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Date: July 12, 02:55:28 PM EDT
Subj: Johnson v. MUSC, et al
Pages: 15

Good afternoon Mr. Shearouse,

I hope this finds you well. Attached please find correspondence regarding our Petition for Rehearing in this matter. This is being sent via FedEx overnight and will arrive to you on Monday together with the check and all necessary copies. Please do not hesitate to let us know if you need anything further.

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July 12, 2019

VIA FED-EX & FASCIMILE
Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

Re: Clair Craver Johnson vs. John Roberts, M.D.
Clair Craver Johnson vs. Medical University of South Carolina
Appellate Case No. 2018-000914
Case No.: 2012-CP-10-2867
YCR File: 2466-20111027

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Petition for Rehearing submitted by Petitioner John Roberts, M.D, the original and one (1) copy of the proof of Service for same and our firm's check in the amount of $50.00 representing the filing fee. Please file the originals and return court-stamped copies to me in the enclosed envelope.

With best wishes and kindest regards, I am

Sincerely,

YCRLAW, LLP

Kathleen B. Barnes
Secretary

Enclosures

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Cases No. 2012-CP-10-2867 and 2011-CP-10-8313

On Writ of Certiorari to the Court of Appeals

Appellate Case No. 2018-000914
Opinion No. 27897 (S.C. Sup. Ct. filed June 19, 2019)

RECEIVED
JUL 12 2019
S.C. SUPREME COURT

Clair Craver Johnson, Respondent,

v.

John Roberts, M.D., Petitioner.

And

Clair Craver Johnson, Respondent,

v.

Medical University of South Carolina, Petitioner.

PETITION FOR REHEARING
Submitted by Petitioner John Roberts, M.D.

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
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Attorneys for John Roberts, M.D.

NOW COMES Dr. Roberts,[1] by and through his undersigned counsel, pursuant to Rule 221(a), SCACR, and hereby petitions this Honorable Court for rehearing of this matter, which it decided in a 3:2 opinion[2] filed June 19, 2019 (the "Subject Decision"),[3] on the grounds that the Court has, most respectfully, misapprehended or overlooked the following material points.

GROUNDS FOR REHEARING

1. **Relying on Rule 220(b)(1), SCACR, the Court decided this appeal against Petitioners in summary fashion. Rule 220(b)(1) grants a limited exception to the general rule, set forth in Rule 220(b), that our state's appellate courts cannot decide appeals summarily, but must instead expressly rule on every distinct point (duly raised in the appeal) that is necessary to the decision of the appeal. Rule 220(b)(1) only applies to memorandum opinions, however. Otherwise, every decision of this Court must comply with Rule 220(b). The Subject Decision is not a memorandum opinion; nor could it be, as it is the published decision of a divided Court. Consequently, the Subject Decision does not comply with Rule 220(b).**

Rule 220(b) establishes a general rule prohibiting the summary disposition of appeals. It requires the appellate court (be it this Court or the court of appeals) to expressly rule on every distinct point (duly raised in the appeal) that is necessary

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[1] The shorthand references already defined in Dr. Roberts's principal brief (e.g., referring to Petitioner John Roberts, M.D., as "Dr. Roberts") are continued in this petition.

[2] Justice Hearn wrote the majority opinion, in which Chief Justice Beatty and Justice Few concurred. Justice James wrote a dissenting opinion in which Justice Kittredge concurred.

[3] This petition is timely submitted pursuant to the Court's order of July 8, 2019, extending the deadline to petition for rehearing to July 15, 2019.

to the decision of the appeal, and to set forth its reasoning in reasonably substantive detail. *See* Rule 220(b) ("In *every* decision rendered by an appellate court, *every* point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court *must be stated in writing* and *must, with the reason for the court's decision*, be preserved in the record of the case.") (emphasis added).

For decisions of this Court, Rule 220(b)(1) provides the only exception to Rule 220(b)'s general rule[4]:

> The *Supreme Court* may file a *memorandum* opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in *unanimous* decision, the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.

Rule 220(b)(1) (emphasis added).

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[4] Rule 220(b)(2) provides another exception to Rule 220(b)'s general rule, but it does not apply to decisions of this Court, only to decisions of court of appeals. Rule 220(b)(2) ("The *Court of Appeals* need not address a point which is manifestly without merit.") (emphasis added).

The Court has relied on Rule 220(b)(1) to dispose of this appeal in summary fashion. (*See* Subject Decision ("Roberts and MUSC now contend that the court of appeals erred in finding Johnson's claims preserved for review and in holding the statute of repose began after each occurrence. We disagree and affirm pursuant to Rule 220(b)(l), SCACR, and the following authorities: (1) As to issue preservation, *see Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) ('While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved.') (emphasis added), and (2) As to the merits, we find the allegations of medical malpractice indistinguishable from those in *Marshall.*") (emphasis in original).)

As explained above, however, Rule 220(b)(1) only applies to memorandum opinions, and the Subject Decision is not a memorandum opinion; nor could it be, as it is the published decision of a divided Court. Accordingly, the Court's reliance on Rule 220(b)(1) is erroneous, and the Subject Decision does not comply with Rule 220(b), which, again, requires the Court to expressly rule on every distinct point (duly raised in the appeal) that is necessary to the decision of the appeal, and to set forth its reasoning in reasonably substantive detail; and, most respectfully, Dr. Roberts requests that the Court do so.

2. Because the Court's reliance on Rule 220(b)(1) is erroneous and the Subject Decision does not comply with Rule 220(b), the Court has not adequately ruled on the issue of issue preservation.

Both Petitioners argued that the court of appeals erred in not deciding this appeal in their favor on preservation grounds. (*See generally* Sup. Ct. Br. of Dr. Roberts at Argument I; Sup. Ct. Br. of MUSC at Argument I; Sup. Ct. Reply Br. of Dr. Roberts pp. 1–5.)[5] Both Petitioners' issue preservation arguments were multi-faceted, with Dr. Roberts's comprising four sub-arguments and MUSC's two. (*See generally Id.*) Incorporating both Petitioners' briefs herein by reference (principal and reply), Dr. Roberts most respectfully asserts that the Court is required by Rule 220(b) to expressly rule (with its reasoning set forth in reasonably substantive detail) on every distinct point of Petitioners' issue preservation arguments—all of them duly raised[6] and, being dispositive in nature, necessary to the decision of this

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[5] In addition to the argument/analysis expressly set forth in his own briefs, and as he did in every other brief and petition he submitted in the course of this appeal, Dr. Roberts duly adopted the argument/analysis presented by MUSC. (*See* Sup. Ct. Br. of Dr. Roberts p. 21; Sup. Ct. Reply Br. of Dr. Roberts p. 5.)

[6] (*See* App. pp. 586–590 (issue preservation argument in Dr. Roberts's brief to the court of appeals), 604–605, (issue preservation argument in MUSC's brief to the court of appeals), 625–626 (issue preservation analysis in the court of appeals' opinion), 632–641 (raising issue preservation in Dr. Roberts's petition to the court of appeals for rehearing), 657–658 (raising issue preservation in MUSC's petition to the court of appeals for rehearing); Cert. Pet. of Dr. Roberts pp. 6–15 (raising issue preservation in petition to this Court for a writ of certiorari); Cert. Pet. of MUSC pp. 3–6 (raising issue preservation in petition to this Court for a writ of certiorari); Dr. Roberts's Reply to Return to Cert. Pet. pp. 2–6 (refuting Ms. Johnson's rebuttal to issue preservation argument); Sup. Ct. Br. of Dr. Roberts pp.

appeal.

3. **With the caveat that the Court's reasoning in this regard is hard to confidently discern (because, again, the Court's reliance on Rule 220(b)(1) is erroneous and the Subject Decision does not comply with Rule 220(b)), the Court's ruling on issue preservation is erroneous, and unless it is changed, the Subject Decision will stand as an outlier, incongruent with in our state's jurisprudence in this area.**

As it stands, the Court's ruling on issue preservation rests solely—and without any other explanation—on the following quote from *Atlantic Coast Builders*, 398 S.C. at 330, 730 S.E.2d at 285: "'While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved.'" (*See* Subject Decision (emphasis in original, i.e., the emphasis was added by the Court in the Subject Decision).)

As explained previously,[7] Ms. Johnson's appellate argument is indeed *clearly* unpreserved. Ms. Johnson made one—and only one—argument on appeal; it was an argument she had not made to the trial court;[8] and, naturally, it was an

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5–15 (issue preservation argument in brief to this Court); Sup. Ct. Br. of MUSC pp. 4–7 (issue preservation argument in brief to this Court); Sup. Ct. Reply Br. of Dr. Roberts pp. 1–5 (refuting Ms. Johnson's rebuttal to issue preservation argument).)

[7] (*See* Sup. Ct. Br. of Dr. Roberts pp. 7–11; Sup Ct. Reply Br. of Dr. Roberts pp. 1–5.)

[8] Even the court of appeals recognized that the argument Ms. Johnson made on appeal was different from what she had argued to the trial court. (*See* App. p. 626 ("The factual theory [Ms. Johnson] presented to the circuit court is not

argument the trial court had not ruled on. Such an argument is clearly unpreserved under a wealth of firmly established law, which affirmatively restricts the universe of permissible reasons for our state's appellate courts to reverse trial court decisions to only those corresponding to an argument that is (1) preserved below, meaning that the appellant has first raised the argument to the trial court and obtained a ruling thereon, *and* (2) presented on appeal, meaning that the appellant then, after preserving the argument below, actually makes the argument to the appellate court.[9] Again, as explained previously, Ms. Johnson made one argument

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identical to the factual theory she argues here."); *see also id.* (stating, "[Ms. Johnson's] statement of issues on appeal is broad enough to encompass *the argument she presents to this court* . . . ," necessarily implying that the argument she presented to the trial court is not "the argument she present[ed] to [the court of appeals]") (emphasis added).)

[9] *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (instructing that South Carolina's preservation requirements are "mandatory"); *see also id.* at 23, 602 S.E.2d at 779 ("[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration."); *id.* at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party."); *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 479 n.5 (2012) ("Preservation in South Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached.") (citing *State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed)); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420–22, 526 S.E.2d 716, 723–24 (2000)

to the trial court and another to the court of appeals. The argument she raised for the first time on appeal was not preserved for review; the argument she made to the trial court—but did not make to the court of appeals—was/is abandoned. Our state's appellate courts cannot reverse lower court decisions for any reason. The appellant must affirmatively give (i.e., actually raise to) them a good reason (i.e., a preserved argument demonstrating reversible error) to do so. Under clearly established law, Ms. Johnson did not do so here, and this appeal should have been, and, respectfully, should still be, decided in favor of Petitioners on preservation grounds.

Moreover, the Court seems to view *Atlantic Coast Builders* as having announced a rule that an issue/argument should be addressed on the merits unless it

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(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] [a]n appellate court may not, of course, *reverse* for any reason appearing in the record.") (emphasis in original); *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."); *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); *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (noting that the two-issue rule is applicable to circuit court orders); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); *Cont'l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 811 n.2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via a reply brief).

is "clearly" unpreserved. It did not. As explained previously,[10] while it is true that the *Atlantic Coast Builders* majority recognized, in *dicta*, that it "may be good practice for [an appellate court] to reach the merits of an issue when error preservation is doubtful," it did so only in the process of stressing the importance of "adher[ing] to settled principles" of issue preservation and "follow[ing] our longstanding precedent [to] resolve . . . issue[s] on preservation grounds when [they are] clearly . . . unpreserved"[11]—as, most respectfully, should have been done here, and still should be. Further still, as also explained previously,[12] the view of *Atlantic Coast Builders* that the Court seems to have endorsed in the Subject Decision is irreconcilable with existing precedent placing the burden on the appellant to demonstrate reversible error.

4. The Subject Decision does not comply with Rule 220(b) for the additional reason that it does not address the statute of *limitations* issue.

In regard to the merits, the Subject Decision addresses only the propriety of trial court's grant of summary judgment on the basis of the statute of *repose*. (*See* Subject Decision.) At every turn in this appeal, however, argument for affirmance

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[10] (*See* Sup. Ct. Br. of Dr. Roberts pp. 11–14.)

[11] *Atlantic Coast Builders*, 398 S.C. at 330, 730 S.E.2d at 285.

[12] (*See* Sup. Ct. Br. of Dr. Roberts pp. 14–15.)

has been duly raised (by MUSC and adopted by Dr. Roberts[13]) based on the trial court's alternative conclusion that Ms. Johnson's suit is barred by the statute of *limitations*.[14] Incorporating both Petitioners' briefs herein by reference, Dr. Roberts most respectfully asserts that the Court is required by Rule 220(b) to expressly rule (with its reasoning set forth in reasonably substantive detail) on every distinct point of Petitioners' statute of limitations arguments—all of them duly raised[15] and, being dispositive in nature, necessary to the decision of this appeal.

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[13] (*See* Rule 208(b)(6), SCACR ("In cases involving more than one appellant or respondent, including cases consolidated for appeal, . . . any party may adopt by reference all or any part of the brief of another.").)

[14] (*See* App. pp. 219–221 (statute of limitations analysis in the trial court's summary judgment order), 610–613 (statute of limitations argument in MUSC's brief to the court of appeals), 595 (Dr. Roberts's adoption of argument/analysis in MUSC's brief to the court of Appeals), 668–670 (statute of limitations argument in MUSC's petition to the court of appeals for rehearing), 646 (Dr. Roberts's adoption of grounds advanced by MUSC in petitioning court of appeals for rehearing); Cert. Pet. of MUSC pp. 16–18 (arguing statute of limitations in petition to this Court for a writ of certiorari); Cert. Pet. of Dr. Roberts pp. 20 (adopting argument/analysis in MUSC's petition to this Court for a writ of certiorari); Sup. Ct. Br. of MUSC pp. 24–27 (arguing statute of limitations); Sup. Ct. Br. Dr. Roberts pp. 21 (adopting argument/analysis in MUSC's brief).)

[15] (*See* footnote 14 above.)

ADOPTION OF MUSC'S ARGUMENT/ANALYSIS

To the extent not inconsistent herewith, Dr. Roberts hereby joins in and adopts as his own any/all argument/analysis presented by MUSC in support of rehearing.

CONCLUSION

For the foregoing reasons, Dr. Roberts asks this Honorable Court to grant rehearing and vacate the Subject Decision in favor of a decision that reverses the court of appeals and affirms the trial court's grant of summary judgment.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____

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Charleston, South Carolina
Dated: 7/12/19

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Cases No. 2012-CP-10-2867 and 2011-CP-10-8313

On Writ of Certiorari to the Court of Appeals

Appellate Case No. 2018-000914
Opinion No. 27897 (S.C. Sup. Ct. filed June 19, 2019)

Clair Craver Johnson, Respondent,

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PROOF OF SERVICE

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Attorneys for John Roberts, M.D.

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioner John Roberts, M.D., hereby certify that the foregoing **PETITION FOR REHEARING Submitted by Petitioner John Roberts, M.D.** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on July 12, 2019, properly posted for delivery to the following addressees:

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Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

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Dated: 7/12/19