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

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.

REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

Appellant, Gretchen A. Rogers, as Guardian *ad litem* for Mark A. Malloy ("Malloy"), wishes to brief the Court further and/or respond further to several of the issues raised by Respondents, Kenneth E. Lee and LAW OFFICES OF LEE & SMITH, P.A. (collectively "Lee").

I. SOUTH CAROLINA COURTS INTERPRET *LEX LOCI DELICTI* TO MEAN "THE PLACE WHERE THE INJURY OCCURS."

Throughout their brief, Lee entirely distorts and misinterprets Malloy's arguments on existing South Carolina choice of law doctrine and application of *lex loci delicti*. Lee's brief asserts that Malloy is arguing for the Court to change South Carolina's long-standing interpretation of *lex loci delicti* from the law of the state where the plaintifff was injured to the "law of the state where the plaintiff resided at the time of the injury." In fact, Malloy notes time and time again that the South Carolina courts have applied *lex loci delicti* to mean that the courts must apply the law of the state where the plaintiff was injured. Review of the South Carolina cases cited by Lee shows that in each case the nature of the injury sustained conclusively determined that the place of the injury was also the place where the tort was committed, causing the South Carolina courts to apply the law of that jurisdiction. Any focus in Malloy's brief on the state in which the plaintiff resided at the time of the injury was within the context of how courts have handled the location of the injury in legal malpractice claims. Often, certain torts have a "place of injury" that is obvious based upon the nature of injury that is suffered, such as personal injury tort; however, in other torts, such as legal malpractice torts and fraudulent misrepresentation torts, by the nature of the financial injuries suffered by the tort victim, the "place of injury" often is in a location hundreds of miles from where the tortious act was committed. Such was the case for

Malloy.

In fact, it is Lee (and effectively the trial court) who seek to change long-standing South Carolina law from *lex loci delicti,* that is, the law of the place where the injury is suffered, to *lex loci delicti commissi*, that is, the law of place where the wrong was committed. The South Carolina approach is reasonable. Even when the events occurred in different states, the defendant's acts may reasonably have been contemplated to have an adverse effect in the place where the plaintiff's injury resulted. In this case, it is undisputed that Lee had a South Carolina client, Malloy, come to Lee's offices in South Carolina seeking representation on North Carolina workers' compensation claims, the benefits of which, if obtained, would have been paid to and received by Malloy at his home in South Carolina, as was the paltry settlement Lee later obtained for Malloy. Therefore, it is reasonable for Lee to have contemplated, foreseen, and anticipated at the outset of the representation that any of his errors or omissions would have adverse financial effects on Malloy at the place where Malloy was to be paid and receive his workers' compensation benefits, which is and always was here in South Carolina.

As interpreted by the Court of Appeals in *Nash*, *Lister* and others, the place where the injury is suffered is the *lex loci delicti. See Nash v. Tindall Corp.,* 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007); *Lister v. NationsBankOf Delaware, N.A. ,* 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997). Malloy is not seeking any change in the precedential approach that the South Carolina courts have treated and interpreted *lex loci delicti*, but instead is asking this Court to reverse the trial court's erroneous application in order to follow South Carolina's established precedents such as *Nash* and *Lister. See id.*

In *Nash*, the plaintiffs were injured when a pedestrian bridge located in North

Carolina collapsed. The *Nash* plaintiffs brought suit in South Carolina against a South Carolina corporation.[1] The Court of Appeals noted that the *Nash* plaintiffs alleged the equipment used to support the bridge was manufactured here in South Carolina. *See id.* at 82 fn. 2. None of the parties in *Nash* disputed that the injuries were suffered in North Carolina, but instead, the *Nash* plaintiffs argued as a novel issue that the North Carolina statute of repose was procedural, not substantive, and therefore because the case was pending in South Carolina, South Carolina's procedural law should control. *See id.* at 83. The Court of Appeals rejected that argument finding the treatment of a statute repose as a substantive issue was not novel and that prior South Carolina Supreme Court precedent controlled mandating, under *lex loci delicti* principles, application of North Carolina's statute of repose to bar the plaintiffs' claims. *Id.*

Thus, as Malloy properly asserts, in his case, the facts are exactly the opposite of *Nash*: Lee's negligent acts were committed in North Carolina, but Malloy sustained financial injuries from those acts at his home here in South Carolina, the place where a substantially greater amount of available workers' compensations benefits should have been received by Malloy and where the woefully deficient amounts were received. Thus South Carolina substantive law applies.

The trial court found that "the financial harm to [Malloy] manifested itself in South Carolina because [Malloy] is and has always been a citizen of this state." (Reconsideration Order at 1, ROA 11). This governing, outcome-determinative finding of fact by the trial court, which was not appealed, is inconsistent with its holding that North Carolina

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[1] According to the public records at the South Carolina Secretary of State's office, Tindall Corporation is a South Carolina domestic corporation incorporated in 1983.

substantive law applies.[2] Since the financial injury to Malloy was found by the trial court to have "manifested itself in South Carolina," the *lex loci delicti* is South Carolina and South Carolina substantive law should have been applied. The trial court erred in concluding that Malloy's claims were barred by North Carolina's statute of repose because there was no finding of any injury, financial or otherwise, that Malloy suffered in North Carolina. And, of course, Malloy never argued that he suffered any economic harm in North Carolina. Respondents' flippant dismissal of these distinctions as "semantics" (Brief of Respondents at 8), discounts the importance of the trial court's finding of South Carolina as the place of Malloy's financial injuries as well as the importance of Lee's voluntary decision to accept the representation of Malloy on claims involving multi-state aspects, with the reasonably foreseeable financial consequences to Malloy here in South Carolina.

Malloy also properly relies on *Lister* to support his claims that South Carolina substantive law controls his causes of action against Respondents because South Carolina was the place of his injury. *See Lister*, 329 S.C. at 143. In *Lister*, a couple vacationing in Aruba rented a car and later sued the rental car company for fraudulent acts by the company employees in misrepresenting their authorization to charge the couple's credit card. *See id.* at 143-144. While the company employees made their misrepresentation in Aruba, the financial harm to the couple occurred in South Carolina. *See id.* The *Lister* court found that "[t]he place of the wrong is not where the misrepresentations were made but where the plaintiff, as a result the misrepresentation, suffered a loss." *Id.* at 143.

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[2] Respondents' claim that "[t]he application of the substantive law of North Carolina is dispositive. (R. ___, Order p. 4)" is an "Unappealed Conclusion[] of Law" is simply wrong. (Brief of Respondents at 5). That error by the trial court is the focus of Malloy's appeal.

"Since the Listers suffered their financial loss as a result of this misrepresentation in South Carolina, we conclude South Carolina law applies under the choice of law test for torts." *Id.* at 144.

Lee is incorrect in arguing that Malloy's "loss" was simply the loss of the "opportunity to further pursue" his workers' compensation claims in North Carolina (Brief of Respondents at 3, 6, and 9 - 10), when in fact his "loss" was the failure to receive a substantially greater amount of workers' compensation benefits at his home in South Carolina had Lee met the standard of care in handling those claims. Malloy, like the Listers, suffered his financial loss in South Carolina, and not in another jurisdiction where the tort was committed.

In their discussion of *lex loci delicti*, Lee misconstrue the South Carolina cases they cited as each one of those cases involved matters where it was undisputed that not only were the torts committed in other jurisdictions, but the injuries were suffered there as well. (Respondents' Brief at 7 citing *Magill v. Seaboard Air Line Ry.*, 84 S.C. 416, 66 S.E. 561, 562 (1909) (alleged injury from being ejected as a passenger on a train in Athens, Georgia; no claims or arguments of any financial or other injuries occurring in South Carolina); *Rauton v. Pullman Co.*, 183 S.C. 495,191 S.E. 416, 417-18 (1937) (alleged injury of becoming "sick, nauseated, and physically indisposed while . . . on [on a train in] route from Mexico City;" no claims or arguments of any financial or other injuries occurring in South Carolina); *Oshiek v. Oshiek*, 244 S.C. 249, 251, 136 S.E.2d 303, 304 (1964) (plaintiff sought "to recover damages for personal injuries alleged to have been sustained as a result of the negligent, willful, wanton, careless and reckless operation of an automobile [in an] accident [that] occurred near the City of Savannah, in the State of Georgia."), *overruled on*

other grounds by Boone v. Boone, 345 S.C. 8, 546 S.E.2d 191 (2001) (doctrine of interspousal immunity under Georgia law was against South Carolina public policy and would not be applied under public policy exception to *lex loci deliciti*)). All of the South Carolina cases cited by Lee actually support Malloy's argument that South Carolina's choice of law doctrine for tort matters requires application of the substantive law of the place where the injury occurred. The trial court found Malloy's financial injuries were "manifested" here in South Carolina, as result of Lee's tortious conduct in North Carolina. (Reconsideration Order at 1, ROA 11). That should have ended the analysis and resulted in a conclusion that South Carolina substantive law controls Malloy's tort claims against Lee. The trial court's ruling to the contrary should be reversed.

The other "authority" Lee cites to support their ineffective arguments was their citation to a definition in BLACK'S LAW DICTIONARY. While BLACK'S can be a useful tool, it is not binding law and the dictionary definition of a term is often not consistent with courts' application of the term. *See e.g., Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001) ("[W]e are reluctant to rely upon either a dictionary or cases that have relied upon a dictionary for a definitive answer . . ..").

"Under South Carolina law when an action is brought in one jurisdiction for a tort which caused injury in another jurisdiction, the substantive law is determined by the law of the state in which the injury occurred and procedural matters by the law of the forum." *Thorton v. Cesna Aircraft Co.*, 886 F.2d 85, 87 (4th Cir. 1989) (applying South Carolina law citing *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); *McDaniel v. McDaniel*, 243 S.C. 286, 133 S.E.2d 809 (1963) (applying Georgia law to claims for alleged wrongful death in Georgia automobile accident);

Rauton v. Pullman Co., 183 S.C. 495, 501, 191 S.E. 416, 419 (1937)). Lee's assertion that "South Carolina has followed this traditional choice of law [the law of the place where the tort or other wrong was committed] for over 100 years," (Brief of Respondents at 7), simply is not how South Carolina courts have treated the application of *lex loci delicti*. In fact, as noted above, the very South Carolina cases relied upon by Lee actually support Malloy's arguments and reversal of the trial court's Orders because, in those cases, all of the injuries by the plaintiffs were suffered in the same state / location where the tortious acts were committed.

South Carolina Courts have consistently held that the *lex loci delicti* in a tort choice of law context is the law of the place of the injury. *See, i.e., Rauton v. Pullman Co.*, 183 S.C. 495, 191 S.E. 416, 419 (1937) ("With reference to torts, the well-established rule is that the law of the place where the injury was occasioned or inflicted, governs in respect of the right of action"); *Thorton v. Cesna Aircraft Co.*, 886 F.2d 85, 87 (4th Cir. 1989) (applying South Carolina law: "[u]nder South Carolina law when an action is brought in one jurisdiction for a tort which caused injury in another jurisdiction, the substantive law is determined by the law of the state in which the injury occurred"); *Dawkins v. State*, 306 S.C. 391, 392, 413 S.E.2d 407, 408 (1991) ("It is well established in South Carolina that in tort cases 'the law of the place where the injury was occasioned or inflicted, governs in respect of the right of action'"); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F.Supp. 1027, 1033 (D.S.C. 1993) ("South Carolina law provides that 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"); *Bannister v. Hertz Corp.*, 316 S.C. 513, 515, 450 S.E.2d 629, 630 (Ct. App. 1994) ("Under South Carolina conflict of law principles, the

substantive law governing a tort action is determined by the state in which the injury occurred."); *Lister v. NationsBankOf Delaware, N.A.* , 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) ("Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred."); *Nash v. Tindall Corp.,* 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007) ("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.").

South Carolina courts have long interpreted *lex loci delicti* to be the law of the place where the injury occurred. Malloy's injury was financial in nature and that financial injury occurred in South Carolina, therefore, South Carolina substantive law should apply and Malloy's claims are not barred by North Carolina's statute of repose. The trial court's Orders to the contrary should be reversed and this matter should be remanded for trial.

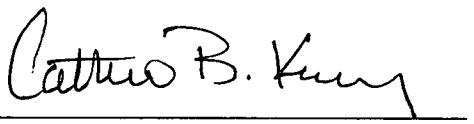
[CONCLUSION AND SIGNATURES ON FOLLOWING PAGE]

CONCLUSION

For all of the above reasons, the trial court's Orders should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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