THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-CP-42-5017

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondents

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that legal malpractice claims arising out of an attorney's alleged negligent advice to settle were governed by the substantive law of the state where the underlying case was commenced, litigated and settled?

   (This encompasses Petitioner's Questions 1 and 2).

2. Should this Court consider abandoning *lex loci delicti* in favor of the most significant relationship test where Petitioner not only failed to raise this argument and then expressly disavowed it in the proceedings below, but fails to present any analysis or argument that its application would warrant a different result in this case?

STATEMENT OF THE CASE

Respondent proposes the following Counter-Statement of the Case to include facts material to the application of North Carolina law:

Petitioner Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy ("Client") seeks this Court's review of the Court of Appeals' opinion affirming summary judgment for Respondents Kenneth E. Lee and Law Offices of Lee & Smith, P.A. (collectively, "Lawyer"), which held that Client's legal malpractice claims were governed by the substantive law of North Carolina and time-barred by North Carolina's four-year statute of repose.

Client's legal malpractice claims arose out of Lawyer's alleged negligent advice to settle an underlying North Carolina workers' compensation claim. Client, a South Carolina resident, was injured on the job while working in North Carolina for a North Carolina employer. (App. p. 19, ¶ 11). Client retained Lawyer, who is licensed to practice in North Carolina, to pursue a workers' compensation claim in North Carolina. (App. p. 83, ¶¶ 2-4, pp. 83-84). Lawyer is also licensed in South Carolina, and Lawyer's office is located in South Carolina. Client and Lawyer entered into the attorney-client relationship

at Lawyer's office pursuant to a contract governed by North Carolina law that provided, *inter alia*, that the purpose and scope of the representation was to pursue Client's North Carolina workers' compensation claim. (App. p. 83, ¶ 2, pp. 86-87).

Client's workers' compensation claim was filed in North Carolina. (App. pp.16-17, ¶ 16). The claim was brought pursuant to North Carolina law, governed by North Carolina law, and was litigated in North Carolina. (App. p. 83, ¶ 3, p. 19, ¶¶ 13-14). Client and Lawyer attended mediation in North Carolina, where Client, acting on Lawyer's advice, agreed to settle the claim and executed a binding settlement agreement. (App. p. 21, ¶ 27, p. 84, ¶¶ 6-7, p. 88, p. 84, ¶ 7). After the settlement was approved by the North Carolina Industrial Commission, Lawyer mailed the settlement proceeds to Client at his home address in South Carolina. (App. p. 84, ¶ 8, p. 84, ¶ 12).

Nine years later, Client filed this legal malpractice action against Lawyer alleging that the settlement was inadequate, that Lawyer was negligent in recommending it, and that as a result, Client lost the opportunity to further pursue his North Carolina workers' compensation claim for a larger settlement or a hearing on the merits before the North Carolina Industrial Commission. (App. p. 22, ¶ 30-33, p. 21, ¶ 38-40).

Lawyer moved for summary judgment on the ground that Client's claim was time-barred by North Carolina's four-year statute of repose. N.C. Gen. Stat. § 1-15(c) (providing action must be commenced within four years of "the last act of the defendant giving rise to the cause of action."). The motion turned on choice of law. Client disputed that North Carolina law applied, but conceded that if it did, his claims were time-barred. The trial court found that under South Carolina's traditional *lex loci delicti* choice of law rule, Client's claims were governed by the substantive law of North Carolina, and

accordingly, Client's action was time-barred under North Carolina's four-year statute of repose. (App. pp. 7-13).

Client moved to reconsider, arguing that because Client has at all times resided in South Carolina, South Carolina is where the financial consequences of the alleged negligence were felt. (App. p. 209). In denying Client's motion to reconsider, the trial court observed that "the financial harm to Plaintiff manifested itself in South Carolina because Plaintiff is and always has been a citizen of this state[,]" but rejected Client's argument that *lex loci delicti* should be read to mean "the state in which the results of the injuries manifest themselves" rather than "the state in which the injury occurred." (App. p. 14).

Client appealed to the Court of Appeals. In affirming, the Court of Appeals held 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." (App. p. 292). The Court of Appeals issued its decision on September 2, 2015. (App. pp. 288-299). Client's Petition for Rehearing was received by the Court of Appeals on September 21, 2015. (App. pp. 300-305). The Court of Appeals denied the Petition for Rehearing on October 23, 2015. (App. p. 306). Client served the Petition for Writ of Certiorari on November 20, 2015.

ARGUMENTS

1. The Court of Appeals correctly applied *lex loci delicti* in holding that Client's injuries occurred in North Carolina, where his underlying case was litigated, settled, and the opportunity to pursue the case for a larger recovery was lost.

(PETITIONER'S QUESTIONS 1 AND 2)

The concept of *lex loci delicti* is not a novel issue, and its application to the facts of this case was straightforward: In a legal malpractice action against an attorney for negligently advising a client to settle a case, the claims should be governed by the law of the state where the client's underlying case was filed, litigated, mediated, settled, approved, and where the case would have proceeded absent the settlement; where the injury – the lost opportunity to pursue a larger recovery – occurred.

In finding that Client's alleged injury occurred in North Carolina, the Court of Appeals rejected Client's proposition that *lex loci delicti* means something other than "the law of the state in which the injury occurred." That decision was correct. There was no disagreement among the members of the panel in reaching this conclusion, and the decision does not conflict with prior decisions of this Court.

Client contends that the decision does conflict with prior decisions of this Court, but only because the Court of Appeals declined to hold that *lex loci delicti* means something other than the law of the state where the injury occurred. It does not. The prior decisions of this Court all stand for the proposition that *lex loci delicti* means exactly what the Court of Appeals said it means, "the law of the state in which the injury occurred." Boone v. Boone, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001).[1]

[1] The other cases that Client cites as conflicting with the Court of Appeals' decision refer to *lex loci delicti* interchangeably as the law of the state where the injury occurred, where the injury was occasioned or inflicted, and where the tort was committed. *See* Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416, 419 (1937) ("the law of the place where the tort was committed"); Oshiek v. Oshiek, 244 S.C. 249, 252, 136 S.E.2d 303, 305 (1964) *overruled on other grounds by* Boone, 345 S.C. at 16, 546 S.E.2d at 194 ("the law of the situs of the tort"); Algie v. Algie, 261 S.C. 103, 106, 198 S.E.2d 529, 530 (1973) (where "the injuries occurred"); Dawkins v. State, 306 S.C. 391, 392, 412 S.E.2d 407, 408 (1991) ("the law of the place where the injury was occasioned or inflicted").

Client further contends that the decision conflicts the prior decision of the Court of Appeals in Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997). The decision of the Court of Appeals, which was authored by a member of the panel in the Lister case, succinctly disposed of Client's reliance on Lister as misplaced, noting that the rulings Lister and the case the Lister court relied on, Hester v. New Amsterdam Cas. Co., 287 F. Supp. 957, 972 (D.S.C. 1968), *aff'd in part, appeal dismissed in part and remanded*, 412 F.2d 505 (4th Cir. 1969), were limited to fraudulent misrepresentation claims, and that neither case stood for the blanket proposition that a plaintiff's residency controls for fraudulent misrepresentation claims, much less non-fraudulent misrepresentation claims. *See* Hester, 287 F. Supp. at 972 n. 7 (*citing* Restatement of Conflict of Laws § 377 (1934); Restatement (First) of Conflict of Laws § 377 (1934), Summary of Rules, Rule 4 ("When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made.").

Although Client frames the questions presented as involving an error by the Court of Appeals in applying *lex loci delicti*, the premise of Client's argument is that, at least for legal malpractice claims and potentially all claims for economic damages, the place "where the injury occurred" does not really mean the place where the injury occurred, but where the plaintiff resides. Client couches this in a seemingly more palatable concept of "where the consequences of the injury are felt," but the success of Client's argument depends entirely on equating this with the plaintiff's state of residence. In other words, as

Client has argued throughout this appeal, legal malpractice claims should be governed by the law of the state where the client resides.[2]

Although Client attempted to distance himself from the implications that such a decision would have on South Carolina lawyers who represent out-of-state clients – a concern voiced by the trial court and noted by the Court of Appeals – the reality is that accepting Client's position would amount to abandoning *lex loci delicti* in favor of a new, unprecedented choice of law test for legal malpractice actions that would subject lawyers to the laws of a foreign jurisdiction simply by virtue of a client's residence.

The Court of Appeals was correct in rejecting this proposition. *Lex loci delicti* does not mean the law of the state were the plaintiff resides or some other state where the plaintiff happens to be when the consequences of an injury are felt; it means the law of the state where the injury occurred. Client's injury in this case was the loss of the opportunity to further pursue his claim for a larger recovery. The Court of Appeals correctly held that the injury occurred in North Carolina, where Client's claim accrued and was filed and litigated, where Client settled the claim on Lawyer's advice and executed a binding settlement agreement, where the settlement was approved, and where Client's case would have proceeded if it had not settled.

The Court of Appeals properly declined to "blindly apply the residence of a plaintiff in a legal malpractice claim as the location of the injury." (App. p. 295). The decision warrants no further review from this Court.

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[2] *See* Brief of Appellant (arguing under the heading "The Law of the State Where the Client Resided at the Time of the Injury Governs the Legal Malpractice Claims" that "[Client's] economic injuries occurred in South Carolina because that is where he resides[,]" and concluding that "[s]ince [Client] was a resident of South Carolina at the time of the financial injuries resulting from [Lawyer's] negligence, South Carolina should govern [Client's] malpractice claims . . . .") (App. pp. 240-242).

2. The Court should not consider Petitioner's invitation to adopt the most significant relationship test.

(PETITIONER'S QUESTION 3)

In Client's third question presented, Client raises the new argument that this Court should consider abandoning *lex loci delicti* – not in favor of a residency-based choice of law test for legal malpractice claims – but for the significant relationship test set forth in the Restatement (Second) of Conflict of Law § 145(1). Although not so much an argument as a suggestion, it was not raised in the trial court or the Court of Appeals, or in Client's petition for rehearing. (App. pp. 227-228, pp. 300-305). It is not preserved for review and should not have been included in the questions presented. Rule 226(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."); Norton v. Opening Break of Aiken, Inc., 319 S.C. 469, 470, 462 S.E.2d 861, 862 (1995) (where party fails to raise argument to the Court of Appeals, Supreme Court will decline to address it under Rule 226(d)(2), SCACR); Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (where Court of Appeals does not address a particular issue and appellant fails to petition Court of Appeals to consider it, Supreme Court will decline to address it).

In fact, not only did Client fail argue that South Carolina should adopt the most significant relationship test in the proceedings below, Client expressly disavowed any argument that he was advocating for a departure from *lex loci delicti*. In his opening brief in the Court of Appeals, Client cited a number of cases from other jurisdictions applying the most significant relationship test, arguing that many courts have applied the law of the state where the client resided, albeit without mentioning that the cases were

from most significant relationship test jurisdictions, or that residency was but one factor considered in applying the test, or for that matter, that most of the cases cited did not turn on residency. (App. pp. 240-241).

This prompted Lawyer to note in his brief that it was unclear whether Client was advocating for the most significant relationship test, but in any event, that issue was not preserved for review, and even if it were, applying the test would not result in a different outcome. (App. p. 265). Client responded in his reply brief that he was "not seeking any change in the precedential approach that the South Carolina courts have treated and interpreted *lex loci delicti* . . . ." (App. p. 280). In Client's petition for rehearing, he reiterated that he was "not asking this Court to make new law or create an exception to existing law[,]" but was instead requesting that the Court of Appeals "issue a new Opinion applying long-standing South Carolina [jurisprudence] applying the *lex loci delicti* on choice of law matters . . . ." (App. p. 301).

Moreover, Client has not offered any analysis of the most significant relationship test or its application to the facts of this case, and for that matter, has not even asserted that its application would warrant a different result in this case. *See* Rule 242(d)(4), SCACR ("Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

The closest Client came to advancing any analysis of the most significant relationship was under Question Presented 2, where Client cited Bobbitt v. Milberg LLP, 801 F.3d 1066 (9th Cir. 2015), for the proposition that the vast majority of courts in most significant relationship test jurisdictions have held that legal malpractice claims are

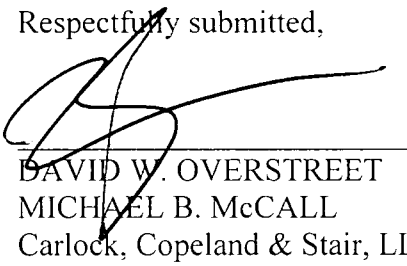
governed by law of the client's state of residence. (Pet. for Cert. p. 8). However, the Bobbitt court actually noted the exact opposite, that "most courts applying § 145 in analogous situations agree that negligent behavior in litigation injures the client in the forum state of the court, whether or not the client is physically present in the state." Id. at 1070 (collecting cases). The Bobbitt court then rejected the very argument that Client advances here, finding that "[o]ur inquiry focuses *not on the place where the victim feels the consequences of the injury, but on the location of injury itself.*" Id. at 1071 (emphasis added). As Bobbitt shows, courts applying most significant relationship test do not consider residency in a vacuum, and its application to the facts of this case would not warrant a different result.

To the extent the Court is inclined to revisit South Carolina's continued adherence to *lex loci delicti*, it should be in a case in which the issue was properly raised in the proceedings below where the facts advocating the adoption the most significant relationship test have been sufficiently developed. As the Court noted in declining to consider adopting another section of the Restatement (Second) of Conflicts of Law under similar circumstances, the Court "will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract." Sangamo Weston, Inc. v. Nat'l Sur. Corp., 307 S.C. 143, 147-48, 414 S.E.2d 127, 130 (1992) (declining to address whether South Carolina would adopt Section 193 of the Restatement (Second) of Conflicts of Law where the facts advocating its adoption had not been sufficiently developed).

CONCLUSION

The trial court and Court of Appeals correctly found that Client's claims were governed by the substantive law of North Carolina, and as a result, Client's claims were time-barred. Client's Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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December 17, 2015

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PROOF OF SERVICE

I certify that on the date indicated below, I served *Respondents' Return to Petition for Writ of Certiorari* on Appellant by depositing copies of the same in the United States Mail, postage prepaid, addressed to Appellant's attorneys of record as follows:

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This 17th day of December, 2015.

Michael B. McCall