majority's ruling is inconsistent with the Legislature's core purpose for the statute of repose and cannot be reconciled with any of the established precedent in the Court's opinions enforcing the statute. The Court has consistently applied and construed §15-3-545(A) to best serve the important public policies underlying the legislative intent for the statute of repose. In this case, the Majority has, as recognized by the Dissent, "essentially adopted a

refined version of the continuous treatment rule” for misdiagnosis claims that does not serve the Legislature’s legitimate purpose of reducing health care providers’ exposure to liability to insure the continued delivery of reasonable health care services. Rather, the Majority’s new rule creates a series of repose periods with each failure to correctly diagnose a condition over the course of treatment. As applied in this case, the new rule will upset the economic balance struck by the legislative body and run afoul of the absolute limitations policy set by the Legislature.

The Court’s ruling leaves a physician proverbially “on the hook” for the entire period of treatment based on a misdiagnosis and thwarts the legislative intent to set an absolute time limit on a physician’s liability. On the medical records and Plaintiff’s own medical expert opinions in this case, the Patient should not be allowed to pursue her claims of misdiagnosis piecemeal. Accordingly, the Petitioners respectfully request that the Court reconsider its decision and affirm the Circuit Court’s ruling barring all the Plaintiffs’ claims for the course of treatment from September 2004 through September 2005.

Respectfully submitted,



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April 11, 2019

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Certificate of Service

The undersigned certifies that on this 11th day of April, 2019, a copy of the foregoing Petition for Rehearing, was served on Counsel for all the parties by depositing a copy in the U.S. Mail, with sufficient first-class postage, addressed to the following counsel at the addresses listed below:

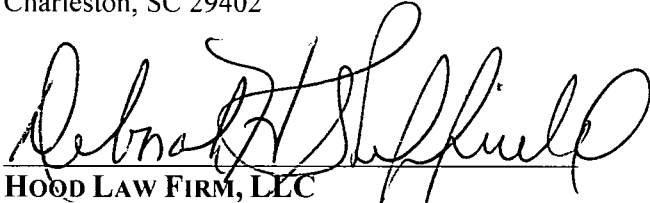
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