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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

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

Case No. 2011-CP-10-0934

On Petition for a Writ of Certiorari to the Court of Appeals

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

Supreme Court Case No. 2016-001936

Virginia L. Marshall and Todd W. Marshall,

Respondents,

v.

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

Petitioners.

BRIEF OF PETITIONERS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A.

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A. **Did the Court of Appeals overlook 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)?**

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

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.**

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[1] Petitioners/Defendants Georgia Roane, M.D., and Rheumatology Associates, P.A., are collectively referred to by the singular noun "Dr. Roane" and referent singular pronouns. 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 are briefing this matter separately.

[2] Plaintiff/Respondent Virginia L. Marshall is referred to as "Mrs. Marshall;" the "Marshalls" refers collectively to Mrs. Marshall and her husband, Plaintiff/Respondent Todd W. Marshall.

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, that their argument was not preserved for review, requiring affirmance of the trial court?**

STATEMENT OF THE CASE

Dr. Roane is a rheumatologist, and Mrs. Marshall was a patient of hers from 2000 to 2007. According to the Marshalls, in 2010, they learned from another doctor that Dr. Roane had mistakenly diagnosed Mrs. Marshall with, and, in turn, had mistakenly treated Mrs. Marshall for, an autoimmune disease that she never actually had and that Dr. Roane had mistakenly failed to diagnose what Mrs. Marshall had actually had, which was cancer. (*See generally* R. pp. 46-50 at ¶¶ 2, 4-16; Appellants' Br. pp. 1-2.)

The Marshalls brought this suit against Dr. Roane in 2011. (*See generally* R. pp. 38-54.)[3] Essentially, the Marshalls claim that Dr. Roane breached the standard of care by misdiagnosing Mrs. Marshall's condition and, from then on, persisting in this error throughout the rest of their doctor-client relationship, continuously and unvaryingly proceeding with a singular, improper course of

[3] Also in 2011, the Marshalls brought a separate, but related, action against the Other Petitioners for medical malpractice. The cases were consolidated in the trial court. (R. pp. 1-2; *see also* Appellants' Br. pp. 1-3.)

treatment for Mrs. Marshall based on the misdiagnosis, never detecting her cancer. (*See, e.g.*, Appellants' Br. p. 2 ("The story of this case begins in the year 2000 . . . when Dr. Roane diagnosed Mrs. Marshall with undifferentiated connective tissue disease and began treating her. Dr. Roane continued this diagnosis and treatment for the next seven (7) years. . . . 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 re-calculating, Dr. Roane stayed the course.").)

Insofar as Dr. Roane's liability is concerned,[4] the Marshalls' only medical expert is Dr. Thomas Zizic. (R. p. 210:20-21.) Based on Dr. Zizic's testimony that Dr. Roane's negligence dated back to the misdiagnosis of Mrs. Marshall's condition in February of 2002, Dr. Roane moved for summary judgment on the ground that the Marshalls' lawsuit—again, not commenced until 2011—was barred by the six-year statute of repose for medical malpractice actions in § 15-3-545(A). (*See generally* R. pp. 115-140, p. 310, pp. 312-314.) The Other Petitioners made a substantially similar motion. (*See generally* R. pp. 106-108, pp. 141-149.)

The trial court heard the motions on March 3, 2014, the Honorable J.C.

[4] The Marshalls rely on other doctors in regard to their allegations against the Other Petitioners.

Nicholson, Jr., presiding. (*See generally* 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 the motions by separate orders (one for each suit) filed May 2, 2014, holding that the repose provision in § 15-3-545(A) barred the Marshalls' claims against the respective defendants. (*See generally* R. pp. 3-24.)

The Marshalls then moved the trial court to alter or amend and to reconsider the summary judgments it had granted to Dr. Roane and the Other Petitioners (the "motion for reconsideration"), this time submitting a legal memorandum in support of their position. (*See generally* R. pp. 150-154, pp. 171-173.) The trial court heard the motion on July 16, 2014,[5] and thereafter denied it by order filed August 7, 2014. (R. p. 25.)

The Marshalls appealed, and following oral argument on February 11, 2016, the Court of Appeals filed its opinion (the "Subject Decision") on May 4, 2016, reversing the trial court's summary judgment and remanding the case for further proceedings. (*See generally* J.A. pp. 1-10.) Dr. Roane and the Other Petitioners timely petitioned for rehearing, with Dr. Roane suggesting that the matter be reheard *en banc*. (*See generally* J.A. pp. 11-44.) The Court of Appeals denied the

[5] (*See generally* pp. 204-238.)

petitions on August 19, 2016. (J.A. pp. 45-48.)

Dr. Roane and the Other Petitioners timely petitioned this Court to review the Subject Decision via writ of certiorari. The Court granted their petitions via order filed August 22, 2017. In accordance with Rule 242, SCACR, this brief follows.

ARGUMENT

I. In this medical malpractice litigation—which was commenced in 2011 and is premised on Dr. Roane's alleged negligence in misdiagnosing Mrs. Marshall's condition in 2002 and, from then on, continuing Mrs. Marshall on a singular (i.e., the same) course of improper treatment based on the original misdiagnosis, which went uncorrected for the rest of their doctor-patient relationship—where the trial court had found the Marshalls' suit to be barred by the six-year statute of repose in § 15-3-545(A) and, therefore, granted summary judgment to Dr. Roane, the Court of Appeals erred in reversing the trial court.

A. The Court of Appeals overlooked or misapprehended the import of this Court's rejection of the continuing tort rule in *Harrison*.[6]

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; it is a separate concept, which the *Harrison* Court separately addressed and separately rejected. *See* 354 S.C. at 139, 580

[6] 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" underlined to help distinguish it from the different, though similarly named, "continuous treatment rule," which is likewise underlined when referenced herein.

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, never addressing the necessary implications of its rejection of the continuing tort rule. (*See* J.A. p. 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* . . . .") (emphasis added).)

The *Harrison* Court began its discussion of the continuing tort rule by 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).[7] It then observed

[7] 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. *See Id.* at 135, 580 S.E.2d at 112.

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 [the petitioner's] argument on the continuing tort doctrine unavailing." *Id.* (emphasis added).[8]

In declining to adopt the continuing tort rule, this 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

[8] 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 § 15-3-545(A) among "the statutes discussed above").

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 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 within the appellate record or the confines staked out by the legal framework governing appellate review to find or otherwise base reversal of the trial 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 not taken issue with the court's characterization of the negligence they allege; and 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.*)[9]

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[9] Of course, in noting that the Marshalls have made no challenge to the facts underlying the trial court's 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. But, in any event, with no proper challenge thereto (*see generally* Appellants' Br.), the factual premise of the trial court's ruling is beyond reproach—as it was when this matter was before 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.").

With all of this uncontroverted—indeed, incontrovertible, at this point—the factual basis on which this appeal must be decided is conclusively established, 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).)

- "[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 conclusively established that the Marshalls' claims arise out of a continuing tort and that there were no subsequent *acts* (plural) of negligence at issue.

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. 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

[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 (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

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 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

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unavoidable corollary of the *Harrison* decision.

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

court had mistakenly relied upon the Georgia Court of Appeals' decision in *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. p. 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 Ga. Code Ann. § 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. [Ga. Code Ann.] § 9-3-71(b). ***Unlike*** *cases involving the medical malpractice statute of* ***limitation****, see [] § 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 [] § 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, 673 S.E.2d 241 (2009)) (emphasis added). For that matter, even the Subject Decision itself, recognizes that Georgia's statute of repose "is based upon when the

negligent act causing the patient's injury occurred . . . ." (J.A. p. 9) (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

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

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 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. E. Distrib., 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 not have been

[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.

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." *Elam*, *361 S.C.* 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

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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.

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." (Appellants' Br. at 4.) Perhaps anticipating a preservation challenge, 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 contrary[17]—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 OTHER ARGUMENT/ANALYSIS

To the extent not inconsistent herewith, Dr. Roane hereby joins in and adopts as her own the argument/analysis presented by the Other Petitioners in their briefing to this Court.

CONCLUSION

For the foregoing reasons, Dr. Roane asks this Honorable Court to reverse the Subject Decision (of the Court of Appeals) and to affirm the summary judgment granted her by the trial court.

Respectfully submitted,
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Dated: 9/21/17

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

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

Case No. 2011-CP-10-0934

On Petition for a Writ of Certiorari to the Court of Appeals

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

Supreme Court Case No. 2016-001936

Virginia L. Marshall and Todd W. Marshall,

Respondents,

v.

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

Petitioners.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioners Georgia Roane, M.D., and Rheumatology Associates, P.A., do hereby certify that the **BRIEF OF PETITIONERS GEORGIA ROANE, M.D., AND RHEUMATOLOGY ASSOCIATES, P.A.** was served on all other parties to this matter by depositing a copy of the same in the U.S. Mail, postage on September 21, 2017, properly posted for delivery to the following addressees:

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