THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

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

Case No. 2011-CP-10-0934

Virginia L. Marshall and Todd W. Marshall,

Appellants,

v.

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

Respondents.

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

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. **In this medical malpractice action, wherein the plaintiffs allege breach of the standard of care via a doctor's negligent misdiagnosis of a patient's condition in 2002 and a continuation of the same course of treatment in accordance with that misdiagnosis into 2007, did the circuit court correctly construe S.C. Code Ann. § 15-3-545(A), which provides a six-year statute of repose for medical malpractice actions, and apply it to the facts of this case in holding that the plaintiffs' lawsuit against the doctor and her practice, which was not commenced until 2011, was barred by the statute of repose entitling the defendants to summary judgment in their favor?**

II. **Is the plaintiffs/appellants' argument preserved for appellate review when it was not raised to the circuit court in opposition to the defendants/respondents' motion for summary judgment, but was raised by the plaintiffs/appellants, for the first time, in support of their motion asking the circuit court to alter or amend and reconsider its order granting summary judgment in favor of the defendants/respondents?**

COUNTER-STATEMENT OF THE CASE

Between 2000 and 2007, Plaintiff/Appellant Virginia L. Marshall ("Mrs. Marshall") was a patient of Defendant/Respondent Georgia Roane, M.D. ("Dr. Roane"), a rheumatologist. According to Mrs. Marshall (and her husband, Plaintiff/Appellant Todd W. Marshall ("Mr. Marshall") (collectively, the "Marshalls")), Dr. Roane diagnosed and treated Mrs. Marshall for an autoimmune disease, but, in 2010, the Marshalls learned from another doctor that Mrs. Marshall did not have an autoimmune disease and that she had cancer. (*See generally* R. pp. 47-50 at ¶¶ 4-14; Apps' Br. at

pp. 1-2.)

In 2011, the Marshalls commenced this medical malpractice action (with Mr. Marshall asserting a claim for loss of consortium) against Dr. Roane (and her practice, Defendant/Respondent Rheumatology Associates, P.A. (collectively, "Dr. Roane" or "these Respondents")). (R. pp. 44-54.)[1]

The essence of the Marshalls' claim[2] is that Dr. Roane was negligent in misdiagnosing Mrs. Marshall's condition and treating her in accordance with that misdiagnosis. (*See* Apps' Br. at p. 1 ("The respondents are two physicians who spent a substantial amount of time giving Virginia Marshall aggressive treatment for a disease that her experts say she did not have."); id.

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[1] Also in 2011, the Marshalls brought a separate medical malpractice action against Defendants/Respondents Kenneth A. Dodds, M.D. and his practice, Charleston Nephrology Associates, LLC (collectively, "Dr. Dodds"). As reflected in the above appeal caption, the Marshalls' lawsuits against Dr. Roane and Dr. Dodds were consolidated in the circuit court. Dr. Dodds is represented by separate counsel and is briefing this appeal separately from Dr. Roane.

[2] Because an essential element of Mr. Marshall's claim for loss of consortium is proof of Dr. Roane's liability to Mrs. Marshall for medical malpractice, these Respondents have, for the sake of convenience, referred to the Marshalls' "claim" in the singular. *See* Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 121, 512 S.E.2d 510, 523 (Ct. App. 1998) ("Although a loss of consortium claim is not res judicata because of a defendant's verdict in a negligence action, 'a loss of consortium claim cannot arise if no tort is committed against the impaired spouse.' In order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury.") (citations omitted).

at p. 2 ("The story of this case begins in the year 2000. This is 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.**") (emphasis added) (citation omitted); id. ("The gist of Mrs. Marshall's claim is that Dr. Roane kept ignoring repeated warning signs that the original diagnosis was wrong. . . . Mrs. Marshall says that Dr. Roane had a continuing duty to reevaluate the diagnosis and react properly. Instead of re-calculating, Dr. Roane stayed the course."); id. ("Mrs. Marshall does not have connective tissue disease. She has cancer. She discovered this in 2010, when a different doctor . . . conducted the investigation that Mrs. Marshall says her other doctors should have conducted previously."); id. at p. 1 ("Mrs. Marshall sued Dr. Dodds and Dr. Roane after she went to a third physician who immediately diagnosed her correctly . . . .").)

Based upon the testimony of the Marshalls' own expert, Dr. Thomas Zizic, that as far back as February of **2002** Dr. Roane was negligent in misdiagnosing Mrs. Marshall's medical condition and treating her in accordance with that misdiagnosis, these Respondents moved for summary judgment on the ground that the Marshalls' lawsuit (which, again, was not commenced until **2011**) was barred by the six-year statute of repose for

medical malpractice actions found in § 15-3-545(A). (R. pp. 115-117; R. pp. 118-140, 310, 312-314.)

The motion was heard by the circuit court (the Honorable J.C. Nicholson, Jr., presiding) on March 3, 2014. (R. pp. 174-203.) As the Marshalls themselves noted in their brief, they "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." (Apps' Br. at p. 4; *see also* R. pp. 174-203; R. pp. 405-406; R. pp. 407-416, 311-312, 320; R. pp. 417-418.) By order filed May 2, 2014, the circuit court granted summary judgment to these Respondents, holding that the Marshalls' lawsuit was barred by the repose provision in § 15-3-545(A). (R. pp. 3-11.)

In the wake of the circuit court's summary judgment, and with the aid of additional, newly-appearing legal counsel, the Marshalls made a motion to alter or amend and for reconsideration ("motion for reconsideration") of the circuit court's decision, this time submitting a legal memorandum in support of their position. (R. pp. 151-154; R. p. 150; R. pp. 171-173.) The circuit court heard the Marshalls' motion for reconsideration on July 16, 2014, and thereafter denied the motion by order filed August 7, 2014. (R. pp. 204-238; R. p. 25.)

This appeal followed.

ARGUMENT

I. The circuit court correctly construed the repose provision in § 15-3-545(A) and applied it to the facts of this case in holding that the Marshalls' lawsuit against these Respondents was barred by the statute of repose entitling these Respondents to summary judgment in their favor.

First off, let us clarify the scope of the Marshalls' appellate challenge to the circuit court's ruling by noting what the Marshalls have **not** challenged, i.e., what they have **not** argued to this Court.

The Marshalls have not challenged the circuit court's view of their expert's testimony, nor have they taken issue with the circuit court's characterization of the negligence that they alleged, nor have they argued that the circuit court in any way otherwise ran afoul of the summary judgment standard[3] by invading the province of the jury; for instance, by failing to view the evidence in the light most favorable to them or by wrongly concluding that no material fact was in dispute.

The Marshalls argue only that the circuit court committed an error of law by misconstruing the relevant statute, i.e., § 15-3-545(A). (*See* Apps'

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[3] *See, e.g.,* Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009) ("Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.") (citations omitted).

Br. at p. 5 ("This case is about whether the statute of repose means what it says."); id. at p. 6 ("This Court should reverse because the circuit court's orders are controlled by an incorrect view of the law."); id. at p. 11 ("The proper construction of the law is . . . ."); id. at p. 13 ("As this brief has attempted to articulate, this view does not appear to have any basis in the law of South Carolina.").)

Consequently, the factual underpinning of the circuit court's ruling is uncontroverted; indeed, it is incontrovertible,[4] and it includes the following:

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[4] Of course, in noting that the Marshalls have not challenged the factual underpinning of the circuit court's ruling, these Respondents are not suggesting that the Marshalls had a meritorious challenge to make in this regard. Indeed, besides being supported by the record, the correctness of the factual basis of the circuit court's ruling is underscored by the very lack of any appellate challenge to it by the Marshalls. Nonetheless, with no argument directed thereto in the Marshalls' principal brief, this aspect of the circuit court's ruling is now incontrovertible. *See* Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Watson v. Underwood, 407 S.C. 443, 452, 756 S.E.2d 155, 160, n. 9 (Ct. App. 2014) ("'[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt.' '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'") (citations omitted); McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); (First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); Cont'l Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the cont.

- "Plaintiffs' Complaint against Dr. Roane and her practice alleges that from 2000 until 2005, Plaintiff Virginia Marshall was 'diagnosed and treated' by Dr. Roane for mixed connective tissue disease ('MCTD'). . . . **Dr. Roane continued to treat Plaintiff for MCTD until October 2007 and her treatment continued in accordance with this diagnosis.**" (R. p. 4 (emphasis added).)

- "Plaintiffs' sole liability expert against these Defendants, 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 Virginia Marshall's cancer." (R. p. 5.)

- "February of 2002 . . . [is] the time at which Dr. Zizic opined that Plaintiff'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 Plaintiffs 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 Plaintiffs' arguments to this Court.**" (R. p. 10 (emphasis added).)

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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.").

Now, let us turn to what the Marshalls have argued. Ultimately, they contend that "[t]he Court should hold that the statute of repose [(i.e., § 15-3-545(A))] means what it says[,]" and that "[e]ach time there is an occurrence of malpractice, the repose period for that malpractice extends six years into the future." (Apps' Br. at p. 6 (bold print omitted).)[5] More specifically, the Marshalls argue that their favored construction of the statute should win out, because the circuit court's "reasoning is not faithful to the statute's language,"[6] the circuit court's recognition of the continuing nature of the negligence that they allege is misplaced,[7] and the "true basis of the circuit court's decision is a Georgia rule . . . [that] does not appear to have any basis

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[5] Here is what § 15-3-545(A) says:

> 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.

[6] (Apps' Br. at p. 5.)

[7] (*See* Apps' Br. at pp. 10-12.)

in the law of South Carolina."[8] Most respectfully, the Marshalls' argument is unavailing.

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) (emphasis added). Harrison shows that the "continuous treatment rule" is not merely another name for the "doctrine of continuing tort;" rather, they are separate concepts, which the Court addressed in turn.

Quoting its prior decision in Preer v. Mims, the Harrison Court 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)).

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[8] (Apps' Br. at p. 13 (bold print omitted).)

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 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) (emphasis added).

The Harrison Court then addressed—and rejected—Harrison's additional argument that it should adopt the "continuing tort doctrine." Id. at

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[9] Among "the statutes discussed above," was, of course, the medical malpractice statute of repose found 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).

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 proceeded to explain 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).

The Marshalls' argument that the Georgia authority (and so-called "Georgia rule") cited by the circuit "does not appear to have any basis in the law of South Carolina"[10] is belied by our Supreme Court's express endorsement of the Georgia court's reasoning, i.e., "the same reason[ing]" as it followed in Harrison, which, again, holds that, in the particular context of medical malpractice actions, application of the continuing tort doctrine—which, if applied, would preclude the running of the statute of repose "where any negligent or tortious act is **of a continuing nature and produces injury in varying degrees over a period of time**. . . . until such time as **the continued tortious act producing injury is eliminated**"—would nullify the legislative intent that "the statute of repose abolish[] any action five years after the negligent or wrongful act or omission." Id. at 139, 580 S.E.2d at 114 (quoting Mears, 225 Ga. App. 636, 484 S.E.2d at 664 (citations omitted)) (emphasis added) and id. (quoting Kohout, 233 Ga. App. 452, 504 S.E.2d at 521) (emphasis added).[11]

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[10] (Apps' Br. at p. 13.)

[11] Indeed, the Georgia authority that the Harrison Court followed cont.

In declining to adopt the continuous tort doctrine, the Harrison Court recognized the incompatibility of that doctrine with the medical malpractice statute of repose (more specifically—and most importantly—the legislative intent reflected by the medical malpractice statute of repose[12]) where, as here, medical malpractice of a continuing nature is alleged. And, to be sure, medical malpractice of a continuing nature is what is alleged here; as noted

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recognized that the type of tortious act at issue under the continuous tort doctrine "**produces injury [(i.e., "damages")] in varying degrees over a period of time.**" Id. at 139, 580 S.E.2d at 114 (quoting Mears, 225 Ga. App. 636, 484 S.E.2d at 664 (citations omitted)) (emphasis added). This belies the notion, advanced by the Marshalls, that South Carolina's traditional focus ("on whether the plaintiff has suffered 'damages'") to determine the viability of a negligence claim is offended by the Georgia rule. (Apps' Br. pp. 14-15.) Of course, for that matter, these Respondents submit that this notion about damages and the "viability" (i.e., accrual) of a negligence cause of action (*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)) is irrelevant in any event. *See* Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 243, 244 (1993) (observing that, 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.'") (citation omitted).

[12] 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 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).

above, it is uncontroverted, indeed, incontrovertible, that medical malpractice of a continuing nature is what is alleged here. (*See also* Apps' Br. at pp. 1-2 (including, "The story of this case begins in the year 2000. This is 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.**") (emphasis added) (citation omitted)). Our Supreme Court's decision in Harrison is alone sufficient to support the position that the circuit court's construction of § 15-3-545(A)—and application thereof to this case—faithfully adhered to the overriding responsibility of ascertaining and effectuating the legislature's intent.

Moreover, the circuit court's citation to Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (Ct. App. 2010) is well founded, and the Marshalls' attempt to cast the so-called "Georgia rule" as contrary to South Carolina law is unavailing. Howell expresses Georgia's view that, "in cases alleging misdiagnosis and mistreatment, the statute of repose begins to run on the date of the initial misdiagnosis and failure to treat where the condition of the disease existed on that date." Id. at 479, 691 S.E.2d at 566 (citation omitted). "Thus," the Howell Court explained, "although 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 of the statute of repose where the negligent act is merely the repeated failure to diagnose and treat a continuing though worsening condition." Id. (emphasis added). While this may put a finer point on the issue, it is wholly consistent with the reasoning endorsed by our Supreme Court in Harrison.[13]

II. The Marshalls' argument is not preserved for appellate review, because it was not made to the circuit court in opposition to these Respondents' motion for summary judgment, but was made by the Marshalls, for the first time, in support of their motion for reconsideration of the circuit court's order granting summary judgment in favor of these Respondents.

South Carolina's preservation requirements are "mandatory." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004); *see also*

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[13] Also, as for the Marshalls' policy argument based upon the characterization of the Georgia rule as "controversial, even in Georgia," noting that Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007), was decided by a 4-to-3 vote of that state's supreme court, these Respondents note our Supreme Court's decision in Harrison was unanimous. As for the Marshalls' suggestion that the circuit court's construction of § 15-3-545(A) presents potential difficulties in its application to other cases, it would certainly seem just as problematic—not to mention an end-run around the legislature's intended operation of the statute of repose—in cases of continuing torts to allow plaintiffs to simply disregard that part of the continuing tortious conduct that places their claim outside of the statute of repose. Regardless, though, policy considerations cannot trump the legislature's intent. *See* Keyserling v. Beasley, 322 S.C 83, 470 S.E.2d 100 (1996) ("We emphasize, at the outset, that the determination of the social and economic desirability of the Barnwell landfill is not the issue before this Court. We do not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.").

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] an appellate court . . . may not *reverse* for any reason appearing in the record.") (emphasis in original); *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.

"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 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;"[14] rather, they "gave [their] position during the hearing and in . . . follow-up letter[s] to the court." (Apps' Br. at 4.) Perhaps anticipating a preservation counter-argument, the Marshalls proceed to explain that "[t]he **gist** of the[ir] argument [(opposing summary judgment)] was that although all of this malpractice was in the same family, each deviation from the standard of care was its own claim with its own damages." (Id. (emphasis added).)

Most respectfully, the record reveals a rather stark contrast between the Marshalls' argument in opposing summary judgment and the Marshalls' argument in support of their motion for reconsideration—and, to be clear, these Respondents expressly challenged the Marshalls' motion in this regard below. (*See generally* R. pp. 174-203; R. pp. 405-406; R. pp. 407-416, 311-312, 320; R. pp. 417-418; R. pp. 151-154; R. pp. 171-173; R. pp. 161-170; R. pp. 204-238.)

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[15]—that there was no malpractice before 2005. (*See generally*

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[14] 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.)

[15] (*See* R. p. 312, line 25 – p. 313, line 5 and R. p. 320, lines 8-25; *see* cont.

R. p. 193, line 8 – p. 196, line 17 (including the following argument by the Marshalls' counsel: "Judge . . . . You've heard many cases where doctors will say, well, I had this thing happen or this blood test going on but it wasn't until sometime later when you were able to correlate a history and it going on for a period of time where we really had the real reason to know that we should do something. . . . [I]t was the failure after '05 . . . that really is where the negligence occurred. . . . Judge, I believe, I personally believe and I think our experts . . . say that the negligence occurred after '05.").

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

The Marshalls' argument to this Court, which they did not raise to the circuit court for the first time until their motion for reconsideration (thus,

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also R. pp. 5-6, 9-10.)

improperly asking the circuit court to "reconsider" its decision on the basis of argument that they had not asked it to consider in the first place), is not preserved for appellate review, and cannot be allowed to undermine the circuit court's grant of summary judgment in favor of these Respondents. *See* Elam, 361 S.C. at 25, 602 S.E.2d at 780; I'On, 338 S.C. at 420-22, 526 S.E.2d at 723-24; Watson, 407 S.C. at 452, 756 S.E.2d at 160, n. 9; McCall, 380 S.C. at 659-60, 670 S.E.2d at 701; *see also* Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996) (applying the two-issue rule to circuit court orders).

CONCLUSION

Wherefore, for the foregoing reasons, and, in accordance with the Court's authority under Rule 220(c), SCACR, for any other reason appearing in the record (to include the reasoning set forth in the circuit court's order granting summary judgment in favor of these Respondents), as well as any other reason presented in Dr. Dodds's brief (in which these Respondents join, in accordance with Rule 208(b)(6), SCACR, to the extent

that it is not inconsistent herewith), these Respondents respectfully request that this Honorable Court affirm judgment in their favor.

Respectfully submitted,

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