

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
Alison Renee 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, ..... Respondent,

v.

Palmetto Health, ..... Petitioner.

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**REPLY TO RETURN TO  
PETITION FOR WRIT OF CERTIORARI**

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Andrew F. Lindemann  
DAVIDSON & LINDEMANN, P.A.  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

James E. Parham, Jr.  
Post Office Box 1576  
Irmo, South Carolina 29063  
(803) 749-8555

*Counsel for Petitioner*

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## 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 her return to the petition for writ of certiorari, the Respondent Ruth Sturkie LeClair ("LeClair"), as Personal Representative of the Estate of Raymond LeClair, argues that the Petitioner Palmetto Health did not complain in the Court of Appeals or in the circuit court that a portion of this Court's decision in *Stokes v. Pee Dee Family Physicians*, 389 S.C. 343, 699 S.E.2d 143 (2010), is dicta. That is both misleading and incorrect.

As Palmetto Health has pointed out in its petition, this Court in *Stokes* was called upon to address a specific question: "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. That question involved a specific factual scenario where the decedent died *after* the three-year statute of limitations had already expired. Palmetto Health believes that the *Stokes* Court answered that question correctly – the question actually raised by

that case, and for that reason, Palmetto Health has relied on this Court's holding in *Stokes* and some of the legal principles that underlie that holding and are relevant to a proper construction of Section 15-51-10 of the Wrongful Death Act.

However, this Court in *Stokes* also answered a much different question -- one that was not raised by the facts of that case, i.e., a factual scenario where the decedent dies *before* the statute of limitations expires. The *Stokes* Court wrote: "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. It is that brief statement in *Stokes* that is dicta because it is not responsive to the issue raised in the case nor the facts at issue. It is that dicta on which the Court of Appeals exclusively relied in reversing the circuit court in this case.

In sum, Palmetto Health has cited favorably to the non-dicta portion of the *Stokes* opinion, that being the actual holding of the case. For instance, Palmetto Health cited the following from *Stokes* as being a correct statement of the law per Section 15-51-10: "[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." *Stokes*, 699 S.E.2d at 145. However, Palmetto Health never relied on the portion of the *Stokes* opinion that was dicta, and when that language from *Stokes* was raised at

oral argument by the Court of Appeals, Palmetto Health took the position that it was dicta. Then, after the Court of Appeals relied exclusively on that dicta in reversing the summary judgment, Palmetto Health again in its petition for rehearing argued that the Court had relied on dicta from *Stokes* that was in error and contrary to a proper construction of Section 15-51-10.

Palmetto Health submits that it is clear from this discussion that the dicta from *Stokes* deserves to be re-examined. This case presents that specific issue, and unlike in *Stokes*, here that issue is in controversy and properly justiciable. Here, the Decedent died *before* the statute of limitations expired, and this Court may now address how Section 15-51-10 should be applied in that situation. As discussed in Palmetto Health's petition and not necessary to repeat verbatim here, Section 15-51-10 should be construed as applying to this factual scenario as well. There is no reason to conclude that Section 15-51-10 has no application after the date of death. There is likewise no reason to give the estate greater rights than the decedent – which is directly contrary to what Section 15-51-10 mandates. Yet, with all due respect, that is precisely what the dicta in *Stokes* does. A re-examination of this specific issue warrants a writ of certiorari in this case.

**II. 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 its additional sustaining ground. Palmetto Health submits that summary judgment should be affirmed on the basis that the LeClair 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.

In response, LeClair argues that summary judgment was denied by Judge Alison Renee Lee on this issue and Palmetto Health did not preserve that issue by appealing it. Of course, LeClair's argument fails to account for the well-settled principle that an order denying summary judgment is not appealable. *See, Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). Thus, Palmetto Health could not appeal from Judge Lee's order, even if it wished to do so. Nonetheless, Palmetto Health submits that current jurisprudence does allow an appellate court to consider any sustaining ground appearing in the record, and that should also include any sustaining ground on which the lower court either did not rule or ruled incorrectly.

In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court discussed at length the law governing additional sustaining grounds. This

Court explained that "in raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." 526 S.E.2d at 722. The *I'On* Court further explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* See also, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

Thus, an appellate court should in its discretion be permitted to consider as additional sustaining grounds even those grounds raised below on which the lower court ruled adversely to the ultimate prevailing party, i.e. the respondent in the Court of Appeals. The reason for that is two-fold: First, the lower court may have ruled in error on a particular issue, and that issue nonetheless is a ground appearing in the record on which the appellate court may affirm the judgment entered for the respondent. Second, and more importantly in the context of a summary judgment

motion, the law is well settled that "[a] denial of a motion for summary judgment decides nothing about the merits of the case." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." *Id.* See, *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988) (party may make a renewed motion for summary judgment); *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157, 159 (Ct. App. 1992) ("If the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial"). Therefore, because the denial of summary judgment does not establish the law of the case and does not decide the merits of the issue presented, the issue is ripe for reconsideration by the lower court. The issue should also be ripe for consideration by the appellate court as an additional sustaining ground on appeal.

In the case at bar, Judge Lee's denial of summary judgment on the medical causation defense is not the law of the case, and her ruling does not decide the merits. Accordingly, Palmetto Health contends that this Court may consider that defense as an additional sustaining ground on appeal even though Judge Lee denied summary judgment on that issue – albeit without any analysis -- in the court below. (R. 46).

It is well settled under *I'On* and subsequent case law that this Court could consider the medical causation defense as an additional sustaining ground had Judge Lee granted summary judgment only on the statute of limitations defense (as she did) and then not ruled on any other issue because it was unnecessary. But, the fact that Judge Lee did summarily deny summary judgment on the medical causation defense should not preclude an appellate court from considering that issue, if it so chooses. As this Court explained in *I'On*, "[a]n affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *I'On*, 526 S.E.2d at 723. Therefore, an appellate court should be able to affirm the judgment entered below on any ground appearing in the record, and that should include a ground on which the lower court committed error.

In sum, the Court is urged to consider the medical causation defense as a basis for affirming the judgment entered for Palmetto Health in the circuit court below.

**CONCLUSION**

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

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN  
1611 Devonshire Drive  
Post Office Box 8568  
Columbia, South Carolina 29202  
(803) 806-8222

JAMES E. PARHAM, JR.  
Post Office Box 1576  
Irmo, South Carolina 29063  
(803) 749-8555

*Counsel for Petitioner Palmetto Health*

Columbia, South Carolina

June 27, 2013

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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 **Reply to Return to Petition for Writ of Certiorari** in the above referenced action was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 27th day of June 2013:

Stephen R. Soltis, Jr., Esquire  
821 East Main Street  
Lexington, South Carolina 29072

James E. Parham, Jr., Esquire  
Post Office Box 1576  
Irmo, South Carolina 29063



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