

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2019-000359

RECEIVED
JAN 28 2020
SC Court of Appeals

David Miller,.....Appellant,

v.

ENT & Face PA, and Brian Wilson, MD,.....Respondents.

Initial Reply Brief

McGowan, Hood & Felder, LLC

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ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities-----	ii
Argument -----	1
Conclusion-----	3

Table of Authorities

<i>Atlantic Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 393, 730 S.E.2d 282 (2012).....	1
<i>Jackson v. Speed</i> , 326 S.C. 289, 486 S.E.2d 750 (1997).....	1
<i>Mickle v. Blackmon</i> , 255 S.C. 136, 177 S.E.2d 548 (1970).....	2
<i>Quality Trailer Prod., Inc. v. CSL Equip. Co.</i> , 349 S.C. 216, 562 S.E.2d 615 (2002).....	2
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	1

Argument

Respondents' lead their argument with the bizarre assertion that this appeal is unpreserved because the directed verdict motion is too broad and the notice of appeal is improper because Appellant appealed following the trial court's denial of his JNOV, yet the appeal addresses an argument raised within the directed verdict motion. These arguments are nonsensical. The argument raised on appeal is encompassed with the directed verdict motion and was addressed in the JNOV. Therefore, for purposes of this Court's review, the inquiry rests solely on whether Respondent Wilson admitted to breach.

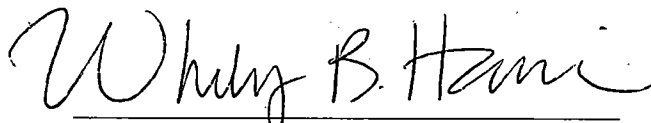
Preservation rules require an issue to be squarely raised to the trial court to provide the court an opportunity to consider the issue and rule. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). That is all. Respondents' perceived standard requiring multiple directed verdict motions be made to address each element of negligence is not only impractical and unnecessary, it overstates preservation. *See generally, Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 393, 329-30, 730 S.E.2d 282, 285 (2012) (holding appellate practice 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"). The issue of breach was encompassed within the directed verdict motion and reasserted in the motion for JNOV. To find otherwise, invites reconsideration of the fundamental purpose of appellate practice and the adoption of the plain error rule. *Jackson v. Speed*, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (refusing to apply the plain error rule).

Moreover, a motion pursuant to Rule 59(e), SCRPC, would have been successive when the trial court denied the JNOV and no unaddressed arguments remained. *Quality Trailer Prod., Inc. v. CSL Equip. Co.*, 349 S.C. 216, 220–21, 562 S.E.2d 615, 617–18 (2002) (holding successive new trial motions or motions for JNOV do not toll the time for an appeal when the judge has already ruled on the issue); *Mickle v. Blackmon*, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its “substance and effect” rather than how it is captioned by movant). Accordingly, Appellant placed all involved on notice of the appeal by stating that he would be appealing from the denial, which was tailored to the issue of breach.

Turning to the merits, this case is simple. For purposes of this Court’s review, the inquiry rests solely on whether Respondent Wilson admitted to breach. As set forth in Appellant’s Final Brief, Respondent Wilson admitted both the standard of care and his breach by acknowledging his failure to inform Appellant that the MRI did not rule out cancer and that cancer was not on the differential diagnosis. (Tr. 315-16). While Respondents now attempt to back away from the admissions by suggesting the questioning was not specific enough to the case and their expert is more reliable as to the breach, the reality is that Respondent Wilson made admissions that neither an expert nor additional facts can undermine.

Conclusion

For these reasons, this Court should reverse.

A handwritten signature in black ink that reads "Whitney B. Harrison". The signature is written in a cursive style with a large initial "W".

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PROOF OF SERVICE

The undersigned certifies that a copy of *Appellant's Initial Reply Brief* has been served upon counsel listed below by mailing a copy of the same, postage prepaid, in the United States Mail, addressed as shown below.

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January 23, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Whitney B. Harrison", with a long horizontal flourish extending to the right.

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January 23, 2020

Honorable Jenny Kitchings
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RE: *David Miller v. ENT & Face PA et al*
Appellate Case No. 2019-000359

Dear Ms. Kitchings,

Enclosed is Appellant's Initial Reply Brief. Please find the original and one copy of the Motion. Please return a clocked copy of the Motion. If you have any questions or concerns, please do not hesitate to contact me.

With kind regards,

Sincerely,

A handwritten signature in black ink that reads 'Whitney B. Harrison'. The signature is fluid and cursive.

Whitney B. Harrison

cc: Andrew Lindemann
Hutson S. Davis, Jr.
S. Harrison Williams