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.

PETITIONERS' REPLY TO RESPONDENTS' RETURN OPPOSING A WRIT OF CERTIORARI

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REPLY

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. Such novel questions of law are expressly recognized as a purpose for exercising the Supreme Court's discretion to grant certiorari. *See* Rule 242(b), SCACR (Certiorari will be granted "where there are special and important reasons.").

Respondent's assert that the Supreme Court's review will not contribute to "the integrity and uniformity" of the law in this state and "no harmful result" is likely to occur from denying certiorari. *See* Respondents' Return at 3. The Respondents' assertions overlook these special and important reasons for granting certiorari:

(a) Wrongful interpretation of a statute resulting in dismissal of a jury's factual finding of negligence impugns the integrity of the due process of our judicial system and significantly harms the plaintiffs.

(b) S.C. Code Ann. § 15-32-230(C) clearly and expressly reveals the legislature's intent to provide a singular "*limitation on physician liability established by subsections (A) and (B).*" Two times within subsection (C) the legislature used 'limitation on physician liability' in the singular and two times used 'and' to say that subsection (A) and subsection (B) conjunctively created the limitation. The statute's language is considered the best evidence of legislative intent. *See Garrison, et. al. v. Target Corporation,* (S.C. Op. No. 28080, Jan. 26, 2022). Interpreting subsection (A) to apply separately from subsection (B) undermines uniformity in the application of our rules of statutory construction.

(c) Obstetrical emergencies with the potential for significant injury or death in delivery rooms are not uncommon, so requiring gross negligence for recovery in such cases has a widespread impact on potential plaintiffs. Failure to recognize that the legislature intended to allow such cases to be proven by simple negligence where physician/patient relationships were established before birth is extremely harmful to the rights of patients.

Subsection (A) provides immunity to "any" physician who renders care within "an" emergency department, surgical suite, or obstetrical suite in a genuine emergency situation. The respondents assert that the purpose of subsection (B) is to extend that same immunity for emergency obstetrical care to locations other than emergency, surgical or obstetric units, if there has not been a previous physician/patient relationship. The respondents conveniently ignore the language of subsection (C), which 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 <u>the</u> emergency department or obstetrical or surgical suite.*

S.C. Code Ann. § 15-32-230(C) (emphasis added).

Clearly, in subsection (C) the legislature was referring to the same facilities described in subsection (A). Otherwise, the legislature would have applied the limitation to care rendered prior to the patient's discharge from "an" emergency department or obstetrical or surgical suite. The purpose of subsection (B) is to provide immunity from simple negligence during emergency obstetrical care by a defendant who has had no prior doctor/patient relationship with the plaintiff. The defendant who has had a prior relationship with the patient and can better anticipate the potential complications of pregnancy does not have immunity for simple negligence during obstetrical care.

Respondents are correct in asserting that *in pari materia* as a rule of statutory construction generally apply to reconciling two or more statutes that address the same subject matter. Respondents wrongly assert that petitioners misapplied the rules of statutory construction found in *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192, (2014), because *Ranucci* "dealt with two different statutes." *See* Respondent's Return at 7. Respondents neglected to point out that *Ranucci*'s analysis *began with the following rules of statutory construction:*

> *'Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.' . . . Further, 'the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.'*

Ranucci at 500, 763 S.E.2d at 192, (*citing S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006))(emphasis added).

Respondents also wrongly suggest that the rule of last legislative expression was discredited when the Supreme Court reversed the Court of Appeals decision in *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2008). The rule was neither discredited, abolished nor overturned, but was simply found unnecessary to the interpretation of the statute applied in that particular case.

The rule of last legislative expression is still applicable, and when "conflicting [statutory] provisions exist, the last in point of time or order of arrangement, prevails." The last legislative expression rule is to be resorted to "when there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted." *See id*. (*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, 54, 26 S.E.2d 22, 24 (1943).

If by the same facts subsection (B) allows the petitioners to hold the respondents liable for simple negligence but a verdict must be directed for failure to prove gross negligence pursuant to subsection (A), that is an irreconcilable conflict within S.C. Code Ann. § 15-32-230, and the last legislative expression rule should be applied.

CONCLUSION

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. 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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