

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

The Honorable Alison Renee Lee, Circuit Court Judge JUL 14 2015

SC Court of Appeals

Appellate Case No. 2013-001410
Civil Action No. 2011-CP-32-02282

Tanya Bennett, as next friend of Mykelvion T.,
a minor,..... Appellant,

v.

Lexington County Health Services District, Inc.
d/b/a Lexington Medical Center,..... Respondent.

**RESPONDENT’S RETURN TO
APPELLANT’S PETITION FOR REHEARING**

Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center (“LMC”), through its undersigned counsel and pursuant to Rule 240(e), SCACR, submits this Return to Appellant’s Petition for Rehearing (the “Petition”).

INTRODUCTION

In this medical malpractice action, Appellant Tanya Bennett alleges that LMC is liable for a brachial plexus nerve injury sustained by her son at birth as a result of a delivery complication known as shoulder dystocia. LMC—a “governmental health care facility” as that term is defined by S.C. Code Ann. § 15-78-30(j)—moved for summary judgment on the grounds the Complaint was not filed and served within the two-year

statute of limitations set forth in S.C. Code Ann. § 15-78-110 even after accounting for seven years of tolling pursuant to S.C. Code Ann. §§ 15-3-40 and 15-3-545. The Honorable Alison Renee Lee granted LMC's Motion for Summary Judgment in an Order signed May 13, 2013, and entered May 15, 2013. Appellant timely appealed, and the parties subsequently briefed and argued their respective positions to this Court. On June 24, 2015, this Court issued its opinion affirming Judge Lee's grant of summary judgment to LMC. Appellant filed her Petition on June 8, 2015. For the reasons set forth herein, the Petition should be denied.

ARGUMENT

Pursuant to Rule 221(a), SCACR, rehearing may be appropriate if the court has "overlooked or misapprehended" one or more points raised by the losing party. However, petitions for rehearing are usually "dismissed with a simple order to that effect" because "they contain nothing but a 'rehash' of what the losing party has said before, matters which the court has already considered well and disposed of." Arnold v. Carolina Power & Light Co., 167 S.E. 234, 238 (S.C. 1933). A comparison of the Petition to Appellant's briefs reveals that it is exactly the type of petition described in Arnold.

- The first and third "Questions Presented" of the Petition (page 1) are nearly identical to the second and third "Statement of Issues on Appeal" of Appellant's Final Brief (page 1).
- The Petition's "Statement of the Case" (pages 2-4) repeats almost verbatim the "Statement of the Case" of Appellant's Final Brief (pages 1-3).
- Section I of the "Argument" portion of the Petition (pages 4-8) repeats almost verbatim Section II of the "Argument" portion of Appellant's Final Brief (pages 12-16).

- Section II of the “Argument” portion of the Petition (pages 8-11) is an amalgamation of arguments made in Appellant’s briefs and at oral argument, including a near-verbatim repeat of the two paragraphs of her Final Brief beginning with “Obstetrical and neurological literature” (pages 4-6).^{1,2}
- Section III of the “Argument” portion of the Petition (pages 11-17) repeats almost verbatim Section III of the “Argument” portion of Appellant’s Final Brief (pages 16-23).

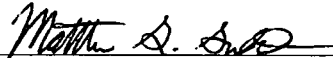
“[T]he purpose of a petition for rehearing is not just to have the case tried in [the appellate] court a second time.” Arnold, 167 S.E. at 238. Yet that is precisely what Appellant seeks in her Petition. The propositions she raises “have already been presented to this Court in the printed briefs and in the oral argument” and “have been considered by this Court in the preparation of the filed opinion.” Hicks v. Hicklin, 197 S.E. 390, 393 (S.C. 1938). They have not been overlooked or misapprehended by this Court, and thus the Petition should be denied.

¹ The referenced literature is not included in the Record on Appeal pursuant to Rule 210(c), SCACR, because it was not presented to the circuit court.

² Section II of the Petition contains argument suggesting that brachial plexus injuries must be determined to be permanent before the statute of limitations begins to run. The Court plainly did not overlook or misapprehend this argument, but rather considered and rejected it. *See* Opinion at 6 (“We appreciate Mother’s argument that Dr. Redmond indicated it could not be known whether Child’s injury would be permanent until he was approximately eighteen to twenty-four months of age. However, our jurisprudence on the discovery rule does not allow a plaintiff to wait until she is certain the injury is permanent to file suit. Rather, Mother was on notice that Child suffered a loss or *might* have a claim against Respondent after the two-week recovery period referenced by Dr. Augustine had expired or, at the latest, when she consulted with an attorney on January 11, 2002.”) (emphasis in original).

CONCLUSION

For the above-stated reasons, Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center respectfully requests that Appellant's Petition for Rehearing be denied.



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July 13, 2015

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Tanya Bennett, as next friend of Mykelvion
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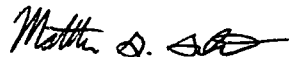
v.

Lexington County Health Services District,
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PROOF OF SERVICE

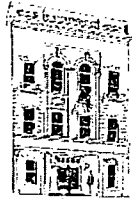
I, the undersigned attorney with Barnes, Alford, Stork & Johnson, LLP, do hereby state that I have on July 13, 2015, served a copy of the **RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING** upon all other parties, through their attorney(s) of record, by depositing copies of the documents in the United States Mail, first class, sufficient postage prepaid, with the return address(es) clearly noted, addressed as follows:

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July 13, 2015

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Re: Tanya Bennett, as next friend of Mykelvion T., a minor v. Lexington
County Health Services District, Inc. d/b/a Lexington Medical
Center

Appellate Case No. 2013-001410
Civil Action No. 2011-CP-32-02282
Client File No. CKE0496

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent's Return to
Petition for Rehearing in this matter. Please file the original and six (6) copies of the
motion and return one (1) clocked copy in the envelope provided for your convenience.

By copy of this letter, I am serving counsel for Appellant with a copy of the
motion. Thank you for your assistance in this matter.

With kindest regards, I remain

Very truly yours,

Matthew G. Gerrald

MGG/mgg

cc: Edward L. Graham, Esquire/J. Layton Ruffin, Esquire

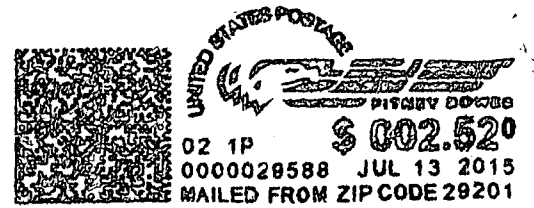
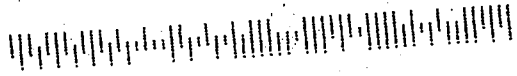
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