

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

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

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SC Court of Appeals

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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

CERTIFICATION OF COUNSEL

The undersigned certifies that a PETITION FOR REHEARING was made and finally ruled upon by the South Carolina Court of Appeals on the matters raised by this petition.

QUESTIONS PRESENTED FOR REVIEW

- I. Is the Court of Appeals' decision affirming the circuit court's order granting Respondents' motion for summary judgment in conflict with prior decisions by the Supreme Court applying the *lex loci delicti* doctrine, the law of the place of the injury, in their finding that North Carolina substantive law controlled where there was an uncontested finding of fact that "the financial harm to [the Petitioner] manifested itself in South Carolina"?
- II. Does the Court of Appeals' decision involve novel questions of law with regard to determining the "place of injury" in a legal malpractice tort claim where the client's financial damages are manifested in a jurisdiction different from the jurisdiction where the lawyer's alleged malpractice took place.
- III. Does the Court of Appeals' decision involve novel questions of law as to whether South Carolina should abandon the First Restatement of Conflicts of Laws' *lex loci delicti* approach to conflicts of laws for tort actions and begin applying the "significant relationship" test as set forth in the Restatement (Second) of Conflict of Laws § 145(1) (1971)?

BACKGROUND

Mark A. Malloy (the Petitioner or Mr. Malloy) lived and resided in Lancaster, South Carolina at all times relevant to the claims in this lawsuit. (Malloy Affidavit, ROA 128); (Summary Judgment Order at 2, ROA 5). Mr. Malloy sustained brain injuries on the job while working in North Carolina. *See id.* After Mr. Malloy was injured, he went to the offices of Respondent Kenneth E. Lee (Respondent Lee or Mr. Lee) located in South Carolina and retained Mr. Lee to represent him on his workers' compensation claims. *See id.* It was in South Carolina where Mr. Lee agreed to represent Mr. Malloy on the workers' compensation claims and where Mr. Malloy also signed a contract employing Respondent LAW OFFICES OF LEE & SMITH, P.A. (Law Firm) to provide legal services with regard to his workers' compensation claim. *See id.* Mr. Malloy has lived his entire life in South Carolina, including at the time he hired Mr. Lee all the way through the time when the workers' compensation matter was settled based on Mr. Lee's recommendations. Mr. Malloy signed the settlement agreement in South Carolina, received the settlement proceeds in South Carolina and deposited the settlement proceeds in the bank account that he maintained here in South Carolina. Years later Mr. Malloy (and his wife) discovered that the amount of the settlement was woefully inadequate and below what should have been recovered. *See* (Complaint, ROA 13).

On December 3, 2012, Gretchen A. Rogers, as Guardian *ad litem* for Mr. Malloy filed a Summons and Complaint in Spartanburg County against Respondents asserting claims against Mr. Lee for professional negligence and breach of fiduciary duty, and claims against Respondent Law Firm for breach of contract. (Complaint,

ROA 13). After Respondents' Answer was filed, Respondents filed a Motion for Summary Judgment on generally undisputed facts and seeking judgment as a matter of law contending that because North Carolina's 4 year statute of repose governed all of Mr. Malloy's claims, the lawsuit had not been timely commenced. (Motion for Summary Judgment, ROA 77). A hearing on Respondents' motion for summary judgment was held and on September 5, 2013, the trial court judge issued a Form 4 Order granting Lee's Motion for Summary Judgment. (Form 4 granting Motion for Summary Judgment, ROA 2). On September 17, 2013, the trial court issued a formal Order ("Summary Judgment Order") concluding, among other things, that "Under traditional South Carolina choice of law principles, **the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred, . . .** Procedural matters are to be determined in accordance with the law of South Carolina, the *lex fori*. *Nash v. Tindall Corp.*, 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007)." (Summary Judgment Order at 4-5 ROA 7) (emphasis added).

Mr. Malloy filed a Motion to Alter or Amend, and on November 26, 2013, the trial court issued its Order denying Malloy's Motion to Alter or Amend on November 26, 2013 ("Reconsideration Order"). (Reconsideration Order, ROA 11). The Reconsideration Order included a critical factual finding that "Clearly, **the financial harm to [Appellant] manifested itself in South Carolina** because [Appellant] is and has always been a citizen of this state." (Reconsideration Order at 1, ROA 11) (emphasis added). Nevertheless, the trial court denied the motion to alter or amend

its findings in the Summary Judgment Order. A timely appeal followed.

The Court of Appeals published its Opinion on September 2, 2015, affirming the trial court's findings. See *Rogers v. Lee*, ___ S.C. ___, 777 S.E.2d 401 (2015), *reh'g denied* (the Opinion). The Opinion specifically found in the part relevant to this Petition that "South Carolina law clearly provides *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. *Rogers v. Lee*, 777 S.E.2d at 405 (citing *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001) and *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994)). A Petition for Rehearing was filed and denied. This Petition for Certiorari follows.

ARGUMENTS

- I. **The Court of Appeals misapplied the Supreme Court's *lex loci delicti* choice of law jurisprudence because South Carolina was the place the financial harm from Respondent Lee's professional errors was manifested.**

The Court of Appeals' Opinion conflicts with the Supreme Court's prior decisions in *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001); *Dawkins v. State*, 306 S.C. 391, 412 S.E.2d 407 (1991); *Algie v. Algie*, 261 S.C. 103, 198 S.E.2d 529 (1973); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964); and *Rauton v. Pullman Co.*, 183 S.C. 495, 501, 191 S.E. 416, 419 (1937), all of which held that for tort claims the substantive law of the place of the injury governs those claims. The Court of Appeals' Opinion, in conflict with the Supreme Court's prior opinions, converted 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). There

is a critically important distinction between those two, which is worthy of this Court's attention and pronouncement on proper treatment under South Carolina law. Mr. Malloy's injuries were manifested here in South Carolina. South Carolina law should apply according to prior decisions by the Supreme Court. This Court should grant this Petition for Certiorari. The Court of Appeals' Opinion and the trial court's ruling should be reversed with an Opinion correcting the application of South Carolina's *lex loci delicti* choice of law jurisprudence for tort claims clarifying the distinction between the law of the place of the injury and the law of the place of the wrong for legal professional negligence matters.

There are important factual matters in the Record on Appeal highlighting the conflict between the Court of Appeals' Opinion and the Supreme Court's prior decisions. 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. Any financial benefits Mr. Malloy obtained or should have obtained from the workers' compensation claim would have been received by Mr. Malloy in South Carolina. It was in South Carolina that the financial harm occurred, which was the last event necessary to complete the tort. The Court of Appeals' 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 Court of Appeals' Opinion to the Supreme Court's opinion in *Boone* and the Court of Appeals' 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" conflicts with the Supreme Court's prior decisions because damages in both of those cases involved personal injuries that were manifested at the moment of impact caused by the defendant's negligent act. In other words, the personal injuries in those cases occurred at the same time and in the same location where the at fault-drivers' errors occurred. Here, although many of Respondent Lee's negligent acts and omissions took place in North Carolina, it was undisputed that the "financial harm" to the Petitioner "manifested itself in South Carolina." South Carolina is where the injury occurred.

The Court of Appeals' Opinion goes to great lengths in its attempt to distinguish the holding in *Lister* where, like here, the defendants' actions forming the basis for liability occurred in another jurisdiction (Aruba), but the financial harm to the plaintiffs was manifested here in South Carolina. In fact, the Court of Appeals' 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 *Lister* 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. The Court of Appeals in *Lister* properly applied the *lex loci delicti* doctrine in a manner consistent with prior Supreme Court decisions to find that South Carolina law controlled the tort claims because the financial harm from the tortious conduct in Aruba was manifested in South Carolina. The same should hold true in this case. This Petition for Certiorari should be granted so this Court will have the opportunity to correct the Court of Appeals' incorrect application of South Carolina law expressed in the Supreme Court's prior opinions.

II. The Court of Appeals' decision involves novel questions of law with regard to determining the "place of injury" in a legal malpractice tort claim.

The South Carolina Supreme Court has not spoken on the proper method to determine – for choice of law purposes – the "place of injury" in a legal malpractice tort claim where a former client's pecuniary losses are manifested in the jurisdiction where the client resides or has its principal place of business and the alleged malpractice took place in another jurisdiction. *See, e.g., Santee-Lynches Affordable Housing and Community Development Corp. v. Ellinger*, ___ F. Supp. 2d ___, 2010 WL 670096 (D.S.C. Feb. 22, 2010) (Currie, J.) ("The court's review of the law presented by the parties, as well as the court's own research, does little to resolve what appears to be a close and undecided issue of state law: which state's law applies to legal advice provided in one state for use in another.").

Clients in South Carolina retain lawyers in South Carolina to represent them on legal matters in other jurisdictions. Also, clients in other jurisdictions retain

lawyers in South Carolina to provide services on a variety of legal matters. The novelty of how or whether to apply the *lex loci delicti* rule to determine what substantive law will govern any legal malpractice claims arising out of those relationships begs this Court to grant this Petition for Certiorari.

This is a novel question of law not only in South Carolina but in other jurisdictions that employ the *lex loci delicti* approach under the Restatement (First) of Conflicts of Laws. As the Court Appeals' Opinion noted, the vast majority of the jurisdictions use the significant relationship tests or other similar tests under the Restatement (Second) of Conflicts of Laws in determining that the substantive law of the state where a former client resides or resided at the time of the acts or omissions giving rise to the claim governs the legal malpractice claims. See e.g., *Bobbitt v. Milberg, LLP*, ___ F.3d ___, 2015 WL 5255081, *2 (Sept. 10, 2015) (applying Arizona's significant relationship test, which includes "especially relevant contacts" such as: 1. The place where the injury occurred; 2. The place where the conduct causing the injury occurred; 3. The domicile, residence, nationality, place of incorporation and place of business of the parties; 4. The place where the relationship, if any, between the parties is centered."); *Workman v. Chinchinian*, 807 F. Supp. 634, 638 (E.D. Wash. 1992) (applying Washington's "significant relationship rule" for choice of law on tort claims); *David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112 (3d Cir. 1994) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971)); *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 233 F. Supp.2d 171, 172–175, 179 (D. Mass. 2002) (client was sued in Florida arising from actions taken based on bad legal advice; the client settled for two

million dollars on the second day of trial in Florida; as to the legal malpractice action, the Court found that the client was injured where its business was located which was in Massachusetts; “[The client’s] injury occurred in Massachusetts where, as the result of the malpractice, it would have to disburse funds.”); *Streber v. Hunter*, 14 F. Supp. 2d 978 (W.D. Tex. 1998) (Under Texas choice of law principles, Texas statute of limitations for legal malpractice actions, under which discovery rule applies, and not Louisiana statute of limitations, under which discovery rule is not recognized, would be applied to legal malpractice action brought by Texas residents against Louisiana lawyer who had represented them in tax matter); *David B. Lilly Co., Inc. v. Fisher*, 18 F.3d 1112, 1119 (3d Cir. 1994) (Delaware law applied to Delaware corporation’s legal malpractice claims against New York law firm based on its rendering of advice to corporation’s Missouri lawyers on structuring acquisition of corporation so that it could retain its small business status; place where injury occurred was Delaware which also was center of web of relationships among the parties, and Delaware had particular stake in protecting its legal consumers from negligent lawyers when resulting injury occurred in Delaware).

The only legal malpractice case located that was issued in a jurisdiction which, like South Carolina, applies the *lex loci delicti* rule, is *Dow v. Jones*, 311 F. Supp.2d 461, 466 n. 3 (D. Maryland 2004) (applying Maryland conflict of law rules). The *Dow* opinion, however, involved an underlying representation on a criminal matter and is not particularly instructive on how the *lex loci delicti* rule should be applied to financial harm alleged to have resulted from lawyer’s representation of a client on a civil matter. This is indeed a novel issue of law.

III. The Court of Appeals' decision involves a novel questions of law as to whether South Carolina should abandon the *lex loci delicti* approach to conflicts of laws for tort ations and begin applying the "significant relationship" test.

In Section II of the Court of Appeals' Opinion titled, "State Where the Client Resided at the Time of the Injury," novel questions of law are addressed implicating the "significant relationship" test under the Second Restatement, albeit indirectly, as part of the analysis. This raises a novel question of law as to whether South Carolina will join the modern trend of jurisdictions striving to achive uniformity in the conflict of laws analysis, especially in this day and age with the internet and increasing frequency of lawyers handling multijurisdictional matters.

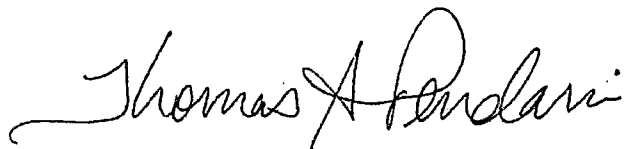
The goals of the Restatement (First) of Conflicts of Laws (1934) were to reduce forum shopping and increase predictability. See Christopherson, *Conflicted About Conflicts*, SOUTH CAROLINA LAWYER, (Sept. 2009) (citing Luther L. Mcdougal III, *et al.*, AMERICAN CONFLICTS LAW §79, at 326 (5th ed. 2001). These goals were to be achieved by a set of concrete rules designed to promote the interests of territorialism and vested rights. *Id.* In modern times, use of the First Restatement approach has steadily declined. The First Restatement's system of broad, single-contact, policy-blind rules, which was almost universally applied until the 1960's, is now the law in fewer than half the states. See Smith, CHOICE OF LAW IN THE UNITED STATES, 38 Hastings L.J. 1041 (1987). The modern trend has been away from the territorialism focus of the First Restatement and towards the universalism promoted by the Second Restatement's significant relationship approach. See Symeonides, AMERICAN CHOICE OF LAW AT THE DAWN OF THE 21ST CENTURY, 37 Willamette L. Rev. 1 (2001).

The factual circumstances in this matter and the reasoning in the Court Appeals' Opinion provide this Court with an opportunity to consider adopting the significant relationship test under the Second Restatement.

CONCLUSION

Based upon the forPetitioner, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, respectfully requests this Court grant her Petition for Certiorari. The Court of Appeals' Opinion is in conflict with prior decisions by the Supreme Court. Novel issues of law are raised concerning how to determine the "place of injury" in a legal malpractice tort claim where the client's financial damages are manifested in a jurisdiction different from the jurisdiction where the lawyer's alleged malpractice took place. In addition, the Court of Appeals' Opinion raises novel questions of law as to whether South Carolina should abandon the First Restatement of Conflicts of Laws' *lex loci delicti* approach for tort ations and begin applying the "significant relationship" test as set forth in the Restatement (Second) of Conflict of Laws § 145(1) (1971).

Respectfully submitted,



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Rogers, as Guardian ad litem for Mark A.
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November 20, 2015

Beaufort, South Carolina

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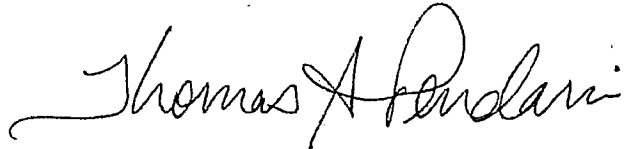
Kenneth E. Lee and
LAW OFFICES OF LEE & SMITH, P.A. Respondents.

PROOF OF SERVICE

I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the PETITION FOR WRIT OF CERTIORARI 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 20th day of November, 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

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink that reads "Thomas A. Pendarvis". The signature is written in a cursive style with a large initial 'T' and 'P'.

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November 20, 2015

Beaufort, South Carolina

PENDARVIS LAW OFFICES, PC



November 20, 2015

VIA US MAIL

Daniel E. Shearouse, Clerk
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COURT OF APPEALS FOR
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**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 Mr. Shearouse and Ms. Kitchings:

Enclosed for filing, please find an original (unbound) and seven copies of a PETITION FOR WRIT OF CERTIORARI in connection with the above matter. Also enclosed for filing is an original and one copy of a PROOF OF SERVICE. Kindly return a time-stamped copy of the PETITION and PROOF OF SERVICE to my attention in the enclosed, postage prepaid envelope.

Should you have any questions, please feel free to contact our office.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink that reads "Thomas A. Pendarvis". The signature is written in a cursive, flowing style.

Thomas A. Pendarvis

TAP/mw
Enclosures

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