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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

Appellate Case No. 2014-001833
Circuit Court 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.

PETITION FOR REHEARING OF RESPONDENTS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A., ***WITH SUGGESTION FOR REHEARING *EN BANC****

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COME NOW Respondents Georgia Roane, M.D., and Rheumatology Associates, P.A. (collectively referred to as "these Respondents" or "Roane"), by and through their undersigned counsel, and, pursuant to Rule 221, SCACR, hereby petition this Honorable Court for rehearing and reconsideration of this matter, which it decided via opinion filed May 4, 2016 (the "Subject Opinion")[1], reversing the circuit court's grant of summary judgment favor of these Respondents.[2]

SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 219(b), SCACR, these Respondents submit that the question addressed in the Subject Opinion—concerning the operation of the statute of repose for medical malpractice claims, S.C. Code Ann. § 15-3-545(A), specifically its operation with respect to claims related to diagnosis and treatment of a condition over a course of time—is of exceptional

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[1] Marshall v. Dodds, Op. No. 5403 (S.C. Ct. App. filed May 4, 2016) (Shearouse Adv. Sh. No. 18 at 54). In view of the date of filing of the Subject Opinion, the standard 15-day allotment of time for a petition for rehearing under Rule 221(a), and the timing of the instant petition, out of an abundance of caution, these Respondents note that, by order filed May 19th, the Court granted their motion for an extension of time, establishing June 3rd, i.e., today, as the deadline to petition for rehearing.

[2] The Subject Opinion also reversed the circuit court's grant of summary judgment in favor of Respondents Kenneth A. Dodds, M.D., Charleston Nephrology Associates, LLC (collectively referred to as the "other Respondents"). The other Respondents are represented by separate counsel and have separately petitioned for rehearing.

importance to the bench and bar, and, in turn, the public, and therefore suggest rehearing *en banc*.[3]

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

Most respectfully, the Subject Opinion reflects that the Court overlooked or misapprehended the following material points.

1. **In Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), our Supreme Court rejected not only the *continuous treatment* rule, which was addressed in the Subject Opinion, but also the *continuing tort* rule, which the Subject Opinion did not address.**[4]

As explained in these Respondents' brief, the ***continuous treatment*** rule is not merely another name for the ***continuing tort*** rule, but a separate

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[3] Included below, among the material points these Respondents contend the Court overlooked or misapprehended, is the error preservation argument presented in their brief. (*See* Roane Br. at p. 1 [Counter-Statement of the Issues on Appeal, Issue II]; id. at pp. 15-19 [Argument II].) Please note that their suggestion for rehearing *en banc* is not intended to detract in any way from the persuasiveness—and potentially dispositive significance—of this argument, which they continue to zealously advance, and which would, of course, were the Court to agree with it, render unnecessary—indeed, improper—decision of this appeal on the merits.

[4] In Harrison, the ***continuing tort*** rule is sometimes referred to as the "continuing tort doctrine," the "doctrine of continuing tort," or the "continuous tort theory." *See* Id. at 139, 580 S.E.2d at 114. In this petition, it is consistently referred to as the "***continuing tort*** rule," with the words "continuing" and "tort" set off in bold, italicized print to help distinguish it from the different, though closely worded, "***continuous treatment*** rule," which is likewise, when referenced herein, set off via emphasized print for the purpose of distinction.

concept, which the Harrison Court separately addressed and separately rejected. 354 S.C. at 139, 580 S.E.2d at 114 ("Citing Georgia law, petitioner ***also*** argues the Court should adopt the ***continuing tort*** doctrine. We disagree.") (emphasis added). The Subject Opinion, however, only addresses Harrison's rejection of the ***continuous treatment*** rule, without discussing the necessary implications of its rejection of the ***continuing tort*** rule. *See* Marshall, *supra*, at p. 63 ("Respondents also argue our interpretation of South Carolina's statute of repose for medical malpractice actions would effectively be an adoption of the ***continuous treatment*** rule that was rejected by our supreme court in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003).") (emphasis added).

The Harrison Court began its discussion of the ***continuing tort*** rule explaining,

> Under Georgia law, the doctrine of ***continuing tort***:
>
> > Applies "where any negligent or tortious act is of a continuing nature and produces injury in varying degrees over a period of time." . . . Under this theory, the statute of limitation does not begin to run "until such time as the continued tortious act producing injury is eliminated."

Id. (quoting Mears v. Gulfstream Aerospace Corp., 225 Ga. App. 636, 484

S.E.2d 659, 664 (Ct. App. 1997) (citations omitted) (emphasis added)).[5] It then observed that, under Georgia law, "the '***continuing tort***' theory is inapplicable to actions for medical malpractice 'since it would nullify the intent of the [Georgia] General Assembly that, after five years, no medical malpractice action could be brought . . . because the statute of repose abolishes any action five years after the negligent or wrongful act or omission.'" Id. (quoting Charter Peachford Behavioral Health Sys. v. Kohout, 233 Ga. App. 452, 504 S.E.2d 514, 521 (Ct. App. 1998) (emphasis added)). "Thus," the Court concluded, "***for the same reason*** we reject adoption of the ***continuous treatment*** rule, Georgia has rejected application of its own ***continuous tort*** theory to medical malpractice claims. Accordingly, we find [the petitioner's] argument on the ***continuing tort***

[5] To underscore the point that the ***continuous treatment*** rule is different from the ***continuing tort*** rule, these Respondents note that, earlier in its opinion, when discussing the ***continuous treatment*** rule, the Harrison Court recited a different formulation of that different rule. Id. at 135, 580 S.E.2d at 112.

doctrine unavailing." Id. (emphasis added).[6]

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

[6] To be clear, by this point in its opinion the Court had already explained that the reason it rejected adoption of the ***continuous treatment*** rule was, "Put 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." Id. at 138, 580 S.E.2d at 114 (emphasis added); *see also* id. at 137, 580 S.E.2d at 113 (including the medical malpractice statute of repose in S.C. Code Ann. § 15-3-545(A) among "the statutes discussed above").

away, i.e., when it first occurs; to hold otherwise would frustrate the legislative intent. Now, with this in mind, let us consider, too, the established facts on which this appeal must be decided.

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

(a) The Marshalls' claims arise out of a continuing tort;

(b) There is no room, neither within the appellate record nor the parameters staked out by the legal framework governing appellate review, for this Court to find, or otherwise base reversal of the circuit court upon, any supposed subsequent *acts* (plural) of negligence;

(c) The Subject Opinion is at odds with the Harrison Court's rejection of the *continuing tort* rule; and

(d) Indeed, Harrison alone, i.e., even without consulting out-of-state authority, supports the circuit court's summary judgment in favor of these Respondents and compels affirmance.

As also explained in these Respondents' brief, the Marshalls' appellate challenge is narrow in scope; their quarrel is solely about the law, not the facts, applied by the circuit court. They have not challenged the circuit court's view of their expert's testimony; they have taken no issue with that court's characterization of the negligence they allege; they have not argued that it in any way otherwise ran afoul of the summary judgment standard—for instance, by invading the province of the jury as to a genuine and material issue of fact or by failing to view the evidence in the light most

favorable to them.

With all of this uncontroverted—indeed, incontrovertible—the factual basis on which this appeal must be decided is firmly established,[7] and it includes the following:

- "[The Marshalls'] Complaint against [these Respondents] alleges that from 2000 until 2005, [Mrs.] Marshall was 'diagnosed and treated' by Dr. Roane for mixed connective tissue disease ('MCTD'). . . . ***Dr. Roane continued to treat [Mrs. Marshall] for***

[7] 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 there was a meritorious challenge to have been made. 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 proper challenge thereto, the circuit court's ruling beyond reproach in this regard—shielding it not only from any late-breaking attack of the Marshalls, but also, most respectfully, from being undermined, expressly or impliedly, by this Court. *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 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.").

MCTD until October 2007 and her treatment <u>continued</u> in accordance with this diagnosis." (R. p. 4 (emphasis added).)

- "[The Marshalls'] sole liability expert . . . , Dr. Thomas Zizic, M.D., testified that Dr. Roane breached the standard of care in 2002 and again in 2003 for failing to perform a proper work up that would have discovered [Mrs.] Marshall's cancer." (R. p. 5.)

- "February of 2002 . . . [is] the time at which Dr. Zizic opined that [Mrs. Marshall's] cancer could have been discovered had proper tests been ordered and conducted." (R. p. 8.)

- "[T]his Court finds that Dr. Zizic's own deposition testimony **draws *<u>no distinction</u> between the alleged failures in February of 2002 and those in 2005 going forward.***" (R. p. 9 (emphasis added).)

- "***The Court finds that what [the Marshalls] contend is a 'distinct event' in this case is <u>nothing more than a continuation of the same course of treatment</u>.***" (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 <u>any discernible difference</u> in Dr. Roane's treatment from 2002 to 2007 which supports [the Marshalls'] arguments to this Court.***" (R. p. 10 (emphasis added).)

For the purpose of deciding this appeal, it is, therefore, conclusively established that there is no "discernable difference in Dr. Roane's treatment" of Mrs. Marshall during the entirety of the time period at issue, "no distinction between [Dr. Roane's] alleged failures [i.e., negligent conduct]," no "distinct event [i.e., no distinct subsequent act of negligence]," "nothing

more than a continuation of the same course of treatment." In other words, it is established that the Marshalls' claims arise out of a continuing tort and there is simply no room, neither within the appellate record nor the parameters staked out by the legal framework governing appellate review,[8] for this Court to find, or otherwise base reversal of the circuit court upon, any supposed ***subsequent acts (plural) of negligence***.

In the Subject Opinion, the Court expressed concern that "the first misdiagnosis rule advocated by Respondents would allow medical professionals to escape liability for ***subsequent acts of negligence***—even when they clearly constitute a breach of the standard of care—only because they failed to properly diagnose the patient's condition in the past." (Marshall, *supra*, at p. 63 (emphasis added).) Respectfully, aside from reflecting misapprehension of these Respondents' argument,[9] this concern is

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[8] *See, e.g.,* Watson, 407 S.C. at 452, 756 S.E.2d at 160, n. 9 ("'[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, 380 S.C. at 659-60, 670 S.E.2d at 701 (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error).

[9] These Respondents' position, like the circuit court's ruling, does not rely on a rule under which medical professionals escape liability for ***subsequent acts of negligence***—that is, a rule that would insulate subsequent acts (plural) which properly constitute distinct and divisible

surly of no moment here because, on this record, and as this matter has been presented to this Court, no act is—or can be—properly viewed as separate and distinct from the original act of negligence attributed to these Respondents.

In view of the immutable factual predicate of this case on appeal, coupled with the above-explained proposition (regarding when the statute of repose begins to run in cases of continuing torts) necessarily embedded in our Supreme Court's rejection of the ***continuous tort*** rule in Harrison, the Subject Opinion stands improperly at odds with Harrison's controlling precedent, which alone, i.e., even without consulting out-of-state authority, supports the circuit court's summary judgment in favor of Dr. Roane and compels affirmance.

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bases upon which to found a claim of negligence—nor, for that matter, as addressed below, is that the rule that prevailed in Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (Ga. Ct. App. 2010). The rule underlying summary judgment in favor of these Respondents applies only where the negligent conduct at issue is of a continuing nature and not properly viewed as distinct and divisible, because to treat it, as the Marshalls would like to do here, as distinct and divisible in spite of its continuing nature would nullify the legislative intent behind the statute of repose—such a rule, the Respondents maintain, is a direct and unavoidable corollary of the Harrison decision.

3. The Georgia statute of repose for medical malpractice claims is not materially different from its South Carolina counterpart, and the Georgia authority cited by the circuit court is harmonious with South Carolina and was properly instructive to that court in granting these Respondents summary judgment.

As explained also explained in these Respondents' brief, while Georgia precedent may have put a finer point on the issue (regarding commencement of the statute of repose in cases involving diagnosis and treatment of a condition over a period of time), it is nonetheless in line with our Supreme Court in Harrison.[10] Respectfully, the Court erred in finding the reliance of these Respondents and the circuit court to have misplaced upon the Georgia Court of Appeals' decision in Howell v. Zottoli.

Essential to the Court's finding was its view that South Carolina's "statute of repose differs from Georgia's because it solely focuses on the time of the medical professional's negligent act or omission, not the patient's injury. . . . Unlike the Supreme Court of Georgia, we find a patient's injury and ensuing damages in these situations are not the misdiagnosis itself, but rather are a *result* of the misdiagnosis." Marshall, *supra*, at p. 62 (emphasis in original).

First off, this is belied by a plain reading of the comparable Georgia

[10] Indeed, as is evident in the above analysis, the Harrison Court itself was entirely in sync with the Georgia cases it discussed.

statute, which, as recited in Howell, provides as follows:

> (a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.
>
> ***(b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.***
>
> (c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. ***Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.***

302 Ga. App. at 478, 691 S.E.2d at 565-66 (quoting O.C.G.A. § 9-3-71) (emphasis added)).[11]

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[11] For ease of reference and comparison, here is the pertinent language of the South Carolina statute:

> (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

Moreover, in the next breath, the Howell Court advises,

> Interpreting this statute, the Supreme Court of Georgia has held:
>
> > Under Georgia law, an action for medical malpractice must be brought within five years from the date on which the negligent or wrongful act or omission occurred. OCGA § 9-3-71(b). ***Unlike cases involving the medical malpractice statute of limitation, see OCGA § 9-3-71(a), our focus in this case is on the date or dates on which appellants may have committed acts of professional negligence. The test for determining when OCGA § 9-3-71(b)'s period of repose begins is based on the determination of when the negligent act causing the injury occurred.***

Id. at 478-79, 691 S.E.2d at 566 (quoting Schramm v. Lyon, 285 Ga. 72, 73(1), 673 S.E.2d 241 (2009) (emphasis added).

Analytically, the Georgia rule "in cases of misdiagnosis and mistreatment" that prevailed in Howell, providing that "the statute of repose begins to run on the date the initial misdiagnosis occurred[,]"[12] can be readily seen as a form of pragmatic recognition, in the form of an affirmative

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of occurrence, or as tolled by this section.

S.C. Code Ann. § 15-3-545.

[12] Id. at 479, 691 S.E.2d at 566.

rule, in accordance with the logical imperative of the state's rejection of the ***continuing tort*** rule in actions for medical malpractice. In other words, recognition—by way of adopting a rule consistent with the prior rejection of a contrary rule—that in these particular types of cases, where a purported later negligent act "is merely the repeated failure to diagnose and treat a ***continuing*** though worsening condition[,]" the complained-of negligence is of a continuing nature and not properly considered distinct and divisible; because, were it to be so considered, it would nullify the operation of the statute of repose intended by the legislature, just as would application of the ***continuing tort*** rule in actions for medical malpractice. *See* Id. ("[A]lthough the focus of a statute of repose is generally the date of the alleged negligent act, a later negligent act cannot serve as the new starting point [i.e., ***in these Respondents' view***, a distinct and divisible starting point] of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition.") (emphasis added to highlight the distinction between counsel's own commentary and the court's language)).

Georgia's law, statutory and decisional, is in line with that of South Carolina, and, though, as explained elsewhere, not essential to the award of summary judgment in these Respondents' favor, it was properly cited in

support thereof.

4. (a) **The Subject Opinion did not address these Respondents' argument, i.e., Argument II in their brief, that the Marshalls' appellate argument is not preserved for review, which, these Respondents most respectfully contend, is an argument that is dispositive of this appeal in their favor (indeed, it is dispositive of the entirety of this appeal in favor of all Respondents) and should be ruled upon by the Court.**

(b) **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;"[13] indeed, the plain-error rule has been expressly rejected as "inconsistent with the law in South Carolina,"[14] and our appellate courts are affirmatively prohibited from addressing issues/arguments that are not properly preserved for review. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (granting a writ of certiorari to review the Court of Appeals' decision, affirming the decision in result only, and vacating the decision to the extent it addressed an issue that was not preserved, explaining, "Since

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

[14] Rule 103, SCRE.

the issue . . . . was not preserved for review, it should not have been addressed.").[15] And Rule 220(b), SCACR, provides, in pertinent part, "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 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

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[15] *See also* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 723-24 (2000) (explaining, "[A]s expressed in Rule 220(c), SCACR, . . . an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. . . . In contrast, different preservation rules apply to an appellant—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record.") (emphasis in original); id. at 422, 526 S.E.2d at 724 ("This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); cf. Watson, 407 S.C. at 452, 756 S.E.2d at 160, n. 9; McCall, 380 S.C. at 659-60, 670 S.E.2d at 701.

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;"[16] 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;

[16] To be clear, these Respondents' 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.)

R. pp. 204-238.)

For instance, at the hearing on these Respondents' motion for summary judgment, the Marshalls argued—in the face of their own expert's testimony to the contrary[17]—that there was no malpractice before 2005. (*See generally* 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

[17] (*See* R. p. 312, line 25 – p. 313, line 5 and R. p. 320, lines 8-25; *see also* R. pp. 5-6, 9-10.)

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, 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).

Respectfully, the Court erred by not addressing this argument in the Subject Opinion and in not affirming the circuit court on this basis.

INCOPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN APPELLATE BRIEF

These Respondents do not intend to abandon (for any potential future consideration) any argument/analysis presenting in their previously filed appellate brief supporting affirmance of the circuit court's grant of summary judgment in their favor; therefore, out of an abundance of caution, besides making the above points, these Respondents incorporate their brief by reference herein and, thereby, reiterate the argument/analysis therein in support of this petition.

ADOPTION OF ARGUMENT/ANALYSIS IN OTHER RESPONDENTS' PETITION FOR REHEARING

To the extent not inconsistent herewith, these Respondents hereby join in and adopt as their own the argument/analysis presented by the other Respondents in support of their separately filed petition for rehearing.

CONCLUSION

For the foregoing reasons, these Respondents ask this Honorable Court to grant this petition; rehear this matter (again, they suggest *en banc*), withdraw the Subject Opinion; and decide this appeal anew, affirming the circuit court's summary judgment in their favor.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 6/3/16

THE STATE OF SOUTH CAROLINA
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J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001833
Circuit Court 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.

PROOF OF SERVICE

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

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondents Georgia Roane, M.D., and Rheumatology Associates, P.A., do hereby certify that I have served the **PETITION FOR REHEARING OF RESPONDENTS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A., ***WITH SUGGESTION FOR REHEARING *EN BANC****** on all other parties of record by depositing a copy of the same in the United States Mail, postage prepaid, on June 3, 2016, addressed as follows to their counsel of record:

Blake A. Hewitt, Esquire
John S. Nichols, Esquire
Bluestein Nichols Thompson Delgado, LLC
P.O. Box 7965
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-and-
J. Edward Bell, III, Esquire
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Kenneth A. Dodds, M.D.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines (SC Bar No. 72100)
Attorneys for Respondents
Georgia Roane, M.D., and
Rheumatology Associates, P.A.

Charleston, South Carolina

Dated: 6/3/16

YCRLAW
Young Clement Rivers, LLP

Kathleen B. Barnes
Secretary

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June 3, 2016

VIA HAND DELIVERY
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Marshall v. Dodds et al./Roane et al.
Appellate Case No.: 2014-001833
YCR File No.: 2466-20110384

Dear Ms. Kitchings:

Attached for filing in the above-referenced matter, please find the original and seven (7) copies of the **Petition for Rehearing of Respondents Georgia Roane, M.D., and Rheumatology Associates, P.A., With Suggestion for Rehearing *En Banc*** along with the original and two (2) copies of a **Proof of Service** for the same and our firm's check in the amount of $25.00 to cover the filing fee. Kindly return court-stamped copies to the bearer of this letter.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

Enclosure
cc: (All below via E-Mail and US Mail)
Blake A. Hewitt, Esquire, Bluestein Nichols Thompson Delgado, LLC
John S. Nichols, Esquire, Bluestein Nichols Thompson Delgado, LLC
J. Edward Bell, III, Esquire, Bell Legal Group, LLC
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