

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 26 2019

Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-0934

On Writ of Certiorari to the Court of Appeals

Appellate Case No. 2016-001936
Opinion No. 27872 (S.C. Sup. Ct. 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

By Georgia Roane, M.D., and Rheumatology Associates, P.A.

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NOW COMES Dr. Roane,¹ by and through her undersigned counsel, pursuant to Rule 221, SCACR, and hereby petitions this Honorable Court for rehearing.

MATERIAL POINTS
OVERLOOKED OR MISAPPREHENDED

In a 3-2 decision filed March 27, 2019 (the “Subject Decision”),² a majority of this Court affirmed the Court of Appeals’ reversal³ of the trial court’s summary judgments in favor of Defendants. Most respectfully, the Subject Decision is erroneous, the majority having overlooked or misapprehended a number of material points.

- 1. The Subject Decision does not comply with the requirements of Rule 220, SCACR.**

The Court is required to “make its decisions in writing by published opinions or memorandum opinions, with any concurring or dissenting opinions attached.” Rule 220(a). Further, “[i]n *every* decision rendered by [the] [C]ourt,

¹ Petitioners/Defendants Georgia Roane, M.D., and Rheumatology Associates, P.A., are collectively referred to in the singular as “Dr. Roane.” The other Petitioners/Defendants, Kenneth A. Dodds, M.D., and Charleston Nephrology Associates, LLC (collectively referred to as the “Other Petitioners”), are represented by separate counsel. “Defendants” collectively refers to Dr. Roane and the Other Petitioners.

² The Subject Decision was published in Advance Sheet No. 13 at pages 37–48. Justice James’s dissent, with which Justice Kittredge concurred, followed at pages 49–56. For ease of reference, copies of these pages (i.e., of pages 37–56 of Advance Sheet No. 13) are attached hereto as Exhibit A.

³ See *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016).

every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the [C]ourt must be stated in writing and must, with the reason for the [C]ourt's decision, be preserved in the record of the case.” Rule 220(b) (emphasis added).⁴

The Subject Decision does not set forth “in writing” “every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record” along “with the reason for the [C]ourt’s decision” thereon:

- (a) **The Subject Decision does not address the import of the Court’s prior rejection of the continuing tort rule in *Harrison v. Bevilacqua*.**

As the majority itself correctly recognized in the Subject Decision, the *Harrison* Court rejected not only the “continuous treatment” rule but also the “continuing tort” rule. (Exhibit A at 43 (“Thus, we must determine whether the Marshalls can pursue a negligence claim based on acts occurring within the six-year statute of repose period when older acts occurred outside the time period. To address this question, we must first discuss the import of the *continuous treatment* rule and *continuous tort* doctrine, as we have previously rejected both doctrines in the medical malpractice context. See *Harrison v. Bevilacqua*, 354 S.C. 129, 580

⁴ Certain exceptions to this requirement are provided in Rule 220(b)(1) and (2), but they are not applicable here. Rule 220(b)(1) applies only to “memorandum” opinions that are “unanimous.” The Subject Decision has been identified for publication; moreover, it is a split decision. Rule 220(b)(2) applies only to decisions of “[t]he Court of Appeals.”

S.E.2d 109 (2003).”) (emphasis added)). Indeed, the continuing tort rule is not merely another name for the continuous treatment rule; it is a separate concept, which the *Harrison* Court separately addressed and separately rejected. See 354 S.C. at 139, 580 S.E.2d at 114 (“Citing Georgia law, petitioner also argues the Court should adopt the *continuing tort* doctrine. We disagree.”) (emphasis added).

Despite recognizing the need to “discuss the import of [both] the continuous treatment rule and continuous tort doctrine,” however, in the Subject Decision, the majority addresses only *Harrison’s* rejection of the continuous treatment rule, never addressing the necessary implications of its rejection of the continuing tort rule. (See generally Exhibit A; see also *id.* at 44 (quoting *Harrison* regarding the formulation of the “so-called ‘*continuous treatment*’ rule”) (emphasis added)); *id.* (“At its core, the *continuous treatment* rule is a tolling mechanism, permitting plaintiffs to recover for malpractice which otherwise would be outside the limitations period because the clock does not begin until treatment has ended. Accordingly, the *continuous treatment* rule acts as a ‘last occurrence rule,’ where the plaintiff can bootstrap prior, untimely acts of alleged negligence to one brought within the limitations period provided the conduct is part of a continuous course of treatment.”) (emphasis added)); *id.* (“Because our focus today is to ascertain only when the negligence occurred, the doctrine is not implicated.”) (emphasis added).

As explained previously in Dr. Roane’s briefs,⁵ in *Harrison*, after first discussing the continuous treatment rule, the Court began its separate discussion of the continuing tort rule by explaining,

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). The *Harrison* Court then observed that, under Georgia law, “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 [the petitioner’s]

⁵ (See generally Roane Principal Br. pp. 5–8; Roane Reply Br. pp. 3–6.)

argument on the continuing tort doctrine unavailing.” *Id.* (emphasis added).⁶

In declining to adopt the continuing tort rule, this Court, in *Harrison*, expressly endorsed and, indeed, employed the very “same reason[ing]” as that underlying Georgia’s rejection of the rule in the particular context of medical malpractice actions—again, the reason being that applying the rule in this context would nullify the legislative intent that the statute of repose abolishes any action with the passage of the prescribed number of years after the negligent or wrongful act or omission. *Id.* at 139, 580 S.E.2d at 114. By force of logic, with its rejection of the continuing tort rule, *Harrison* stands for the following proposition, unaccounted for in the Subject Decision: When any negligent act is of a continuing nature—that is to say, when, under appropriate circumstances, the law regards certain negligent conduct, even though continuing, as legally indistinct and indivisible, which may be the case even if injury is produced in varying degrees over a period of time—the statute of repose for all claims arising out of such an act begins to run right away, i.e., when it first occurs; to hold otherwise would nullify the legislative intent.

⁶ Here, Dr. Roane would note that the majority did correctly “disagree with the court of appeals that our [(South Carolina)] statute of repose is materially different than Georgia’s provision” (Exhibit A at 46.) In other words, the majority correctly recognized that South Carolina’s statute of repose is not materially different from Georgia’s.

- (b) **While not addressing the import of this Court's prior rejection of the continuing tort rule in *Harrison*, the majority has also not addressed the established facts on which this appeal must be decided.**

In view of the established facts on which this appeal *must* be decided,

- (a) The Marshalls' claims arise out of a continuing tort;
- (b) There is no room within the appellate record or the confines staked out by the legal framework governing appellate review to find or otherwise base reversal of the trial court upon any supposed subsequent *acts* (plural) of negligence;
- (c) The Subject Decision is at odds with the *Harrison* Court's rejection of the continuing tort rule; and
- (d) Indeed, *Harrison* alone, i.e., even without consulting out-of-state authority, supports the trial court's summary judgment in favor of Dr. Roane and compels affirmance.

As explained previously in Dr. Roane's briefs,⁷ the Marshalls' appellate challenge is narrow in scope; their quarrel is solely about the *law*, not the *facts*, applied by the trial court. (*See generally* Appellants' Br.) They have not challenged the trial court's view of their expert's testimony; they have not taken issue with the court's characterization of the negligence they allege; they have not argued that the court ran afoul of the summary judgment standard in any way otherwise—for instance, by invading the province of the jury as to a genuine and material issue of fact or by failing to view the evidence in the light most favorable

⁷ (*See generally* Roane Principal Br. pp. 8–12; Roane Reply Br. pp. 1–2.)

to them. (*Id.*)⁸

With all of this uncontroverted—indeed, incontrovertible, at this point—the factual basis on which this appeal must be decided is conclusively established, and it includes the following:

- “[The Marshalls’] Complaint against Dr. Roane . . . alleges that from 2000 until 2005, [Mrs.] Marshall was ‘diagnosed and treated’ by Dr. Roane for mixed connective tissue disease (‘MCTD’). . . . *Dr. Roane continued to treat [Mrs. Marshall] for MCTD until October 2007 and her treatment continued in accordance with this diagnosis.*” (R. p. 4 (emphasis added).)

⁸ Of course, in noting that the Marshalls made no challenge to the facts underlying the trial court’s judgment, Dr. Roane is not suggesting that there was a meritorious challenge for the Marshalls to have made. Indeed, besides being supported by the record, the correctness of the factual basis of the trial court’s ruling is underscored by the very lack of any appellate challenge to it. But, in any event, with no proper challenge thereto (*see generally* Appellants’ Br.), the factual premise of the trial court’s ruling is beyond reproach. *See, e.g., 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); *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); (*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); Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

- “[The Marshalls’] sole liability expert . . . , Dr. Thomas Zizic, M.D., testified that Dr. Roane breached the standard of care in 2002 and again in 2003 for failing to perform a proper work up that would have discovered [Mrs.] Marshall’s cancer.” (R. p. 5.)
- “February of 2002 . . . [is] the time at which Dr. Zizic opined that [Mrs. Marshall’s] cancer could have been discovered had proper tests been ordered and conducted.” (R. p. 8.)
- “[T]his Court finds that Dr. Zizic’s own deposition testimony draws no distinction between the alleged failures in February of 2002 and those in 2005 going forward.” (R. p. 9 (emphasis added).)
- “*The Court finds that what [the Marshalls] contend is a ‘distinct event’ in this case is nothing more than a continuation of the same course of treatment.*” (R. p. 9 (emphasis added).)
- “Importantly, these yearly exams which Dr. Zizic references are the same tests which he testified should have been conducted in 2002 and 2003.” (R. p. 10.)
- “*Dr. Zizic’s testimony fails to articulate any discernible difference in Dr. Roane’s treatment from 2002 to 2007 which supports [the Marshalls’] arguments to this Court.*” (R. p. 10 (emphasis added).)

For the purpose of deciding this appeal, it is, therefore, conclusively established that there is no “discernable difference in Dr. Roane’s treatment” of Mrs. Marshall during the entirety of the time period at issue, “no distinction between [Dr. Roane’s] alleged failures [i.e., no distinction in the alleged negligent conduct],” no “‘distinct event’ [i.e., no distinct subsequent act of negligence],” “nothing more than a continuation of the same course of treatment.” In other words, it is conclusively established that the Marshalls’ claims arise out of a

continuing tort and that there were no subsequent *acts* (plural) of negligence at issue. But the majority never addressed this in the Subject Decision.⁹

The majority did, however, rely heavily on the dissent in the Georgia case of *Kaminer v. Canas*, 653 S.E.2d 691 (Ga. 2007). In particular, the majority quoted the following language from that dissent:

[I]t is possible for a doctor to misdiagnose a patient more than once in the course of treatment, where new or more severe symptoms would, under the relevant standard of care, require a reassessment of the initial diagnosis. The Court of Appeals did not, as the majority contends, effectively revive the continuing treatment doctrine, which effects an *extension* of the statute of limitation with respect to the *initial* diagnosis. *See Young v. Williams*, 274 Ga. 845, 846, 560 S.E.2d 690 (2002). Instead, the Court of Appeals simply held that a *new* act of negligence, with its concomitant *new* injury, carries with it a *new* limitations period.

(Exhibit A at 46.) But the majority overlooks and never reconciles the idea that “new act” plus “new injury” equals “new limitations period” with the conclusively established factual basis on which *this appeal* has to be decided, under which there is no distinct “new act” or “new injury” to give rise to a “new limitations period.”

In view of the immutable factual predicate of this case on appeal, coupled with the proposition (regarding when the statute of repose begins to run in cases of

⁹ As noted in Dr. Roane’s reply brief to this Court (*see* p. 1), nowhere in their brief do the Marshall address—much less refute—this point. (*See generally* Marshall Br.)

continuing torts) necessarily embedded in this Court's rejection of the continuous tort rule in *Harrison*, the Subject Decision stands improperly at odds with *Harrison*'s controlling precedent, which alone, i.e., even without consulting out-of-state authority, supports the trial court's summary judgment in favor of Dr. Roane and compels its affirmance.

- (c) **The majority has overlooked or misapprehended Dr. Roane's argument that the Marshalls' appellate argument is unpreserved for review. The Court should have found that the Marshalls did not raise their appellate argument for the first time until their motion for reconsideration of the summary judgment granted to Dr. Roane and, therefore, that their argument was not preserved for review, requiring affirmance of the trial court.**

South Carolina's preservation requirements are "mandatory;"¹⁰ indeed, the plain-error rule has been expressly rejected as "inconsistent with the law in South Carolina,"¹¹ and our appellate courts are affirmatively prohibited from addressing issues/arguments that are not properly preserved for review. *Hendrix v. E. Distrib., Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995) (granting a writ of certiorari to review the Court of Appeals' decision, affirming the decision in result only, and vacating the decision to the extent it addressed an issue that was not preserved, explaining, "Since the issue . . . was not preserved for review, it should not have been

¹⁰ *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).

¹¹ Rule 103, SCRE.

addressed.”)¹² And, again, Rule 220(b) provides, in pertinent part, “In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court’s decision, be preserved in the record of the case.”

“Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” *Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80. Argument must be “sufficiently specific to inform the trial court of the point being urged” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Raising an argument for the first time via a motion asking the lower court to reconsider its decision is insufficient to preserve an argument for appellate review. *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (“We find this issue is not preserved. The issue first appears in Sonoco’s motion seeking reconsideration of the circuit court’s December 20, 2006 order. An

¹² See also *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 723-24 (2000) (explaining, “[A]s 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. . . . In contrast, different preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record.”) (emphasis in original); *id.* at 422, 526 S.E.2d at 724 (“This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); *cf. Watson*, 407 S.C. at 452, 756 S.E.2d at 160 n. 9; *McCall*, 380 S.C. at 659-60, 670 S.E.2d at 701.

issue may not be raised for the first time in a motion to reconsider.”).

As noted above, in their own brief (more specifically, their statement of the case), the Marshalls acknowledge that they “did not file a memo opposing summary judgment;”¹³ rather, they “gave [their] position during the hearing and in . . . follow-up letter[s] to the court.” (Appellants’ Br. at 4.) Perhaps anticipating a preservation challenge, the Marshalls proceed to explain that “[t]he *gist* of the[ir] argument [(opposing summary judgment)] was that although all of this malpractice was in the same family, each deviation from the standard of care was its own claim with its own damages.” (*Id.* (emphasis added).)

Most respectfully, the record reveals a rather stark contrast between the Marshalls’ argument in opposing summary judgment and the Marshalls’ argument in support of their motion for reconsideration—and, to be clear, Dr. Roane expressly challenged the Marshalls’ motion in this regard below. (*See generally* R. pp. 151-154, pp. 161-238, pp. 311-312, p. 320, pp. 405-418.) For instance, at the hearing on Dr. Roane’s motion for summary judgment, the Marshalls argued—in the face of their own expert’s testimony to the contrary¹⁴—that there was no malpractice before 2005. (*See generally* R. pp. 193:8-196:17 (“Judge You’ve

¹³ To be clear, Dr. Roane’s motion for summary judgment was expressly grounded upon the statute of repose for medical malpractice actions found in § 15-3-545(A). (R. p. 116.)

¹⁴ (*See* R. pp. 312:25-313:5, p. 320:8-25; *see also* R. pp. 5-6, pp. 9-10.)

heard many cases where doctors will say, well, I had this thing happen or this blood test going on but it wasn't until sometime later when you were able to correlate a history and it going on for a period of time where we really had the real reason to know that we should do something. . . . [I]t was the failure after '05 . . . that really is where the negligence occurred. . . . Judge, I believe, I personally believe and I think our experts . . . say that the negligence occurred after '05.”).

At no time prior to their motion for reconsideration did the Marshalls argue the legislative text or intent of § 15-3-545(A) or for a narrow construction of the statute or upon the basis of any policy consideration favoring the construction of the statute that they argue on appeal. Indeed, the first mention by the Marshalls of this case presenting a “novel” issue of law as to “how the statute of repose is properly applied to a medical malpractice case that involves a physician’s repeated misdiagnosis of an illness” is in their motion for reconsideration. (R. p. 151; *see generally* R. pp. 174-203, pp. 405-406, pp. 417-418.)

The Marshalls’ appellate argument, which they did not raise to the trial court for the first time until their motion for reconsideration—thus, improperly asking the trial court to “reconsider” its decision on the basis of argument that they had not asked it to consider in the first place—was not preserved for appellate review, and should not have been allowed to undermine the summary judgments in favor of Defendants. *See Elam*, 361 S.C. at 25, 602 S.E.2d at 780; *I’On*, 338 S.C. at 420-

22, 526 S.E.2d at 723-24; *Watson*, 407 S.C. at 452, 756 S.E.2d at 160, n. 9; *McCall*, 380 S.C. at 659-60, 670 S.E.2d at 701; *see also 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.”); *Anderson v. S.C. Dep’t of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (applying the two-issue rule to circuit court orders).

Respectfully, the majority erred by not addressing this argument (*see generally* Roane Principal Br. pp. 16–20; Roane Reply Br. pp. 9–11) in the Subject Decision and in not affirming the trial court on this basis.

2. **Although correctly recognizing that the Georgia statute of repose for medical malpractice claims is not materially different from its South Carolina counterpart, the majority has overlooked or misapprehended the fact that the Georgia authority cited by the trial court is harmonious with South Carolina law and was properly instructive to that court in granting Dr. Roane summary judgment.**

While Georgia precedent may have put a finer point on the issue—regarding commencement of the statute of repose in cases involving diagnosis and treatment of a condition over a period of time—it is nonetheless in line with *Harrison*.¹⁵

¹⁵ Indeed, as shown in the above analysis, the *Harrison* Court itself was entirely in sync with the Georgia cases it discussed.

Analytically, the Georgia rule “in cases of misdiagnosis and mistreatment,” that “the statute of repose begins to run on the date the initial misdiagnosis occurred[,]”¹⁶ is no more than a practical recognition, by way of an affirmative rule of law, of the logical imperative of Georgia’s rejection of the continuing tort rule in actions for medical malpractice. In other words, Georgia follows this affirmative rule for the same essential reason that it rejected the continuing tort rule in cases like this—which is at bottom the same essential reason that *this Court* rejected the rule *Harrington*: Because where a purported later negligent act “is merely the repeated failure to diagnose and treat a continuing though worsening condition[,]” the complained-of negligence is of a continuing nature and not properly considered distinct and divisible, and it would nullify the operation of the statute of repose intended by the legislature to view it otherwise. *See Id.* (“[A]lthough the focus of a statute of repose is generally the date of the alleged negligent act, a later negligent act cannot serve as the new starting point [i.e., *in Dr. Roane’s view*, it cannot serve as a distinct and divisible starting point] of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition.”) (emphasis added to highlight the distinction

¹⁶ *Howell v. Zottoli*, 302 Ga. App. 477, 479, 691 S.E.2d 564, 566 (Ct. App. 2010).

between counsel's own commentary and the court's language)).¹⁷

Georgia law, statutory and decisional, is in line with South Carolina law (as it stood prior to the Subject Decision, that is), and, though, as explained elsewhere, not essential to the summary judgments in Defendants' favor, Georgia law was properly cited in support thereof. Indeed, given that the *Harrison* Court was clearly of the same mind as the Georgia courts it cited in rejecting both the continuous treatment rule and the continuing tort rule as offensive to the South Carolina statute of repose, and especially given the majority's own recognition of the substantial similarity between the Georgia and South Carolina statutes, unless corrected on rehearing, it is the majority's decision here that will stand as the outlier.

ADOPTION OF OTHER ARGUMENT/ANALYSIS

To the extent not inconsistent herewith, Dr. Roane hereby joins in and


¹⁷ Dr. Roane would make clear that, like the trial court's ruling, her position does not rely on a rule under which medical professionals escape liability for *subsequent acts of negligence*—that is, a rule that would insulate subsequent *acts* (plural) which properly constitute distinct and divisible bases upon which to found a claim of negligence—nor, for that matter is that the rule that prevailed in *Howell*. The rule underlying summary judgment in favor of Dr. Roane applies only where the negligent conduct at issue is of a continuing nature and not properly viewed as distinct and divisible, because to treat it, as the Marshalls would do here, as distinct and divisible in spite of its continuing nature would nullify the legislative intent behind the statute of repose—such a rule, Dr. Roane maintains, is a direct and unavoidable corollary of the *Harrison* decision, and, respectfully, it was overlooked and never meaningfully addressed by the majority in the Subject Decision.

adopts as her own the argument/analysis presented by the Other Petitioners in support of rehearing.

CONCLUSION

For the foregoing reasons, Dr. Roane asks this Honorable Court to grant rehearing and vacate the Subject Decision in favor of a new or revised decision that reverses the Court of Appeals and affirms the summary judgments properly granted by the trial court.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

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Charleston, South Carolina

Dated: 4/25/19

**THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2016-001936

EXHIBIT

A

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27873
Heard May 1, 2018 – Filed March 27, 2019

AFFIRMED AS MODIFIED

Robert H. Hood, James Bernard Hood and Deborah
Harrison Sheffield, all of Hood Law Firm, of Charleston,
Stephen L. Brown, D. Jay Davis, Jr., James E. Scott IV,
Perry M Buckner IV, and Russell G. Hines, all of Young
Clement Rivers, LLP, of Charleston, all for Petitioners.

Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, of Columbia and J. Edward Bell III, of Bell Legal Group, and C. Carter Elliott, Jr., of Elliott & Phelan, both of Georgetown, all for Respondents.

JUSTICE HEARN: Virginia Marshall and her husband filed a medical malpractice claim against Dr. Kenneth Dodds (a nephrologist), Dr. Georgia Roane (a rheumatologist), and their respective practices, alleging negligent misdiagnosis against both Dodds and Roane. The circuit court granted Dodds' and Roane's motions for summary judgment, ruling these actions were barred by the statute of repose. The Marshalls appealed, and the court of appeals reversed and remanded the cases for trial. *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016). We affirm as modified, holding the Marshalls' claims for negligent acts that occurred within the six-year repose period are timely.

FACTS/PROCEDURAL HISTORY

In February 2010, Marshall was diagnosed with Waldenstrom's macroglobulinemia, also known as lymphoplasmacytic lymphoma, a rare type of blood cancer. Before this diagnosis, she was treated by Dodds and Roane, who the Marshalls contend committed malpractice by failing to diagnose her cancer. The Marshalls filed suit against Dodds on February 7, 2011, and against Roane on April 8, 2011. The actions were consolidated for discovery, and both doctors moved for summary judgment, contending the claims were time-barred by the six-year statute of repose.

A. Treatment by Dodds

Dodds first evaluated Marshall on July 16, 1999, two days after she was admitted to Roper Hospital for a persistent high fever. During her hospitalization, testing revealed elevated sedimentation rates (a measure of the speed at which red blood cells in a tube of blood fall to the bottom of the tube) and proteinuria (elevated protein levels in the urine). On September 15, 2004, Marshall returned to Dodds for the first time since the 1999 visit, and during this appointment, Dodds reviewed a 24-hour urine test performed a month prior that revealed urine protein levels of 3.5 grams per day. This level of protein established Marshall had proteinuria at that time. Dodds did not order further testing during the September 2004 visit but instead

started Marshall on Diovan, which is typically prescribed for hypertension. When Marshall returned to Dodds two months later, she had no complaints, and Dodds ordered no additional testing. Thereafter, on February 9, 2005, Dodds treated Marshall again, ordering a 24-hour urine test which revealed proteinuria, with protein levels of 3.1 grams per day. Despite her protein levels remaining elevated, Dodds did not order further testing. Marshall's final visit to Dodds was on September 5, 2005, where another 24-hour urine test revealed her urine protein levels had increased to 4.2 grams per day. However, Dodds did not administer any further testing. The Marshalls' actions against Dodds are based solely upon Dodds' alleged negligence on and after February 9, 2005. They allege Dodds was negligent in failing to recognize the signs and symptoms of proteinuria and in failing to order proper testing—a urine protein electrophoresis test (UPEP) and a serum protein electrophoresis test (SPEP)—which allegedly would have revealed the type of protein in Marshall's urine was cancerous. Apparently cognizant of the statute of repose, the Marshalls did not allege any negligence for acts that occurred more than six years from when the complaint was filed on February 7, 2011.

Dodds moved for summary judgment, asserting any alleged negligence first occurred more than six years prior to the Marshalls filing suit. Citing deposition testimony from the Marshalls' own experts, Dodds contended the claims were time-barred. One expert, Barry L. Singer, M.D., a specialist in oncology, testified Marshall likely had blood cancer in 2004, which would have been revealed then if a UPEP or SPEP test had been performed. He further testified that in 2004, Dodds negligently failed to diagnose the cancerous protein in Marshall's urine.

Another expert retained by the Marshalls, nephrologist Robert G. Luke, M.D., noted in his deposition and pre-suit affidavit the following standard of care for nephrologists:

1. If significant proteinuria is present, the nephrologist must determine the cause, which requires the nephrologist to order proper testing to rule out certain causes, including cancerous protein.
2. If routine tests—such as a 24-hour urine test—have inconsistent results, the nephrologist has a duty to order UPEP and SPEP tests to determine whether the protein is cancerous.

In his deposition, Luke reviewed Marshall's course of treatment with Dodds spanning four office visits from September 15, 2004, through September 15, 2005.

During that time, Marshall took the prescription medication Diovan, as prescribed by Dodds, which should have lowered her protein levels. Despite taking this medication, all her 24-hour urine tests showed proteinuria. As a result, Luke testified that Dodds negligently failed to properly monitor Marshall's response to Diovan because otherwise, he would have realized there was no change in her urine protein levels. Further, Luke opined Dodds was negligent in failing to recognize that the continued proteinuria could constitute cancer and failing to order UPEP and SPEP testing, which would have revealed cancerous protein.

Luke also opined Dodds was negligent in scheduling a six-month follow-up appointment after Marshall's September 2005 visit when a one-month check-up was warranted. However, Marshall did not go to her follow-up appointment. Luke then testified, "I have said ten times [in this deposition] that during the first two visits, [Dodds] was outside the standard of care without following up for the diagnosis of the proteinuria. The other business about responding to Diovan is a relatively minor element of the whole thing." Additionally, Luke noted, "I said the first two visits were enough information for further studies to be done, and I think that's the main evidence." The "first two visits" referred to by Luke were in September and November of 2004, both over six years before the actions were commenced against Dodds on February 7, 2011. However, Luke opined Dodds should have revisited his diagnosis in February and September of 2005 after Marshall's protein levels remained elevated. These alleged acts of negligence occurred within the repose period.

The circuit court concluded Dodds' alleged misdiagnoses after February 7, 2005, were a continuation of his previous alleged misdiagnoses and were not distinct acts of negligence that could serve as new trigger points of the statute of repose. The court found the statute of repose applicable to the Marshalls' claims against Dodds began to run prior to February 7, 2005, and therefore, time-barred their claims.

B. Treatment by Roane

Dr. Roane began treating Marshall in 2000 and in that year diagnosed Marshall with mixed connective tissue disease (MCTD), a rare autoimmune disease. This diagnosis was based in part upon laboratory studies evincing low complements (the complement system helps the body defend against infection) and the aforementioned elevated sedimentation rates and proteinuria. Roane treated Marshall for MCTD until 2007.

Beginning in 2000, Roane prescribed a drug named Imuran and increased the dosage in April 2001 and again in February 2002. During the time Marshall took Imuran, there were no changes in her sedimentation rates or proteinuria, but the complement levels improved. In August 2003, Roane stopped prescribing Imuran and prescribed CellCept. During the 2002-2003 time frame, Roane ordered no testing other than 24-hour urine tests and the same lab studies. On April 29, 2005, Marshall visited Roane with symptoms including elevated sedimentation rates, enlarged lymph nodes, proteinuria, fever, and chills. Five months later, on September 29, 2005, Roane ordered another 24-hour urine test which revealed Marshall's proteinuria had increased from 3.5 grams per day to 4.2 grams per day over the prior year. However, despite this increase in protein levels when the opposite should have occurred if Marshall actually suffered from MCTD, Roane did not order further testing. Thereafter, Marshall returned to Roane in 2006 and ceased treatment a year later. The Marshalls claim Roane negligently misdiagnosed her cancer as MCTD and negligently failed to order additional testing after the proteinuria was still present at the September 29, 2005 office visit. The Marshalls did not commence their actions against Roane until April 8, 2011, and accordingly, the claims against Roane are only based on conduct that occurred within six years.

To pursue their claims against Roane, the Marshalls retained Thomas M. Zizic, M.D., an expert in the field of rheumatology. In his deposition, Zizic was particularly critical of Roane's failure to reassess Marshall's condition beginning in 2002 and 2003, especially since her proteinuria, high sedimentation rate, and low complements had not changed even with an increased dosage of Imuran. Specifically, he testified, "I'm very critical at '03. I'm critical at the point where she goes to maximal Imuran in February of '02, 150 milligrams, and still things don't change in terms of the laboratory parameters we've been talking about." Zizic further testified that when the maximal dosage of Imuran was being administered in 2002 and "it still hasn't changed, then at that point you've got to re-workup the patient." Zizic testified this "re-workup" would consist of almost a dozen tests comprising a "complete antibody profile," as well as the aforementioned UPEP and SPEP tests, which if administered in 2003 would have revealed Marshall was not suffering from MCTD.

Additionally, Zizic testified that Roane breached the standard of care as far back as 2002 and 2003 by not engaging in a "reconsideration of where [Roane] was in the treatment of the patient" and that if the "re-workup" had been done in August 2003, Marshall's blood cancer would have been discovered. Finally, Zizic testified

that from 2004 until treatment ended in 2007, Roane should have administered yearly laboratory studies until reaching a definitive diagnosis of Marshall's blood cancer. While Zizic was critical of acts prior to 2005, the failure to administer these tests constituted alleged negligence within six years from when the Marshalls commenced their actions against Roane on April 8, 2011.

The Marshalls focus solely upon the negligent conduct of Roane occurring on and after April 29, 2005, contending separate repose periods were triggered by each misdiagnosis when the standard of care required Roane to reconsider the original diagnosis. The circuit court disagreed, concluding the sole trigger date of the six-year statute of repose was prior to April 8, 2005, and because the actions against Roane were not commenced until April 8, 2011, the claims were time-barred.

C. Court of Appeals' Decision

The Marshalls appealed both rulings, and the court of appeals reversed, holding even though there was evidence Dodds and Roane negligently misdiagnosed Marshall's condition before February 7, 2005, and April 8, 2005, respectively, a new statute of repose period was triggered by each subsequent misdiagnosis because each act was a separate occurrence of negligence. *Marshall*, 417 S.C. at 205, 789 S.E.2d at 92. We granted Dodds' and Roane's petitions for a writ of certiorari to review the court of appeals' decision.

ISSUE

In a medical malpractice case where evidence exists that doctors breached the standard of care on multiple occasions, does the statute of repose begin to run with each breach, resulting in recent breaches being actionable even though older ones are barred?

STANDARD OF REVIEW

An appellate court employs the same lens as the trial court in reviewing a grant of summary judgment. *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 244, 711 S.E.2d 908, 910 (2011). While the facts are viewed in the light most favorable to the nonmoving party, the interpretation of a statute is a question of law decided without any deference to the court below. *Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n*, 424 S.C. 542, 547, 819 S.E.2d 124, 126 (2018); *Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008).

DISCUSSION

The statute of repose for medical malpractice claims requires an action to be commenced within "six years from date of occurrence." S.C. Code Ann. § 15-3-545(A) (2005). Subsection 15-3-545(A) provides:

[T]o 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 . . . 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.

(emphasis added). The six-year period "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Hoffman v. Powell*, 298 S.C. 338, 339–40, 380 S.E.2d 821, 821 (1989). Initially, the statute clearly sets forth the triggering date as the "date of occurrence." However, we note what this provision does not say—the date of the *first* occurrence. Thus, we must determine whether the Marshalls can pursue a negligence claim based on acts occurring within the six-year repose period when older acts occurred outside the time period. To address this question, we must first discuss the import of the continuous treatment rule and (continuous tort) doctrine, as we have previously rejected both doctrines in the medical malpractice context. *See Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). Dodds and Roane contend the court of appeals' decision breathes new life into these two rules previously rejected by this Court.¹ However, the Marshalls assert both doctrines are irrelevant to the inquiry before us. We agree with the Marshalls that neither doctrine is invoked by our decision today.

¹ The dissent likewise posits that we have resurrected these two doctrines today, a characterization of our opinion with which we disagree. Our differences stem from how we view the text of our statute of repose, and we maintain our rejection of judicially engrafted tolling principles.

In *Harrison*, we recognized,

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. At its core, the continuous treatment rule is a tolling mechanism, permitting plaintiffs to recover for malpractice which otherwise would be outside the limitations period because the clock does not begin until treatment has ended. Accordingly, the continuous treatment rule acts as a "last occurrence rule," where the plaintiff can bootstrap prior, untimely acts of alleged negligence to ones brought within the limitations period provided the conduct is part of a continuous course of treatment. See *Caughell v. Grp. Health Co-op. of Puget Sound*, 876 P.2d 898, 905 (Wash. 1994) (noting under the continuous treatment rule the statute of limitations begins to run on "the *last* negligent act committed by the defendant"). 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. See, e.g., *Parr v. Rosenthal*, 57 N.E.3d 947, 959 (Mass. 2016) (adopting the continuous treatment rule and expressly holding it "does not affect the statute of repose..."); *Forshey v. Jackson*, 671 S.E.2d 748, 756 (W.Va. 2008) (citing 61 Am.Jur.2d *Physicians, Surgeons, Etc.* § 299, at 400 (2002) ("Under the 'continuous treatment' doctrine, the running of the statute of limitations is tolled when a course of treatment that includes wrongful acts or omissions has run continuously and is related to the original condition or complaint."); *Hill v. Fitzgerald*, 501 A.2d 27, 31–32 (Md. 1985) (holding while the doctrine applies to toll the limitations period for an undiscoverable medical malpractice claim, "[t]he rule does not, however, govern the date upon which the actionable negligence occurred"). Because our focus today is to ascertain only when the negligence occurred, the doctrine is not implicated.

Accordingly, we find persuasive a decision by Maryland's highest court, which like us, has rejected the continuous treatment rule. In *Jones v. Speed*, 577 A.2d 64 (Md. 1990), Jones and her husband filed a claim against her doctor, alleging failure to properly diagnosis her condition. The doctor moved for summary

judgment, contending any negligence occurred outside the five-year limitations period. The issue was whether Jones could recover for subsequent malpractice if the initial negligence, but not the subsequent acts, was untimely. *Id.* at 67. The doctor presented the same argument that Dodds makes here—that because any negligence first occurred on the initial visit and outside the limitations period, claims based on all subsequent acts of malpractice were untimely. *Id.* at 66–67. As the court noted,

The theory of the plaintiffs is rather straightforward. They do not retreat from their assertion that [the doctor] was negligent on 17 July 1978 when he failed to order a CAT scan or other radiographic studies and failed to diagnose the presence of Mrs. Jones's brain tumor. They argue, however, that each time Mrs. Jones returned to [the doctor] with unabated complaints of her chronic symptoms, the doctor had a duty to reconsider his original diagnosis, and to obtain additional diagnostic studies. The breach of that duty, they urge, constitutes negligence.

Id. at 67. The doctor argued that to allow Jones to recover for acts that occurred within the limitations period would be to revive the continuous treatment rule, which had previously been rejected in Maryland. *Id.* However, the court disagreed, holding Jones could proceed on the theory that subsequent acts of negligence within the limitations period were recoverable, and in doing so, the court rejected the notion that its decision disturbed the legislature's intent that the limitations period act as an outer limit of liability. Instead, the court noted, "if the plaintiffs are correct, they will be entitled to recover damages *only* for acts of negligence occurring within five years of the filing of their claim." *Id.* at 68. Further, "[c]laims for damages occurring at an earlier time, and resulting from earlier acts of negligence on the part of the defendant, are effectively barred." *Id.* Notwithstanding this conclusion, the court reaffirmed that "[t]he continuous course of treatment rule remains lifeless in Maryland."² *Id.*

² The dissent contends *Jones* is inapposite because it addresses Maryland's statute of limitations. We agree that the policy reasons supporting statutes of limitation and repose are different but believe this distinction is the proverbial red-herring in this case. The court's analysis in *Jones* is not premised on tolling principles applicable in a statute of limitations analysis, as the date of occurrence did not change based on when treatment ended or when the plaintiff's injury was discovered. Instead, the court's decision stood for the proposition that tortfeasors cannot cherry-pick untimely acts to shield themselves from every subsequent act of malpractice,

Dodds and Roane rely on Georgia case law where in *Kaminer*, the Georgia Supreme Court effectively adopted the "first occurrence rule" in interpreting its statute of repose in a misdiagnosis case.³ *Kaminer v. Canas*, 653 S.E.2d 691, 692 (Ga. 2007). In a 4-3 decision containing a spirited dissent, the majority asserted the date of the initial negligence starts the clock even for subsequent acts of malpractice. *Id.* at 695. The dissent's analysis mirrors that of Maryland's highest court, namely that a patient may pursue a claim for separate acts of medical malpractice that occurred within the limitations period. *Id.* at 698–99 (Hunstein, J., dissenting). While we disagree with the court of appeals that our statute of repose is materially different than Georgia's provision, and modify that portion of the court's opinion accordingly, we nevertheless believe the dissent in *Kaminer* is more persuasive, as it noted,

[I]t is possible for a doctor to misdiagnose a patient more than once in the course of treatment, where new or more severe symptoms would, under the relevant standard of care, require a reassessment of the initial diagnosis. The Court of Appeals did not, as the majority contends, effectively revive the continuing treatment doctrine, which effects an *extension* of the statute of limitation with respect to the *initial* diagnosis. See *Young v. Williams*, 274 Ga. 845, 846, 560 S.E.2d 690 (2002). Instead, the Court of Appeals simply held that a *new* act of negligence, with its concomitant *new* injury, carries with it a *new* limitations period.

Id. at 698 (Hunstein, J., dissenting). We find this reasoning better comports with the General Assembly's codification of the statute of repose. We readily acknowledge the policy behind section 15-3-545(A) as "**an absolute time limit beyond which liability no longer exists and is not tolled for any reason** because to do so would

whether or not those acts are within the limitation period. This rationale is entirely consistent with the text of our statute of repose, which is not limited to the first occurrence. Finally, we repeat, the continuous treatment rule and its companion the **continuing tort** doctrine are of no moment here because our precedent categorically bars recovery for acts which occurred outside the repose period. See *Harrison*, 354 S.C. at 141, 580 S.E.2d at 116.

³ Ga. Code Ann. § 9-3-71(b) (2007) provides:

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

upset the economic balance struck by the legislative body." *Harrison*, 354 S.C. at 138, 580 S.E.2d at 113–14 (emphasis in original). Moreover, our decision honors the purpose behind the statute of repose, in part, that "[w]hen causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission." *Langley v. Pierce*, 313 S.C. 401, 404–05, 438 S.E.2d 242, 243–44 (1993) (quoting *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326–28 (Ind. Ct. App. 1991)). 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.

Our decision also does not implicate any tolling principles, as only claims based on acts within the repose period are actionable. 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. *See State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 78, 777 S.E.2d 176, 199–200 (2015) (noting that fixing the deadlines on the date of the first instance of misconduct when there is repeated wrongdoing would allow "parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated") (quoting *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 880 (2013)).

To hold otherwise would require us to rewrite our statute of repose and superimpose "first occurrence" into section 15-3-545(A) rather than merely interpret what the provision actually says—"the date of occurrence." Like the court of appeals, we reject the notion that our statute of repose requires us to aggregate multiple acts of malpractice as part of a "first diagnosis rule." Neither the statute's language nor our precedent sanctions such a result. Accordingly, we turn to whether the Marshalls have presented facts to survive a motion for summary judgment based on their claims of alleged medical malpractice which occurred on and after February 7, 2005, as to Dodds, and April 8, 2005, as to Roane.

Regarding Dodds, the record contains expert testimony that Dodds was negligent in failing to recognize that the continued use of medication designed to reduce protein levels was not effective, as revealed by tests in February and

September of 2005—within the six-year repose period. Therefore, the Marshalls contend Dodds should have reconsidered the original diagnosis. At the least, the Marshalls' experts noted that if she had undergone the UPEP and SPEP tests, which would have cost approximately \$100, Dodds would have realized the protein was cancerous. Concerning Roane, there is evidence in the record to support the Marshalls' claims that further testing was necessary, especially after Marshall exhibited chills, fever, enlarged lymph nodes, proteinuria, and elevated sedimentation rates on her April 29, 2005 visit. These symptoms, as well as the continued lack of improvement in her protein levels despite medication, are sufficient to defeat summary judgment. Because section 15-3-545(A) is triggered on the "date of occurrence," the Marshalls claims are not barred.

CONCLUSION

Section 15-3-545(A) begins to run after each occurrence, which is consistent with our rejection of the continuous treatment rule and the continuous tort doctrine. Accordingly, we affirm as modified.

AFFIRMED AS MODIFIED.

BEATTY, C.J., and FEW, J., concur. JAMES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE JAMES: I respectfully dissent. I believe the majority has applied the continuous treatment rule and the continuing tort doctrine to the Marshalls' claims against Petitioners Dodds and Roane. We specifically refused to adopt either rule in *Harrison v. Bevilacqua*, 354 S.C. 129, 138-39, 580 S.E.2d 109, 114 (2003). The majority's holding undercuts the clear policy statement made by the General Assembly when it enacted the statute of repose. Many would applaud the alteration of the statute of repose to permit this action to proceed, but such alteration is within the province of the General Assembly, not the courts. Therefore, I would reverse the court of appeals and reinstate the circuit court's grant of summary judgment to Dodds and Roane.

I.

A. Section 15-3-545(A)

Our statute of repose provides:

[A]ny 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 . . . 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.

S.C. Code Ann. § 15-3-545(A) (2005) (emphasis added). The six-year period "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Hoffman v. Powell*, 298 S.C. 338, 339-40, 380 S.E.2d 821, 821 (1989).

In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), we quoted with approval the following from *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326-28 (Ind. Ct. App. 1991):

A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a

statute of limitation. See *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

.....

Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

.....

Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience of society but also due to necessity. At that point, society is secure and stable.

Langley, 313 S.C. at 404-05, 438 S.E.2d at 243-44.

B. The Continuous Treatment Rule and the Continuing Tort Doctrine

In *Harrison v. Bevilacqua*, the patient at the center of the litigation was James McLean, a diagnosed schizophrenic who was judicially deemed incompetent. He was involuntarily committed to Crafts-Farrow State Hospital (operated by the Department of Mental Health) in 1982 and was not discharged until March 6, 1995. In the action commenced on his behalf on June 1, 1995, the plaintiff alleged the Department of Mental Health was negligent because McLean (1) had been confined in the hospital too long, (2) should not have resided in a locked ward, and (3) had been improperly medicated. Specifically, the plaintiff alleged McLean should have been released as early as October 1983. The plaintiff also alleged the Department failed to follow its own Level of Care reports which, at various times, recommended McLean's transfer to an open ward or a community facility or his home. The

Department claimed the action was barred by our six-year statute of repose found in subsection 15-3-545(A). The plaintiff first claimed the continuous treatment rule and the continuing tort doctrine mandated that the time to commence the action did not begin to run until the date of McLean's discharge, March 6, 1995. Alternatively, the plaintiff contended the five-year insanity tolling provision found in section 15-3-40(2)(a) of the South Carolina Code (2005) allowed recovery for any acts of negligence occurring five years before the date the action was commenced.

In *Harrison*, we considered and specifically rejected the adoption of both the "continuous treatment rule" and the "continuing tort doctrine." 354 S.C. at 138-39, 580 S.E.2d at 114. We recited the continuous treatment rule as follows:

[I]f 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 v. Mims*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)).

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." *Id.* at 139, 580 S.E.2d at 114 (quoting *Mears v. Gulfstream Aerospace Corp.*, 484 S.E.2d 659, 664 (Ga. Ct. App. 1997)). Under this theory, a limitations period does not begin to run "until such time as the continued tortious act producing injury is eliminated." *Id.* (quoting *Mears*, 484 S.E.2d at 664).

Our reason for rejecting both doctrines was to honor the public policy rationale behind the legislature's adoption of both the statute of limitations and the statute of repose, the latter of which reflects the establishment of "an absolute time limit beyond which liability no longer exists." *Id.* at 138, 580 S.E.2d at 113-14 (quoting *Langley*, 313 S.C. at 404, 438 S.E.2d at 243).

In finding the Marshalls' claims to be barred by the statute of repose, the circuit court relied in part upon Georgia case law holding that when there is a medical negligence claim arising from an alleged failure to diagnose and treat a condition over a course of time, the statute of repose begins to run on the date of the first negligent act. *See Kaminer v. Canas*, 653 S.E.2d 691, 697 (Ga. 2007); *Howell v. Zottoli*, 691 S.E.2d 564, 567 (Ga. Ct. App. 2010).

The Georgia statute of limitations and statute of repose are found in section 9-3-71 of the Georgia Code and provide as follows:

(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought *more than five years after the date on which the negligent or wrongful act or omission occurred.*

Ga. Code Ann. § 9-3-71(a)-(b) (2007) (emphasis added). The Georgia statute of repose, subsection 9-3-71(b), is markedly similar to our statute of repose.

The Supreme Court of Georgia, like this Court, has refused to adopt the continuous treatment rule. *See Young v. Williams*, 560 S.E.2d 690, 693 (Ga. 2002) (refusing to adopt the continuous treatment rule in medical malpractice cases involving allegations of misdiagnosis). In *Harrison*, we relied upon Georgia precedent in rejecting the continuing tort doctrine. 354 S.C. at 139, 580 S.E.2d at 114 (providing the continuing tort doctrine is inapplicable to medical malpractice cases since the doctrine "would nullify the intent of the General Assembly that, after five years, no medical malpractice action could be brought, even when a disability attaches to toll the running of the statute because the statute of repose abolishes any action five years after the negligent or wrongful act or omission" (quoting *Charter Peachford Behavioral Health Sys. v. Kohout*, 504 S.E.2d 514, 521 (Ga. Ct. App. 1998))).

In light of our holding in *Harrison*, I am constrained to agree with the rationale employed by the Supreme Court of Georgia in *Kaminer*. The *Kaminer* Court held that in cases of misdiagnosis and resulting mistreatment, when the disease existed

on the date of initial misdiagnosis, the statute of repose begins to run on the date of the initial misdiagnosis. 653 S.E.2d at 697. In *Kaminer*, the plaintiff was born with a rare heart defect for which he underwent surgery when he was two months old. During and after the procedure, the plaintiff received transfusions of whole blood and blood products. The plaintiff then exhibited signs of pediatric AIDS, but the defendant doctors attributed these signs to the plaintiff's heart condition. The plaintiff began treatment with one defendant doctor at age seven and with the other defendant doctor at age nine. After being treated by one defendant doctor for nine years and by another defendant doctor for seven years, the plaintiff was finally given an HIV test at age seventeen. The test showed he had AIDS, and it was uncontroverted he contracted the AIDS virus from the blood transfusions beginning at age two months. Although the defendant doctors serially misdiagnosed the plaintiff's AIDS each time the plaintiff presented to them for treatment, the *Kaminer* Court concluded the plaintiff's claims were barred by the statute of repose, holding that in cases of misdiagnosis and mistreatment, the statute of repose begins to run on the date of the initial misdiagnosis. *Id.* In so holding, the *Kaminer* Court recognized that even though the focus of a statute of repose is generally the date of the alleged negligent act, a later negligent act by the same medical care provider cannot serve as the new starting point of the statute of repose where the negligent act is the repeated failure to diagnose and treat a continuing condition. *Id.*⁴ I agree with this reasoning, as it comports with the public policy considerations upon which our statute of repose is based.

The majority gives short shrift to our conclusions in *Harrison* and simply concludes that the continuous treatment rule and the continuing tort doctrine do not apply to the Marshalls' claims. I certainly agree that neither doctrine applies; neither doctrine can ever apply, as we explicitly rejected both in *Harrison*. The majority has essentially adopted a refined version of the continuous treatment rule and the continuing tort doctrine. In my view, the majority has "run afoul of the absolute

⁴ The Supreme Court of Georgia has held that its interpretation of the Georgia statute of repose in *Kaminer* does not apply in a medical malpractice case founded upon allegations of failure to warn, treat, and advise a plaintiff patient when she presented for treatment of new medical conditions not related to the condition for which she first sought treatment. See *Schramm v. Lyon*, 673 S.E.2d 241, 242-43 (Ga. 2009).

limitations policy the Legislature has clearly set" in our statute of repose. See *Harrison*, 354 S.C. at 138, 580 S.E.2d at 114.

The majority relies upon the rationale of the Court of Appeals of Maryland in *Jones v. Speed*⁵ in support of its conclusion that the statute of repose is not violated when a patient seeks recovery only for those acts of negligence occurring within the statute of repose. The majority's reliance upon *Jones* is misplaced. In *Jones*, the Court of Appeals considered the provisions of section 5-109(a)(1) of the Maryland Code when considering a factual scenario very similar to the one at bar and concluded the plaintiff's action could proceed, in spite of Maryland's rejection of the continuous treatment rule. 577 A.2d at 70. Section 5-109(a)(1) is markedly different from our statute of repose and provides in pertinent part:

(a) An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in § 3-2A-01 of this article, shall be filed within the earlier of:

(1) Five years of the time the injury was committed[.]

A recitation of the facts and legal analysis employed by the Court of Appeals of Maryland in *Jones* is not necessary, as the Court clarified in *Anderson v. United States*, 46 A.3d 426, 443 (Md. 2012), that section 5-109(a)(1) was a statute of limitations and not a statute of repose. Citing *Jones* and other prior decisions as examples, the *Anderson* Court acknowledged it had previously characterized section 5-109(a)(1) as both a statute of limitations and a statute of repose. *Id.* The *Anderson* Court explained in great detail the difference between the two and concluded section 5-109(a)(1) was "a statute of limitations because its trigger is an 'injury' which . . . means when the negligent act is coupled with some harm, rather than being dependent on some action independent of the injury." *Id.* I see no logic in applying another state's analysis of its statute of limitations to our analysis of our statute of repose, especially when the statutes are worded so differently and when the public policy considerations prompting the adoption of a statute of repose are different from the public policy considerations prompting the adoption of a statute of limitations. "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

⁵ 577 A.2d 64 (Md. 1990).

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 Constr. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing *Langley*, 313 S.C. at 403-04, 438 S.E.2d at 243).

The policy behind our statute of repose is that at some point, the liability of a negligent defendant has to be extinguished, even if the plaintiff has not discovered her injury by the expiration of the repose period. Statutes of repose are designed to cut off liability after a period of years, sometimes bringing harsh results. As we noted in *Capco*, "[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."⁶ *Id.* at 142, 628 S.E.2d at 41 (quoting *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 54 n.6 (Minn. 2005)). However, we cannot ignore the policy considerations behind the statute, and "we are not at liberty to rewrite the statute[]." *Id.* at 144, 628 S.E.2d at 42.

The approach sponsored by the majority allows the Marshalls to move forward the dates of treatment for which they want to sue, even though, according to their experts, virtually identical acts of alleged negligence occurred on all pertinent treatment dates before and after the crucial dates of February 7, 2005 (Dodds) and April 8, 2005 (Roane). This approach belies the reasoning behind our refusal to adopt the continuous treatment rule and the continuing tort doctrine in *Harrison* and nullifies the public policy rationale behind our General Assembly's adoption of the statute of repose. As I stated when I began, many would applaud the alteration of the statute of repose necessary to permit the instant action to proceed; however, such alteration is within the province of the General Assembly, not the courts. "[T]his court does not make the law, but it does enforce it, in sorrow over its rigor in some instances." *Hillhouse v. Jennings*, 60 S.C. 373, 380, 38 S.E. 599, 601-02 (1901).

II.

As to the Marshalls' claims against Dodds, (1) Dodds allegedly first negligently failed to diagnose Ms. Marshall's cancer in 2004 and (2) any subsequent misdiagnoses by Dodds were a continuation of Dodds' previous alleged

⁶ In *Hoffman*, we rejected equal protection and due process challenges to the statute of repose. 298 S.C. at 342, 380 S.E.2d at 823.

misdiagnoses. I would hold any misdiagnoses by Dodds on or after February 7, 2005, did not trigger any new repose periods as to Dodds. As to the Marshalls' claims against Roane, Roane allegedly first breached the standard of care as early as 2002, 2003, or 2004 (1) by failing to perform appropriate testing, (2) by not reconsidering Ms. Marshall's lack of progress under the prescribed course of treatment, and (3) by failing to administer yearly laboratory studies until reaching a definitive diagnosis of Ms. Marshall's blood cancer. I would hold any misdiagnoses by Roane on or after April 8, 2005, did not trigger any new repose periods as to Roane. Therefore, I would reverse the court of appeals and reinstate the circuit court's grant of summary judgment to Dodds and Roane.

KITTREDGE, J., concurs.

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

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-0934

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S.C. SUPREME COURT

On Petition for a Writ of Certiorari to the Court of Appeals

Opinion No. 5403 (S.C. Ct. App. filed May 4, 2016)

Supreme Court Case No. 2016-001936

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.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioners Georgia Roane, M.D., and Rheumatology Associates, P.A., do hereby certify that the **PETITION FOR REHEARING** By **Georgia Roane, M.D., and Rheumatology Associates, P.A.** was served on all other parties to this matter by depositing a copy of the same in the U.S. Mail, postage on April 25, 2019, properly posted for delivery to the following addressees:

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