

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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DEC 31 2015

S.C. Supreme Court

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.

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

Thomas A. Pendarvis (SC Bar # 64918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary St., Unit A-1
Beaufort, SC 29902-4188
(843) 524.9500
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

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

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ARGUMENTS IN REPLY

I. **A Writ of Certiorari Is Appropriate Because The Court of Appeals' Opinion Is Conflict With Prior Supreme Court Decisions.**

South Carolina was the place where of the economic injury occurred forming the basis of Mr. Malloy's legal malpractice tort claims according to the uncontested factual findings by the trial court. Based on those specific, unappealed factual findings, the Court of Appeals' Opinion is in conflict with prior decisions by this Court holding that the substantive law of the "place of the injury" governs the tort claims.

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. 282) (emphasis in original). The Court of Appeals cited *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) in support of its finding as applied to Mr. Malloy's legal malpractice claims. Both *Boone* and *Bannister* involved personal injury claims arising out of vehicle collisions where the injuries were sustained at the moment of the collision. The nature of personal injury damages is simply not comparable to the nature of the purely economic losses arising from a lawyer's negligence. In other words, the only losses resulting from Respondents' legal errors were economic, balance sheet losses; no physical pain, suffering, or emotional distress.

The Court of Appeals' Opinion and the Respondents' Return mischaracterize the nature of Mr. Malloy's financial losses and attempt to blend Respondent Lee's negligent acts with the losses suffered in South Carolina by Mr. Malloy as a result

of those acts. The nature of the financial injuries sustained by clients as a result of their lawyer's negligence, like the financial injuries sustained as a result of fraudulent misrepresentations, are not manifested *where* the lawyer makes the legal errors (or *where* the false statements are made). Instead, the financial injuries are manifested *where* the client should have received the benefit of the legal services the lawyer was retained to provide.

In this case, it is undisputed that Mr. Malloy should have received greater benefits at his residence in South Carolina; either a much higher clincher settlement or greater weekly workers' compensation benefits and medical services. See (App. p. 31; expert Jim Lore's opinion that "the settlement accepted is less than the reasonable settlement value in this case given the evidence contained in the records in the attorney's own legal file.") The Respondents' Reply (p. 4) and the Court Appeals' Opinion (App. p. 292) both gloss over *where* Mr. Malloy should have received those benefits and *where* "the financial harm to Mr. Malloy manifested themselves . . ." according to the undisputed factual findings by the trial court. (App. p. 14). Mr. Malloy's losses were suffered only here in South Carolina.

The Court of Appeals' Opinion created a distinction—contrary to prior Supreme Court decisions—between the nature of financial injury sustained by clients in a legal malpractice case and nature of the financial injuries resulting from fraudulent misrepresentations. (App. p. 292). This newly-crafted distinction is in conflict with the Supreme Court's decisions cited on page 4 of the Petition for Certiorari. This is because the nature of the economic injuries resulting from a

lawyer's legal errors virtually always "occur" where the client resides or has its principal place of business. The Court of Appeals' Opinion and Respondents' Reply effectively create a legal malpractice exception to the general *lex loci delicti* rule that the place of the wrong is not where the tort occurs but where the plaintiff, as a result of the tort, suffers a loss. See *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 455 (Ct. App. 1997). See also, *Santee-Lynches Affordable Hous. & Cmty. Dev. Corp. v. Ellinger*, No. C/A 3:09-1015-CMC, 2010 WL 670096, at *2 (D.S.C. Feb. 22, 2010) ("[A]t least some South Carolina cases suggest that in situations such as this, the location where the injury is manifested is key.") (citing *Lister*); *Creml v. Brown*, 955 F. Supp. 499, 524 (D. Md.) *aff'd sub nom. Banca Creml, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017 (4th Cir. 1997); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir.), *cert. denied*, 352 U.S. 871, 77 S.Ct. 96, 1 L.Ed.2d 76 (1956) ("the place of the wrong is not where the fraudulent statement was made, but where the plaintiff, as a result thereof, suffered a loss"). It is worthy to note that WestLaw's KeyCite cites to the Court of Appeals' Opinion in *Rogers v. Lee* as the "Most Negative" treatment of the holding in *Lister*.

A correct application of South Carolina's existing *lex loci delicti* rule will remind lawyers and other professionals to consider including choice of law provisions in their fee agreements when representing out-of-state clients or handling out-of-state matters, especially when the client, like Mr. Malloy, resides or has its principal place of business in a *lex loci delicti* state. Such choice of law provisions could easily be crafted to include not just the law firm, as was the circumstance in

this case, but also specifically include all lawyers involved in representing the client.

II. THE CONCURRING OPINION CORRECTLY NOTED THAT THE FEE AGREEMENT DID NOT GOVERN THE ENTIRE RELATIONSHIP BETWEEN THE CLIENT AND THE LAWYER.

The Concurring Opinion issued by the Hon. John C. Few, Chief Judge of the Court of Appeals, accurately noted that

Lee's duty to exercise reasonable care related to a variety of options that included the possibility of bringing an action in South Carolina. **That duty of due care arose under South Carolina law.** The fact that one of the services Lee eventually performed for Malloy involved a proceeding before the North Carolina Industrial Commission does not automatically transform the entire attorney-client relationship to one arising under North Carolina law, and neither does the choice of law provision in the fee agreement that covered only that proceeding.

(App. p. 298) (emphasis added).

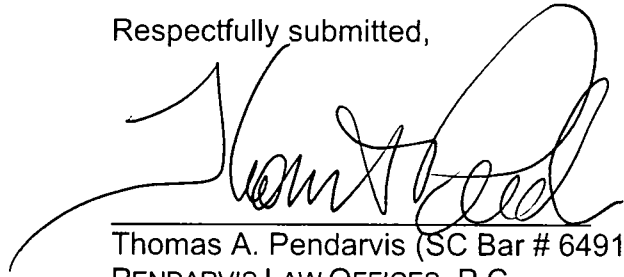
The Complaint alleges, among other things, that Respondents "failed to meet the minimum standard of care thereby breaching their professional duties to Malloy by other such particulars as the evidence in this case may demonstrate." (App. p. 18). The Court of Appeals' Opinion affirming the trial court's orders granting Respondents' motion for summary judgement should be reversed.

CONCLUSION

Based upon the forgoing, Petitioner, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy, respectfully requests this Court grant her Petition for Certiorari. The undisputed factual findings by the trial court establish that "the financial harm to Plaintiff manifested itself in South Carolina because Plaintiff is and has always been a citizen of this state." South Carolina was the "place of injury" resulting from Respondents' legal errors. The Court of Appeals' Opinion is in

conflict with prior decisions by the Supreme Court.

Respectfully submitted,



Thomas A. Pendarvis (SC Bar # 64918)
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Beaufort, SC 29902-4188
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Brent P. Stewart (SC Bar # 66083)
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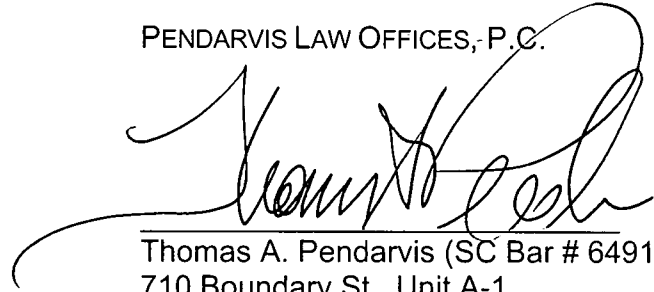
Kenneth E. Lee and
LAW OFFICES OF LEE & SMITH, P.A. Respondents.

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 PETITIONERS' REPLY TO RESPONDENTS' RETURN TO 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 28th day of December, 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, appearing to read 'Thomas A. Pendarvis', written over a horizontal line.

Thomas A. Pendarvis (SC Bar # 64918)
710 Boundary St., Unit A-1
Beaufort, SC 29902-5066
843.524.9500 tel.
Thomas@PendarvisLaw.com

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

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Beaufort, South Carolina