THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

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Op. No. 2013-UP-081
(S.C. Ct. App. filed February 20, 2013)

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Ruth Sturkie LeClair, as Next of Kin
to and Personal Representative of the
Estate of Raymond Conrad LeClair, ..... Respondent,

v.

Palmetto Health, ..... Petitioner.

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# PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

Counsel for the Petitioner Palmetto Health certifies that its Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on April 18, 2013. (App. 3).

## QUESTIONS PRESENTED

I. Did the Court of Appeals err in relying on dicta in this Court's decision in *Stokes v. Pee Dee Family Physicians*, 389 S.C. 343, 699 S.E.2d 143 (2010), and in reversing summary judgment on the wrongful death action thereby giving the estate greater rights than the decedent had which is in contravention of Section 15-51-10 of the Wrongful Death Act?

II. Did the Court of Appeals err in reversing summary judgment on the survival action (if that were even the Court's intent which is not clear from the per curiam opinion)?

III. Did the Court of Appeals err in declining to consider the additional sustaining ground and thereby affirm summary judgment on the basis that LeClair presented no expert medical testimony to establish a causal link between the alleged negligence and the Decedent's death?

## STATEMENT OF THE CASE

On July 2, 2008, the Respondent Ruth Sturkie LeClair ("LeClair"), as Personal Representative of the Estate of Raymond LeClair, filed a wrongful death action and survival action against the Petitioner Palmetto Health. LeClair alleges that Palmetto Health operates Palmetto Senior Care, which is a senior day care program. (R. 1). Raymond LeClair ("Decedent") was a participant in that program. Palmetto Senior Care transported Decedent by van from his home to the day care facility in the morning and transported him home in the afternoon. (R. 2). LeClair alleges that on March 4, 2005, Decedent was severely injured when he was allowed to stand unattended while the driver placed Decedent's walker in the van's storage compartment. Decedent allegedly fell and struck his head. (R. 2). He was admitted to the hospital and later was transferred to the Lowman Home, where he died almost six months later on September 28, 2005. (R. 3).

In her Complaint, LeClair asserted claims for both survival and wrongful death. (R. 1-5). The action was filed more than three years after the accident whereby Decedent was injured. (R. 1). The Petitioner Palmetto Health moved for summary judgment based on a statute of limitations defense. Palmetto Health also maintains that there is no evidence of any negligence proximately causing Decedent's death. (Supp. R. 1-2).

By order filed June 10, 2011, Circuit Court Judge Alison Renee Lee granted Palmetto Health's motion for summary judgment on the statute of limitations defense. (R. 40-46). LeClair later filed a Rule 59(e) motion which was denied by order filed July 6, 2011. (R. 52).

LeClair thereafter filed a timely appeal to the Court of Appeals which reversed and remanded the case by an unpublished opinion issued on February 20, 2013.

Palmetto Health petitioned for rehearing, and that petition was summarily denied. No substitute opinion was issued. (App. 3). Palmetto Health now seeks review in this Court by way of writ of certiorari.

## ARGUMENTS

**I. The Court of Appeals erred in relying on dicta in this Court's decision in *Stokes v. Pee Dee Family Physicians*, 389 S.C. 343, 699 S.E.2d 143 (2010), and in reversing summary judgment on the wrongful death action thereby giving the estate greater rights than the decedent had which is in contravention of Section 15-51-10 of the Wrongful Death Act.**

In the Circuit Court, Judge Alison Renee Lee ruled that *both* LeClair's wrongful death claim and her survival claim were barred by the statute of limitations.[1] The Personal Representative appealed and argued that she had three years *from the date of death* in order to commence the wrongful death action in accordance with Section 15-3-530(6). Because Raymond LeClair (Decedent") died on September 28, 2005, LeClair contends that the filing of her action on July 2, 2008 was timely. The Court of Appeals agreed with LeClair and reversed. (App. 2).

Relying exclusively on this Court's decision in *Stokes v. Pee Dee Family Physicians*, 389 S.C. 343, 699 S.E.2d 143 (2010), the Court of Appeals ruled that "Decedent had a right of recovery at the time of his death," and as a result, LeClair had three years from the date of death to file the wrongful death action. (App. 2).

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[1] LeClair did not appeal the summary judgment on the survival claim; yet, it is unclear from the Court of Appeals' per curiam opinion whether the reversal applies as well to the survival claim. If that was the intent of the Court of Appeals, it constitutes clear error on both procedural and substantive bases, as addressed in Section II below.

Palmetto Health submits that this was in error, and a writ of certiorari should be issued to review this issue.

Palmetto Health contends that the Court of Appeals erred in its reliance on this Court's decision in *Stokes*. In reversing summary judgment on the wrongful death action, the Court of Appeals cited the following language from *Stokes* as dispositive of the statute of limitations defense: "If the decedent had a right of recovery at the time of death, then the wrongful death action must be filed within three years, which begins to run upon the death of the person on account of whose death the action is brought." *Stokes*, 699 S.E.2d at 146. The Court of Appeals then reasoned that the Decedent died on September 28, 2005, and thus had a right of recovery at the time of his death because the statute of limitations had not yet run. The Court of Appeals further reasoned based on the foregoing language from *Stokes* that a new statute of limitations begins to run at the time of death, and as a result, the filing of the wrongful death component of the lawsuit on July 2, 2008 was timely.

This conclusion was in error specifically because the language in *Stokes*, on which the Court of Appeals relied, is with all due respect in error. As an initial matter, the Court of Appeals was not required to rely on the erroneous language in *Stokes* because that language is dicta. It is well settled that dicta is not binding as precedent. *State v. Addison*, 338 S.C. 277, 525 S.E.2d 901, 904 (Ct. App. 1999).

*See also*, *Nash v. Tindall Corp.*, 375 S.C. 36, 650 S.E.2d 81, 83 (Ct. App. 2007) (dicta "is not binding as authority").

In *Stokes*, a specific question was posed: "If 'A' has been injured and has a known claim against Defendant, but fails to file suit within the statute of limitations, and A thereafter dies as a result of the injury, may A's estate file and maintain a wrongful death claim against Defendant?" *Stokes*, 699 S.E.2d at 143. This Court in *Stokes* answered "no." But the language from the *Stokes* opinion that was found dispositive by the Court of Appeals was not in response to the question posed. Instead, that language addressed an *entirely different factual scenario* from what was presented in that case – a scenario where the decedent dies *before* the statute of limitations expires. In sharp contrast, in *Stokes*, the decedent died *after* the three-year statute of limitations had already expired and the estate was trying to bring suit against new defendants by arguing that a previously-barred claim could be revived by commencing a wrongful death case after death occurs. Clearly, this Court in *Stokes* was not called upon and did not need to address what happens where the statute of limitations had not already expired at the time of the decedent's death. Thus, the language at issue from the *Stokes* opinion was unnecessary to a resolution of the actual issue before this Court in *Stokes*. It clearly constitutes dicta which is the "discussion of a legal principle in an opinion ... where it was clearly unnecessary to a resolution of the issue before the court."

*State v. Addison*, 338 S.C. 277, 525 S.E.2d 901, 904 (Ct. App. 1999).

Furthermore, as indicated, the dicta from *Stokes* is in error. With all due respect, this Court in *Stokes* did not sufficiently consider the impact of Section 15-51-10 of the Wrongful Death Act, which provides in pertinent part as follows:

> Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default *is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued,* shall be liable to an action for damages, notwithstanding the death of the person injured. ...

S.C. Code Ann. § 15-51-10. (Emphasis added). Section 15-51-10 is designed to ensure that the defendant's liability to the estate is no greater and no different than its liability to the decedent. The estate, in essence, steps into the shoes of the decedent – similar to an assignee. If under the same procedural and substantive facts the decedent's claim is barred, so too is the estate's claim. That is the express intent, purpose, and application of Section 15-51-10. The estate should not be granted any greater rights than the decedent had.[2]

Therefore, Section 15-51-10 requires a simple analysis. A court should

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[2] In *Stokes*, this Court explained: "Our jurisprudence makes clear that if the decedent was barred from recovering damages for his injuries, the bar passes to the decedent's estate." *Stokes*, 699 S.E.2d at 145. This Court likewise wrote: "[O]ur law has remained steadfast to the principle of limiting the right of recovery under the wrongful death statute to those cases in which the party injured would have been entitled to recover if death had not ensued." *Id.*

merely look at whether the decedent could have brought suit. A court should look at the date suit is filed and then determine whether the decedent could have brought suit on that date if he were still alive. If not, then the case is time-barred. Here, if Raymond LeClair had lived and brought suit on July 2, 2008, his suit would have been time-barred. His estate should not therefore have any greater rights.

Because the statute of limitations had not expired at the time of Mr. LeClair's death, the Court of Appeals in effect concluded that Section 15-51-10 had no application and the statutory time for filing of a wrongful death action is enlarged beyond three years. Section 15-51-10, however, does not include any language that would limit or end its application at the date of death. Nor does Section 15-51-10 include any language that justifies or allows for an enlargement of the statute of limitations. In fact, if the Court of Appeals indeed were correct based on the dicta from *Stokes*, the statute of limitations could conceivably be doubled from three to six years.[3] Yet, there is absolutely no provision in the Wrongful Death Act for the extension of the statute of limitations, and frankly, there is no reasonable basis in the law for enlarging the statute of limitations for the

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[3] It is undisputed that Mr. LeClair had until March 4, 2008 to file his action within the three year statute of limitations for alleged negligence occurring on March 4, 2005. According to the Court of Appeals' ruling, assuming Mr. LeClair had died on March 4, 2008, without having filed suit, the wrongful death claim is not time-barred and the estate has three more years until March 4, 2011 to file suit – *a total of six years* after the incident giving rise to liability.

estate.

The Court of Appeals' error also may be attributable to reliance on law holding that the accrual date for a wrongful death case is the date of death. While that may be true in most circumstances, it is not always the case. An accrual date when death occurs does not – as *Stokes* does make clear in the non-dicta portions of the opinion – override the effect of Section 15-51-10, which gives the estate no greater rights than the decedent. In actuality, a wrongful death action has an accrual date of the death-causing event. This is demonstrated by the following: If the death-causing event occurs on January 1, 2005, and death does not result until June 1, 2008, no wrongful death claim may be filed. That is consistent with Section 15-51-10 and *Stokes* – the decedent did not commence suit within three-years of the death-causing event and although the death did not yet result within those three years, no wrongful death claim may be brought. In this example, the accrual date is *not* the date of death. The same is true in *Stokes* – as this Court ruled, the accrual date was not the date of death; it was the date of the death-causing event.

The irrationality of the result in the present case is perhaps best demonstrated by the following: The date of accident for Mr. LeClair was on March 4, 2005. If he died on March 5, 2008, no wrongful death action could be brought per *Stokes*. But if he died on March 4, 2008 – just one day earlier – a

wrongful death action may be brought *and the estate has an additional three years to commence that action.* That simply makes no sense, and statutes should not be construed to create absurd results. *See, Regions Bank v. Strawn*, 399 S.C. 530, 732 S.E.2d 230, 236 (Ct. App. 2012) ("[a]n appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended"). There is quite simply no reason for creating that distinction, and most importantly, that distinction has no basis in the language of Section 15-51-10.

Again, the proper construction of Section 15-51-10 is that the estate has no greater rights than the decedent. If the decedent could not have brought suit on the date of filing had he lived, the estate cannot bring suit. Here, Mr. LeClair could not have sued on July 2, 2008, for the alleged negligence occurring on March 4, 2005, and hence, his estate is likewise barred.

This Court is respectfully requested to issue a writ of certiorari to re-examine the language in *Stokes* found to be dispositive by the Court of Appeals. This appeal presents the Court with an opportunity to address the impact of Section 15-51-10 to a wrongful death claim where the death occurs prior to the lapse of the statute of limitations – the question that was not actually implicated by the facts in *Stokes*. In sum, the Court is requested to find that *Stokes* is not dispositive of the issue and that LeClair's wrongful death claim -- like her survival claim -- is barred because LeClair did not file suit by March 4, 2008.

## II. The Court of Appeals erred in reversing summary judgment on the survival action -- if that were even the Court's intent which is not clear from the per curiam opinion.

In her complaint, the Respondent LeClair brought *both* a wrongful death action and a survival action. In her order granting summary judgment, Judge Alison Renee Lee recognized that "[t]he Complaint contains causes of action for Survival and Wrongful Death." (R. 41). She then granted summary judgment based on the statute of limitations for *all claims*. (R. 46). As Judge Lee ruled, the statute of limitations for the survival action began to run on March 4, 2005, and by March 4, 2008, neither the Decedent while still alive nor his estate after his death commenced the survival action within three years of the accident. (R. 46).[4]

In her brief to the Court of Appeals, the Personal Representative raised the following broadly-worded issue on appeal: "Did the trial court err in granting Defendant's motion for summary judgment?" She did not differentiate between the survival action and the wrongful death action. In her arguments, however, the Personal Representative did not appear to contest the dismissal of the survival action. As a result, the dismissal of the survival action on the basis of the statute of limitations defense should have been affirmed by the Court of Appeals.

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[4] On Palmetto Health's motion for summary judgment, Circuit Court Judge Alison Renee Lee ruled as a matter of law that "the facts and circumstances of Mr. LeClair's injury on March 4, 2005, put him on notice that some claim against another party might exist." (R. 45). LeClair did not challenge that ruling on appeal.

In its per curiam opinion, the Court of Appeals makes no specific mention of the survival action and fails to specify that the summary judgment on the survival action is affirmed. (App. 2). It seems apparent that the Court of Appeals intended only to reverse summary judgment as to the wrongful death action. Certainly that was the correct decision on both procedural and substantive bases. Nonetheless, the opinion concludes by indicating that the lower court order is "reversed and remanded." (App. 2). The opinion also refers to the complaint as including "other claims" and then concludes that "the filing was within the statute of limitations." (App. 2).

In its petition for rehearing, Palmetto Health sought clarification from the Court whether the reversal includes the survival action or not. The order denying the petition for rehearing failed to provide that clarification nor provide for a substituted opinion. (App. 3). Palmetto Health submits that the summary judgment on the survival action should not be reversed (if it was). LeClair did not appeal the dismissal of the survival action. Moreover, it is clear that neither Section 15-51-10 nor *Stokes* extended or tolled the statute of limitations for the survival action. Instead, the statute of limitations for the survival action clearly began to run on March 4, 2005, and the filing of the survival action on July 2, 2008 was beyond the three-year statute of limitations.

Palmetto Health is therefore requesting, as an alternative position, that the Court of Appeals' opinion be reviewed to clarify that the summary judgment for the survival action is affirmed and that the lower court order is "affirmed in part, reversed in part, and remanded." This will avoid any confusion or disagreements on remand with respect to whether the survival action is dismissed or not, and as indicated, there should be no question that the survival action is barred by the statute of limitations.

## III. The Court of Appeals erred in declining to consider the additional sustaining ground and thereby affirm summary judgment on the basis that LeClair presented no expert medical testimony to establish a causal link between the alleged negligence and the Decedent's death.

Palmetto Health further requests that a writ of certiorari be granted so that due consideration may be given to the additional sustaining ground. Palmetto Health submits that summary judgment should be affirmed on the basis that the Respondent has failed to identify any expert witness to establish medical causation, and that expert medical evidence is clearly required to satisfy the burden of proof.

LeClair has alleged that the Decedent was injured when he fell and struck his head on March 4, 2005. He did not die until almost six months later. According to LeClair, the Decedent died of pneumonia; however, LeClair is not competent to offer medical opinions to establish causation or link the pneumonia to

the fall. (R. 17). The Decedent was age 76 at the time of his fall. (R. 2). He had also had numerous health issues. LeClair clearly needed expert medical testimony to establish that the injury sustained on March 4, 2005 proximately resulted in his death on September 28, 2005. *See*, *Smith v. Michelin Tire Corp.*, 320 S.C. 296, 465 S.E.2d 96 (Ct. App. 1995) (proof of proximate causation in medically complex case requires expert medical testimony). *See also*, *Oglesby v. Smith*, 258 S.C. 392, 188 S.E.2d 856 (1972); *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371 (1995). Yet, evidence of that requisite causal link is non-existent. LeClair has not identified any expert to testify as to causation, and she has presented no such evidence in opposition to the summary judgment motion. Instead, counsel offered the unsupported opinion that "he died from the bump on his head and nothing else." (R. 35).

Therefore, the summary judgment in favor of Palmetto Health should have been affirmed on the basis that LeClair failed to meet her burden of proving that the death proximately resulted from any alleged negligence by the Palmetto Health employee. This Court is respectfully requested to grant a writ of certiorari to decide this dispositive issue.

## CONCLUSION

Based on the foregoing discussion, the Petitioner Palmetto Health respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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BY: _____

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May 20, 2013

THE STATE OF SOUTH CAROLINA
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Ruth Sturkie LeClair, as Next of Kin
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**CERTIFICATE OF SERVICE**

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The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioner, Palmetto Health, does hereby certify that service of the **Petition for Writ of Certiorari** in the above referenced action was made upon the Clerk of the South Carolina Court of Appeals by hand delivery and upon all counsel of record as well as a copy of the **Appendix** being made upon all counsel of record (minus the briefs, Record and Supplemental Record on Appeal filed with the Court of Appeals) by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 20th day of May 2013:

***Hand Delivered***
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
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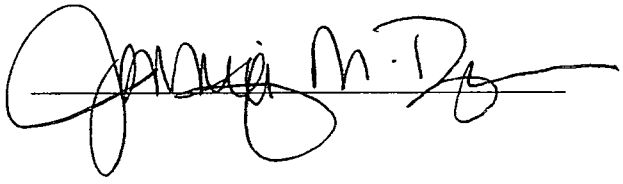

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May 20, 2013


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***Hand Delivered***
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Ruth Sturkie LeClair, as Next of Kin to and Personal Representative of the Estate of Raymond Conrad LeClair v. Palmetto Health
SCCA Tracking Number: 2011-195746
Civil Action Number: 2008-CP-40-4832
Claim Number: 2018
Our File Number: 79.8783

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven copies of the **Petition for Writ of Certiorari** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. Additionally, please find enclosed for filing two copies of the **Appendix.** I have also enclosed my law firm's check in the amount of $100.00 for the filing fee.

By copy of this letter, I am serving a copy of the Petition on all counsel of record as well as the Clerk of the Court of Appeals. I am also serving a copy of the Appendix on all counsel of record; however, have not provided counsel with the briefs, Record and Supplemental Record filed with the Court of Appeals since they are already in possession of those documents.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures As Stated)

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May 20, 2013

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South Carolina Court of Appeals
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Columbia, South Carolina 29201

RE: Ruth Sturkie LeClair, as Next of Kin to and Personal Representative of the Estate of Raymond Conrad LeClair v. Palmetto Health
SCCA Tracking Number: 2011-195746
Civil Action Number: 2008-CP-40-4832
Claim Number: 2018
Our File Number: 79.8783

Dear Ms. Kitchings:

Please find enclosed for filing two copies of the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has been filed with the South Carolina Supreme Court. Please provide me with a clocked-in copies of each document by way of my courier.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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cc: (w/ Enclosures)

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