

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

Appeal from Charleston County
Court of Common Pleas

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

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

Appellate Case No. 2014-001833

Circuit Court Case No. 2011-CP-10-0934

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SEP 26 2016

SC Court of Appeals

Virginia L. Marshall and Todd W. Marshall,

Respondents,

v.

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

Petitioners.

**PETITION OF GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A.,
FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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INDEX

Page:

CERTIFICATION OF COUNSEL 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

I. In this medical malpractice litigation—commenced in 2011, premised on Dr. Roane’s alleged negligence in misdiagnosing Mrs. Marshall’s condition in 2002 and, in accordance with that misdiagnosis, continuously following the very same improper course of treatment for Mrs. Marshall thereafter—where the trial court had found the Marshalls’ suit barred by the six-year statute of repose in § 15-3-545(A) and granted summary judgment in favor of Dr. Roane, the Court of Appeals erred in reversing the trial court. 6

A. The Court of Appeals overlooked or misapprehended the import of this Court’s rejection of the continuing tort rule in Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003). 7

B. While overlooking or misapprehending the import of this Court’s rejection of the continuing tort rule in Harrison, the Court of Appeals also overlooked or misapprehended the established facts on which this appeal must be decided. 10

C. Contrary to the Court of Appeals’ view, 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 trial court is harmonious with South Carolina law and was properly instructive to that court in granting Dr. Roane summary judgment. 14

II. A. The Court of Appeals erred in not addressing Dr. Roane’s argument that the Marshalls’ appellate argument was not preserved for review. 18

B. The Court of Appeals should have found that the Marshalls did not raise their appellate argument for the first time until their motion for reconsideration of the summary judgment granted to Dr. Roane, and therefore, their argument was not preserved for review, requiring affirmance of the trial court. 18

ADOPTION OF ARGUMENT/ANALYSIS IN OTHER PETITIONERS’ PETITION FOR A WRIT OF CERTIORARI..... 22

CONCLUSION 23

CERTIFICATION OF COUNSEL

By and through her undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Dr. Roane¹ certifies that she timely petitioned for rehearing (J.A. at 23-44) in the wake of the Subject Decision² and that the Court of Appeals has ruled on her petition with finality, denying it August 19, 2016. (J.A. at 45-48.)

¹ Petitioners-Defendants Georgia Roane, M.D., and Rheumatology Associates, P.A., i.e., the petitioners on whose behalf the instant petition is filed, are collectively referred to in the singular as “Dr. Roane.” The other Petitioners-Defendants, Kenneth A. Dodds, M.D., and Charleston Nephrology Associates, LLC (collectively referred to as the “Other Petitioners”), are represented by separate counsel, and they have separately petitioned this Court for a writ of certiorari. Though their cert petitions are separate, Dr. Roane and the Other Petitioners have submitted a Joint Appendix.

² The “Subject Decision” is Marshall v. Dodds, Op. No. 5403 (S.C. Ct. App. filed May 4, 2016). (J.A. at 1-10.)

QUESTIONS PRESENTED

- I. In this medical malpractice litigation—commenced in 2011, premised on Dr. Roane’s alleged negligence in misdiagnosing Mrs. Marshall’s³ condition in 2002 and, in accordance with that misdiagnosis, continuously following the very same improper course of treatment for Mrs. Marshall thereafter—where the trial court had found the Marshalls’ suit barred by the six-year statute of repose in S.C. Code Ann. § 15-3-545(A) and granted summary judgment in favor of Dr. Roane, did the Court of Appeals err in reversing the trial court?**
- II. A. Did the Court of Appeals err in not addressing Dr. Roane’s argument that the Marshalls’ appellate argument was not preserved for review?**
- B. Should the Court of Appeals have found that the Marshalls did not raise their appellate argument for the first time until their motion for reconsideration of the summary judgment granted to Dr. Roane, and therefore, their argument was not preserved for review, requiring affirmance of the trial court?**

³ Plaintiff-Respondent Virginia L. Marshall is referred to as “Mrs. Marshall;” the “Marshalls” refers to Mrs. Marshall and her husband, Plaintiff-Respondent Todd W. Marshall, collectively.

STATEMENT OF THE CASE

Dr. Roane is a rheumatologist, and Mrs. Marshall was a patient of hers between 2000 and 2007. According to the Marshalls, in 2010, they learned from another doctor that Dr. Roane had incorrectly diagnosed Mrs. Marshall with, and thereafter treated her for, an autoimmune disease that she did not actually have; rather, Mrs. Marshall had cancer. (*See generally* R. pp. 47-50, ¶¶ 4-14; Appellants' Br. pp. 1-2.) The Marshalls sued Dr. Roane for medical malpractice in 2011. (R. pp. 44-54.)⁴

Essentially, the Marshalls claim Dr. Roane breached the standard of care by misdiagnosing Mrs. Marshall's condition; whereupon, Dr. Roane began Mrs. Marshall on *the*—as in, the very same—allegedly improper course of treatment that thereafter went uncorrected and was continuously followed throughout the remainder of their doctor-patient relationship. (*See, e.g.*, Appellants' Br. p. 2 (“The gist of Mrs. Marshall's claim is that Dr. Roane kept ignoring repeated warning signs that the original diagnosis was wrong. . . . Dr. Roane had a continuing duty to reevaluate the diagnosis and react properly. Instead of recalculating, Dr. Roane stayed the course.”).

Insofar as Dr. Roane's liability is concerned, the Marshalls' only medical

⁴ Also commenced in 2011, the Marshalls brought a separate action against the Other Petitioners for medical malpractice. The cases were consolidated in the trial court. (R. pp. 1-2.)

expert was Dr. Thomas Zizic. Based on the Dr. Zizic's testimony that Dr. Roane's negligence dated back to the alleged misdiagnosis of Mrs. Marshall's condition in February of 2002, Dr. Roane moved for summary judgment on the ground that the Marshalls' lawsuit—not commenced until 2011—was barred by the six-year statute of repose for medical malpractice actions in § 15-3-545(A). (R. pp. 115-117, pp. 118-140, p. 310, pp. 312-314.)

The trial court heard Dr. Roane's motion on March 3, 2014, the Honorable J.C. Nicholson, Jr., presiding. (R. pp. 174-203.) The Marshalls "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." (Appellants' Br. p. 4; *see generally* R. pp. 174-203, pp. 311-312, p. 320, pp. 405-418.) The trial court granted Dr. Roane summary judgment by order filed May 2, 2014, holding that the Marshalls' lawsuit was barred by the repose provision in § 15-3-545(A). (R. pp. 3-11.)

With the aid of additional, newly appearing legal counsel, the Marshalls then moved the trial court to alter or amend and reconsider (the "motion for reconsideration") the summary judgment it had granted Dr. Roane, this time submitting a legal memorandum in support of their position. (R. pp. 151-154, p. 150, pp. 171-173.) The trial court heard the motion for reconsideration on July 16, 2014, and thereafter denied it by order filed August 7, 2014. (R. p. 25, pp. 204-

238.)

The Marshalls appealed to the South Carolina Court of Appeals, and following oral argument on February 11, 2016, that court filed the Subject Decision on May 4, 2016, reversing the trial court's grant of summary judgment and remanding the case for further proceedings. (J.A. at 1-10.) Dr. Roane timely petitioned for rehearing, suggesting rehearing *en banc*, but the Court of Appeals denied the same on August 19, 2016. (J.A. at 23-48.)

The instant petition for this Court's review of the Subject Decision via writ of certiorari timely follows.

ARGUMENT

- I. **In this medical malpractice litigation—commenced in 2011, premised on Dr. Roane’s alleged negligence in misdiagnosing Mrs. Marshall’s condition in 2002 and, in accordance with that misdiagnosis, continuously following the very same improper course of treatment for Mrs. Marshall thereafter—where the trial court had found the Marshalls’ suit barred by the six-year statute of repose in § 15-3-545(A) and granted summary judgment in favor of Dr. Roane, the Court of Appeals erred in reversing the trial court.**

As an initial, general matter, beyond furthering the interests of justice by correcting error in this particular case, Dr. Roane submits that, in view of the Court’s law-giving function and the importance of the subject matter involved here—concerning the operation of the statute of repose for medical malpractice claims, specifically in regard to claims related to diagnosis and treatment of a condition over a course of time—the Court’s review of the Subject (published) Decision is all the more compelled in furtherance of the broader interest of the bench and bar—and, ultimately, the public.

A. The Court of Appeals overlooked or misapprehended the import of this Court's rejection of the *continuing tort* rule in Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003).⁵

In Harrison, this Court rejected not only the *continuous treatment* rule, but also the *continuing tort* rule. The *continuing tort* rule is not merely another name for the *continuous treatment* rule, but a separate 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 Decision, however, addresses only Harrison's rejection of the *continuous treatment* rule, without discussing the necessary implications of its rejection of the *continuing tort* rule. (J.A. at 9 (“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 by

⁵ 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 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.

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)).⁶ 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 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

⁶ To underscore the point that the *continuous treatment* rule is different from the *continuing tort* rule, Dr. Roane notes 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.

[the petitioner's] argument on the *continuing tort* doctrine unavailing.” Id. (emphasis added).⁷

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 this context would nullify the legislative intent that the statute of repose abolishes any action with the passage of the prescribed number of years after the negligent or wrongful act or omission. Id. at 139, 580 S.E.2d at 114. By force of logic, with its rejection of the *continuing tort* rule, Harrison therefore stands for the following proposition, unaccounted for in the Subject Decision: *When any negligent act is of a continuing nature—that is to say, when, under appropriate circumstances, the law regards certain negligent conduct, even though continuing, as legally indistinct and indivisible, which may be the case even if injury is produced in varying degrees over a period of time—the statute of repose for all claims arising out of such an act begins to run right away, i.e., when it first occurs; to hold*

⁷ 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”).

otherwise would frustrate the legislative intent.

- B. While overlooking or misapprehending the import of this Court's rejection of the *continuing tort* rule in Harrison, the Court of Appeals also overlooked or misapprehended the established facts on which this appeal must be decided.**

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

- (a) The Marshalls' claims arise out of a continuing tort;
- (b) There is no room, 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 Decision is at odds with the Harrison Court's rejection of the *continuing tort* rule; and
- (d) Indeed, Harrison alone, i.e., even without consulting out-of-state authority, supports the trial court's summary judgment in favor of Dr. Roane and compels affirmance.

The Marshalls' appellate challenge is narrow in scope; their quarrel is solely about the law, not the facts, applied by the trial court. (*See generally* Appellants' Br.) They have not challenged the trial court's view of their expert's testimony; they have taken no issue with the court's characterization of the negligence they allege; they have not argued that the court ran afoul of the summary judgment standard in any way otherwise—for instance, by invading the province of the jury as to a genuine and material issue of fact or by failing to view the evidence in the light most favorable to them. (Id.)

With all of this uncontroverted—indeed, incontrovertible—the factual basis on which this appeal must be decided is firmly established,⁸ and it includes the following:

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

⁸ Of course, in noting that the Marshalls have not challenged the factual underpinning of the trial court’s summary judgment, Dr. Roane is not suggesting that there was a meritorious challenge for the Marshalls to have made. Indeed, besides being supported by the record, the correctness of the factual basis of the trial court’s ruling is underscored by the very lack of any appellate challenge to it by the Marshalls. Nonetheless, in this regard, with no proper challenge thereto (*see generally* Appellants’ Br.), the trial court’s ruling is, as it was when this matter was before the Court of Appeals, beyond reproach—and could not be undermined, expressly or impliedly, not even by the Court of Appeals. *See, e.g., Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); *Watson v. Underwood*, 407 S.C. 443, 452, 756 S.E.2d 155, 160 n. 9 (Ct. App. 2014) (“[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt.” “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.”) (citations omitted); *McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance”); *Cont’l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the appellant’s principal brief may not be raised via a reply brief); Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

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

For the purpose of deciding this appeal, it is, therefore, conclusively established that there is no “discernable difference in Dr. Roane’s treatment” of Mrs. Marshall during the entirety of the time period at issue, “no distinction between [Dr. Roane’s] alleged failures [i.e., 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,⁹ for this Court to find, or otherwise base reversal of the circuit court upon, any supposed *subsequent acts* (plural) of negligence.

In the Subject Decision, the Court of Appeals 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.” (J.A. at p. 10 (emphasis added).) Respectfully, aside from reflecting misapprehension of Dr. Roane’s argument,¹⁰ this concern is of no moment here because, on this record, and as this

⁹ See, e.g., Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; 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; First Union, 333 S.C. at 566, 511 S.E.2d at 378; Cont’l Ins., 328 S.C. at 474, 492 S.E.2d 811 n. 2; Rule 208(b)(1)(B).

¹⁰ Dr. Roane’s position, like the trial 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 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 Dr. Roane applies only where the negligent conduct at issue is of a continuing nature and not properly viewed as distinct and divisible, because to treat it, as the Marshalls would do here, as distinct and divisible in spite of its continuing nature would nullify the legislative intent behind the statute of repose—such a rule, Dr. Roane maintains, is a direct and unavoidable corollary of the Harrison decision.

matter was presented to the Court of Appeals by the Marshalls, no act is—or can be—properly viewed as separate and distinct from the original act of negligence attributed to these Dr. Roane.

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

- C. Contrary to the Court of Appeals' view, 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 trial court is harmonious with South Carolina law and was properly instructive to that court in granting Dr. Roane summary judgment.**

While Georgia precedent may have put a finer point on the issue—regarding commencement of the statute of repose in cases involving diagnosis and treatment of a condition over a period of time—it is nonetheless in line with Harrison.¹¹ Respectfully, the Court of Appeals erred in finding that Dr. Roane and the trial court had mistakenly relied upon the Georgia Court of Appeals' decision in

¹¹ Indeed, as shown in the above analysis, the Harrison Court itself was entirely in sync with the Georgia cases it discussed.

Howell, 302 Ga. App. 477, 691 S.E.2d 564.

According to the Court of Appeals, 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[;]" thus, "[u]nlike . . . 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." (J.A. at 9 (emphasis in original).)

First off, the Court of Appeals' view is belied by a plain reading of the comparable Georgia 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)). 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 of occurrence, or as tolled by this section.

S.C. Code Ann. § 15-3-545.

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

¹² Id. at 479, 691 S.E.2d at 566.

summary judgment in Dr. Roane's favor, it was properly cited in support thereof.

- II. A. The Court of Appeals erred in not addressing Dr. Roane's argument that the Marshalls' appellate argument was not preserved for review.**
- B. The Court of Appeals should have found that the Marshalls did not raise their appellate argument for the first time until their motion for reconsideration of the summary judgment granted to Dr. Roane, and therefore, their argument was not preserved for review, requiring affirmance of the trial court.**

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 the issue . . . was not preserved for review, it should

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.

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 preserved. The issue first appears in Sonoco’s motion seeking reconsideration of the circuit court’s December 20, 2006 order. An issue

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.

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.” (Appellants’ 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, Dr. Roane expressly challenged the Marshalls’ motion in this regard below. (*See generally* R. pp. 151-154, pp. 161-238, pp. 311-312, p. 320, pp. 405-418.) For instance, at the hearing on Dr. Roane’s motion for summary judgment, the Marshalls argued—in the face of their own expert’s testimony to the contrary¹⁷—that there was no malpractice before 2005. (*See generally* R. pp. 193:8-196:17 (“Judge You’ve

¹⁶ 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.)

¹⁷ (*See* R. pp. 312:25-313:5, p. 320:8-25; *see also* R. pp. 5-6, pp. 9-10.)

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

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

The Marshalls’ appellate argument, which they did not raise to the trial court for the first time until their motion for reconsideration—thus, improperly asking the trial court to “reconsider” its decision on the basis of argument that they had not asked it to consider in the first place—was not preserved for appellate review, and should not have been allowed to undermine the summary judgment in favor of Dr. Roane. *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 of Appeals erred by not addressing this argument (Argument II in Dr. Roane’s brief to that court) in the Subject Decision and in not affirming the trial court on this basis.

**ADOPTION OF ARGUMENT/ANALYSIS
IN OTHER PETITIONERS’ PETITION FOR A WRIT OF CERTIORARI**

To the extent not inconsistent herewith, Dr. Roane hereby joins in and adopts as her own the argument/analysis presented by the Other Respondents in support of their separately filed petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, Dr. Roane asks this Honorable Court to review the Subject Decision via issuance of a writ of certiorari to the Court of Appeals and affirm the summary judgment granted by the trial court.

Respectfully submitted,

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Charleston, South Carolina

Dated: 9/26/16

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

Appeal from Charleston County
Court of Common Pleas

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

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

Appellate Case No. 2014-001833

Circuit Court Case No. 2011-CP-10-0934

Virginia L. Marshall and Todd W. Marshall,

Respondents,

v.

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

Petitioners.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioners-Defendants Georgia Roane, M.D., and Rheumatology Associates, P.A., do hereby certify that I have served the **PETITION OF GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A., FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS** on all other parties of record by depositing a copy of the same in the United States Mail, postage prepaid, on September 26, 2016, addressed as follows to their counsel of record:

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Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____

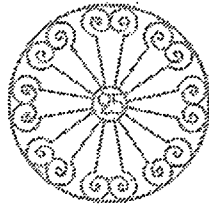
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Dated: _____

9/26/16



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September 26, 2016

VIA US MAIL AND FASCIMILE

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South Carolina Supreme Court
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Columbia, SC 29201

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

SC Court of Appeals

Dear Sir or Madam:

Enclosed for filing in the above-referenced matter, please find the original and seven (7) copies of Petition of Georgia Roane, N.D., and Rheumatology Associates, P.A., for a Writ of Certiorari to the Court of Appeals and the original and one (1) copy of the Proof of Service of same. Also enclosed is a firm check in the amount of \$100.00 to cover the costs associated with this request.

Kindly file the originals and return one-court stamped copy of each document to me using the pre-stamped envelope provided.

With best wishes and kindest regards, I am

Sincerely,

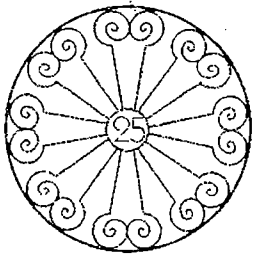
YOUNG CLEMENT RIVERS, LLP



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RGH/kbb
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cc: Jenny Abbott Kitchings, South Carolina Court of Appeals (via US Mail and facsimile)
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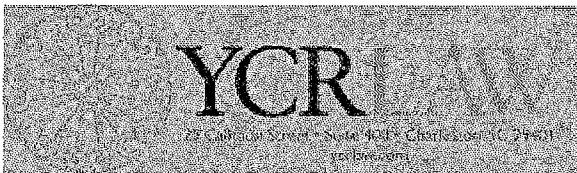
SC Court of Appeals

Dear Sir or Madam,

Attached please find correspondence in the above-referenced matter sent for filing. The originals along with our firm's check were placed in the mail. Please do not hesitate to let me know if you have any questions or concerns.

Thank you!

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