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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2011-CP-10-0934

Virginia L. Marshall and
Todd W Marshall, ... Appellants,

v.

Kenneth A. Dodds, M.D., Charleston
Nephrology Associates, LLC, Georgia
Roane, M.D., and Rheumatology
Associates, P.A., ... Respondents.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

South Carolina law requires a plaintiff to file a medical malpractice lawsuit no later than six years after the alleged malpractice "occurred." This deadline is an absolute bar to a complaint. It applies regardless of whether the plaintiff even knows that he or she has been injured.

This case involves a claim that there were multiple occurrences of malpractice. Some of these are outside the six-year window and are not the subject of this suit, but others are within the last six years and would seem to be fair game. The issue is whether the circuit court correctly held that the repose period for all of these occurrences began at the first instance of malpractice, or whether the court should instead have held that each occurrence of malpractice begins a new clock that is related to that occurrence.

STATEMENT OF THE CASE

The respondents are two physicians who spent a substantial amount of time giving Virginia Marshall aggressive treatment for a disease that her experts say she did not have. In the case of Dr Georgia Roane, this lasted for several years. In the case of Dr. Kenneth Dodds, it lasted about thirteen (13) months.

Mrs. Marshall sued Dr Dodds and Dr. Roane after she went to a third physician who immediately diagnosed her correctly, but Mrs. Marshall lost her suit on summary judgment because the circuit court held that the repose period for all of her claims began running the first time these doctors breached the standard of care. Mrs. Marshall agreed that claims for the early malpractice were off the table, but the circuit court held that the repose period for the first occurrence insulated the whole series of occurrences from liability.

The story of this case begins in the year 2000. This is when Dr. Roane diagnosed Mrs. Marshall with undifferentiated connective tissue disease and began treating her. (R. p. 47, ¶4).

Dr. Roane continued this diagnosis and treatment for the next seven (7) years. There were multiple appointments and several diagnostic procedures. This was a long-term relationship It is not a case that involves only one interaction between the physician and the patient. See, e.g. (R. pp. 47-49)

The gist of Mrs. Marshall's claim is that Dr. Roane kept ignoring repeated warning signs that the original diagnosis was wrong Mrs Marshall was relatively stable during treatment, but her experts say her lab work never really improved. For example, the protein in Mrs. Marshall's urine was one of her more important symptoms, and this level remained persistently abnormal. Mrs Marshall says that Dr Roane had a continuing duty to reevaluate the diagnosis and react properly. Instead of re-calculating, Dr. Roane stayed the course.

Mrs. Marshall's allegations against Dr. Dodds are generally similar, but over a much shorter time frame. Dr Dodds entered the picture in 2004 by virtue of a referral from Dr. Roane, and he treated Mrs. Marshall until September of 2005. Like the claim against Dr. Roane, the allegation of malpractice is that Dr. Dodds failed in his duty to monitor Mrs. Marshall's treatment and to respond appropriately when her symptoms did not improve. See generally (R. pp. 388-391) (an affidavit from one of Mrs. Marshall's experts).

Mrs. Marshall does not have connective tissue disease. She has cancer. She discovered this in 2010, when a different doctor — Dr. Eric Pride — conducted the investigation that Mrs. Marshall says her other doctors should have conducted previously.

Mrs. Marshall began the process of making claims against Dr. Roane and Dr. Dodds after she learned her correct diagnosis. She did this quickly, but not immediately She made the appropriate pre-suit filings against Dr. Dodds in February of 2011, and she filed similar documents as to Dr. Roane in April. Additional complaints followed in June (as to Dr. Dodds) and August (as to Dr. Roane). These were identical to the complaints that Mrs. Marshall served with her pre-suit filings. The cases were eventually consolidated. See (R. p. 4)

Both Dr. Dodds and Dr. Roane answered with a denial and a variety of affirmative defenses, including the assertion that all claims were barred by the statute of repose The statute of repose provides that a plaintiff must bring a medical malpractice suit within six years of the "date of occurrence." See S.C. Code Ann § 15-3-545 (A) (2005). This issue of timeliness was the principal issue that the parties argued to the circuit court.

Both doctors contended that the statute of repose for all of Mrs. Marshall's claims began to run at the "first occurrence" of malpractice. Dr. Roane was the first of the respondents to file for summary judgment on this basis. See (R. pp. 115-117) Dr. Dodds followed shortly thereafter. See (R. pp. 106-108). The filings are not identical, but the essence of the argument is the same.

The doctors focused on the fact that Mrs. Marshall's experts had identified breaches of the standard of care that occurred more than six years before the litigation started. The doctors claimed that any later malpractice was nothing more than a continuation of the original course of treatment. The argument went that subsequent errors could not restart the repose period. Because all of the negligence was the same, all of the negligence was barred.

Mrs. Marshall argued that this view was incorrect, and she stressed that she was not complaining about any of the original malpractice, which she agreed was stale. She admitted that her experts had identified breaches of the standard of care which occurred outside the six-year deadline, but she said that she was not suing for those breaches — she was suing for *later* breaches which caused *continued* pain and suffering as well as the costs of getting *more* treatment for a disease that she did not have. Mrs. Marshall did not file a memo opposing summary judgment. She gave her position during the hearing and in a follow-up letter to the court. The gist of the argument 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.

The circuit court agreed with the doctors and held that the statute of repose begins to run at the first occurrence of a negligent act. See (R. p. 7) and (R. p. 18). The court took this to mean that all of the claims were untimely. Mrs. Marshall's experts had identified multiple points where they said the warning signs should have caused the doctors to change direction, but the circuit court focused elsewhere — it focused on the earliest date the experts said that Dr. Dodds and Dr. Roane should have caught the cancer.

The circuit court saw Mrs. Marshall's argument as running contrary to South Carolina's rejection of the "continuous treatment" rule and contrary to the purpose of the statute of repose. The court also cited a decision from the State of Georgia for the proposition that a later negligent act cannot re-start the repose period if the later act is a repeated failure to diagnose a continuing condition. The court issued separate orders for each doctor. These orders were signed May 1, 2014 and filed May 2. See (R. pp. 3-11, pp. 12-24)

Mrs. Marshall filed a timely motion for reconsideration, see (R. pp. 151-154), which Dr. Roane and Dr. Dodds opposed, see (R. pp. 155-160, pp. 161-170), and which Mrs. Marshall supported with a reply. See (R. pp. 171-173).

The circuit court conducted a hearing on July 16, 2014. On August 7, it issued a form order that summarily denied the motion. See (R. p. 25).

ARGUMENT

This case is about whether the statute of repose means what it says. When the statute speaks about the six-year deadline, the trigger date is the date the malpractice "occurs." The statute does not talk about the "first" occurrence of malpractice or "a new chain" of malpractice. The circuit court's reasoning is not faithful to the statute's language. Whenever there is an occurrence of malpractice, the repose period extends six years into the future.

This is not the continuous treatment rule The continuous treatment rule is a rule of equitable tolling that holds all deadlines in abeyance while a patient is treating with his or her physician This rule would allow Mrs. Marshall to sue for *all* of the malpractice that her experts identified, but her claim is not that broad. She is only suing for the malpractice that occurred within the deadline. The continuous treatment rule is not in play.

The irony is that it is the respondents who are seeking to apply a rule that focuses on the continuous nature of Mrs. Marshall's treatment Their argument brings multiple occurrences of malpractice under one umbrella in an effort to insulate repeated breaches of the standard of care from liability. This is the view that the circuit court adopted, and this view is not faithful to South Carolina law. The circuit court's ruling does not fulfill the purpose of the statute of repose, it creates a windfall. This Court should reverse.

I. The Court should hold that the statute of repose means what it says. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future.

This Court should reverse because the circuit court's orders are controlled by an incorrect view of the law. Both of the summary judgment orders hold that the statute of repose begins to run at the "first occurrence of a negligent act." See (R. p. 7) and (R. p. 18). This holding was error.

The circuit court's view is contrary to the statute's language. It also goes against the rule that statutes which restrict the common law must be construed narrowly, not broadly. Although the circuit court cited multiple South Carolina cases, none of those cases actually support the circuit court's reasoning. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future

a The circuit court's ruling is contrary to the statute's language.

Section 15-3-545 (A) of the South Carolina Code contains the statute of limitations for medical malpractice lawsuits. It also contains the statute of repose. The "limitations" part of the statute provides that a plaintiff must file a malpractice claim within three years of the date of the doctor's treatment or omission, or within three years of the date the plaintiff should have discovered the injury. The "repose" provision explains that the suit must not begin later than "six years from date of occurrence, or as tolled by this section."

This statute seems to be straightforward. It appears to contemplate that whenever there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. It would seem to follow by extension that if there were multiple occurrences

of malpractice, there would be multiple repose periods. Yes, a repose period *does* start running at the first act of negligence. But just as one act of negligence creates one deadline, the sensible implication is that a series of negligent acts would create a series of deadlines.

It would have been easy to write the statute differently if the legislature did not want the statute to work this way. It would have been easy to say that a malpractice suit must be commenced within three years, but "not to exceed six years from date of *first* occurrence." Another option would have been to add a clause to the end of the paragraph. If the legislature intended to link multiple occurrences together, it might have closed sub-section (A) by saying "*If there are a series of negligent occurrences that are similar, the repose period begins to run at the first date of a negligent act or omission.*"

But the statute is not written this way, and as this Court knows, the cardinal rule of statutory instruction is to determine the statute's intent by examining the statute's language. *Hodges v Rainey*, 341 S C. 79, 85, 533 S.E 2d 578, 581 (2000). The language of this statute does not appear to give any support to the circuit court's holding that in a case involving multiple occurrences of malpractice or a series of occurrences that are similar, the repose period for all of these occurrences begins to run at the first act of negligence. The court's holding puts words in the statute that are not there.

b. In failing to follow the statute's language, the circuit court interpreted the statute broadly rather than narrowly.

The statute of repose is supposed to be interpreted narrowly, not broadly. This Court is familiar with the rule that "statutes in derogation of the common law are to be strictly construed." *Grier v AMISUB of SC*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). This

means that when a court interprets a statute that restricts common law rights like the right to sue a doctor for malpractice, the court will resolve any ambiguity in the way that represents the least encroachment on the common law. *Id* at 538, 725 S.E.2d at 697.

This principle required the circuit court to construe the statute of repose in the way that was more favorable to Mrs. Marshall, not the defendant doctors. And there does not appear to have been the need for the court to perform any real "construction" here — the statute's language seems plain and straightforward. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. This is the most sensible application of the statute's language as written.

c The South Carolina authorities the circuit court cited do not actually support the circuit court's ruling.

The circuit court's orders cited several South Carolina cases Both orders cite to this Court's decision in *O'Tuel v Villani* This citation comes immediately after the orders pronounce that the statute of repose begins running after the first occurrence of a negligent act. (R p 7) and (R. p. 18). The other South Carolina decisions that are prominently cited on the statute of repose are *Kerr v Richland Memorial Hospital*, *Shadwell v Craigie*, *Langley v Pierce*, and *Hoffman v Powell.*

None of these actually support the view that the repose period for a series of occurrences begins to run at the first act of negligence. As far as South Carolina decisional authority is concerned, the cases in the court's order do not shore-up the court's holding.

O'Teul v Villani involved a single occurrence of negligence. The allegation was that the doctor should have delivered a baby by C-section instead of allowing the baby to be

delivered by the traditional avenue. The opinion never discusses a "first" act of negligence or a "first" event in a chain of malpractice. The suit was barred because it was filed more than six years after the child's birth. See 318 S.C. 24, 455 S.E.2d 698 (Ct App. 1995).

Kerr v Richland Memorial Hospital is also a "one occurrence" case. The malpractice there was the failure to correctly diagnose a mole as cancerous. The issue in *Kerr* was whether the statute of repose applies to government hospitals. The word "first" does not even appear in the decision See 383 S.C. 146, 678 S.E.2d 809 (2009).

Langley v Pierce involved two occurrences of negligence, but the issue in the case was whether the repose period was tolled when Dr. Pierce moved to another state. See 313 S.C. 401, 438 S E 2d 242 (1993).

Hoffman v Powell was a constitutional challenge to the statute of repose. The opinion does not appear to contain any support for the proposition that the first act of negligence triggers the repose period for all acts of negligence that are similar. See 298 S.C. 338, 380 S E.2d 821 (1989). The underlying facts are not even referenced in the decision.

Shadwell v Cragie is different. It *does* involve multiple occurrences of negligence, but all of the occurrences were more than six years old when the plaintiff filed her suit. See 361 S.C. 492, 605 S.E.2d 567 (Ct App. 2004) The *Shadwell* case *is* instructive, but it is instructive in Mrs. Marshall's favor because the decision observes "the occurrence in this case is no later than the date of [the plaintiff's] *last* appointment." *Id.* at 499, 605 S.E.2d at 570 (emphasis added). If the repose period began at the first occurrence of negligence, the proper way to analyze *Shadwell* would have been to examine the first time that the defendant failed to tell the plaintiff about her kidney problems, not the last time.

Candor requires acknowledging that this language from *Shadwell* is not absolute. The modifying phrase "no later than" suggests that this Court may have been giving the plaintiff the benefit of the doubt rather than affirmatively holding that the occurrence was indeed the date of the plaintiff's last doctor's appointment. But Mrs. Marshall is not arguing that *Shadwell* controls. She is simply arguing that *Shadwell* and the other cases the circuit court cited do not support the circuit court's holding.

Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future. This is the natural effect of the statute's language, and the circuit court did not cite a South Carolina case that suggests differently.

II. This approach is different from the continuous treatment rule, which is a rule of tolling that would preserve *all* of Mrs. Marshall's claims for *every* occurrence of malpractice.

Both of the circuit court's orders discuss a doctrine known as the "continuous treatment rule" or the "continuous tort rule." See (R pp. 8-9) and (R. pp. 17-18). South Carolina has refused to adopt this doctrine, and the circuit court viewed this refusal as illustrating that the statute of repose is supposed to be applied "strictly." The court took the view that Mrs. Marshall was trying to revive claims that would otherwise be barred and that her approach violated the idea that the statute of repose is an outer limit on a physician's liability. This view was not correct.

The problem with this reasoning is that it compares things that are not equivalent. The circuit court articulated the continuous treatment rule correctly — this rule says that when a patient is being continually treated by a doctor, the deadlines for a malpractice claim do not start running until the doctor's treatment for the particular condition is over. See (R.

pp. 17-18) (citing *Preer v Mims*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)). This rule arose as courts struggled to apply these sorts of statutes to wrongful conduct that is not a single act, but is instead "a course of conduct, a series of negligent acts, or a continuing impropriety of treatment." *Preer*, 323 S C. at 518-19, 476 S.E.2d at 473.

The Supreme Court rejected the continuous treatment rule in *Harrison v Bevilacqua*, reasoning that tolling the limitations and repose deadlines would run afoul of the statute's language and purpose. 354 S.C. 129, 138, 580 S.E 2d 109, 113 (2003). The statute of repose is not supposed to be tolled. Once the repose period runs, the repose period applies.

With the utmost respect for the circuit court, the fact that South Carolina has rejected this doctrine really has no material bearing on Mrs. Marshall's claims. While it is perfectly fair to say that Mrs Marshall's case involves allegations that there were a series of negligent acts, Mrs. Marshall did not sue for her original misdiagnosis and she has not argued that the repose period should be tolled. Instead, she has focused on the fact the Dr Roane and Dr. Dodds *kept* breaching the standard of care. The first malpractice occurred outside the six-year deadline, but Mrs. Marshall's experts have said that these doctors continued committing malpractice as time went on. This is different from a doctor who makes an initial misstep but who has no reason to re-evaluate the treatment plan. The allegation is that there were repeated and identifiable mistakes, and that the errors got more obvious as time went on.

The proper construction of the law is that every time someone violates the standard of care, there is a period of time after that violation for a plaintiff to bring a lawsuit. Nothing in the statute of repose suggests otherwise. This is not a "construction" of the statute. It is an application of the statute's language. The statute speaks of an "occurrence" of negligence,

and if Mrs. Marshall's experts are right, there were a number of "occurrences" that took place within six years of Mrs. Marshall initiating this suit. Those claims should be viable.

Not only is Mrs. Marshall's view faithful to the statute's language, it is faithful to the statute's purpose as well. The statute of repose is a rule of closure. The Supreme Court explained this in *Hoffman v Powell*, when it upheld the statute against a constitutional challenge. Because medical conditions can be dormant for a number of years, medical malpractice claims have a long "tail" — an indeterminate period where a physician's potential liability exposure is uncertain and unknown. See 298 S.C. at 340-41, 380 S E 2d at 822. *O'Teul v Villani* is an example. The malpractice claim was tied to medical care that a child received at birth, but the child and his parents argued that they did not know the child was injured until he started school several years later. 318 S.C. at 27, 455 S.E 2d at 700

The statute of repose represents the legislature's judgment about the length of time that is reasonable for a physician to have potential exposure to a claim for malpractice. It encourages physicians to keep practicing medicine by allowing them peace of mind after a certain amount of time passes

But the statute is not a license to keep committing malpractice, the idea being that once someone breaches the standard of care, they can continue committing malpractice and insulate a series of mis-steps from liability. The circuit court was correct when it observed that the repose period is an outer limit on the right to sue, but that limit is tied to the occurrence of malpractice; not the "first" occurrence of malpractice or the first act in "a new chain" of malpractice. For every mistake, there is an outer limit that corresponds with that mistake. This is the correct view, and it is not the same as the continuous treatment rule.

III. The true basis of the circuit court's decision is a Georgia rule that this Court should reject. South Carolina does not ask whether the plaintiff's injury is "new." It asks whether the plaintiff suffered "damages."

The true basis of the circuit court's decision is a rule that the court imported from the State of Georgia. This rule provides that in a misdiagnosis case, the repose period begins to run at the first instance of a physician's negligence, which is the original misdiagnosis This is true even though the physician might have technically committed multiple acts of negligence over a long period of time. As this brief has attempted to articulate, this view does not appear to have any basis in the law of South Carolina. It must have come from Georgia, which is perfectly fine as long as the rule is sound.

The circuit court's decisions cited *Howell v Zottoli*, 691 S.E.2d 564 (Ga. Ct App. 2010) as persuasive, see (R. pp. 10-11) and (R. pp 19-20), but the principle case that adopts this rule and articulates its reasoning is *Kamıner v Canas*, 653 S.E.2d 691 (Ga. 2007) The circuit court cited *Kamıner* in its order as to Dr. Dodds. (R. pp. 17-18)

Georgia's rule is driven by two things. The first is the fact that Georgia focuses on the time of the plaintiff's "injury." The second is that Georgia says the only "injury" in a misdiagnosis case is the injury caused by the original misdiagnosis.

The *Kamıner* decision seems to put the point relatively plainly. The decision provides that even though a physician's subsequent failures to re-evaluate a diagnosis "may well constitute new and separate instances of professional negligence," Georgia's deadline statutes are no longer triggered by the occurrence of a negligent act or omission, instead they are tied to the date of the injury. See 653 S.E.2d at 695.

Kaminer is principally a statute of limitations case. It does not focus on the repose period until the end. This distinction matters because Georgia's statute of limitations is tied to the date of the plaintiff's injury. It does not focus on the date the malpractice occurred.

But *Howell v Zottoli* is purely a repose case, and *Howell* applies the same reasoning. The *Howell* court took the view that although there *were* multiple occurrences of negligence, there was no "new injury" as a result of the subsequent failures to correctly diagnose and treat the patient. Thus, even though there were multiple "occurrences," the court held that the plaintiff's claim was barred because there was only one "injury." See 691 S.E.2d at 566.

With the utmost respect for the Georgia courts and for the circuit court who found these foreign cases persuasive, this Court should reject this rule as *un*sound.

First, this rule has been controversial, even in Georgia *Kaminer* was a 4-3 decision by the Georgia Supreme Court, and as the dissent observes, it is not accurate to say that there is only a single and indivisible injury that flows from the serial misdiagnosis of a medical condition. If a patient has to *continue* to pay for the wrong medical treatment, and if the patient has to suffer *additional* stress and anxiety while the patient's actual disease worsens, these are further invasions of the plaintiff's rights that would not have occurred without additional breaches of the standard of care. One of the cases after *Kaminer* criticized this rule and the body of precedent it created as confusing and difficult to apply. That is from the concurring decision in *Howell*. See 691 S.E.2d at 568. The Court will recall that *Howell* is the same case the circuit court cited in granting summary judgment against Mrs. Marshall.

Second, South Carolina has not traditionally tied the viability of a negligence claim to whether the plaintiff has suffered a "new injury" or a "distinct injury " Instead, the law

has generally focused on whether the plaintiff has suffered "damages." The Supreme Court's decision in *Grier v AMISUB* articulates this principle. *Grier* provides that "to establish a cause of action for negligence [a plaintiff] must prove . . . (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." 397 S C at 537, 725 S.E 2d at 696. The *Grier* decision actually lists a number of cases that state the principle the same way. It does not matter if the injury is new. What matters is whether the new occurrence causes the plaintiff to incur additional damages.

With the utmost respect for the Georgia court system, this view is the better view. Mrs. Marshall's injury is not just her illness. A jury might not believe Mrs. Marshall's experts, but if the jury *did* believe them, the jury could conclude that each time they failed to reach a correct diagnosis, this failure resulted in a continued disease, additional pain, additional suffering, and additional expenses while Mrs Marshall was being aggressively treated for a diseased immune system when she really had (and has) blood cancer. A rule that ties the repose clock to the original misdiagnosis will encourage a physician to stick to a misdiagnosis rather than re-evaluate it. It will encourage someone to keep committing negligence rather than police his or her own work. A defendant's refusal to correct course will be rewarded by insulating not just one occurrence, but a chain of occurrences, from liability. This is more than an outer limit for liability. It is a windfall.

Mrs. Marshall's claims are focused. She tailored her allegations so that they would satisfy the statute of repose, and as she wrote when she was arguing to the circuit court, these additional instances of negligence caused her to suffer damages. See (R p. 406). A jury

might not believe Mrs. Marshall's experts, but these experts have identified specific breaches of the standard of care that occurred within six years of the date that Mrs. Marshall initiated these proceedings. For Dr. Roane, those breaches involve the failure to reach a hard or conclusive diagnosis after Mrs. Marshall's lab work showed no material improvement following a long period of aggressive treatment. For Dr. Dodds, those breaches involve the alleged failure to recognize that different tests of Mrs. Marshall's protein levels were yielding inconsistent results. A jury might decide that these doctors were not negligent, but if Mrs Marshall's experts are right, their failure to order a routine test let Mrs. Marshall's cancer grow for six years. Each day caused more damages. This view reflects reality, and it is the view that the law should apply.

CONCLUSION

This Court should reverse. Each time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future

Respectfully submitted,

May 4, 2015

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v.

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Roane, M.D., and Rheumatology
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Final Brief of Appellants, Reply Brief* and *Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. **In this medical malpractice action, wherein the plaintiffs allege breach of the standard of care via a doctor's negligent misdiagnosis of a patient's condition in 2002 and a continuation of the same course of treatment in accordance with that misdiagnosis into 2007, did the circuit court correctly construe S.C. Code Ann. § 15-3-545(A), which provides a six-year statute of repose for medical malpractice actions, and apply it to the facts of this case in holding that the plaintiffs' lawsuit against the doctor and her practice, which was not commenced until 2011, was barred by the statute of repose entitling the defendants to summary judgment in their favor?**

II. **Is the plaintiffs/appellants' argument preserved for appellate review when it was not raised to the circuit court in opposition to the defendants/respondents' motion for summary judgment, but was raised by the plaintiffs/appellants, for the first time, in support of their motion asking the circuit court to alter or amend and reconsider its order granting summary judgment in favor of the defendants/respondents?**

COUNTER-STATEMENT OF THE CASE

Between 2000 and 2007, Plaintiff/Appellant Virginia L. Marshall ("Mrs. Marshall") was a patient of Defendant/Respondent Georgia Roane, M.D. ("Dr. Roane"), a rheumatologist. According to Mrs. Marshall (and her husband, Plaintiff/Appellant Todd W. Marshall ("Mr. Marshall") (collectively, the "Marshalls")), Dr. Roane diagnosed and treated Mrs. Marshall for an autoimmune disease, but, in 2010, the Marshalls learned from another doctor that Mrs. Marshall did not have an autoimmune disease and that she had cancer. (*See generally* R. pp. 47-50 at ¶¶ 4-14; Apps' Br. at

pp. 1-2.)

In 2011, the Marshalls commenced this medical malpractice action (with Mr. Marshall asserting a claim for loss of consortium) against Dr. Roane (and her practice, Defendant/Respondent Rheumatology Associates, P.A. (collectively, "Dr. Roane" or "these Respondents")). (R. pp. 44-54.)[1]

The essence of the Marshalls' claim[2] is that Dr. Roane was negligent in misdiagnosing Mrs. Marshall's condition and treating her in accordance with that misdiagnosis. (*See* Apps' Br. at p. 1 ("The respondents are two physicians who spent a substantial amount of time giving Virginia Marshall aggressive treatment for a disease that her experts say she did not have."); id.

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[1] Also in 2011, the Marshalls brought a separate medical malpractice action against Defendants/Respondents Kenneth A. Dodds, M.D. and his practice, Charleston Nephrology Associates, LLC (collectively, "Dr. Dodds"). As reflected in the above appeal caption, the Marshalls' lawsuits against Dr. Roane and Dr. Dodds were consolidated in the circuit court. Dr. Dodds is represented by separate counsel and is briefing this appeal separately from Dr. Roane.

[2] Because an essential element of Mr. Marshall's claim for loss of consortium is proof of Dr. Roane's liability to Mrs. Marshall for medical malpractice, these Respondents have, for the sake of convenience, referred to the Marshalls' "claim" in the singular. *See* Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 121, 512 S.E.2d 510, 523 (Ct. App. 1998) ("Although a loss of consortium claim is not res judicata because of a defendant's verdict in a negligence action, 'a loss of consortium claim cannot arise if no tort is committed against the impaired spouse.' In order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury.") (citations omitted).

at p. 2 ("The story of this case begins in the year 2000. This is when Dr. Roane diagnosed Mrs. Marshall with undifferentiated connective tissue disease and began treating her. **Dr. Roane continued this diagnosis and treatment for the next seven (7) years.**") (emphasis added) (citation omitted); id. ("The gist of Mrs. Marshall's claim is that Dr. Roane kept ignoring repeated warning signs that the original diagnosis was wrong. . . . Mrs. Marshall says that Dr. Roane had a continuing duty to reevaluate the diagnosis and react properly. Instead of re-calculating, Dr. Roane stayed the course."); id. ("Mrs. Marshall does not have connective tissue disease. She has cancer. She discovered this in 2010, when a different doctor . . . conducted the investigation that Mrs. Marshall says her other doctors should have conducted previously."); id. at p. 1 ("Mrs. Marshall sued Dr. Dodds and Dr. Roane after she went to a third physician who immediately diagnosed her correctly . . . .").)

Based upon the testimony of the Marshalls' own expert, Dr. Thomas Zizic, that as far back as February of **2002** Dr. Roane was negligent in misdiagnosing Mrs. Marshall's medical condition and treating her in accordance with that misdiagnosis, these Respondents moved for summary judgment on the ground that the Marshalls' lawsuit (which, again, was not commenced until **2011**) was barred by the six-year statute of repose for

medical malpractice actions found in § 15-3-545(A). (R. pp. 115-117; R. pp. 118-140, 310, 312-314.)

The motion was heard by the circuit court (the Honorable J.C. Nicholson, Jr., presiding) on March 3, 2014. (R. pp. 174-203.) As the Marshalls themselves noted in their brief, they "did not file a memo opposing summary judgment;" rather, they "gave [their] position during the hearing and in . . . follow-up letter[s] to the court." (Apps' Br. at p. 4; *see also* R. pp. 174-203; R. pp. 405-406; R. pp. 407-416, 311-312, 320; R. pp. 417-418.) By order filed May 2, 2014, the circuit court granted summary judgment to these Respondents, holding that the Marshalls' lawsuit was barred by the repose provision in § 15-3-545(A). (R. pp. 3-11.)

In the wake of the circuit court's summary judgment, and with the aid of additional, newly-appearing legal counsel, the Marshalls made a motion to alter or amend and for reconsideration ("motion for reconsideration") of the circuit court's decision, this time submitting a legal memorandum in support of their position. (R. pp. 151-154; R. p. 150; R. pp. 171-173.) The circuit court heard the Marshalls' motion for reconsideration on July 16, 2014, and thereafter denied the motion by order filed August 7, 2014. (R. pp. 204-238; R. p. 25.)

This appeal followed.

ARGUMENT

I. The circuit court correctly construed the repose provision in § 15-3-545(A) and applied it to the facts of this case in holding that the Marshalls' lawsuit against these Respondents was barred by the statute of repose entitling these Respondents to summary judgment in their favor.

First off, let us clarify the scope of the Marshalls' appellate challenge to the circuit court's ruling by noting what the Marshalls have **not** challenged, i.e., what they have **not** argued to this Court.

The Marshalls have not challenged the circuit court's view of their expert's testimony, nor have they taken issue with the circuit court's characterization of the negligence that they alleged, nor have they argued that the circuit court in any way otherwise ran afoul of the summary judgment standard[3] by invading the province of the jury; for instance, by failing to view the evidence in the light most favorable to them or by wrongly concluding that no material fact was in dispute.

The Marshalls argue only that the circuit court committed an error of law by misconstruing the relevant statute, i.e., § 15-3-545(A). (*See* Apps'

[3] *See, e.g.,* Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009) ("Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.") (citations omitted).

Br. at p. 5 ("This case is about whether the statute of repose means what it says."); id. at p. 6 ("This Court should reverse because the circuit court's orders are controlled by an incorrect view of the law."); id. at p. 11 ("The proper construction of the law is . . . ."); id. at p. 13 ("As this brief has attempted to articulate, this view does not appear to have any basis in the law of South Carolina.").)

Consequently, the factual underpinning of the circuit court's ruling is uncontroverted; indeed, it is incontrovertible,[4] and it includes the following:

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[4] Of course, in noting that the Marshalls have not challenged the factual underpinning of the circuit court's ruling, these Respondents are not suggesting that the Marshalls had a meritorious challenge to make in this regard. Indeed, besides being supported by the record, the correctness of the factual basis of the circuit court's ruling is underscored by the very lack of any appellate challenge to it by the Marshalls. Nonetheless, with no argument directed thereto in the Marshalls' principal brief, this aspect of the circuit court's ruling is now incontrovertible. *See* 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 cont.

- "Plaintiffs' Complaint against Dr. Roane and her practice alleges that from 2000 until 2005, Plaintiff Virginia Marshall was 'diagnosed and treated' by Dr. Roane for mixed connective tissue disease ('MCTD'). . . . **Dr. Roane continued to treat Plaintiff for MCTD until October 2007 and her treatment continued in accordance with this diagnosis.**" (R. p. 4 (emphasis added).)

- "Plaintiffs' sole liability expert against these Defendants, 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 Virginia Marshall's cancer." (R. p. 5.)

- "February of 2002 . . . [is] the time at which Dr. Zizic opined that Plaintiff'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 Plaintiffs 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 Plaintiffs' arguments to this Court.**" (R. p. 10 (emphasis added).)

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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.").

Now, let us turn to what the Marshalls have argued. Ultimately, they contend that "[t]he Court should hold that the statute of repose [(i.e., § 15-3-545(A))] means what it says[,]" and that "[e]ach time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future." (Apps' Br. at p. 6 (bold print omitted).)[5] More specifically, the Marshalls argue that their favored construction of the statute should win out, because the circuit court's "reasoning is not faithful to the statute's language,"[6] the circuit court's recognition of the continuing nature of the negligence that they allege is misplaced,[7] and the "true basis of the circuit court's decision is a Georgia rule . . . [that] does not appear to have any basis

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[5] Here is what § 15-3-545(A) says:

> In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

[6] (Apps' Br. at p. 5.)

[7] (*See* Apps' Br. at pp. 10-12.)

in the law of South Carolina."[8] Most respectfully, the Marshalls' argument is unavailing.

In Harrison v. Bevilacqua, our Supreme Court "declin[ed] to adopt the continuous **treatment** rule **or** the doctrine of continuing **tort**." 354 S.C. 129, 141, 580 S.E.2d 109, 115 (2003) (emphasis added). Harrison shows that the "continuous treatment rule" is not merely another name for the "doctrine of continuing tort;" rather, they are separate concepts, which the Court addressed in turn.

Quoting its prior decision in Preer v. Mims, the Harrison Court summarized the "continuous treatment rule" as follows:

> "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 (quoting Preer, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)).

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[8] (Apps' Br. at p. 13 (bold print omitted).)

The Harrison Court went on to explain that—notwithstanding numerous policy considerations supporting adoption of the rule—"the continuous treatment rule should not be judicially adopted," because, "[p]ut simply, . . . judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above[[9]]." Id. at 136-38, 580 S.E.2d at 112-13; *see also* Epstein v. Brown, 363 S.C. 372, 378, 610 S.E.2d 816, 819 (2005) ("Notwithstanding the very legitimate policy rationales in favor of adoption of a continuous treatment rule, we declined to adopt it, finding **the Legislature has set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose** both for medical malpractice and for persons operating under disability") (citing Harrison, 354 S.C. at 136-37, 580 S.E.2d at 113) (emphasis added).

The Harrison Court then addressed—and rejected—Harrison's additional argument that it should adopt the "continuing tort doctrine." Id. at

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[9] Among "the statutes discussed above," was, of course, the medical malpractice statute of repose found in § 15-3-545(A). Id. at 137-38, 580 S.E.2d at 113 (explaining, "[t]he primary argument against adoption of the continuous treatment rule is that it offends the clear policy set by the Legislature in its adoption of statutes of limitations and statutes of repose;" then expressly citing the repose provision in § 15-3-545(A) and noting the "'economic balance struck by the legislative body'" in enacting such a statute of repose) (citations omitted).

139, 580 S.E.2d at 114 ("Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree."). It explained,

> 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)).

Having explained the continuing tort theory, the Harrison Court proceeded to explain that, in Georgia, "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 [Harrison's] argument on the **continuing tort doctrine** unavailing." Id. (emphasis added).

The Marshalls' argument that the Georgia authority (and so-called "Georgia rule") cited by the circuit "does not appear to have any basis in the law of South Carolina"[10] is belied by our Supreme Court's express endorsement of the Georgia court's reasoning, i.e., "the same reason[ing]" as it followed in Harrison, which, again, holds that, in the particular context of medical malpractice actions, application of the continuing tort doctrine—which, if applied, would preclude the running of the statute of repose "where any negligent or tortious act is **of a continuing nature and produces injury in varying degrees over a period of time**. . . . until such time as **the continued tortious act producing injury is eliminated**"—would nullify the legislative intent that "the statute of repose abolish[] any action five years after the negligent or wrongful act or omission." Id. at 139, 580 S.E.2d at 114 (quoting Mears, 225 Ga. App. 636, 484 S.E.2d at 664 (citations omitted)) (emphasis added) and id. (quoting Kohout, 233 Ga. App. 452, 504 S.E.2d at 521) (emphasis added).[11]

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[10] (Apps' Br. at p. 13.)

[11] Indeed, the Georgia authority that the Harrison Court followed cont.

In declining to adopt the continuous tort doctrine, the Harrison Court recognized the incompatibility of that doctrine with the medical malpractice statute of repose (more specifically—and most importantly—the legislative intent reflected by the medical malpractice statute of repose[12]) where, as here, medical malpractice of a continuing nature is alleged. And, to be sure, medical malpractice of a continuing nature is what is alleged here; as noted

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recognized that the type of tortious act at issue under the continuous tort doctrine "**produces injury [(i.e., "damages")] in varying degrees over a period of time.**" Id. at 139, 580 S.E.2d at 114 (quoting Mears, 225 Ga. App. 636, 484 S.E.2d at 664 (citations omitted)) (emphasis added). This belies the notion, advanced by the Marshalls, that South Carolina's traditional focus ("on whether the plaintiff has suffered 'damages'") to determine the viability of a negligence claim is offended by the Georgia rule. (Apps' Br. pp. 14-15.) Of course, for that matter, these Respondents submit that this notion about damages and the "viability" (i.e., accrual) of a negligence cause of action (*see* Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004) ("'A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.'") (citation omitted)) is irrelevant in any event. *See* Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 243, 244 (1993) (observing that, in effecting the economic balance struck by the legislative body, "'[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.'") (citation omitted).

[12] Of course, "[i]t is well-established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 696 (2012) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). And, with respect to statutes of repose, our Supreme Court recognized that they are "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." Langley, 313 S.C. at 404, 438 S.E.2d at 244 (emphasis in original).

above, it is uncontroverted, indeed, incontrovertible, that medical malpractice of a continuing nature is what is alleged here. (*See also* Apps' Br. at pp. 1-2 (including, "The story of this case begins in the year 2000. This is when Dr. Roane diagnosed Mrs. Marshall with undifferentiated connective tissue disease and began treating her. **Dr. Roane continued this diagnosis and treatment for the next seven (7) years.**") (emphasis added) (citation omitted)). Our Supreme Court's decision in Harrison is alone sufficient to support the position that the circuit court's construction of § 15-3-545(A)—and application thereof to this case—faithfully adhered to the overriding responsibility of ascertaining and effectuating the legislature's intent.

Moreover, the circuit court's citation to Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (Ct. App. 2010) is well founded, and the Marshalls' attempt to cast the so-called "Georgia rule" as contrary to South Carolina law is unavailing. Howell expresses Georgia's view that, "in cases alleging misdiagnosis and mistreatment, the statute of repose begins to run on the date of the initial misdiagnosis and failure to treat where the condition of the disease existed on that date." Id. at 479, 691 S.E.2d at 566 (citation omitted). "Thus," the Howell Court explained, "although 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 of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition." Id. (emphasis added). While this may put a finer point on the issue, it is wholly consistent with the reasoning endorsed by our Supreme Court in Harrison.[13]

II. The Marshalls' argument is not preserved for appellate review, because it was not made to the circuit court in opposition to these Respondents' motion for summary judgment, but was made by the Marshalls, for the first time, in support of their motion for reconsideration of the circuit court's order granting summary judgment in favor of these Respondents.

South Carolina's preservation requirements are "mandatory." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004); *see also*

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[13] Also, as for the Marshalls' policy argument based upon the characterization of the Georgia rule as "controversial, even in Georgia," noting that Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007), was decided by a 4-to-3 vote of that state's supreme court, these Respondents note our Supreme Court's decision in Harrison was unanimous. As for the Marshalls' suggestion that the circuit court's construction of § 15-3-545(A) presents potential difficulties in its application to other cases, it would certainly seem just as problematic—not to mention an end-run around the legislature's intended operation of the statute of repose—in cases of continuing torts to allow plaintiffs to simply disregard that part of the continuing tortious conduct that places their claim outside of the statute of repose. Regardless, though, policy considerations cannot trump the legislature's intent. *See* Keyserling v. Beasley, 322 S.C 83, 470 S.E.2d 100 (1996) ("We emphasize, at the outset, that the determination of the social and economic desirability of the Barnwell landfill is not the issue before this Court. We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.").

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420-22, 526 S.E.2d 716, 723-24 (2000) (explaining, "as 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 . . . [but] an appellate court . . . may not *reverse* for any reason appearing in the record.") (emphasis in original); *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.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Id. 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). And 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 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;"[14] rather, they "gave [their] position during the hearing and in . . . follow-up letter[s] to the court." (Apps' Br. at 4.) Perhaps anticipating a preservation counter-argument, 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, these Respondents expressly challenged the Marshalls' motion in this regard below. (*See generally* R. pp. 174-203; R. pp. 405-406; R. pp. 407-416, 311-312, 320; R. pp. 417-418; R. pp. 151-154; R. pp. 171-173; R. pp. 161-170; R. pp. 204-238.)

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 contrary[15]—that there was no malpractice before 2005. (*See generally*

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[14] 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.)

[15] (*See* R. p. 312, line 25 – p. 313, line 5 and R. p. 320, lines 8-25; *see* cont.

R. p. 193, line 8 – p. 196, line 17 (including the following argument by the Marshalls' counsel: "Judge . . . . You've 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 this 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; R. pp. 405-406; R. pp. 417-418.)

The Marshalls' argument to this Court, which they did not raise to the circuit court for the first time until their motion for reconsideration (thus,

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also R. pp. 5-6, 9-10.)

improperly asking the circuit court to "reconsider" its decision on the basis of argument that they had not asked it to consider in the first place), is not preserved for appellate review, and cannot be allowed to undermine the circuit court's grant of summary judgment in favor of these Respondents. *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).

CONCLUSION

Wherefore, for the foregoing reasons, and, in accordance with the Court's authority under Rule 220(c), SCACR, for any other reason appearing in the record (to include the reasoning set forth in the circuit court's order granting summary judgment in favor of these Respondents), as well as any other reason presented in Dr. Dodds's brief (in which these Respondents join, in accordance with Rule 208(b)(6), SCACR, to the extent

that it is not inconsistent herewith), these Respondents respectfully request that this Honorable Court affirm judgment in their favor.

Respectfully submitted,

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Charleston, South Carolina

Dated: 5/5/15

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

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

C.A. No. 2011-CP-10-0934
App. No. 2014-001833

Virginia L. Marshall and Todd W. Marshall,

Appellants,

v.

Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC., Georgia Roane, M.D., and Rheumatology Associates, P.A.

Respondents.

FINAL BRIEF OF RESPONDENTS KENNETH A. DODDS, M.D. AND CHARLESTON NEPHROLOGY ASSOCIATES, LLC

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STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Respondents Dr. Kenneth Dodds and Charleston Nephrology Associates, LLC, would restate the issue on appeal as:

> Did the Trial Court properly grant summary judgment to Respondents Dr. Dodds and Charleston Nephrology Associates, LLC on the Plaintiffs' medical malpractice claims as barred by the statute of repose, S C. Code Ann. §15-3-545(A), because the six-year period began to run on September 15, 2004 when Dr. Dodds allegedly first breached the standard of care by failing to order certain the testing that allegedly would have revealed that she had a rare disease known as Waldenström's macroglobulinemia?

Introductory Preface

This is an appeal involving two medical malpractice claims against two doctors that were consolidated for discovery and trial. As alleged, the Plaintiff Patient, Virginia L. Marshall,[1] was treated by Respondent Dr. Roane, a rheumatologist, from 2000 to 2007, who diagnosed her with a condition of undifferentiated connective tissue disease, an autoimmune disease. Respondent Dr. Dodds, a nephrologist, treated the Patient from September 15, 2004 through September 15, 2005, for high levels of protein in her urine (proteinuria) on a referral from Dr. Roane. Years later, in January/February 2010, she was diagnosed with a rare form of lymphoplastmatic lymphoma, a non-Hodgkin's blood cancer known as Waldenström's macroglobulinemia.

As described by the Plaintiff Patient, her case is broadly based on allegations that the Respondents misdiagnosed her condition and should have discovered that she had Waldenström's earlier. However, the time frames and medical treatments relevant as to each Respondent Physician are distinct and separate, and the Plaintiff Patient filed separate actions as to each Physician As discussed in more detail below, the claims against Dr Dodds -- commenced on February 7, 2011 -- are based on allegations that he should have ordered certain testing during the treatment of her proteinuria and discovered that she had Waldenström's in February 2005. Apart from any evidentiary dispute about whether Dr. Dodds breached the standard of case, the Trial Court held that the Patient's claims 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 expert's testimony that her Waldenström's could have and should have been diagnosed by testing at that time.

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[1] The Patient's spouse is also a plaintiff, but for clarity, they are generally referred to collectively as "Plaintiff Patient" throughout this brief

STATEMENT OF THE CASE

By virtue of the fact that the course of treatment spanned July 1, 2005, the effective date of the Medical Malpractice Act, including S.C. Code Ann. §15-79-125 and 15-36-100, this case comes to the Court through a somewhat protracted process. Briefly, the Plaintiff Patient filed a Notice of Intent to File Suit and a summons and complaint against Dr. Kenneth A. Dodds and Charleston Nephrology Associates, L.L.C. [collectively referred to as Dr. Dodds] on February 7, 2011. [ROA 31; Complaint, 2011CP1000934.] After completing the presuit medication process, she later filed a separate summons and complaint on June 8, 2011. [ROA 55; Complaint 2011CP1004057.] After motion and order, the Plaintiff Patient filed an amended complaint asserting only allegations covering before July 1, 2005, and an amended complaint asserting allegations covering after the effective date. [ROA 62; Amended Complaint 2011CP1000934, filed 12/28/11. ROA 69; Amended Complaint 2011CP1004057, filed 12/28/11.]

Dr. Dodds and his Group filed answers to the amended complaints, generally denying all allegations of negligence and asserting affirmative defenses, including the statute of repose [ROA 83, 98; Answers to Amended Complaint 2011CP1004057, filed 1/3/12, 1/23/12 ROA 76, 90; Answers to Amended Complaint 2011CP1000934, filed 1/3/12, 1/23/12]. Motions for Summary Judgment were filed by Dr. Dodds and his Group, asserting that the claims were barred by the statute of repose. [ROA 106; Motions filed 10/23/2013, 12/11/2013.]

The motions came for hearing before the Honorable J.C. Nicholson, Jr., on March 3, 2014, who granted the motions for summary judgment by order, filed May 2, 2014

[ROA 12; Order.] Although the Plaintiff Patient alleged that the cancer was present and should have been detected as early as February 9, 2005[2] -- within the six-year period -- the Trial Court held that the Plaintiff Patient's claims against Dr. Dodds are barred by the statute of repose based on her own expert's testimony that the first alleged misdiagnosis occurred on September 15, 2004 at her initial visit.

Thereafter, the Plaintiff Patient made a motion for reconsideration, which was denied by Order, filed August 7, 2014. [ROA 151, 25; Motion, Order.] The Plaintiff Patient timely filed and served a Notice of Appeal.

As noted above, the Plaintiff Patient has pursued similar proceedings against Dr Georgia Roane and Rheumatology Associates, P.A. [collectively referred to as Dr Roane], based on medical treatment spanning from 2000 to 2007. The cases were consolidated – over Dr. Dodds' objection – for discovery and trial.[3] However, the Trial Court issued a separate order granting summary judgment to Dr. Roane on similar statute of repose grounds. The Plaintiff Patient has appealed and submitted a single brief presenting an issue as to the statute of repose without relevant distinction as between the two sets of Respondents and the different diagnoses and courses of treatment While the facts and law overlap in certain points, the time frames and medical treatments relevant as to each Respondent Physician are distinct and separate. Accordingly, the Respondents are submitting separate briefs.

STATEMENT OF THE FACTS

Overview – The Importance of the Distinctions between the Diagnoses and Course of Treatment by Dr. Dodds and Dr. Roane

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[2] ROA 62, 69; Amended Complaints ¶8.]

[3] [ROA 109, 1; Objection filed, 10/30/13, Order, filed 11/18/13.]

As described by the Plaintiff Patient: "The respondents are two physicians who spent a substantial amount of time giving Virginia Marshall aggressive treatment for a disease that her experts say she did not have." [Appellants' Brief, p. 1] However, the facts are that the Plaintiff Patient was treated by Dr. Roane, a rheumatologist, from 2000 to 2007, for a diagnosed condition of undifferentiated connective tissue disease, an autoimmune disease. After having been diagnosed with Waldenström's in 2010, the Plaintiff Patient claims that Dr. Roane's original diagnosis was wrong and she failed to reevaluate the diagnosis to discover the cancer and change the treatment. The Plaintiff Patient states that her allegations against Dr. Dodds are "generally similar, but over a much shorter time period. .... Like the claim against Dr. Roane, the allegation of malpractice is that Dr. Dodds failed in his duty to monitor Mrs. Marshall's treatment and to respond appropriately when her symptoms did not improve." [Appellants' Brief, p. 2.] However, the Plaintiff Patient's characterization of a relationship between Dr. Roane's treatment for the autoimmune disease and Dr Dodd's treatment for the proteinuria is inaccurate and inconsistent with her pleadings and the expert testimony elicited during discovery.

In her amended complaints, the Plaintiff Patient alleges that she was seen and treated by Dr. Dodds on February 7, 2005, February 9, 2005, September 12, 2005, and September 15, 2005, during which times his diagnosis was proteinuria and he prescribed a medication called Diovan. However, she strategically omitted the fact that she also had been seen and treated by Dr. Dodds in September 2004 for the same condition. Not coincidentally, the September 2004 dates are critical because they fall outside the six-year statute of repose that bars her claims for any alleged negligence by Dr. Dodds during

the course of his treatment of her proteinuria from September 15, 2004 through September 15, 2005.

The Plaintiff Patient's Allegations as to Dr. Dodds

As alleged, the Plaintiff Patient underwent a 24-hour urine test as ordered by Dr. Dodds on February 7, 2005, which showed elevated protein in her urine of 3045 mg/day [3.1 g/day]. She was seen by Dr. Dodds on February 9, 2005, with a diagnosis of chronic proteinuria and treatment with medication/Diovan. She was advised to follow-up in six months for another 24-hour urine test. [ROA 63, 70; Amended Complaints, ¶ 4.]

The Plaintiff Patient returned to Dr. Dodds for the scheduled follow-up in September 2005. She had a 24-hour urine test on September 12, 2005, which showed elevated protein in her urine of 4169 3 mg/day [4.2 g/day]. She last saw Dr. Dodds on September 15, 2005. [ROA 63, 70; Amended Complaints, ¶ 5.]

The Plaintiff Patient was referred to another nephrologist in January 2010, and he ordered testing to evaluate the type of protein in her urine, which showed a cancerous myeloma protein. She was referred to an oncologist in February 2010 who diagnosed her with lymphoplastmatic lymphoma.[4] [ROA 64, 71 Amended Complaints, ¶ 7.]

The Plaintiff Patient alleged that the Waldenström's was present and should have been detected as early as February 9, 2005, and, that she could have been put on cancer treatment with Rituxan therapy immediately She alleged that if her Waldenström's had been diagnosed in 2005, her prognosis would have been better and her life expectancy longer. [ROA 64, 71; Amended Complaints, ¶ 8-9.]

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[4] She has a rare form of non-Hodgkin's blood cancer known as Waldenstrom's. It is not curable. Dr. Singer testified that there is no evidence that the failure to diagnose Waldenström's in 2004 has led to any complications. [ROA 329; Singer Dep. 58:8-14.]

The Facts as shown by the Medical History

The medical records show that the Plaintiff has a long history of chronic proteinuria dating back prior to 1999. She had been seen on a consult by Dr. Dodds in July 1999 when she was hospitalized by her treating physician with a diagnosis of acute renal failure and interstitial nephritis, during which time her protein levels were as high as 6.1g/per day. She was treated with steroids and her condition resolved. A renal biopsy was performed which did not show any cause for her condition. Later in 2000, her treating physician ordered a serum protein electrophoresis ("SPEP") test that was negative for signs of cancer. [ROA 240; Dodds Dep. 64-66]

Although the Patient continued to have proteinuria after 1999/2000 hospitalization, her condition was stable and it did not substantially change [ROA 242, 294; Dodds Dep. 66-67, 93.] Dr. Dodds did not see the Patient again until 2004-2005. Meanwhile, Dr. Roane, the rheumatologist, had diagnosed the Patient in 2000 as having undifferentiated/mixed connective tissue disease with nephritic syndrome, and she was being treated with medications.

While the medical records confirm, as alleged in the amended complaint, that the Plaintiff Patient was treated by Dr. Dodds again in February and September 2005 for her chronic proteinuria, she seeks to avoid the fact that her course of treatment with Dr. Dodds actually began in September 2004. The medical records show that the Patient had a history of elevated protein in her urine, and when she had a 24-hour urine test on August 6, 2004, which revealed protein levels of 3 5 g/day, she requested that Dr. Roane refer her to Dr. Dodds to treat the proteinuria. Dr. Dodds was not asked to confirm or

evaluate Dr. Roane's underlying diagnosis. [ROA 245; Dodds Dep. 98. See also ROA 257; Luke Dep. 46.]

The Patient was seen by Dr. Dodds on September 15, 2004, and he prescribed Diovan to treat her proteinuria She was advised to follow-up in two months, and at the time of the follow-up visit on November 11, 2004, the Patient reported that she was feeling very well and she had no complaints; Dr. Dodds did not order any urine tests, and just continued her medication. [ROA 345; Singer Dep. Ex. 5 – Timeline Summary. See also ROA 385; Dr. Luke Affidavit.]

As alleged, when the Patient was seen by Dr Dodds on February 7, 2005, her protein level was 3.1 g/day, and in September 15, 2005, it was 4 2 g/day Those levels were not significantly different in comparison to the 3.5 g/day year earlier in September 2004, and she was considered stable with normal renal function.

Although Dr. Dodds had recommended at the September 2005 visit that the Patient return for a follow-up in six months, she never returned to Dr. Dodds and eventually she self-discontinued her medications after she quit seeing Dr Roane [ROA 262 Luke Dep. 151. ROA 345; Singer Ex 5.] In 2010, Patient had a new internist (Dr. Honney) who wanted her to have an updated evaluation of her proteinuria so she was referred to Dr. Pride, a nephrologist with the practice group from which Dr. Dodds had retired in 2008. She had a 24-hour urine test -- for the first time since September 2005 -- and her protein levels had risen dramatically to 9.1 g/day (9077 mg/day). [ROA 345; See Singer Dep. Ex. 5.]

The Plaintiff Experts' Opinions

In accordance with §15-79-125 and §15-36-100, the Plaintiff Patient had submitted expert affidavits from Dr. Barry Singer, an oncologist/hematologist, and Dr Barry Luke, a nephrologist.

Dr. Singer opined in his affidavit that the Plaintiff Patient had cancerous protein in her urine in February 2005 that could have been detected by Dr. Dodds if he had ordered further testing with a urine protein electrophoresis test (UPEP) and/or a serum protein electrophoresis test (SPEP). He opined in his affidavit that it was medical negligence to fail to order the testing to determine the type of protein in her urine. [ROA 382; Singer Affidavit, ¶4-6.]

Dr. Robert Luke opined in his affidavit that Dr. Dodds breached a standard of care in February 2005 by failing to order UPEP/SPEP testing and by continuing her on Diovan. He also echoed Dr. Singer's opinion that there was cancerous protein present in her urine in 2005 and cancer would have been detected is Dr. Dodds had performed the UPEP/SPEP testing beginning in 2005. [ROA 385; Luke Affidavit, filed 2/7/11.]

In striking contrast to the opinion in the affidavit filed with the pleading, Dr. Singer testified in his deposition that if the UPEP/SPEP testing had been done in 2004, it would have shown her Waldenström's, and that Dr. Dodds failed to diagnose her then

Q: We established earlier that you're aware that Mrs. Marshall saw Doctor Dodds in September of 2004?

A: Yes, sir.

Q: And it would be your testimony that she had cancerous protein in her urine at that time as well?

A: I believe she did.

Q: And it would be your opinion that Doctor Dodds failed to diagnose the cancerous protein at that time as well?

A: Yes, sir.

[ROA 330-331; Singer Dep. 61:20–62.6 See also ROA 323-324, 337; Singer Dep. 8:12-9:1, 68:17–68:23.] Dr. Singer could not offer any explanation as to why he did not include his opinion about September 2004 in his affidavit. [ROA 331; Singer Dep. 62:8-16.] He also testified that each of the four times that Doctor Dodds saw the Patient, her proteinuria was relatively stable. [ROA 340; Singer Dep. 88:15-20]

Plaintiff's other expert, Dr. Robert Luke, testified in his deposition that the cancer was present as early as 2000, and at least by 2003. ROA 249; Luke Dep. 25:7–12.] He also testified that Dr. Dodds breached the standard of care during the September 2004 visit:

- his "principal complaint" of Dr. Dodds' treatment was "the first two visits were enough to indicate other actions" [ROA 284; Luke Dep. 173:6-7];
- "during the first two visits, he was outside the standard of care without following up for the diagnosis of the proteinuria" [ROA 284-285; Luke Dep. 173.24 - 174:1]; and
- "the first two visits were enough information for further studies to be done, I think that's the main evidence " [ROA 286; Luke Dep. 175:7-9.]

Plaintiff's oncology expert testified that Waldenström's is not curable, and the average life expectancy is four to five years. With a "smoldering" type that does not have organ involvement, they do not even begin treatment, and the patient can live a normal life. [ROA 325-327, 342-344; Singer Dep. 36-38, 129-131.] As of 2011, the Patient was stable and functional with no complications or organ failure. [ROA 328, 329,

339; Singer Dep 39, 58, 84.] Thus, even with the alleged delayed diagnosis, she has survived past the average life expectancy.

THE APPLICABLE LAW

A. The Statute of Repose ~ §15-3-545(A)

As specifically applies to medical malpractice actions, S.C. Code Ann. § 15-3-545 provides for a three-year statute of limitation and a six-year statute of repose.

> (A) In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, ***not to exceed six years from date of occurrence, or as tolled by this section***. (Emphasis added.)

The statute of limitations is a matter of procedure that operates as a defense to limit the remedy available from an existing cause of action, while the statute of repose creates a substantive right to be free from liability. Langley v Pierce, 313 S.C. 401, 403-404, 438 S.E.2d 242, 243 (1993) (citing First United Methodist Church v U.S. Gypsum Co., 882 F.2d 862, 865–866 (4th Cir 1989)). "[T]he statute of repose portion of section 15–3–545(A) is substantive law, unlike a statute of limitations, which is procedural law." Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citing Capco of Summerville, Inc v J.H Gayle Const Co., Inc , 368 S.C. 137, 142, 628 S E.2d 38, 41 (2006))

While the three-year limitation period begins to runs from the date of discovery, the six-year statute of repose runs from the date of occurrence of the alleged negligent act or omission and "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, 339-340, 380 S.E.2d 821, 821 (1989); O'Tuel v. Villani, 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App. 1995) overruled by on other grounds; I'On, L L C v. Town of Mt Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

Since its passage, the Supreme Court has upheld the statute of repose in the face of equal protection and due process challenges and rejected other challenges that would extend or avoid the six-year period of repose In the face of constitutional challenges, the Court has held that a six-year statute of repose is not unreasonable even though it seems unfair and harsh to bar a claim that may not have been discovered because there is a reasonable basis to protect the class of health care providers, and a rational relationship to the legitimate legislative purpose of reducing health care providers' exposure to liability and continued delivery of reasonable health care services Hoffman v. Powell, 380 S E 2d at 822; Smith v. Smith, 291 S.C. 420, 425, 354 S.E.2d 36, 39 (1987).

In Langley v Pierce, the Court rejected an argument that the general tolling provisions of § 15–5–30 might toll the medical malpractice statute of repose.[5] 438 S.E 2d at 243 (holding statute of repose was not tolled by the doctor's absence from the state). In so holding, the Court noted "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." 438 S.E 2d at 243 (citations omitted). The Court has also rejected an argument that the statute of repose did not apply to medical malpractice actions against government entities under the Tort Claims Act. Kerr v. Richland Mem'l Hosp., 678 S.E.2d at 810.

[5] The only tolling allowed for a medical malpractice action is the specific provision of §15-3-545(D) dealing with minors.

The Court has also refused to adopt the continuous treatment rule ("the doctrine of continuing tort") that would have a malpractice cause of action for a continuous course of treatment accrue at the termination of his physician's treatment of the plaintiff patient Harrison v. Bevilacqua, 354 S.C. 129, 133, 580 S E.2d 109, 111 (2003) [6] "[W]e find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set..." *Id.* at 114. The Court again noted --- with added emphasis – 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 " *Id* (citations omitted).

B. The Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537 (1991); Celotex Corp. v Catrett, 477 U.S. 317, 325 (1986). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the nonmoving party "may not rest upon the mere allegations or denials of his pleading." Rule 56(e), S.C.R.C.P. Instead, the nonmoving party "must set forth specific facts

[6] The Court considered and discussed the continuous treatment doctrine in Preer v Mims, 323 S.C. 516, 520, 476 S.E.2d 472, 474 (1996), but the Court did not at that time decide whether to adopt the continuous treatment doctrine because the doctrine would not have saved the plaintiff's claim under the facts of that case.

showing that there is a genuine issue for trial." Id. Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of repose. See Kerr v. Richland Mem'l Hosp., 678 S.E.2d at 811.

An appellate court reviews the grant of summary judgment using the same standard employed by the circuit court Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C 356, 361, 563 S.E.2d 331, 333 (2002).

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENTS DR. DODDS AND CHARLESTON NEPHROLOGY ASSOCIATES, LLC ON THE PLAINTIFFS' MEDICAL MALPRACTICE CLAIMS AS BARRED BY THE STATUTE OF REPOSE, S.C. CODE ANN. §15-3-545(A) BECAUSE THE SIX-YEAR PERIOD BEGAN TO RUN ON SEPTEMBER 15, 2004 WHEN DR. DODDS FIRST FAILED TO ORDER THE TESTING THAT ALLEGEDLY WOULD HAVE REVEALED HER WALDENSTRÖM'S.

As described by the Plaintiff Patient, this is not a case that involves only allegations of one interaction between the patient and physician but of continued misdiagnosis and improper treatment over a course of time. [Appellants' Brief, p. 2.] Over the course from September 15, 2004, through February 2005, and until her last visit with Dr. Dodds on September 15, 2005, she was diagnosed with and treated for the same condition – proteinuria. As established by the Plaintiff's own expert, she had the cancer during that same time period, which could have been diagnosed as early as the September 15, 2004, if Dr. Dodds ordered a UPEP/SEP test. However, the Plaintiff Patient purports to pursue only a claim for the allegedly negligent failure to test her on the February 9, 2005, and subsequent visits in September 2005. The Trial Court held that the alleged negligence on February 9, 2005 did not trigger the statute of repose, but rather, that the six-year period began on September 15, 2004, and bars her claims

The Plaintiff Patient contends that the Trial Court erred in dismissing all her claims because Dr. Dodds committed a series of negligent acts that created a series of deadlines, and she is entitled to pursue claims for the negligent acts in February and September 2005. However, the Trial Court wisely and correctly reasoned that according to the Plaintiff's own experts' opinions, the first alleged misdiagnosis occurred on September 15, 2004, at her initial visit, and the alleged misdiagnosis on February 9, 2005 was simply the continuation of the initial misdiagnosis:

> While [Patient] did subsequently visit [Dr Dodds] for treatment on February 9, 2005 and was not diagnosed with cancer, this later alleged misdiagnosis cannot serve as the starting point for the statute of repose and is not a 'separate and independent act' of negligence as claimed by Plaintiffs.

[ROA 23; 5/2/14 Order, p. 12.]

As the Court discussed in Preer v. Mims, the application of the statute of repose is "relatively easy" to apply when the alleged malpractice consists of a single identifiable act, but application is more difficult where the alleged malpractice "consists of a course of conduct, a series of negligent acts, or a continuing impropriety of treatment." 476 S.E.2d at 473 (citations omitted). The Court noted that in such "difficult" situations, the continuous treatment rule could preserve a patient's claim from a statute of repose bar However, the Court has refused to adopt the continuous treatment rule and the Plaintiff Patient's cannot pursue her claims of misdiagnosis piecemeal Her claims for negligence by Dr. Dodds during the course of treatment from September 2004 through September 2005 are all barred by the statute of repose.

A. A new six-year period of repose did not begin on each subsequent visit when Dr. Dodds failed to order the testing that would have revealed her cancer.

In the face of the Supreme Court's refusal to judicially adopt the continuous treatment rule in South Carolina, the Plaintiff Patient attempts to avoid the statute of repose bar with an argument that Dr. Dodds committed a series of separate, identifiable negligent acts during the course of his treatment. She acknowledges the Court' precedent in Harrison v. Bevilacqua, but argues that she does not seek to invoke the continuous treatment rule to toll the statute of repose. Rather, she contends that the continuous treatment rule is not relevant to the issue in this case and she affirmatively disavows any argument that the statute of repose should be tolled. "She is only suing for the malpractice that occurred within the deadline The continuous treatment rule is not in play." [Appellants' Brief, pp. 5, 11.]

Plaintiff Patient concedes – even "stresses" – that she is not complaining about any of the "original malpractice" which she agrees is stale. [Appellants'' Brief, p. 4] She maintains that she is suing for "*later* breaches which caused *continued* pain and suffering as well as the costs of getting *more* treatment for a disease that she did not have " [Id.] The "gist" of her argument is 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.] She argues "the first malpractice occurred outside the six-year deadline, but [her] experts have said that these doctors continued committing malpractice as time went on.... The allegation is that there were repeated and identifiable mistakes, and that the errors got more obvious as time went on." [Appellants' Brief, p. 11.] She complains that the Trial Court's ruling that has misapplied the statute of repose to "bring multiple occurrences of malpractice under one umbrella in an effort to insulate repeated breaches of the standard of care from liability." [Appellants' Brief, p. 5.]

She contends that "a series of negligent acts would create a series of deadlines": "Each time there is an occurrence of malpractice; the repose period for that malpractice extends six years into the future." [Appellants' Brief, pp. 7, 6, 8.] The Respondents maintain that "[s]uch a result would be fundamentally at odds with the language and manifest purpose of the statute of repose" Columbia/CSA-HS Greater Columbia Healthcare System, LP d/b/a Providence Hospital v. The South Carolina Medical Malpractice Liability Joint Underwriting Association, et al., ___ S.C. ___, 769 S.E.2d 847 (2015).

First, Plaintiff's argument about separate acts of negligence is factually and legally inconsistent with her own description of this case as involving a continued misdiagnosis and improper treatment over a course of time. The Plaintiff Patient asserts that she has focused her claims and tailored her allegations to stay in the statute of repose. [Appellants' Brief, p. 15.] However, her "tailored" – if not contrived -- assertions of selective claims for separate acts of negligence cannot be logically reconciled with her concession that the first malpractice occurred outside the six-year period of repose and her argument that Dr. Dodds kept breaching the standard of care and continued committing malpractice.

Nor can the Plaintiff Patient's argument that a series of negligent acts creates a series of deadlines be reconciled with any of the Court's opinions as discussed above Each time the Court has addressed issues involving this statute of repose, 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. The Plaintiff's proposed rule for misdiagnosis claims would 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. Hoffman v. Powell, supra. Rather, the adoption of such a rule that creates a series of repose periods with each failure to correctly diagnose over the course of treatment would upset the economic balance struck by the legislative body and run afoul of the absolute limitations policy set by the Legislature. Langley v Pierce, supra; Harrison v Bevilacqua, supra.

B. Where there is a claim of negligence in making a diagnosis and treatment of a condition over a course of time, the statute of repose begins to run on the date of the initial negligent act.

In holding that the statute of repose began to run on the date of the first visit in September 2004, the Court relied, in part, upon the holding of the Georgia Appellate Courts that where there is a claim of negligence in making a diagnosis and treatment of a condition over a course of time, the statute of repose begins to run on the date of the initial negligent act. Kaminer v. Canas, 282 Ga. 830, 831, 653 S.E.2d 691, 693 (2007); Howell v. Zottoli, 302 Ga. App. 477, 691 S.E 2d 564 (2010). The Plaintiff Patient complains that the Trial Court erred in relying upon these opinions because the Georgia Courts' reasoning is unsound and inconsistent with South Carolina precedent to the extent that it focuses on the original misdiagnosis as the only injury. [Appellants' Brief, p. 13.] However, the Georgia Appellate Courts' decisions stand firmly on sound reasoning and important public policy fully consistent with our statute and caselaw.

Georgia has a two-year statute of limitations and a statute of repose of only five years. Ga. Code Ann § 9-3-71. The statute of limitations period commences on the occurrence of an injury: "(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." However, the statute of repose runs from the occurrence of the negligent act: "(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."

Like the South Carolina Supreme Court, the Georgia Supreme Court also has refused to adopt the continuous treatment rule. Young v. Williams, 274 Ga. 845, 560 S.E.2d 690 (2002). Notably, the South Carolina Supreme Court looked to, and relied upon Georgia precedent in rejecting the continuing treatment/continuous tort theory for the reason that it would nullify legislative intent. *See* Harrison v. Bevilacqua, 580 S.E.2d at 114 (citing Charter Peachford Behavioral Health Sys. v Kohout, 233 Ga.App. 452, 504 S.E 2d 514, 521 (1998); *see also* Young v. Williams, 274 Ga. 845, 845, 560 S.E.2d 690, 691 (2002) (refusing to adopt doctrine of "continuous treatment" in medical malpractice cases involving misdiagnosis).

In Kaminer v. Canas, the Georgia Supreme Court was presented with the question of "if a plaintiff in a misdiagnosis case presents with additional or significantly increased symptoms of the same misdiagnosed disease, the medical malpractice statute of limitations and statute of repose do not bar the plaintiff's claims?" 653 S.E.2d at 693. The Court held that the statute of repose begins to run on the date of the initial misdiagnosis and failure to treat if the disease existed on that date. There, the patient suffered from AIDS which was misdiagnosed and went untreated for years, but the Court held that even though misdiagnosis and failure to treat occurred each time the patient reappeared for treatment, the statute of repose began to run on the date the initial

misdiagnosis occurred. The plaintiff contended that he was reinjured when he developed additional and significantly increased symptoms of his misdiagnosed condition. The Court reasoned, however, that any subsequent failure to diagnose and treat him for AIDS did not inflict any new injury on him. *Id* at 695. While the statute of repose generally begins to run on the date of the alleged negligent act, a later negligent act does not start a new repose period where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition. Howell v. Zottoli, 691 S E.2d at 566 (discussing Kaminer).

In Howell v. Zottoli, the defendant physician had treated the plaintiff patient over the course of years for various matters from 1996 through the time of his death in 2001 from coronary artery disease, and although the patient manifested several cardiovascular risk factors, the physician did not diagnose decedent as a high risk for coronary artery disease and did not counsel him on nor treat him for the deadly condition. The Court held that his claim was barred by the statute of repose because the condition and injury continued uninterrupted from the time the physician first diagnosed and treated him:

> Rather, as testified to by [plaintiff's] own expert, the undisputed evidence showed that the cardiac disease and attendant vascular damage had occurred and existed when the decedent began smoking cigarettes, which The condition or injury of damage to his vascular system did not become "new" over the years; rather, it simply worsened and eventually resulted in his demise, as in *Kaminer* Because the condition or injury was already existing, the rule regarding diagnosing and treating the condition applied, not the rule regarding warning the decedent about a condition in the future. Thus, the statute of repose began to run from the date of the first misdiagnosis and mistreatment.

691 S.E.2d at 567.

As discussed in Howell, the Georgia Supreme Court has recognized a "subsequent" or "new injury" exception that recognizes a new repose period may be

triggered if/when the misdiagnosed condition leads to a new condition, but it is limited to cases in which the patient's injury arising from the misdiagnosis occurs subsequently, as when a condition left untreated because of the misdiagnosis, leads to the development of a new, more debilitating or less treatable condition. Cleaveland v. Gannon, 288 Ga.App. 875, 655 S.E.2d 662 (2007), *aff'd* 284 Ga 376, 377, 667 S.E.2d 366, 368 (2008); *see also* Amu v. Barnes, 283 Ga. 549, 662 S E 2d 113 (2008). Under such "new injury" exception, the repose period is not "retriggered" by pain or economic loss that the patient suffers due the misdiagnosis, but by the subsequent development of another condition. The Georgia Court reasoned that "the deleterious result of a doctor's failure to arrive at the correct diagnosis in these cases is not pain or economic loss that the patient suffers beginning immediately and continuing until the original medical problem is properly diagnosed and treated Rather, the injury is the subsequent development of the other condition. 667 S.E.2d at 368.[7]

The Plaintiff Patient did not develop any other condition to retrigger the six-year period of repose She had proteinuria for which she was treated, and she had undiagnosed cancer during that same time. As the Trial Court correctly held, the statute of repose was triggered on September 15, 2004, and thus, her claims are barred.

C. The statute of repose does not restart if the patient later incurs additional damages during the course of treatment.

Plaintiff Patient argues that "it does not matter if the injury is new. What matters is whether the new occurrence causes the plaintiff to incur additional damages," citing to Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693 (2012)

[7] There also is an addition element of the new injury exception; namely, the patient "must also remain asymptomatic for a period of time following the misdiagnosis and mistreatment " Amu v. Barnes, 662 S.E.2d at 113; Howell v Zottoli, 691 S.E.2d at 567

[Appellants' Brief, p. 15.] However, the Grier opinion does not address any issue related to the statute of repose. It simply held that "nothing in section 15–79–125(A) requires that an expert affidavit in a medical malpractice action submitted pursuant to section 15–36–100(B) contain an opinion regarding causation" *Id* at 698

Plaintiff Patient claims that each time Dr. Dodds failed to reach a correct diagnosis she suffered a continued disease and additional pain and suffering, and additional expenses. However, nothing in any of the statute of repose opinions supports any argument that additional damages for a continued disease restarts the clock for a new six-year period. To the contrary, the statute of repose runs from the date of occurrence O'Tuel v. Villani, 455 S.E.2d at700 (the date of "occurrence" was the date of the child's delivery when the physician allegedly committed negligence in failing to perform a caesarean delivery). In a statute of repose opinion from the Court of Appeals in Shadwell v. Craigie, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004), the plaintiff patient brought a medical malpractice action against a physician for failing to inform her of certain laboratory test results that indicated she had kidney trouble, but the Court held that it was barred by the statute of repose because the "occurrence" happened when the physician failed to inform him within a reasonable time after learning the results

All the additional damages are related to the failure to diagnose her cancer. There is no expert opinion evidence that she has developed any new condition. To the contrary, her expert testified that Waldenstrom's is incurable, and that she has not suffered any complications from failure to diagnose it any earlier; in fact, she has outlived the average life expectancy of Waldenström's patients. So just as the plaintiff in Kaminer could not make any claim that he suffered any pain or economic loss other than that proximately

caused by his unchanged AIDS condition which claim was barred, the Plaintiff Patient here has no claim that she suffered any pain or economic loss other than that proximately caused by her undiagnosed Waldenström's -- which is barred.

CONCLUSION

Dr. Dodds treated the Plaintiff Patient for proteinuria over the course of a year -- beginning on September 15, 2004, through September 15, 2005 According to the opinion testimony of the Plaintiff's own experts, she had Waldenström's during that entire course of treatment, which would have been diagnosed and properly treated if Dr. Dodds had ordered the proper tests.

On such a claim of negligence in making a diagnosis and treatment of a condition over a course of time, the statute of repose begins to run on the date of the initial negligent act. In this case it began to run on September 15, 2004 and expired before she commenced her legal proceeding against Dr. Dodds on February 7, 2011.

Contrary to the Plaintiff's contentions, the alleged negligence in failing to order the tests at the time of each office visit does not constitute separate occurrences that trigger separate periods of repose. Similarly, she cannot avoid the statute of repose bar by attempting to waive any claim for damages from September 15, 2004, until the February 9, 2005 visit Accordingly, the Trial Court properly granted summary judgment to the Respondents because her claims against Dr. Dodds are barred by the six-year statute of repose in §15-3-545(A).

WHEREFORE, based on the foregoing, the Respondents Kenneth A. Dodds, M.D. and Charleston Nephrology Associates, LLC respectfully request that this Court affirm the summary judgment granted to them on the Plaintiffs' claims.

Respectfully submitted,

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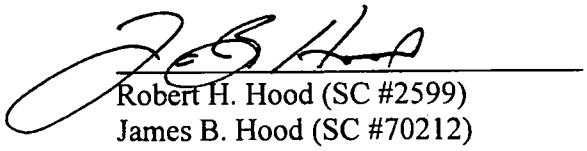

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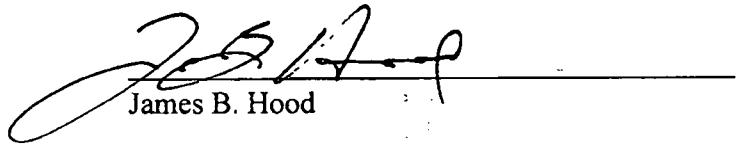
Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 4, 2015



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STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

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

C A. No. 2011-CP-10-0934
App. No. 2014-001833

Virginia L. Marshall and Todd W Marshall,

Appellants,

v

Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC., Georgia Roane, M.D., and Rheumatology Associates, P.A.

Respondents.

Certificate of Service

The undersigned certifies that on this 5th day of May, 2015, a copy of the Final Brief on behalf of Respondents Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC., was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below.

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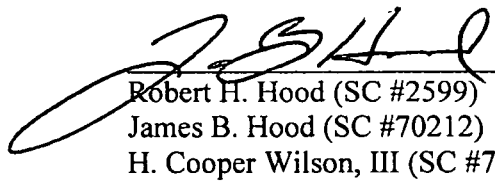

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ARGUMENT

A. The Respondents refuse to acknowledge that there is no South Carolina case supporting their position and that they are adding words to the statute of repose.

The circuit court granted summary judgment because it believed that the statute of repose begins running at the "first occurrence" of a physician's negligence. It did not matter if there were several occurrences The court said the repose clock starts with the first breach of the standard of care. See (R. p. 7) and (R. p. 18).

The respondents have never identified any South Carolina case articulating this view.

The circuit court cited *O'Teul v Villani*, but that case only involved one instance of negligence, not multiple instances of negligence The word "first" appears only one time in the decision, when the Court was describing the plaintiff's discovery of his learning disabilities. 318 S.C. 24, 27, 455 S.E.2d 698, 700 (Ct. App 1995)

When the respondents sold this theory to the circuit court, they cited *O'Teul* as well as *Hoffman v Powell*, *Langley v Pierce*, and *Shadwell v Cragie*. See (R. pp. 122, 124) and (R. pp. 143-145). None of these cases talk about the "first" occurrence of negligence. The respondents were just misrepresenting South Carolina law.

The respondents' briefs follow the same pattern. The briefs never cite a South Carolina case that articulates this principle, either in dicta or as a holding

And the respondents never examine the statute of repose's language or articulate why their reading is faithful to the way the statute is written. The statute does not contain any words of sequence It does not say (or suggest) that multiple breaches of the standard of care should be treated as a one "occurrence" if those breaches are similar or are related.

B. The Respondents refuse to acknowledge the distinction between the "continuous treatment rule," which revives stale claims, and the rule Ms. Marshall is advancing, which leaves stale claims alone.

Both of the respondents continue to emphasize South Carolina's rejection of the continuous treatment rule. Dr. Dodds says this means that Ms. Marshall cannot pursue her claims "piecemeal." Dr. Roane says that the "continuous treatment rule" and the "continuing tort doctrine" are different concepts and that the Supreme Court's rejection of these approaches supports the circuit court's decision.

Ms. Marshall cannot discover any meaningful difference between the "continuous treatment rule" and the "continuous tort doctrine" where deadlines are concerned. Our Supreme Court explained the continuous treatment rule in *Harrison v Bevilacqua*. See 354 S.C. 129, 135, 580 S.E.2d 109, 112 (2003). The Georgia Supreme Court recognized the "continuing tort" theory in *Everhart v Rich's, Inc* See 194 S.E.2d 425, 428 (Ga 1972). Both approaches take a series of negligent acts and treat them as a cumulative event for the purpose of deadlines. These rules say that the limitations and repose periods for *all instances* of malpractice do not begin until the *end* of treatment. The rules are basically the same. Ms. Marshall does not follow the argument that they are different in any way that matters here.

Those rules are not equivalent to the approach Ms. Marshall is advancing. She has openly acknowledged that claims for the original malpractice would be stale, but she has evidence of more malpractice that is within the deadline and she has identified damages that flow from those instances of negligence. The respondents still have not offered any lucid explanation of why Ms. Marshall's approach is not correct Instead, they are pushing the

same theory they pushed below, which is that the continuous treatment rule has been rejected and that everything is barred because the first act of negligence was outside the deadline.

The respondents are fixating on the word "continuous" and on phrases like "course of treatment," but those can describe temporal connections, logical connections, sequential connections, or other connections that are irrelevant to the question whether multiple acts of medical malpractice should be aggregated for the purpose of the limitations or repose deadlines. We would never say that someone who engaged in a "continuous" crime spree committed only one crime, and if we said that someone "continued" to be unfaithful to his or her spouse, nobody would seriously contend that it made a difference whether the later instances of unfaithfulness were similar or different than the first.

The first cut of a physician's malpractice may be the deepest, but this does not mean that subsequent cuts did not cause any harm. It is intellectually dishonest for the respondents to continue associating Ms. Marshall's argument with the continuous treatment rule, and the respondents continue to give the statute of repose a broad construction instead of the narrow reading that the law requires.

C. The Respondents offer no principled reason why Ms. Marshall's argument violates the purpose of the statute of repose and why granting immunity for repeated instances of negligence is the correct view.

Ms. Marshall's interpretation honors the purpose of the statute of repose, which is to allow a physician to have closure six years after providing treatment. For the first act of malpractice, that closure comes six years after the first instance of negligence. For any later malpractice, it naturally follows that peace of mind will have to wait longer.

The Court does not need to take Ms. Marshall's word for it. The Supreme Court has articulated the same reasoning and rationale.

The Supreme Court has held that when a case presents a series of discrete wrongs that would each be independently actionable, the defendant's claim to repose, which means rest, is "vitiated." *State v Ortho-McNeil-Janssen Pharmaceutical*, Op. No. 27502 (S.C Sup. Ct. filed Feb. 25, 2015) (Shearouse Adv. Sh. No. 8 at 31, 59). The court called this scenario "continuous accrual" and explained that if the deadlines in cases of repeated wrongdoing were tied to the first breach of duty or instance of misconduct, then "parties engaged in long-standing malfeasance would [] obtain immunity in perpetuity from suit even for recent and ongoing malfeasance." *Id.* (quoting *Aryeh v Canon Bus Solutions*, 292 P.3d 871, 880 (Cal. 2013)) There is no need to resort to Georgia law This case puts the point plainly.

In fairness, the Supreme Court issued this decision well after the circuit court's order. However, fairness also requires acknowledging that there is no principled way to distinguish this analysis from the circumstances in Ms. Marshall's case.

Someone trying to distinguish the Supreme Court's decision might argue that the case involves the Unfair Trade Practices Act and not a claim for medical malpractice. That is true, but the court based its holding on the fact that the violations were ongoing and independently actionable, and when the evidence is viewed in Ms. Marshall's favor, the same can be said here. If each instance of malpractice caused Ms. Marshall to suffer additional damages, it naturally follows that each instance of malpractice was actionable. This is because South Carolina, unlike Georgia, has never required a new "injury." South Carolina focuses on whether negligence causes "damages." (Brief of Appellant, pp.14-15)

Someone might also try to distinguish the case by saying that it involved the statute of limitations and not the statute of repose, but the court's point was that the law should not provide immunity to ongoing negligence and that where misconduct is continuing, the justification for the defendant's claim to rest is "vitiated." The law should hold people accountable if they keep making mistakes. The statute of repose does not provide differently.

It makes sense that the Supreme Court would embrace "continuous accrual" but wold reject the continuous treatment rule The continuous treatment rule would toll parts of the initial malpractice claim after the repose period for those parts has lapsed. Continuous accrual does not do this. *Aryeh*, 292 P.3d at 880 (distinguishing the two approaches).

It also makes sense that the Supreme Court would embrace continuous accrual but reject the tolling argument made in *Langley v Pierce*. The statute of repose contains a tolling provision, and because the statute expresses a single circumstance when the repose period is tolled and includes the language "as tolled by this section," it naturally follows that this is the *only* circumstance when the repose period is tolled. 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). Ms. Marshall is not "tolling." She is seeking to pursue timely claims and to leave the stale ones alone.

It is difficult to understand why the respondents insist on ignoring these distinctions. It is also difficult to understand how they have a good faith basis for calling Ms. Marshall's theory "contrived" or suggesting that she is trying to be clever in how she drafted this lawsuit. This was the *respondents'* motion for summary judgment, which means that Ms. Marshall and her husband get the benefit of the doubt. Leaving stale claims alone is just diligent lawyering, and while a jury might not believe Ms. Marshall's experts, some of those

experts expressed shock at the repeated failure to do a routine test that would have found this woman's cancer. See (R. p. 341) (R. pp 288, 300-301, 320-321).

D. The record can certainly speak for itself, but the suggestion that Ms. Marshall's arguments are not preserved is inaccurate.

Ms. Marshall does not understand Dr. Roane's error preservation argument.

The complaints allege multiple acts of negligence — repeated failures to properly monitor elevated protein levels and repeated failures to change course in the face of persisting and non-responsive symptoms — that occurred within the repose period. No one hid the history that was outside the deadline The pre-suit affidavits *acknowledged* it. See (R. p. 388); (R. p. 398).

Ms. Marshall reiterated this in a letter to the circuit court after the summary judgment hearing. (R. pp. 405-406). She wrote that it did not matter whether there were acts of negligence that occurred outside the repose period — she was suing for negligence that happened within the deadline. This was the same theory she offered in the argument on rehearing and it is the same theory she is arguing now

When the circuit court ruled that the "first" date of malpractice was the trigger date, Ms. Marshall sought rehearing and pointed out that this reasoning was not faithful to the statute's language and was not consistent with any South Carolina cases.

Error preservation requires that the circuit court have a "fair opportunity" to consider the argument. *Atl Coast Builders & Contractors v Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). The circuit court had a "fair opportunity" to consider everything here. Indeed, the court *did* consider these arguments. The court's error was rejecting them.

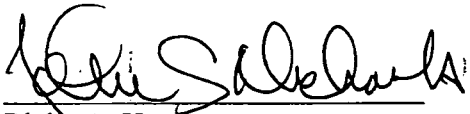
CONCLUSION

This is not a complicated case. There are certainly some factual differences between the claims against the defendants, but unless Ms. Marshall is missing something, there has been no argument that any of those factual differences make a difference in this appeal.

When the facts are viewed in Ms. Marshall's favor, those facts show that Dr. Roane and Dr. Dodds breached the standard of care on multiple occasions. Some of these breaches were outside the repose period but others were not. The breaches might be disputed, but everyone should agree that there is *some* evidence to support this view, and that is all that counts when considering summary judgment.

The circuit court held that the statute of repose begins to run at the first occurrence of a negligent act. This was the theory the respondents argued in their request for summary judgment, and this was the theory that the circuit court adopted. The Court should reverse because this rationale is not faithful to the language of the statute of repose or to the statute's purpose

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

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PROOF OF SERVICE

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