THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Opinion No. 5864 (S.C. Ct. App. Filed December 2, 2021)

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,

Petitioners,

v.

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

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 2, 2021.

QUESTIONS PRESENTED

1) Must subsection (C) of § 15-32-230 be read *in pari materia* with subsections (A) and (B) and not ignored as was done by the trial court and Court of Appeals?

2) Does the "last legislative expression" rule require subsection (B) to prevail over subsection (A)?

3) Must a more specific statute be considered an exception to, or a qualifier of, the general statute and given such effect.

4) Pursuant to § 15-32-230(C) did the legislature intend subsections § 15-32-230(A) & (B) to be read as a singular "limitation" and not as "separate and distinct" limitations as interpreted by the trial court and Court of Appeals?

5) Did the legislature intend § 15-32-230(B) to apply separately from § 15-32-230(A) rather than as a limitation to § 15-32-230(A)?

6) Does S.C. Code Ann. § 15-32-230 provide a defense against simple negligence in two separate and distinct scenarios?

7) Did the trial court err in denying the appellants' motion to strike the doctors' affirmative defense of emergency medical care?

STATEMENT OF THE CASE

This medical malpractice case was commenced in the Spartanburg County Court of Common Pleas by filing a Notice of Intent to File Suit on October 7, 2011, pursuant to S.C. Code Ann. § 15-79-125. *See* Notice of Intent to File Suit (ROA 6). The matter could not be resolved by mediation, and a mediator declared an impasse between the parties on January 16, 2012. A Summons and Complaint were filed on March 12, 2012. *See* Complaint (ROA 9).

Plaintiffs Treva C. Flowers and Tristan Flowers brought causes of action on behalf of themselves and on behalf of their daughter, Ashley F., a minor child. *See* Complaint (ROA 9). The defendants were Bang Giep, M.D., and the medical practice where he was employed, Spartanburg & Pelham OB-GYN, P.A. (formerly Spartanburg OB-GYN, P.A.).

The plaintiffs alleged that on October 7, 2008, at Spartanburg Regional Medical Center, Dr. Giep, a specialist in obstetrics, undertook to medically manage the labor of Treva Flowers and the birth of Ashley F., who was a viable, female child. They alleged that when the birth became complicated by shoulder dystocia, Giep's application of traction to deliver Ashley F. caused permanent, severe injuries to cervical nerve roots contained within her left brachial plexus nerve bundle. They alleged that Dr. Giep was negligent, wanton, willful, reckless, and grossly negligent in his application of traction and in failure to properly use maneuvers to release the child from shoulder dystocia. *See* Complaint ¶¶ 10-13. (ROA 10).

The cause of action brought for Ashley F. sought compensation for permanent physical disability of the child's left shoulder, arm, and hand and for other personal injuries, including physical disfigurement. *See* Complaint ¶ 15-16. (ROA 11). In the second cause of action, Treva and Tristan Flowers, as parents, sought recovery for extraordinary financial losses related to the

child's medical, hospital, special needs, and care taking expenses during her childhood. *See* Complaint ¶ 18-19. (ROA 12).

The defendants generally and specifically denied the plaintiffs' material allegations, but admitted that Giep was an agent and employee of Spartanburg & Pelham Ob-Gyn, P.A., and was acting within the course and scope of his employment during the delivery of Ashley F. They admitted that during the delivery the child suffered from various medical conditions, including shoulder dystocia. *See* Answer ¶¶ 2-3, 5-6 (ROA 14-15).

The case came to trial on October 9, 2017.

After presentation of the evidence, the trial judge allowed defendants to amend their answer to plead S.C. Code Ann. § 15-32-230 (A) as an affirmative defense. (ROA 855:11-856:06). Plaintiffs' counsel moved to strike the affirmative defense on grounds that it should not be applied when there was no factual dispute that plaintiffs had prenatal care and a prior doctor/patient relationship with defendant Giep and other doctors in his medical practice pursuant to § 15-32-230(B). The motion to strike was denied. (ROA 858:13-859:15).

The trial judge told the jury, "The defendants . . . allege that if defendants are shown to have, in any way, been negligent in the care provided, that such conduct occurred during and in the course of a genuine medical emergency situation, and, therefore, under the law, the defendants are not to be held responsible for that claim of negligence." (ROA 932:13-18). The trial judge then charged the jury with the provisions of subsections (A) and (C) of § 15-32-230, excluding the provisions of subsection (B).

> *You are further instructed that South Carolina Code annotated Section 15-32-230 and the Code of Laws is just these volumes, and these volumes have a lot of laws and rules and regulations that govern our conduct in a variety of ways, and one particular section that could be applicable in this case, depending upon your determination of the facts, is that particular section, 15-32-230. That section provides that a physician who commits some act of negligence in the*

> *course of the providing of medical care and treatment to a patient in an emergency department or in an obstetrical or surgical suite is not liable in a claim of malpractice if that care is rendered in a genuine emergency situation which involves an immediate threat of death or serious bodily injury to the patient receiving that care. The statute further provides that the immunity and the limitation on liability from a claim of medical negligence, as provided for in that statute, shall only apply where it is proven that the patient is not medically stable, and the patient is in immediate threat of either death or of serious bodily injury. Where a physician claims immunity from liability based upon this particular statute, the burden is on the physician to establish that the care provided to the patient was rendered in a genuine emergency situation, that the patient was not medically stable, and was in immediate threat of either death or serious bodily injury, and the defendant would have the same burden of establishing entitlement to liability under that statute, and the same standard that the plaintiff has in proving that the defendant is liable for any injury they claim to have sustained.*

(ROA 946:18-947:23). Plaintiffs' counsel objected to the jury instructions relating to the medical emergency statute on grounds they were not appropriate to the case for the reasons stated in plaintiffs' motion to strike. (ROA 963:05-12).

The jury returned a verdict on October 13, 2017. In a special verdict form, the trial judge had asked:

> *Do you find that the plaintiffs have proven by the greater weight or preponderance of the evidence that the defendants, by and through Bang N. Giep, were negligent in the providing of medical care during the birth and delivery of [Ashley F.] and that such negligence was the proximate cause of some injury or other loss sustained by plaintiffs?*

The jury responded 'Yes,' and moved to the next question, which asked:

> *Do you find that the defendants have proven by the greater weight or preponderance of the evidence that the medical care rendered by the defendants, by and through Bang N. Giep, during the birth and delivery of [Ashley F.] was rendered in a genuine emergency situation where she was not medically stable and was in immediate threat of either death or serious bodily injury?*

The jury responded 'Yes,' and was directed to "***STOP*** and ***DELIBERATE NO FURTHER***, your verdict would be for defendants." *See* Verdict Form (Court's emphasis) (ROA 4).

The plaintiffs moved immediately for new trial, and the motion was denied. (ROA 971:15-972:05).

Judgment was entered on October 31, 2017. *See* Judgment (ROA 1). The plaintiffs filed Notice of Appeal with the South Carolina Court of Appeals on November 3, 2017. *See* Notice of Appeal (ROA 17).

The Court of Appeals entered a decision on October 6, 2021, affirming the rulings of the trial judge. On October 19, 2021, the appellants moved for rehearing of the decision of the South Carolina Court of Appeals. The motion for rehearing was denied on December 2, 2021.

ARGUMENTS

This is a case of first impression as to whether in certain types of medical malpractice claims subsection (B) of S.C. Code Ann. § 15-32-230 was intended to limit application of subsection (A) of the same statute. If subsection (B) limits the application of (A) in obstetrical cases, plaintiffs would need to prove only simple negligence to prevail over defendant. If subsection (A) is independent of subsection (B) in obstetrical cases, plaintiffs would need to prove at least gross negligence to prevail.

The Court of Appeals found that the legislature intended subsection § 15-32-230(B) "to apply separately from subsection (A) rather than as a limitation to (A)." Without consideration of § 15-32-230(C), the Court of Appeals held that the language of 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." *See Flowers v. Giep*, 2021 S.C. App. LEXIS 121, *7-8, 2021 WL 4570930 (S.C. Ct. App. October 6, 2021).

The Court of Appeals overlooked that the singular legislative purpose of § 15-32-230[1] is

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[1] In its entirety S.C. Code Ann. § 15-32-230 reads 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 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.

to provide a limitation on liability in certain emergencies "unless it is proven such physician is grossly negligent." While subsection (A) provides that simple negligence generally will not impose liability 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, subsection (B) provides simple negligence will impose liability on a physician or practice that had a previous physician/patient relationship with the victim for obstetrical care. In other words, subsection (B) provides an exception to subsection (A).

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, 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 asingle, harmonious result."*

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

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 § 15-32-230 twice cross references

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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.

subsections (A) and (B) as establishing a singular limitation.

> *(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(C) (emphasis added).

The "limitation on physician liability" cross referenced by subsection (C) clearly should be interpreted as a singular limitation established by subsections (A) *and* (B) together, rather than separate and distinct limitations as found by the Court of Appeals.

Another pertinent rule of statutory construction overlooked by the Court of Appeals is 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)). Also overlooked is the rule of statutory construction that where one statute addresses an issue in general terms and another statute dealing with the identical issue addresses the 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. SouthCarolina Hwy. Dep't*, 228 S.C. 448, 90 S.E.2d 635 (1955).

In this case subsection (A) pertains generally to medical emergencies occurring in obstetrical suites, surgical suites, or emergency departments regardless of whether the medical

problem is obstetrical. Subsection (B) pertains to emergencies arising in the course of obstetrical care. The conflict as to which will prevail must be resolved in favor of subsection (B), which is more specific to the type of emergency and follows subsection (A) in the order of the statute.

CONCLUSION

This petition for a writ of certiorari should be granted, the decision of the Court of Appeals and the order of the trial court should be reversed, and the case should be remanded for new trial.

Respectfully submitted,

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