THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge



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Case No. 2016-CP-42-3178

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Treva C. Flowers, Tristan Flowers, and Ashley F., an infant under the age of fourteen (14) years, by and through her next friends, Treva C. Flowers and Tristan Flowers,

Appellants,

v.

Bang N. Giep, M.D., and Spartanburg & Pelham OB-GYN, P.A. (formerly Spartanburg OB-GYN, P.A.),

Respondents.

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# REPLY BRIEF OF APPELLANTS

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## Statement of Issues on Appeal

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## Statement of the Case

On respondents' counsel's motion to amend, appellants' counsel acknowledged to the trial judge that facts concerning a medical emergency during the labor and delivery had been litigated and that respondents were entitled to amend their answer to include the affirmative defense allowed by S.C. Code Ann. § 15-32-230. At the same time, appellants' counsel gave notice of his motion to strike the affirmative defense at the appropriate time. ROA 903:11 – 904:06. When respondents' attorney finished his trial motions, appellants' attorney immediately presented his motion to strike on grounds that section 15-32-230 was not applicable as a matter of law. ROA 904:09-21. Apodictically, the motion to strike was essentially a motion for a directed verdict as to the affirmative defense. *See Wright v. Craft*, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006); *Allison v. Charter Rivers Hosp., Inc.*, 334 S.C. 611, 615, 514 S.E.2d 601, 604 (Ct. App. 1999).

Contrary to respondents' assertions and in accord with their motion to strike and objection jury charge objections, appellants do dispute the applicability of subsection (A) and disagree that the jury should have been required to make factual findings for applying subsection (A).

## Standard of Review

An issue regarding statutory interpretation is a question of law. *S.C. Coastal Conserv. League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). "Questions of statutory interpretation are questions of law, which we [the appellate court] are free to decide without any deference to the court below." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012). The granting or refusal of a motion to strike is subject to the trial judge's discretion but can be reversed if the trial judge's action was an abuse of discretion or controlled by an error of law. *See Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 792 S.E.2d 240 (Ct. App. 2016) (citing *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194-95, 213 S.E.2d 726, 728 (1975). Where an appellate court is deciding whether the trial judge properly denied a motion to strike based on a question of law, the appellate court should decide the questions of law also with no deference to the circuit court's findings. *See Gates* (citing *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010).

## Argument

*Was it error to apply S.C. Code Ann. § 15-32-230(A) to the exclusion of § 15-32-230 (B) and render judgment for defendants in medical malpractice claims arising from emergency obstetrical care when the plaintiffs had a previous doctor/patient relationship with the defendant physician and other members of his practice and received prenatal care?*

In *Ranucci v. Crain*, 409 S.C. 493 (2014), the South Carolina Supreme Court reversed lower courts that found separate and distinct purposes in statutory subsections that

had been created for a singular legislative purpose. As here, the lower courts in *Ranucci* accepted defendants' arguments that the plain and ordinary meaning of different sections within the same legislative act, (here S.C. Code Ann. § 15-32-230[1]) rendered those sections separate and distinct in their applications. The Supreme Court, however, said the lower courts were wrong.

> *"It is well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result."*

*Ranucci*, 409 S.C. at 501(quoting *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

Even without delving into the specific text of each statute, the Supreme Court in *Ranucci* found that the General Assembly's internal cross-referencing of the statutes manifested an intent for the sections to be read *in pari materia*. *See Ranucci*, 409 S.C. at 501. Similarly, subsection (C) of section 15-32-230 pulls subsections (A) and (B) together by clearly referring to them both.

> *(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and: (1) in*

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[1] For convenient reference, S.C. Code Ann. § 15-32-230, is republished here:

(A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.

(B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

*immediate threat of death; or (2) in immediate threat of serious bodily injury.*

S.C. Code Ann. § 15-32-230(C).

Note that the "limitation on physician liability" mentioned by subsection (C) is a singular limitation established by subsections (A) *and* (B) together, rather than separate and distinct limitations as argued by respondents. Further note that while the term "genuine emergency" is stated as a qualification in subsection (A), and subsection (B) only requires care on an "emergency basis," subsection (C) provides no limitation on liability under either subsection unless the patient is "not medically stable" and under threat of "immediate death" or "immediate serious bodily harm." Because of 15-32-230(C), there is no distinction within the subsections as to the level of emergency necessary to qualify for the immunity.

As further evidence that the subsections are *in pari materia*, the last sentence of subsection (C) provides:

*Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.*

S.C. Code Ann. § 15-32-230(C).

The respondents wrongly asserted to the contrary that "(s)ubsection (B) is not limited to care provided in an emergency department, obstetrical suite, or surgical suite, and would apply to care provided anywhere outside of those locations." *See* Respondents' Brief at p. 13.

The respondents also wrongly asserted that the term 'obstetrical suite' was specifically included in subsection (A) to give physicians immunity from simple negligence for emergency obstetrical care regardless of the existence of a prior

doctor/patient relationship. The General Assembly understood that all emergency care in an obstetrical suite is not necessarily emergency obstetrical care. Nonobstetrical emergencies that sometimes require care within obstetrical suites include stroke, myocardial infarction, and acute asthma. *See* Tillet, *Nonobstetrical Emergencies in the Obstetrical Unit*, J' OF PERINAT NEONATAL NURS., 2013 Jan-Mar, 27(1): 5-7. Such nonobstetrical emergencies can also involve some of the many non-patient visitors to obstetrical suites awaiting a birth. The term 'obstetrical suite' in Subsection (A) should not be equated with 'obstetrical care,' a term exclusive to subsection (B). The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense. *See Pee v. AVM, Inc.*, 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001).

By failing to read subsections (A) and (B) *in pari materia*, respondents create the absurd and non-harmonious result that subsection (A) should grant a physician qualified immunity in the very same situation that subsection (B) would deny the physician qualified immunity. A court must reject interpretation of a statute "which leads to an absurd result or renders it meaningless." *Ranucci*, 409 S.C. at 500-01.

A well settled rule of statutory construction is that the court must ascertain the intent of the legislature and give it effect so far as possible within constitutional limitations. When a statute is a part of other legislation, designed as a whole to establish an expressed state policy, the court should strive to effectuate that policy. To aid in its construction, the statute must be read in the light of cognate legislation. *See Gregg Dyeing Co. v. Query*, 166 S.C. 117, 123 (1931) (citing *Tallevast v. Kaminski*, 146 S.C. 225, 143 S.E. 796 (1928)). Statutes

on the same subject "shall be taken together and construed *in pari materia*; even though there be no express reference by the latter statute to the former." *See Gregg Dyeing Co.*, 166 S.C. at 123 (citing *State v. Fields*, 2 Bail. 554, 555 (1832)).

"The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes that are contemporaneous." *Gregg Dyeing Co.*, 166 S.C. at 123. "'There is no rule better supported by justice and wisdom than that, when there are several Acts on the same subject, they should be read together as one Act, so far as their provisions are consistent; as by this means, the mischief, the remedy, and the intention, of the legislature, are more distinctly seen and applied.'" *Gregg Dyeing Co.*, 166 S.C. at 123 (citing *Richards v. McDaniel*, 2 Mill S.C. 18). While, generally, reference to statutes *in pari materia* for purposes of construction has been made largely where there is ambiguity in the language of the statute construed, this principle has not been limited solely to such instances. "Statutes *in pari materia* must be construed together and given a construction, if possible, which violates no constitutional provision." *Id.* (citing *Neil v. Independent Realty Co.*, 317 Mo. 1235, 298 S.W. 363 (1927)). When two acts are "cognate parts" of a single purpose (in this case providing qualified immunity for emergency medical care), the two acts should be considered as "inextricably" interrelated and construed *in pari materia*. *See Gregg Dyeing Co.*, 166 S.C. at 123-24.

Reading the subsections of S.C. Code Ann. § 15-32-230 *in pari materia*, the General Assembly clearly intended to grant qualified immunity to all physicians providing emergency care in an emergency room, obstetrical unit, or surgical suite to an unstable patient facing an immediate threat of death or serious bodily injury, except when the

physician was providing obstetrical care and the patient had undergone prenatal care or had a pre-existing medical relationship with the doctor or his practice.

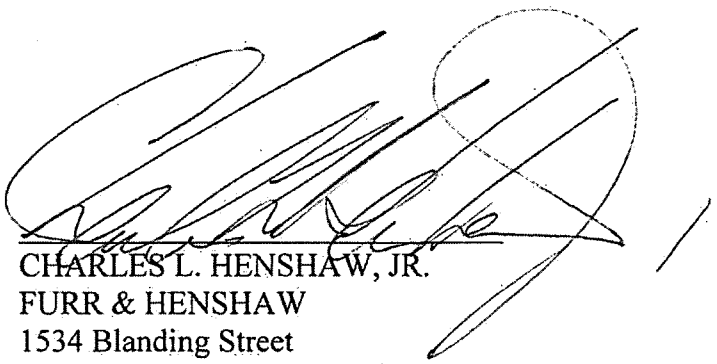
This interpretation is bolstered by the last legislative expression rule, which provides that where conflicting provisions exist, the last in point of time or order of arrangement, prevails. *See Eagle Container Co., LLC v. Cty. of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005) (citing *Ramsey v. County of McCormick*, 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991); *Feldman v. S.C. Tax Comm'n*, 203 S.C. 49, 51, 26 S.E.2d 22, 24 (1943)). Further, "where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Eagle Container Co.* 366 S.C. at 629 (citing *Wilder v. South Carolina Hwy. Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955).

Neither of these rules were addressed by respondents, but both lead to the conclusion that the trial judge was wrong to apply subsection (A) to the exclusion of subsection (B).

## Conclusion

The judgment should be reversed, and the case remanded for a trial on the issues of liability and damages.[2]

[2] Pursuant to S.C. Code § 15-33-125 appellants agree with respondents that a new trial in this case must be as to both liability and damages and not as to damages alone.

By: 

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