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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Rene Lee
Circuit Court Judge

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

Ruth Sturkie LeClair as next of kin to
And Personal Representative of the Estate
Of Raymond Conrad LeClair

v.

Palmetto Health

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Supreme Court

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SC Court of Appeals

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STATEMENT OF THE CASE

This is a wrongful death action. On July 8, 2008, the action was brought by Ruth LeClair as next of kin to and personal representative of the estate of Raymond Conrad LeClair.

The nature of the action was an action alleging wrongful death of the decedent by the negligence of the Petitioner Palmetto Health.

The Petitioner Palmetto Health answered the complaint denying the allegations and alleging the case was barred by the statute of limitations.

In December of 2010, more than two years after being served with the complaint and shortly before trial, the Petitioner filed a motion for summary judgment alleging there was no proof of any deviations from accepted standards of medical care on the part of the Petitioner. (R.11)

On the eve of trial Petitioner amended its motion for summary judgment alleging that the then recent case of *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143(S.C.2010) Hereinafter *Stokes*, prohibited the case from proceeding as the action was barred by the statute of limitations. (Supp R. 1)

On May 23, 2011, the motion was heard by the Honorable Allison R. Lee, Circuit Court Judge sitting in Richland County. Judge Lee ruled on two issues, the first issue was whether the Plaintiff needed an expert on the issue of negligence and the second issue was whether the statute of limitations. On the first issue the court summarily dismissed the allegation that an expert was needed, but the court granted the motion for summary judgment in favor of the Defendant based on statute of limitations argument as set forth and consistent with *Stokes*. (R. 46) Plaintiff counsel received the order and a

timely motion to reconsider was filed. (R. 47) Defendant also filed a response in opposition alleging that an expert was needed and arguing again that Stokes was the controlling case. (R. 50) The Motion to reconsider was denied on July 6, 2011. (R.52) On July 20, 2011 Plaintiff timely filed and served the notice of intent to appeal on the Defendant. Today's Petitioner Palmetto Health did not appeal the trial court's order denying their argument that an expert was needed on the issue of negligence.

The Court of Appeals scheduled the matter for an oral argument and following the oral argument prepared their unpublished opinion reversing the trial court's interpretation of Stokes and remanding the matter to the trial court. From this unpublished opinion Petitioner filed a Petition for Rehearing alleging that the Court of Appeals relied upon improper interpretation of Stokes and that their "additional sustaining ground" argument was ignored by the Court of Appeals. The Court of Appeals denied the petition for rehearing.

From these decisions the Petitioner now seeks certiorari and alleges a new set of arguments.

ARGUMENT IN OPPOSITION TO ACCEPTANCE OF WRIT OF CERTIORARI

I. The Court of Appeals correctly ruled that the wrongful death claim was not barred by *Stokes v. Pee Dee Family Physicians*, 389 S.C. 343,669 S.E.2d 143 (2010)

Petitioner argues that the Court of Appeals relied upon “dicta” in the Supreme Court decision of *Stokes* in reversing the trial court. In the first argument, Petitioner, Palmetto Health now alleges that the Court of Appeals relied upon “dicta” in reversing the trial court’s grant of summary judgment and further alleges that the Court of Appeals in applying *Stokes* to the facts of the case, created a new statute of limitations.(Petition 6). The Petitioner did not mention “dicta” in its brief before the Court of Appeals and did not mention “dicta” in any argument at the trial level.

Stokes is clear and unambiguous. The Court of Appeals did not create a new statute of limitations as alleged by the Petitioner. Section 15-5-530(6) created the statute of limitations. Petitioner does not challenge the constitutionality of the wrongful death statute, but now alleges that the Supreme Court was wrong in its interpretation of *Stokes* (Petition 6-8) and the Court of Appeals was wrong in relying upon this erroneous decision. (Petition 6).

Petitioner argued at the trial court level that *Stokes* requires that you bring the action even though death may not have occurred. (R. 23); and yet at the Court of Appeals level Petitioner admits that the decedent had a right of recovery at the time of his death

(Respondent Brief 4); at the oral argument Petitioner argued that the wrongful death action accrued at the time of the injury. Respondent admitted at the summary judgment hearing that the deceased Mr. LeClair at the time of his death was not barred from bringing a cause of action on his own. "Mr. LeClair therefore could have brought it (the cause of action) in those six months he was still alive..." (R. 33). I don't know how to bring a wrongful death action before the death of the injured.

Petitioner's argument is that if Mr. LeClair was injured on March 4, 2005 and if he died on March 5, 2008, he would have an additional 3 years within which to bring a cause of action. The problem with the rationale of Petitioner's argument is that he was injured on March 4, 2005 and he died on September 28, 2005. Plaintiff brought the cause of action for wrongful death on July 2, 2008 which is within 3 years of his death which is within the statute of limitations for wrongful death actions and consistent with *Stokes*. Petitioner also argues that date of death is now immaterial. He must bring the cause of action (for wrongful death) within 3 years of the injury not the death. The problem with the argument is that the Petitioner's logic flies in the face of the statute whose language is clear and unequivocal. As stated by the Court of Appeals "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 at 349*, quoting S.C. Code Ann. Section 15-3-530(6).

II. The Court of Appeals did not err in reversing the summary judgment.

Petitioner now argues in their second argument that the Court of Appeals erred in reversing summary judgment on the survival action. "if that were even the Court's

intent...” Petitioner’s second question, now raised for the first time, that Petitioner believes there is now some type of survival action that the Court of Appeals ruled on but really meant to rule a different way. Petitioner’s second question now alleges that this is a survival action and it is unclear whether the Court of Appeals really meant what the Court of Appeals actually said. The Court of Appeals cites the trial court’s Order wherein it states: “The Complaint contains causes of action for Survival and Wrongful Death...” (R. 41) However, the trial court neither made this statement nor provided it in any document, further it never mentioned this in its ruling; which was an email from the Court asking the Petitioner to prepare an order based on Stokes. The only mention of the survival action is by the Petitioner when it penned the trial court order, (R. 48-49) which was signed over the objection of the Respondent.

This is an action for wrongful death. It is the Petitioner who is clouding the issue in an attempt to make this a survival action so it can muddy the waters with its statute of limitations argument; an argument which is contrary to the trial court’s ruling, and is an argument from which the Petitioner did not appeal.

The bottom line to the argument is that Petitioner Palmetto Health sought to convince the trial judge that a new case (Stokes) which sounded factually like the case at bar said that you could ignore the wrongful death statute and impose a 3 years limitation commencing at the date of injury.

The Court of Appeals reviewed and upheld the Supreme Court’s decision in Stokes. Stokes is not complicated and is the only decision interpreting Section 15-5-530(6).

This is a wrongful death action. The Plaintiff had three years from the date of death to bring the suit and did so in compliance with the statute. Section 15-5-530(6).

III. The Court of Appeals did not err in declining to consider the additional sustaining ground.

Finally Petitioner argues that it was error for the Court of Appeals to decline to consider the additional sustaining. The Petitioner's third argument is without merit as the trial court ruled favorably towards the Plaintiff on this issue and the Defendant chose not to appeal the ruling. Hence, the Court of Appeals ruling that it declined to address the issue is correct. Petitioner's third question presents the same argument as before the Court of Appeals. Now the Respondent again asks for help on an issue they lost at trial level, a ruling against them that they did not appeal, yet tried to argue at the Court of Appeals level.

The trial court in its discretion denied Palmetto's request and Palmetto did not appeal. If the issue is dispositive as the petitioner now suggests, the petitioner should have appealed the decision of the trial court. The issue was not appealed by the Petitioner to the Court of Appeals and therefore never ruled on by the Court of Appeals. In fact in the oral argument the Court of Appeals summarily dismissed the Petitioners argument as not before the Court having not been appealed. The argument is without merit.

CONCLUSION

There is no legitimate reason for this Court to accept this matter on Certiorari. This is nothing more than a delaying tactic made in an attempt to again try to bite the apple. While counsel for the Respondent acknowledges that there are many reasons why the Supreme Court may in its discretion issue the writ, the reasons propounded by the Petitioner are insufficient.

Rule 226, SCAR provides: that a writ or certiorari may be granted only where there are special and important reasons and is not a matter of right.

1. This is clearly not a novel question of law. Stokes has already resolved any novel issue that might have been present. Stokes is clear and unequivocal.
2. There were no dissenting opinions of the Court of Appeals.
3. The decision is not in conflict with any prior decisions of the South Carolina Supreme Court.
4. There are no substantial constitutional issues which are directly involved and this is clearly not a federal question.

Understanding that the reasons contained in Rule 226 are not limiting, they are an important indicator of the character of the reasons which this Court would normally consider.

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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By:

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June 14, 2013

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CERTIFICATE OF SERVICE

The undersigned as counsel for Respondent, Ruth Sturkie LeClair, hereby certifies that Honorable Jenny Abbott Kitchings was hand delivered a copy of this Response and Andrew F. Lindemann and James E. Parham, Jr., attorneys for the Petitioner have been served a copy of the Response to Petition for Writ of Certiorari in the above referenced action by placing copies in the United States Mail, first class postage prepaid at the addresses listed below on the 17th day of June 2013

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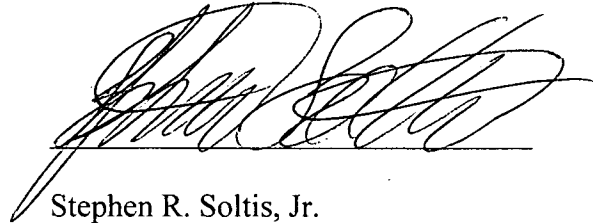
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Hand Delivered to:

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JUN 17 2013

SC Court of Appeals

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A handwritten signature in black ink, appearing to read "Stephen R. Soltis, Jr.", written over a horizontal line.

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