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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

**RECEIVED**

Frank R. Addy, Jr., Circuit Court Judge

SEP 21 2015

SC Court of Appeals

Lower Court Case No. 2012-CP-42-5017  
Appellate Case No. 2013-002699

Gretchen A. Rogers, as Guardian *ad litem*  
for Mark A. Malloy. .... Appellant,

v.

Kenneth E. Lee and  
LAW OFFICES OF LEE & SMITH, P.A. .... Respondents.

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**PETITION FOR REHEARING**

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Thomas A. Pendarvis (SC Bar # 64918)  
PENDARVIS LAW OFFICES, P.C.  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
(843) 524.9500  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Brent P. Stewart (SC Bar # 66083)  
THE STEWART LAW OFFICES, LLC  
P.O. Box 570  
Rock Hill, SC 29731  
803.328.5600  
[Brent@stewartlawoffices.net](mailto:Brent@stewartlawoffices.net)

Counsel for Appellant Gretchen A. Rogers, as  
Guardian *ad litem* for Mark A. Malloy

## ARGUMENT FOR REHEARING

Pursuant to Rule 221, SCRPC, Appellant, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, respectfully petitions the Court for rehearing on the Opinion issued on September 2, 2015, affirming the circuit court's order granting Respondents' motion for summary judgment. Respectfully, the Opinion misapprehended a critical factual finding by the trial court and the application from that finding to South Carolina's existing choice of law jurisprudence. Appellant is not asking this Court to make new law or create an exception to existing law. In effect, the Court of Appeals' Opinion converts South Carolina from a *lex loci delicti* state (law of the place of the injury) to a *lex loci delicti commissi* state (law of the place of the wrong). The Court of Appeals should grant this Petition for Rehearing, and issue a new Opinion applying long-standing South Carolina applying the *lex loci delicti* on choice of law matters and reversing the trial court's orders granting Defendants' motion for summary judgment.

**I. South Carolina law should apply because South Carolina was the place of Mr. Malloy suffered the injury from Mr. Lee's errors.**

The trial court's order found, "Clearly, the financial harm to [Malloy] manifested itself in South Carolina because [Malloy] is and always has been a citizen of this state." Op. at p. 5. In other words, it was in South Carolina where Mr. Malloy suffered injuries from Mr. Lee's errors. The Opinion correctly states that "[u]nder South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred, commonly referred to as the *lex loci delicti* rule." Op. at p. 5. The Opinion misapprehended the

distinction between the location where Mr. Lee's errors occurred (North Carolina), and the location where Mr. Malloy's resulting financial injuries occurred (South Carolina).

The citation in the Opinion to the Supreme Court's opinion in *Boone* and this Court's opinion in *Bannister* to support its erroneous conclusion that "*lex loci delicti* is determined by the state in which *the injury occurred*, not where the results of the injury were felt or where the damages manifested themselves" is mistaken because both of those cases involve personal injury claims. The injuries in those cases occurred at the same time and in the same location where the at fault-drivers' errors occurred.

Similarly, the Opinion goes to great lengths to distinguish the holding in *Lister* where, like here, the defendants' actions forming the basis for liability occurred in another jurisdiction (Aruba), but the plaintiffs' injuries and financial effects from those actions manifested themselves here in South Carolina. In fact, the Opinion in this case characterized the findings in *Lister* that "the injury that occurred was the misappropriation of the plaintiffs' money and this injury was directly to their money, which occurred in South Carolina." Op. at p. 6. This finding, however, cannot be reconciled with the actual facts in *Lister* where what really happened was an unauthorized charge on the *Lister* plaintiffs' credit card account. The defendants never misappropriated any funds belonging to the *Lister* plaintiffs that were in an account located in South Carolina. In fact, the credit card company was one of the defendants in that action. This Court in *Lister* properly applied the *lex loci delicti*

doctrine to find that South Carolina law controlled the tort claims. The same should hold true in this case.

The efforts in the opinion to distinguish persuasive authority, such as *Dow v. Jones*, 311 F. Supp. 2d 461 (D. Md. 2004), is also unavailing. The findings in the *Dow* opinion are consistent with Mr. Malloy's arguments. Because the client in *Dow* resided in Maryland and the lawyer's negligence also occurred in Maryland, the *Dow* court did not need to make the distinction between the place where the injury occurred in the place where the negligent act occurred, as is necessary in this case.

A straightforward application of South Carolina's long-standing *lex loci delicti* rule should result in a reversal of the trial court's orders granting the Respondents' motion for summary judgment. The place of Mr. Malloy's injury is and always was South Carolina.

**II. The choice of law provision in the contract should not apply because Lee was not a party to the contract.**

Lee was not a party to the contract between Mr. Malloy and Respondent, LAW OFFICES OF LEE & SMITH, P.A. ("the Law Firm"), but he could have been as likely drafter of that contract. Any ambiguities in the contract, such as who is a party to or otherwise benefits from the contract, should be construed against the drafter, Mr. Lee as an agent of the Law Firm. Mr. Lee presumably drafted the contract and therefore made a conscious decision not to include himself as a party. The Opinion's references to the contract of representation into the allegations in the pleadings do not change the fact that Mr. Lee was simply not a party to the contract.

**III. The choice of law provision does not govern the entire relationship between Mr. Lee and Mr. Malloy.**

Judge Few's finding in the Concurring Opinion that the choice of law provision does not govern the entire relationship between Mr. Lee and Mr. Malloy is correct and, as applied to Mr. Malloy's claims should result in a reversal of the trial court's orders granting the Respondents' motion for summary judgment. The sole basis of Respondents' motion for summary judgment was with the North Carolina statute of repose. There were likely other claims available to Mr. Lee. The Complaint alleges that "LEE failed to meet the minimum standard of care thereby breaching their professional duties to Malloy by other such particulars as the evidence in this case may demonstrate." (R. 23).

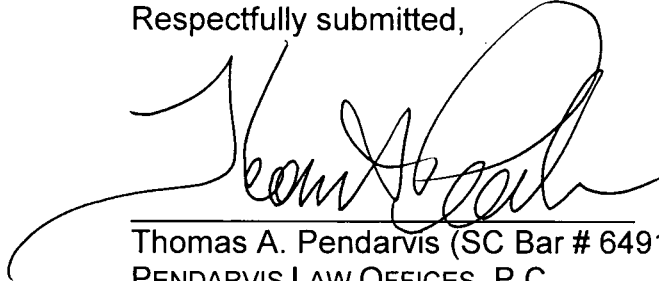
Virtually no discovery has been conducted in this case and Mr. Malloy should have the opportunity to explore whether Mr. Lee met the standard of care as to "(1) . . . whether Malloy should go to probate court to have a guardian and/or conservator appointed; (2) advising Malloy a lawyer could investigate a third-party action, such as a claim against the ladder manufacturer, the floor installer, or his medical providers, some of which the record indicates were in South Carolina; (3) pursuing a workers' compensation claim, possibly in South Carolina; and (4) advising Malloy he could pursue a claim for social security disability under federal law in South Carolina." Concurring Opinion, at p. 2 (footnotes and citations omitted).

**CONCLUSION**

Based upon the foregoing, Appellant, Gretchen A. Rogers, as Guardian *ad*

*litem* for Mark A. Malloy, respectfully requests this Court grant her petition for rehearing. The Court of Appeals should withdraw its prior Opinion and issue a new Opinion applying long-standing South Carolina law as to the choice of law and reversing the trial court's orders granting Defendants' motion for summary judgment.

Respectfully submitted,



Thomas A. Pendarvis (SC Bar # 64918)  
PENDARVIS LAW OFFICES, P.C.  
500 Carteret St., Suite A  
Beaufort, SC 29902-5066  
(843) 524.9500  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Brent P. Stewart (SC Bar # 66083)  
THE STEWART LAW OFFICES, LLC  
P.O. Box 570  
Rock Hill, SC 29731  
803.328.5600 Tel.  
[Brent@stewartlawoffices.net](mailto:Brent@stewartlawoffices.net)

Counsel for Appellant, Gretchen A.  
Rogers, as Guardian ad litem for Mark A.  
Malloy

September 16, 2015

Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

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**PROOF OF SERVICE**

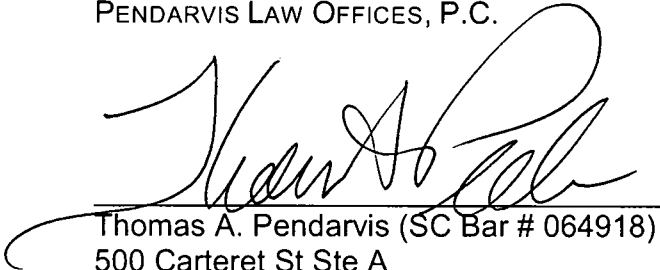
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I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the PETITION FOR REHEARING on counsel for Respondents, David W. Overstreet, J.D. and Michael B. McCall, J.D., by depositing a copy of the same in the United States Mail, postage prepaid, on the 16<sup>th</sup> day of September, 2015, addressed as follows:

David W. Overstreet, J.D.  
Michael B. McCall, J.D.  
CARLOCK, COPELAND & STAIR, LLP  
40 Calhoun Street, Suite 400  
Charleston, SC 29401

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 064918)  
500 Carteret St Ste A  
Beaufort, SC 29902-5066  
843.524.9500 Tel.  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)

Brent P. Stewart (SC Bar # 66083)  
THE STEWART LAW OFFICES, LLC  
P.O. Box 570  
Rock Hill, SC 29731  
803.328.5600 Tel.  
[BPStewart@hotmail.com](mailto:BPStewart@hotmail.com)

Lawyers for Appellant, Gretchen A. Rogers, as  
Guardian *ad litem* for Mark A. Malloy

September 16, 2015

Beaufort, South Carolina

PENDARVIS LAW OFFICES, PC



February 11, 2015

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SEP 21 2015

SC Court of Appeals

**VIA US MAIL**

Jenny Abbott Kitchings, Clerk of Court  
COURT OF APPEALS FOR  
THE STATE OF SOUTH CAROLINA  
PO Box 11629  
Columbia, SC 29211

**Re: Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy v.  
Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A.  
Appellate Case No. 2013-002699**

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the PETITION FOR REHEARING and the original and one copy of the PROOF OF SERVICE in reference to the above matter. Also enclosed is our check for \$25 to cover the filing fee. Kindly return clocked copies in the enclosed postage prepaid envelope.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/alg  
Enclosures  
ec:

David W. Overstreet, J.D.  
Michael B. McCall, J.D.  
Brent P. Stewart, J.D.  
Gretchen A. Rogers, J.D.

**THOMAS A. PENDARVIS, J.D.**  
ADMITTED IN SC AND GA  
[Thomas@PendarvisLaw.com](mailto:Thomas@PendarvisLaw.com)  
Board Certified by the American Board of  
Professional Liability Attorneys in  
Legal Malpractice

500 CARTERET ST., SUITE A  
BEAUFORT, SC 29902-5066  
[www.PendarvisLaw.com](http://www.PendarvisLaw.com)  
T 843.524.500  
F 843.524.9501