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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 27873 (S.C. Sup. Ct. filed Mar. 27, 2019)
Appellate 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.

RETURN

This return is filed pursuant to Rule 221(a), SCACR, and this Court's request. The petitions for rehearing should be denied.

A. Petitioners' arguments are not faithful to the statute's language.

The statute of repose says a lawsuit for medical malpractice:

> 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[.]

S.C. Code Ann. § 15-3-545(A). There are no words of sequence. Nothing in the statute suggests a plaintiff has to file suit within six years of the first act of negligence if a doctor breaches the standard of care more than once, perhaps over a period of months or years.

Petitioners say the statute of repose creates an absolute right to be free from liability once six years passes from the first date a doctor allegedly commits malpractice. They say this right is so absolute that it covers not just the first act of malpractice, but subsequent acts of malpractice even if repeated again and again, within six years of a lawsuit.

There is no support for that in the statutory language. Respondents have pointed to negligence within the repose period as "giving rise to" their causes of action. That claim is plainly proper under the statute. Petitioners imagine a different statute than the one enacted.

B. There is no reason to go beyond the statute's language, but the Petitioners' argument also creates the wrong sort of incentives.

The statute's text settles this case. Nothing in section 15-3-545 suggests a defendant can kill a suit for malpractice occurring within the repose period by pointing to a similar act of malpractice outside the repose period and claiming the plaintiff should have sued earlier.

Even so, consider the incentive structure flowing from the rule Petitioners propose. A rule that uses the first date of negligence to immunize additional occurrences of repeated negligence rewards a negligent actor for stringing an injured person along. It encourages a defendant to stick to a diagnosis rather than re-evaluate. The rule also perversely encourages defendants in a lawsuit to search for earlier breaches of negligence outside the repose period in an effort to use those acts as the measuring acts, barring a plaintiff's claims.

None of these incentives are faithful to the statute of repose's purpose. The statute grants physicians a legitimate claim to "rest" when six years has passed from each instance of treating a patient. The Court's decision reflects a straightforward application of that purpose. No more, no less.

C. The claim that it will be difficult to try a case where some instances of negligence are stale but others are not is both untimely and unproven.

Dr. Dodds' petition for rehearing claims it will be difficult to defend a case where there is some negligence outside the repose period and other negligence within the repose period.

First, these concerns must not be that significant, because this argument was not in any of Dr. Dodds' briefs to the Court of Appeals or to this Court.

Second, there is no reason to think the jury cannot faithfully follow an instruction that it may only award damages for negligence that occurred within the repose period.

Third and finally, the way to prove whether Dr. Dodds' argument has merit (it does not) would be to *try the case*. The circuit court granted Petitioners a summary judgment. A record built for summary judgment is a poor vehicle for assessing Dr. Dodds' claim that it will supposedly be difficult to litigate a case that will involve telling the jury it may only award damages for negligence occurring within the repose period.

D. The circuit court did not make a factual finding that the multiple alleged acts of negligence are legally indistinguishable from each other and would not be independently actionable.

Dr. Roane seems to believe the circuit court made a factual finding that each of her alleged acts of negligence were legally and factually indistinguishable from each other and could not independently support a claim for negligence. She thinks this implicates the "continuing tort" rule.

In other words, Dr. Roane believes the circuit court found the "injury" in this case is a single, cumulative injury. She seems to think this series of interactions constitutes one

"occurrence" of negligence and that the proper way to analyze the timeliness of that occurrence is to backdate it to the earliest alleged breach of the standard of care.

First, the circuit court does not find facts on summary judgment. The circuit court granted summary judgment based on the erroneous reasoning that the first act of negligence starts the repose period for all subsequent acts of negligence. That reasoning is wrong.

Second, it is hard to square Dr. Roane's advocacy of this rule with her intolerance of the continuous treatment rule. The continuous treatment rule allows plaintiffs to aggregate a series of acts together for the purpose of evaluating a malpractice claim's timeliness. Dr. Roane is asking for the same thing—to aggregate a series of acts together for the purpose of evaluating timeliness. Unlike plaintiffs, who would like to combine the acts of negligence and use the last one to start the clock, she wants to combine the negligent acts and use the first one. That rule has no foundation in the statutory text. It is also difficult to see how one could square a rule allowing defendants to lump multiple acts of negligence together when the same treatment has already been denied to plaintiffs.

E. Respectfully, Dr. Roane's error preservation arguments are wrong.

Respondents wrote the circuit court the day after the summary judgment hearing and articulated the same arguments they have made throughout this appeal. Respondents explained the continuous treatment rule was distinguishable, that they were not seeking to toll claims that were more than six years old, and that they were only seeking to pursue claims that were within six years. (R.p.405-406). Respondents pointed out that their experts had identified acts of negligence occurring within six years that caused damages. *Id.*

Dr. Roane apparently believes those arguments are different from the argument that any time there is allegedly an act of medical malpractice, the period to sue for that act of malpractice expires six years in the future. Respondents do not see the difference.

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For the foregoing reasons the petitions for rehearing should be denied.

Respectfully submitted,

May 14, 2019

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioners with a copy of the *Return to Petitions for Rehearing* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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May 14, 2019

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