

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

J. Derham Cole, Circuit Court Judge

Case No. 2016-CP-42-03178
Appellate Case No. 2017-002299

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.

Respondents' Return to Petition for Rehearing

Pursuant to Rules 221(a) and 240(e), SCACR, Respondents Dr. Bang N. Giep, M.D. (“Dr. Giep”) and Spartanburg & Pelham OB-GYN, P.A. (collectively, “Respondents”) hereby submit this return to Appellants’ Petition for Rehearing.

In *Flowers v. Giep*, Op. No. 5864 (S.C. Ct. App. filed October 6, 2021) (Shearouse Adv. Sh. No. 35 at pp. 28-34) (“Op. No. 5864”), the unanimous Panel of this Court affirmed the circuit court’s denial of Appellants’ motion to strike Respondents’ affirmative defense of emergency medical care. This Court correctly held that subsections (A) and (B) of S.C. Code Ann. § 15-32-230 provide “a defense against simple negligence in two separate and distinct scenarios,” and further upheld the trial court’s interpretation that only subsection (A) and (C) applied in this

particular situation. (Op. No. 5864 at p. 33). Appellants now seek rehearing on this issue. As explained more fully below, rehearing of this matter is not warranted under Rule 221 because the Panel's opinion is correct and well-reasoned and does not overlook or misapprehend any points of fact or law. Therefore, Respondents respectfully request that this Court deny Appellants' Petition for Rehearing.

Standard of Review

A petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). In order to prevail on a petition for rehearing, the petitioner must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The purpose of a petition for rehearing "is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron* at 466, 719 S.E.2d at 643 (quoting *Kennedy v. S.C. Ret. Sys.*, 349 S.C. at 532, 564 S.E.2d at 322). Thus, our appellate courts will deny a petition for rehearing whenever "the points set forth in the petition have all been considered and expressly decided against the respondent by this Court in the opinion filed." *Clemmons v. Nicholson*, 188 S.C. 124, 198 S.E. 180, 183 (1938). As explained herein, Appellants have not met the heavy burden that they face in seeking rehearing of the Panel's decision.

Argument

In their Petition for Rehearing, Appellants reassert the same arguments they previously made to this Court seeking a misinterpretation of S.C. Code Ann. § 15-32-230. Appellants now assert that this Court overlooked or misapprehended these arguments. As with their prior briefing to this Court, Appellants' Petition for Rehearing argues that subsections (A) and (B) of 15-32-230

do not establish separate and distinct defenses for physicians against simple negligence in medical malpractice actions. Rather, Appellants contend that these two sections actually create a “singular limitation,” and that subsection (B) modifies or limits subsection (A) by creating an exception to the defense established in (A). Appellants continue to attempt to support this position by relying on statutory construction rules such as the “last legislative expression” rule, “specific vs. general” legislative expressions, and the assertion that all of section 15-32-230’s subsections are not being properly read together. Appellants are incorrect. This Court properly rejected these same arguments and held that subsections (A) and (B) of 15-32-230 each establish a separate and distinct defense as to simple negligence for physicians in certain circumstances which is then subject to the requirements of subsection (C).¹ (Op. No. 5864 at p. 33). This Court then correctly held that it was subsection (A) that applied to this situation. Appellants’ reassertion of the same arguments in this Petition should be similarly rejected by this Court and the Petition should be denied.

I. This Court correctly held that subsections (A) and (B) of 15-32-230 apply in separate and distinct scenarios.

The full text of Section 15-32-230 is as follows:

- (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

¹ Subsection (C) provides that the defense for physicians against simple negligence in medical malpractice actions established by both subsection (A) and subsection (B) only applies where the patient is not medically stable and is either in immediate threat of death or in immediate threat of serious bodily injury. S.C. Code Ann. § 15-32-230(C). As the Court noted in its Opinion, there is no dispute in this case as to whether these conditions were met. (Op. No. 5864 at p. 31).

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.

S.C. Code Ann. § 15-32-230. In Opinion No. 5864, this Court held that a “plain reading of the text” of this statute established that subsections (A) and (B) apply to different factual scenarios, and, therefore, the simple negligence defense established by this statute applies in “two separate and distinct scenarios.” (Op. No. 5864 at p. 33). Appellants have presented no basis to reconsider that sound ruling.

A. Subsection (A) applies to emergency situations in certain specific locations and clearly applies to the facts of this case.

Subsection (A) provide the defense against simple negligence for any physician who renders care in a “genuine emergency situation”² to a patient in an emergency department, obstetrical suite, or a surgical suite. There is **no** limitation on the type of medical care provided and there is **no** limitation based the existence of a prior doctor/patient relationship. Subsection (A)'s specific inclusion of “obstetrical suite” in its scope makes apparent that, based on the facts here, this Court correctly affirmed the trial court as to the applicability of the defense of immunity from simple negligence claims.

B. Subsection (B) applies to obstetrical care rendered on an emergency basis by a physician with no prior relationship with the patient and, by its clear language, and does not apply to the facts of this case.

² As this Court noted, there was no issue as to whether the requirement of a “genuine emergency situation” was met. (Op. No. 5864 at p. 31).

Subsection (B) provides a defense against simple negligence for any physician who provides obstetrical care on “an emergency basis where there is no prior doctor/patient relationship or the patient has not received prenatal care.” Significantly, the immunity established in subsection (B) is not limited to care provided in an emergency department, obstetrical suite, or surgical suite, and would apply to care provided anywhere whether inside or outside of those locations, where there was no pre-existing physician-patient relationship. Contrary to Appellants’ misinterpretation, subsection (B) neither revokes any immunity provided to a physician under subsection (A), nor does it specifically impose liability on any physician who does not qualify for subsection (B)’s immunity. Rather, it simply establishes an immunity for a situation where a physician is providing obstetrical care to a previously unknown patient. That was not the case in this matter, making subsection (B) inapplicable and irrelevant. Therefore, this Court correctly affirmed the trial court’s ruling.

C. This Court correctly held that subsection (B) does not limit or restrict the application of subsection (A).

In Opinion No. 5864, this Court correctly concluded that the legislature intended “subsection (B) to apply separately from subsection (A) rather than as a limitation to (A)” and that “the language within subsection (B) neither indicates that it is a limitation on the defense provided in subsection (A) nor does it state that subsection (A) only provides a defense for obstetrical care if the requirements within subsection (B) are satisfied.” (Op. No. 5864 at p. 33). Appellants persist in their attempt to mischaracterize the language of subsection (B) in order to create a limitation subsection (A). As this court found, subsection (B) creates a defense for a physician in a specific scenario—where obstetrical care is provided on an emergency basis for a patient with whom the physician or his/her practice does not have an existing physician-patient relationship. Nowhere does it attempt to impose liability on a category of physician who might otherwise meet the

requirements of subsection (A). Appellants, however, attempt to recast subsection (B) as “impos[ing] liability on a physician or practice that has a previous physician/patient relationship. (Petition at p. 5). Thus, rather than relying on the actual language of subsection (B) that creates an immunity in a certain circumstance, Appellants argue that subsection (B) must be read to bar immunity for anyone who does not qualify within the limited scope of (B). This is incorrect. Appellants’ forced construction would improperly limit the operation of (A), and would improperly render the specific inclusion of “obstetrical suite” in (A) to be meaningless. Thus, this Court should continue to reject this argument.

D. Appellants’ reliance on various statutory construction rules to rewrite S.C. Code § 15-32-230 is misplaced.

In their petition, Appellants seek to support their contention that subsection (B) acts to limit subsection (A) by relying on various statutory construction rules in an attempt to change what the plain language of the statute actually provides. As an initial matter, such rules are only applicable where the statute in question is ambiguous. “When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” *Ranucci v. Crane*, 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). Here, there is no ambiguity, so Appellants’ reliance on these rules of construction is misplaced. Subsections (A), (B) and (C) of 15-32-230 do not require the application of rules of construction to ascertain or harmonize their meaning. The plain language of these three sections does not render them inconsistent. (A) and (B) provide a defense against simple negligence in certain delineated situations and (C) imposes certain limitations on the application of both (A) and (B). Additionally, as described below, the rules of construction relied upon do not actually have the effect desired by Appellants.

1. Subsection (C)'s referencing of both subsections (A) and (B) does not result in (A) being limited by (B).

The first rule of construction that Appellants misapply is “for the sections to be read *in pari materia*.” (Petition at p. 5). Appellants cite to the *Ranucci* case for this proposition. The *Ranucci* case dealt with two different statutes that contained internal cross references and addressed the same subject matter. The actual rule is stated as “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*, 371 S.C. at 501, 640 S.E.2d at 193 (quoting *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)). Appellants then contend that this Court violated this rule of construction by disregarding subsection (C) which twice references “the limitation on physician liability established by subsections (A) and (B).” (Petition at p. 4-6). Appellant assert that because the word “limitation” in this sentence is singular rather than plural, this must have the effect of merging subsections (A) and (B) into one “singular limitation” wherein (B) limits (A).

Appellants read the use of the singular in the phrase “The limitation of physician liability” to mean that subsection (A) and (B) are not independent. Appellants are mistaken. Subsections (A) and (B) apply to separate situations, but they share a common effect—they both limit the qualifying physician’s liability to only gross negligence. The limitation of liability is the same for both scenarios—thus the use of the singular word “limitation” is grammatically correct.

2. The “last legislative expression” rule does not apply.

Appellants next attempt to have subsection (B) limit (A) through the misapplication of the “last legislative expression” rule—that where conflicting provisions exist the last in point of time or order of arrangement prevails. (Petition at p. 6). In support of the application of this rule, Appellants cite to the Court of Appeals opinion in *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733, (S.C. App., 2005), which invoked this rule when faced

with what it perceived as conflicting Articles in a zoning ordinance. This opinion, however, was reversed by the Supreme Court in *Eagle Container Co., LLC v. County of Newberry*, 379 S.C. 564, 666 S.E.2d 892 (2008). Specifically, the Supreme Court noted that “the last legislative expression rule ... is purely an arbitrary rule of construction and is to be resorted to only when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted” and concluded that there was no irreconcilable conflict between the different zoning ordinance Articles in question because they served different functions. *Eagle Container*, 379 S.C. at 572, 666 S.E.2d at 896 (internal quotation omitted). Here, there is no conflict between subsections (A) and (B), let alone an “irreconcilable” conflict. As both the trial court and this Court found, subsections (A) and (B) serve separate functions and are not inconsistent. Thus, there is no basis for the application of this rule of construction.

3. Subsections (A) and (B) are both “specific” rather than “general.”

Appellants also seek the application of the statutory construction rule that where there is a statute dealing with a subject in general terms and another statute dealing with a part of the same subject in a more specific and definite way, the special statute will be considered as an exception to, or qualification of, the general statute. (Petition at p. 6). Appellants contend that (A) is more general and (B) is more specific. This is incorrect. Subsections (A) and (B) each address specific and separate situations. Neither can be accurately described as more general than the other. In addition to the fact that both subsection address specific rather than general situations, they simply are not in conflict with each other, such that there is no need to apply one as an exception or qualification to the other.

Therefore, none of the statutory construction rules proffered by appellants are applicable to this situation and the Petition for Rehearing should be denied.

Conclusion

For the reasons set forth herein, and for the reasons and arguments set forth in Respondents' appellate brief, which should be deemed incorporated herein, this Court should deny Appellants' Petition for Rehearing.

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