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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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

Appellate Case No. 2015-001463

Clair Craver Johnson, Appellant,

v.

John Roberts, M.D., Respondent.

And

Clair Craver Johnson, Appellant,

v.

Medical University of South Carolina, Respondent.

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC
BY RESPONDENT JOHN ROBERTS, M.D.

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NOW COMES Respondent John Roberts, M.D. ("Dr. Roberts"), by and through his undersigned counsel, and hereby petitions this Honorable Court for rehearing of this matter, suggesting it be reheard en banc.

SUGGESTION FOR REHEARING EN BANC

The Court decided this consolidated appeal by published opinion filed February 7, 2018 (the "Subject Decision"),[1] reversing the circuit court's summary judgments in favor of Dr. Roberts and Respondent Medical University of South Carolina ("MUSC").[2]

As set forth below, Dr. Roberts contends, most respectfully, that the Subject Decision is not only erroneous but also, with particular regard to its ruling on the preservation questions in this appeal (the Court finding Appellant to have "preserved her [appellate] arguments . . . and . . . adequately appealed the circuit court's order" even though "[t]he factual theory Appellant presented to the circuit court is not identical to the factual theory she argue[d] [on appeal]"[3]) the Subject Decision stands to be a problematic outlier, incongruous with our state's jurisprudence in an area of law that "is a fundamental component of appellate

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[1] By order filed February 22, 2018, the Court extended the time for serving and filing Respondents' petitions for rehearing until March 9, 2018.

[2] For ease of reference, a copy of the Subject Decision (with page numbers added for citation purposes) is attached hereto as Exhibit A.

[3] (Exhibit A p. 5.)

practice." *See, e.g., Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322-23 (2001) ("We reiterate this Court's longstanding principle of error preservation. Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule. The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal.") (internal citation and quotation marks omitted).

Accordingly, pursuant to Rule 219, SCACR, Dr. Roberts suggests this matter be reheard en banc because (1) consideration by the full Court is necessary to secure or maintain uniformity of its decisions, and (2) this proceeding involves a question of exceptional importance.

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

Again, most respectfully, the Subject Decision is erroneous. Dr. Roberts submits that the following material points were overlooked or misapprehended by the Court.

I. The Court's finding that "Appellant . . . preserved her [appellate] arguments . . . and . . . adequately appealed the circuit court's order"[4] is erroneous; to the contrary, Appellant's argument clearly is unpreserved, and, as such, it is error to not decide this appeal (in favor of Respondents) on preservation grounds.

A. Appellant only made one argument on appeal.

As an initial matter, the Subject Decision is worded as if Appellant presented the Court with multiple appellate arguments. (*See generally* Exhibit A (making reference to Appellant's "arguments," plural.) As both Respondents pointed out in their briefs, however,[5] Appellant only made one argument on appeal, and it is this: *that the circuit court erred in granting summary judgment in favor of Respondents on the basis of the repose provision in S.C. Code Ann. § 15-3-545(A) (i.e., the medical malpractice statute of repose) because there existed a material issue of fact as to when (i.e., at what point in time) Appellant's treatment with ECT constituted negligence.* (*See* Appellant's Br. p. i [Table of Contents] (stating one argument and identifying "the error" on the part of the circuit court as "being that

[4] (Exhibit A p. 5.)

[5] (*See generally* Dr. Roberts Br. pp. 4-8; MUSC Br. pp. 4-5.)

[ECT] did not cause identifiable injury to Appellant until no earlier than 2009-2010 thereby triggering a three year period in which to initiate a claim pursuant to S.C. Code Ann. § 15-[3-]545(A)") (emphasis omitted); *id.* at p. 1 [Statement of "Issues" on Appeal] (stating one issue and identifying "the error" on the part of the circuit court the same as quoted above); *id.* at 2 ("Appellant contends that the evidence of the date triggering the statute of repose is *not a question of law* for the Court *but is one of fact.*") (emphasis added); *id.* at p. 5 ("Given testimony that Appellant first experienced problems with [ECT] in 2009 *a jury issue is present* over the timeliness of these actions. The issue is not whether use of [ECT] is negligent from the first treatment but at what point (number and timing and type of [ECT]) does use of [ECT] constitute negligence.") (emphasis added); *id.* at p. 7 ("*A fact issue* over when [ECT] could have been found to have caused permanent brain damage is present and requires action by a *jury.*") (emphasis added); *id.* at pp. 7-8 ("[T]he presence of eighty-six (86) acts over a period beginning on December 2, 2009 and running to and including June 26, 2008, each of which may not be characterized an act of negligence but collectively at some point can be so characterized . . . cannot be determined by the Court as a matter of law."); *id.* at p. 8 ("A fact issue as to **when** [Appellant] allegedly sustained injuries [is] present in this action . . . . Ms. Johnson was treated for her condition by [ECT] from 2003 to 2008 and the question is unresolved as to when and whether the use of [ECT]

caused her permanent mental issues.") (emphasis in original).)

B. The Court overlooked established preservation rules—under which, Appellant's argument clearly is unpreserved.

The Subject Decision does not actually address any of the established rules of preservation; rather, it sights but one authority, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012), essentially for the proposition that Appellant's argument is preserved because it could not, in the Court's view, be said to be clearly unpreserved. (*See* Exhibit A p. 5.) Dr. Roberts will address why he believes the Court misapprehended *Atlantic Coast Builders*, *infra*, but he would first draw attention to the established preservation rules that the Court overlooked—and under which it is clear that Appellant's argument is unpreserved.

As the Court itself acknowledged in the Subject Opinion, Appellant's appellate argument is different from the argument she presented to the circuit court. (*See* Exhibit A p. 5 ("The factual theory [Ms. Johnson] presented to the circuit court is not identical to the factual theory she argues here.");[6] *see also id.*

[6] To be clear, in no way does the Court's use of the language "not identical to the factual theory" diminish Appellant's preservation problem. As a practical matter, the Court's language is merely another way of saying her appellate argument is *different* from what she argued below, which, as further explained, *infra*, is plainly contrary to establish preservation rules. Moreover, in this particular case, as explained in **I.A.** above, the new "factual theory" on which Appellant's argument is premised cannot possibly be deemed immaterial here,

(stating, "Appellant's statement of issues on appeal is broad enough to encompass *the argument she presents to this court . . .*," and, thus, necessarily implying that the argument Appellant presented below is not "the argument she presents to this [appellate] court") (emphasis added). This alone renders Appellant's argument clearly unpreserved and requires that her appeal be decided (against her) on preservation grounds because, under South Carolina law, where an issue or argument is not preserved, it is error for an appellate court to reach the merits—the court must decide it on preservation grounds. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (instructing that South Carolina's preservation requirements are "mandatory"); *see also id.* at 23, 602 S.E.2d at 779 ("[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration."); *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 479, n. 5 (2012) ("Preservation in South Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached.") (citing *State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not

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where her Appellant's sole argument on appeal is about the supposed existence of a *factual* question—her new "factual theory" is a new argument entirely.

preserved for review should not be addressed)); *see also Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-22, 526 S.E.2d 716, 723-24 (2000) (explaining, "as expressed in Rule 220(c), SCACR, . . . an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal[,] . . . [but] [a]n appellate court may not, of course, *reverse* for any reason appearing in the record.") (emphasis in original).

Accordingly, because Appellant's appellate argument is different from her argument to the circuit court, the circuit court, of course, did not rule on it; therefore, her appellate argument is unpreserved pursuant to the established requirement that, to be preserved, all issues and arguments must be raised to and ruled on below. *Elam v. S.C. Dep't of Transp.*, 361 S.C. at 23, 602 S.E.2d at 779-80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *see also Kennedy*, 349 S.C. at 532-33, 564 S.E.2d 322-23 ("South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal."). Moreover, because this new argument was Appellant's *only* appellate argument, Appellant never actually presented any challenge to what the

circuit court *did* rule on; therefore, the circuit court's ruling is the law of the case, any potential challenge thereto by Appellant having been abandoned, and affirmance of the circuit court's summary judgments is mandated under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (noting that the two-issue rule is applicable to circuit court orders); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); *Cont'l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via a reply brief).

C. The Court misapprehended *Atlantic Coast Builders*: that case actually supports Dr. Roberts's contention that this appeal must be decided (in favor of Respondents) on preservation grounds.

As noted above, the Court's preservation analysis relies on a single legal authority: *Atlantic Coast Builders*. (*See generally* Exhibit A pp. 4-5). Citing

Atlantic Coast Builders, the Court states, "Our supreme court has *cautioned* that issue preservation 'is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants.'" (*Id.* at 5 (citing *Atlantic Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285) (emphasis added by *this* Court, i.e., this emphasis was not in the Supreme Court's opinion).) Respectfully, the Court misapprehends *Atlantic Coast Builders*.

The Subject Decision isolates the "'gotcha' game" language and does not place it in proper context. In context, it is clear that the *Atlantic Coast Builders* majority was actually making a very different point (indeed, pretty much the opposite point) than that reflected in the Subject Decision.

Explaining its disagreement with Chief Justice Toal (who, as she stated in a separate opinion—to which, it should be noted, she was the lone subscriber—that she *would* reach the merits of the appellant's arguments) and why it *could not* reach the appellant's arguments because they were unpreserved, the *Atlantic Coast Builders* majority stated as follows:

> The Chief Justice would not find that the two-issue rule applies in this case. The thrust of her argument is that the master's order does not award damages for unjust enrichment, correctly noting that the actual expenditures made by Atlantic are not a proper measure for unjust enrichment. Thus, in her view, the master did not enter judgment in favor of Atlantic on its unjust enrichment claim and no unappealed theory of liability exists to trigger the two-issue rule.

However, our review of the record shows the master intended to award damages for all causes of action, including unjust enrichment. In fact, he went so far as to specifically state he was excluding certain expenditures from his award because they did not unjustly enrich Lewis. While his calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case. Therefore, the master awarded damages to Atlantic based on a theory of unjust enrichment, and because the master made this alternate finding of liability from which Lewis did not appeal, the two-issue rule bars us from considering Lewis's arguments regarding negligent misrepresentation and breach of contract.

In the Chief Justice's view, applying the two-issue rule to this case is an "over-zealous application" of our long-standing error preservation rules because she does not believe the rule's application is clear. We certainly share her concerns about a hypertechnical application of a procedural bar to appellate arguments, *but error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that we do not reach issues which were not ruled upon by the trial court. We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us*. In fact, a rule which would permit such an "appeal by consent" is contrary to the very core of our preservation requirement . . . .

Nevertheless, *these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it.* This is so regardless, to use the Chief Justice's terms, of the "life-blood litigant or criminal defendant" before us. However, *this is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function*. While it may

> be good practice for us to reach the merits of an issue when error preservation is doubtful, *we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.* Here, we do not believe the existence of this procedural bar is questionable and would place no weight on the fact that neither the parties nor the court of appeals raised it. Therefore, the two-issue rule precludes our consideration of Lewis's arguments.

398 S.C. at 329-30, 730 S.E.2d at 285 (emphasis added).

Contrary to the view endorsed by the Subject Decision, the majority in *Atlantic Coast Builders* did not at all "caution[]" that preservation rules are not a "gotcha game;" rather, it made clear that these rules are not trivial, that they should not be looked at as a mere "gotcha game," "but rather . . . [as] settled principles that serve an important function" that should consistently be applied by the appellate court where they applicable—even in cases (unlike the instant case) where they were not raised by the parties themselves.

D. The Subject Decision is irreconcilable with South Carolina precedent placing the burden on the appellant to demonstrate reversible error.

Respectfully, reading *Atlantic Coast Builders* in the context provided above shows that the language cited by the Court in the Subject Decision about it perhaps being good practice to reach the merits of an issue/argument when preservation is "doubtful" is at best *dicta*. Even assuming, *arguendo*, the Subject Opinion is correct in finding that Appellant's argument was neither clearly preserved nor

clearly unpreserved, the Court's decision to reach the merits in such a situation is nonetheless irreconcilable with established precedent according presumptive validity to an appealed order and placing an affirmative burden on the appellant to preserve and present sufficient appellate argument to demonstrate reversible error. *See, e.g., 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);

II. The Subject Decision is also erroneous on the merits.

A. The circuit court correctly concluded Appellant's claims are time-barred under § 15-3-545(A).

The Court overlooked/misapprehended the premise of Appellant's argument about the supposed "cumulative effect" of ECT treatments. (*See* Appellant's Br. p. 6 ("The issue is not whether use of [ECT] is negligent from the first treatment but at what point . . . does use of [ECT] constitute negligence[,]" nonetheless, "[she] contends that the *cumulative effect* of these [ECT] treatments constituted an independent tort . . . .") (emphasis added).) This idea of divorcing cumulative

effect from causative origin is not only illogical but also contrary to § 15-3-545(A).[7]

The Court overlooked/misapprehended Appellant's conflation of the date of accrual of a cause of action[8] with the date of occurrence under § 15-3-545(A). As observed in *Langley v. Pierce*, however, in effecting the economic balance struck by the legislative body, "'[s]tatutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, *or perhaps before it even exists*.'") 313 S.C. 401, 404, 438 S.E.2d 243, 244 (1993) (emphasis added) (citation omitted).

Moreover, in *Harrison v. Bevilacqua*, our Supreme Court "declin[ed] to adopt the continuous treatment rule or the doctrine of continuing tort." 354 S.C. 129, 141, 580 S.E.2d 109, 115 (2003). Quoting its prior decision in *Preer v. Mims*,

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[7] In pertinent part, § 15-3-545(A) provides as follows:

> In any action . . . 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.

[8] *See Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 397, 596 S.E.2d 42, 46 (2004) ("'A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.'") (citation omitted).

the *Harrison* Court first summarized the "continuous treatment rule" as follows:

> "The so-called 'continuous treatment' rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated-unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive."

Id. at 135, 580 S.E.2d at 112 (quoting *Preer*, 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996)).

The *Harrison* Court went on to explain that—notwithstanding numerous policy considerations supporting adoption of the rule—"the continuous treatment rule should not be judicially adopted," because, "[p]ut simply, . . . judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above[[9]]." *Id.* at 136-38, 580 S.E.2d at 112-13; *see also Epstein v. Brown*, 363 S.C. 372, 378, 610 S.E.2d 816, 819 (2005) ("Notwithstanding the very legitimate policy rationales in favor of

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

adoption of a continuous treatment rule, we declined to adopt it, finding the Legislature has set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability") (citing *Harrison*, 354 S.C. at 136-37, 580 S.E.2d at 113).

The *Harrison* Court then addressed—and rejected—Harrison's additional argument that it should adopt the "continuing tort doctrine." *Id.* at 139, 580 S.E.2d at 114 ("Citing Georgia law, petitioner also argues the Court should adopt the continuing tort doctrine. We disagree."). It explained,

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

Id. (quoting *Mears v. Gulfstream Aerospace Corp.*, 225 Ga. App. 636, 484 S.E.2d 659, 664 (Ct. App. 1997) (citations omitted)).

Having explained the continuing tort theory, the *Harrison* Court explained that, in Georgia, "the 'continuing tort' theory is inapplicable to actions for medical malpractice 'since it would nullify the intent of the [Georgia] General Assembly that, after five years, no medical malpractice action could be brought . . . because

the statute of repose abolishes any action five years after the negligent or wrongful act or omission.'" *Id.* (quoting *Charter Peachford Behavioral Health Sys. v. Kohout*, 233 Ga. App. 452, 504 S.E.2d 514, 521 (Ct. App. 1998)). "Thus," the *Harrison* Court concluded, "*for the same reason* we reject adoption of the *continuous treatment rule*, Georgia has rejected application of its own *continuous tort theory* to medical malpractice claims. Accordingly, we find [Harrison's] argument on the *continuing tort doctrine* unavailing." *Id.* (emphasis added).

Appellant's claims, which arise out of a course of treatment initiated by 2003 but were not pursued via legal action until more than six years thereafter, are barred by the medical malpractice statute of repose in §15-3-545(A). Her argument to the contrary is incompatible with that statute (more specifically—and most importantly—the legislative intent reflected thereby[10]), while the circuit court's analysis faithfully adheres to the overriding responsibility of ascertaining and effectuating the legislature's intent.

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[10] Of course, "[i]t is well-established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 696 (2012) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). And, with respect to statutes of repose, our Supreme Court has recognized that they are "typically an *absolute time limit* beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." Langley, 313 S.C. at 404, 438 S.E.2d at 244 (emphasis in original).

B. Alternatively, the Court should hold this case in abeyance pending the Supreme Court's decision in *Marshall v. Dodds*.

Assuming, *arguendo*, it is proper for the Court to address the merits (i.e., assuming, *arguendo*, that this appeal should not be decided (in favor of Respondents) on preservation grounds), because the Subject Decision relied on *Marshall v. Dodds*, 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016), and that case is, as the Court recognized in the Subject Decision, presently before the Supreme Court on writ of certiorari granted August 23, 2017, the Court should hold this appeal in abeyance pending the Supreme Court's forthcoming decision in *Marshall*.

INCOPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN DR. ROBERTS'S BRIEF

As a general matter, Dr. Roberts incorporates the argument/analysis presented in his previously submitted appellate brief by reference herein and, thereby, reiterates the same and asks that the Court consider it along with the particular points above stated in support of this petition for rehearing.

ADOPTION OF ARGUMENT/ANALYSIS IN MUSC'S PETITION FOR REHEARING

To the extent that it supports the grant of the relief sought in this petition, Dr. Roberts hereby joins in and adopts as his own the argument/analysis presented by MUSC in support of its separately filed petition for rehearing.

CONCLUSION

For the foregoing reasons, Dr. Roberts asks this Honorable Court to grant this petition; rehear this matter (again, en banc, it is suggested); withdraw the Subject Opinion; and decide this appeal anew, affirming the trial court's summary judgment in his favor.

Respectfully submitted,
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By: _____

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Dated: 3/8/18

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Medical University of South Carolina, Respondent.

Appellate Case No. 2015-001463

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5535
Heard September 20, 2017 – Filed February 7, 2018

REVERSED

Jonathan Blake Asbill, of Baker Ravenel & Bender, LLP and Bradley Lewis Lanford, of The Law Office of Kenneth E. Berger, LLC, both of Columbia for Appellant.

Donald Jay Davis, Jr., Stephen Lynwood Brown, James Edward Scott, IV, and Russell Grainger Hines, all of

Exhibit A

Young Clement Rivers of Charleston for Respondent John Roberts, M.D.

William Peele Early, of Pierce, Herns, Sloan & Wilson, LLC, of Charleston, for Respondent Medical University of South Carolina.

LOCKEMY, C.J.: In this action Clair Craver Johnson appeals the circuit court's entry of summary judgment in favor of John Roberts, M.D. and the Medical University of South Carolina (MUSC) (collectively Respondents). Johnson asserts the circuit court erred in finding her claims were time barred by the statute of repose applicable to medical malpractice claims. We reverse.

Johnson suffers from bi-polar disorder and depression. In 1997 she experienced severe mania, which required hospitalization. Dr. Roberts, a licensed psychiatrist, began treating Johnson at that time.

Johnson experienced several episodes of mania between 1997 until November 2003. On November 26, 2003, Johnson's doctors admitted her to MUSC, and on December 10, 2003, they began treating her with electroconvulsive therapy (ECT).[1] Between December 10, 2003 and June 26, 2008, Johnson's doctors treated her with ECT on eighty-six separate occasions. According to Johnson, she sustained serious permanent cognitive damage as a result of the ECT.

Johnson, proceeding pro se, filed a Notice of Intent to File Suit against MUSC on June 25, 2010. She alleged "due to having ECT . . . for an extended period of time between 2003 and 2008 [I] am now left with cognitive impairment and memory loss." Johnson also requested an extension to file an expert affidavit because "I am informed and have a good faith belief that the statute of limitation on my cause of action in this matter (absent a discovery exception) will expire within the next 10 days from the date my Notice of Intent to File Suit is filed." On August 20, 2010,

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[1] "Electroconvulsive therapy is a procedure, done under general anesthesia, in which small electric currents are passed through the brain, intentionally triggering a brief seizure. ECT seems to cause changes in brain chemistry that can quickly reverse symptoms of certain mental illnesses." Mayo Clinic Staff, Electroconvulsive Therapy (ECT), Mayo Clinic (May 9, 2017), http://www.mayoclinic.org/tests-procedures/electroconvulsive-therapy/basics/definition/prc-20014161.

Exhibit A

Johnson filed a Stipulation of Dismissal without Prejudice of her Notice of Intent to Sue.

On November 16, 2011, Johnson filed a complaint against MUSC, asserting medical malpractice claims resulting from her ECT treatments. Johnson claimed, "[d]uring, after and a direct and proximate result of this extensive and involuntary ECT treatment, [she] lacked the mental capacity to understand and appreciate the detrimental effect the ECT had upon her until 2010 . . . ." Johnson also filed an affidavit from Harold J. Burstztajn, M.D., corroborating her claims that she was incapacitated as a result of the ECT until 2010. On May 16, 2012, Johnson filed an Amended Complaint against Dr. Roberts for damages resulting from the ECT treatments.

Following discovery, Respondents filed motions for summary judgment alleging Johnson's claims were barred by the statute of limitations and the statute of repose. Dr. Roberts contended the first act of negligence would have occurred between 2002 and 2003, meaning the statute of repose would bar any claims filed after 2009. MUSC also asserted, "Plaintiff's complaint against MUSC having arisen out of ECT treatment initiated in 2003 is time barred."

The circuit court held a hearing on Respondents' motions and later issued its order granting Respondents' summary judgment, finding Johnson's claims were time-barred by the statute of repose. Johnson filed a motion for reconsideration pursuant to Rule 59(e). The circuit court denied the motion. This appeal followed.

LAW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A circuit court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

South Carolina law requires claims for medical malpractice be filed 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 . . . ." S.C. Code Ann. § 15-3-545(A) (Supp. 2017). Section 15-3-545(A) creates a six-year statute of repose, beyond which a patient

cannot sue their medical provider for malpractice. *Id.*, *see also Kerr v. Richland Mem. Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 810 (2009) ("Accordingly, the statute of repose provision within section 15-35-545(A) applies as an absolute limit applicable in *any* medical malpractice action."). "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce,* 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting *First United Methodist Church v. U.S. Gypsum Co.,* 882 F.2d 862, 866 (4th Cir.1989)).

ANALYSIS

Initially, we note Respondents assert the arguments Appellant presents to this court are different from the arguments presented to the circuit court and Appellant has not appealed the circuit court's ruling on the previous argument. We disagree.

During the circuit court's hearing on Respondents' motions for summary judgment, Appellant asserted she "received [ECT] eighty-six times over a several years period of time – 2003 to 2008. Each time she received that, it was a blow to her head, a tort." Appellant conceded the "continuous treatment rule" was unavailable to her, but she argued "each of these is an individual to[rt]." The circuit court found

> Plaintiff's medical records indicate ECT was commenced on December 20, 2003. For purposes of the statute of repose, such allegations constitute an occurrence beginning as early as the commencement of treatment in 2003. . . . Thus, Plaintiff was required to bring the instant action against MUSC no later than December 10, 2009, six years from the date of the onset of treatment. Plaintiff's untimely Complaint filed on November 16, 2011, is therefore barred as a matter of law pursuant to § 15-3-545.[2]

In her briefing to this court, Appellant's statement of issue on appeal was

> The lower court erred by concluding that the trigger date for computing the running of the six[-]year statute of repose and the three[-]year statute of limitation as

[2] Judge Dennis made the same finding as to Dr. Roberts.

> December 10, 2003, the date of the first of eighty-six [ECT] treatments ending on June 26, 2008, the date of the eighty-sixth such treatment, the error being that [ECT] did not cause identifiable injury to appellant until no earlier than 2009-2010 thereby triggering a three-year period in which to initiate a claim pursuant to S.C. Code Ann. § 15-545(A).

Our supreme court has cautioned that issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." *Id.* at 330, 730 S.E.2d at 285 (emphasis added). The factual theory Appellant presented to the circuit court is not identical to the factual theory she argues here. But Appellant's statement of issues on appeal is broad enough to encompass the argument she presents to this court, and the circuit court's ruling makes clear the judge's belief that the date of occurrence in this case was the first date of treatment. Appellant asserts in her brief she is "not [seeking] the application of [the continuous treatment] rule to her facts . . . . Johnson contends that *her claim arose . . . certainly [within] the six year statute of repose.*"

It cannot be said that Appellant's arguments are clearly preserved. But in light of the foregoing, it also cannot be said that Johnson's arguments are clearly unpreserved. In these situations, "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part). Therefore, we find Appellant has preserved her arguments to this court, and has adequately appealed the circuit court's order.

In *Marshall v. Dodds*, this court confronted the issue of whether the medical malpractice statute of repose bars subsequent acts of negligence in the course of a prolonged medical treatment. 417 S.C. 196, 789 S.E.2d 88 (Ct. App. 2016), *cert. granted*, August 23, 2017. Virginia Marshall was diagnosed with a rare form of blood cancer while she was under the care of two physicians. *Id.* at 199, 789 S.E.2d at 89. She initially began seeing the two doctors in 2000 and 2004, but neither noticed signs in her blood and urine tests which indicated the presence of cancer. *Id.* In 2011, after her diagnosis, she sued her doctors, alleging they

committed malpractice by not discovering her cancer sooner. *Id.* at 200, 789 S.E.2d at 90. The circuit court found the claims were time barred "because the statute of repose began to run after the first alleged misdiagnoses . . . ." *Id.* at 202, 789 S.E.2d at 90. "[T]he court reasoned . . . [any] subsequent misdiagnoses were merely a continuation of the first misdiagnoses, not distinct acts of negligence that could serve as new trigger points for the statute of repose." *Id.*

This court reversed. The court found if a plaintiff alleges a "misdiagnosis or failure to diagnose a condition within the six-year period–which an expert witness opines to be a breach of the physician's duty of care–the statute of repose does not bar the cause of action merely because the physician previously misdiagnosed the condition outside the repose period." *Id.* at 205, 789 S.E.2d at 92. The court found the plaintiffs alleged specific dates and appointments within the statute of repose when Marshall's doctors failed to diagnose her with cancer. *Id.* at 205-06, 789 S.E.2d at 93-94. Accordingly, the court found Marshall's claims for medical malpractice for alleged negligent acts which occurred within the six-year statute of repose would not be time barred. *Id.* at 206, 789 S.E.2d at 93.

The *Marshall* court found this analysis to be consistent with our supreme court's decision in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003). In *Harrison*, the court declined to adopt the continuous-treatment rule which would toll the statute of repose until the termination of a patient's treatment. *Id.* at 138, 580 S.E.2d at 114. The plaintiff in *Harrison* was a diagnosed schizophrenic that was involuntarily committed to the care and treatment of the Department of Mental Health (the Department) in 1982. *Id.* at 132, 580 S.E.2d at 111. He remained in the Department's care through 1995, when he was discharged. *Id.* He was appointed a guardian ad litem in 1994 that successfully petitioned for his release, and subsequently filed a complaint alleging the Department should have discharged him as early as 1983. *Id.* The circuit court determined Harrison would only be allowed to present evidence of acts of negligence that occurred within the five-year statue of repose contained within the Tort Claims Act. *Id.* at 134, 580 S.E.2d at 111-12. A jury returned a verdict in favor of Harrison, but for only $1 in damages. *Id.* at 133, 580 S.E.2d at 111. Harrison then appealed the circuit court's decision, arguing the court should adopt the continuous treatment rule, meaning the statute of repose would have begun running after his discharge. *Id.* The *Harrison* court disagreed and found the continuous treatment rule would conflict with the General Assembly's objective to limit liability for medical malpractice cases. *Id.* at 138, 580 S.E.2d at 114.

Exhibit A

Our court in *Marshall* noted, "[o]ur interpretation . . . is entirely consistent with *Harrison* because we are not suggesting the statute of repose is tolled until the termination of the physician's course of treatment." 417 S.C. at 208, 789 S.E.2d at 94. Rather, "we hold the statute begins to run at the time of a medical professional's alleged negligent act or omission for which the plaintiff seeks to impose liability without regard to when the course of treatment ended." *Id.*

The allegations in this case are indistinguishable from *Marshall.* Appellant asserts she has been harmed as a result of treatment she received within the six-year statute of repose. Because there is evidence that her injury occurred as a result of treatment within the six years prior to her lawsuit, the circuit court erred in finding as a matter of law her claim is barred by the statute of repose.

CONCLUSION

Accordingly, the circuit court's order is

REVERSED.

HUFF and HILL, JJ., concur.

Exhibit A

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001463
Circuit Court Case Nos. 2012-CP-10-2867 and 2011-CP-10-8313

Clair Craver Johnson,	Appellant,
v.	
John Roberts, M.D.,	Respondent.
And	
Clair Craver Johnson,	Appellant,
v.	
Medical University of South Carolina,	Respondent.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent John Roberts, M.D., hereby certify that the foregoing **PETITION FOR REHEARING ***WITH SUGGESTION FOR REHEARING EN BANC*** BY RESPONDENT JOHN ROBERTS, M.D.** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on March 8, 2018, properly posted for delivery to the following addressees:

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Respectfully submitted,
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March 8, 2018

VIA FEDERAL EXPRESS FIRST OVERNIGHT
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Clair Craver Johnson vs. John Roberts, M.D.
Clair Craver Johnson vs. Medical University of South Carolina
Appellate Case No. 2015-001463
Case No.: 2012-CP-10-2867
YCR File: 2466-20111027

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of a Petition for Rehearing and the original and one (1) copy of the Proof of Service for same. Please file the originals and return court-stamped copies of each document to me in the enclosed envelope.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

Enclosures
Cc: Jonathan Blake Asbill, Esquire, Baker Ravenel & Bender, LLP
Bradley Lewis Lanford, Esquire, The Law Office of Kenneth E. Berger, LLC
William Peele Early, Esquire, Pierce, Herns, Sloan & Wilson, LLC