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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge
William B. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000288

Angela Patton, as Next Friend of Alexia L., a minor, ... Respondent,

v.

Dr. Gregory A. Miller and Rock Hill Gynecological &
Obstetrical Associates, P.A., ... Appellants.

PETITION FOR WRIT OF SUPERSEDEAS

Appellants Dr. Gregory A. Miller (“Dr. Miller”) and Rock Hill Gynecological & Obstetrical Associates, P.A. (the “Practice”) (together, “Appellants”) seek a writ of supersedeas pursuant to Rule 241 of the South Carolina Appellate Court Rules and a reversal and modification of Orders of the circuit court requiring a \$6.25 million bond to be posted in order to stay execution on a judgment entered against a doctor and his (now dissolved) practice. The writ should be granted. Respectfully, the circuit judge did not engage in the appropriate analysis in considering the motion to stay and the appeal bond amount, and gave no weight to the *only* evidence presented to him on the undue financial burden created by the bond amount ordered. A court’s failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (*quoting Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). A writ of supersedeas should issue and the appeal bond required for this matter should be reduced to \$2 million.

Appellants have appealed several erroneous orders arising out of pretrial proceedings, trial, and post-trial rulings in this case. If Appellants prevail on appeal, a new trial will be required. While the appeal is pending, Respondent indicated an intent to execute on the judgment. Appellants moved to stay execution, with no requirement for a bond, or, in the alternative, a maximum bond of \$2 million (consisting of \$1 million as to the individual, Dr. Miller, and \$1 million as to the Practice (now a dissolved entity)). Appellants' request conformed with the current maximum statutory bond limits.¹

The circuit court held a hearing and denied Appellants' request in a Form 4 Order, instead ordering that a stay of execution would require Appellants to purchase a \$6.25 million bond. The circuit court did not expressly rule on Appellants' arguments. Appellants moved to reconsider this Order and simultaneously moved that the bond amount be reduced based on evidence (including two affidavits) submitted regarding the insurance available and the financial circumstances of Dr. Miller. These motions were denied by Form 4 Order two business days later, with no explanation of the reasoning for the denial and no reference to the affidavit evidence. Thus, Appellants on June 6, 2022, lastly moved to reconsider the decision not to reduce the bond amount based on the affidavit evidence presented. This motion was denied by Order dated June 14, 2022. In this Order, the Court held that section 18-9-130 was "inapplicable" and that the \$6.25 million bond is appropriate "[c]onsidering the lengthy history of this case and the potential length of time this case

¹ These maximum limits are not *mandatory* in this case, based on the accrual date of the claims in this action. However, the General Assembly's acknowledgment of the public policy in favor of appeal bond maximums—as set forth in S.C. Code Ann. § 18-9-130 (2011)—could certainly be a basis for a bond amount. *See e.g., Gentry v. Yonce*, 337 S.C. 1, 532 S.E.2d 137 (1999) (Court looking, in deciding case, to General Assembly passage of statute consistent with the Court's discretionary ruling); *see also Se. Booksellers Ass'n v. McMaster*, 233 F.R.D. 456, 458 (D.S.C. 2006) (factor to consider is "where the public interest lies" in setting bond amount).

may spend on appeal.” The circuit court did not expressly address Appellants’ arguments or the affidavits presented.

Appellants now seek a writ of supersedeas review of the circuit court’s orders. As required by Rule 241, this petition is accompanied by a signed verification, certified copies of the orders at issue, and a copy of the Notice of Appeal with its proof of service. *See* Rule 241(c)(3), SCACR; Certified Copies of Orders, attached as Exhibit A; Notice of Appeal with Proof of Service, attached as Exhibit B.

Factual Background and Procedural History

This is a medical malpractice action originally filed in 2009. Respondent sued Dr. Miller and the Practice based on injuries suffered by the minor plaintiff allegedly as a result of a delivery complication known as shoulder dystocia which occurred on April 5, 2007. The parties tried the case in January 2022, and the jury returned a verdict in favor of Respondent on her claim for medical negligence and awarded \$1.5 million in economic damages and \$1 million in noneconomic damages.

I. Pretrial Proceedings

Portions of the history of this case are recited to help this Court understand the issues and the time line involved. Respondent filed her original complaint on November 25, 2009, and an amended complaint in November 2012.

The circuit court granted partial summary judgment in favor of Appellants in 2013. Respondent appealed the ruling on January 15, 2014, which automatically stayed the case in the circuit court while the appeal remained pending. The Supreme Court remitted the case to the circuit court in October 2017, and trial court proceedings resumed. In 2018, Respondent—

recognizing that Appellants would assert the issue of statutory emergency² as a defense—moved for partial summary judgment “to preclude the *expected* statutory defense under S.C. Code of Laws Section 15-32-230, representing a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies.” *See* Respondent’s Motion for Partial Summary Judgment or a Stay, attached as Exhibit C (emphasis added). In the alternative, Respondent sought a stay of this action until the appellate courts resolved two appeals in which section 15-32-230 was at issue. *See id.* The circuit court granted Respondent’s request to stay the case. This case ultimately proceeded to trial in January 2022, some time after this Court issued its final opinion in *Flowers v. Giep*, Op. No. 5864 (2021), regarding the construction of the statutory emergency defense.

² The issue of statutory emergency is codified at section 15-32-230 of the South Carolina Code, which provides:

(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.

II. Trial

During trial, both parties presented evidence addressing the statutory emergency issue. Expert testimony for both parties included questions and answers regarding whether the circumstances surrounding delivery of the minor plaintiff constituted a genuine obstetrical emergency, whether the patient was medically stable, and whether there was an immediate threat of death or serious bodily injury. Accordingly, Appellants moved pursuant to Rule 15(b) of the South Carolina Rules of Civil Procedure to amend their answer to conform to the evidence and assert the statutory emergency doctrine as a defense and for appropriate jury charges as to that defense regarding Respondent's claims. The trial judge (not the same judge who had previously stayed the case on request to stay from Respondent) denied the requests.

Appellants and Respondent agreed at trial that only Dr. Miller's liability would be submitted to the jury on the verdict form, and that issues of *respondeat superior* and course and scope need not become jury questions. Thus, only the issue of Dr. Miller's liability on Respondent's sole remaining claim for medical negligence was submitted to the jury. The jury returned a verdict against Dr. Miller and awarded \$1.5 million in economic damages and \$1 million in noneconomic damages.

III. Post-Trial Proceedings

After the verdict, Appellants moved for a new trial absolute on several grounds:

- (1) The circuit court erred in denying Appellants' Rule 15(b) motion to conform to the evidence and Appellants' request that the jury be charged on statutory emergency;
- (2) The circuit court erred in denying Appellants' motion to exclude Respondent's expert witness who was not timely disclosed;
- (3) The circuit court erred in allowing Respondent's expert witness to physically examine the minor plaintiff in the presence of the jury;
- (4) The circuit court judge presiding over the trial erred in declining to recuse himself;

- (5) The circuit court erred by permitting Respondent to refer to the standard of care as “safety rules” throughout trial;
- (6) The cumulative effect of the errors entitled Appellants to a new trial; and
- (7) Appellants requested a new trial based on the thirteenth juror doctrine.

See Mot. for New Trial and Related Briefing Filed by Appellants, attached as Exhibit D. Appellants also requested that the circuit court apply the \$350,000 noneconomic damages cap pursuant to South Carolina Code section 15-32-220 on the ground that the verdict was against only one healthcare provider, Dr. Miller, and reduce the noneconomic damages award. *See id.*

The circuit court denied the new trial motion, ruled the cap on noneconomic damages must be doubled because it found the judgment should be entered against two healthcare providers (Dr. Miller and the Practice), applied a \$50,000 setoff, added interest from the date of an earlier offer of judgment, and entered judgment in the amount of \$4,682,689.57. *See Ex. B* (Post-Trial Order and Judgment, attached to Notice of Appeal). Appellants appealed (1) the March 3, 2022 Post-Trial Order and Judgment; (2) the jury verdict, related judgment, and evidentiary and other rulings at trial, including the issues related to the statutory emergency defense described above; and (3) the circuit court’s denial of Respondents’ motion for recusal. *See* Notice of Appeal, attached as Ex. B.

After the appeal, Respondent indicated she intended to execute on the judgment. Accordingly, Appellants moved for a stay of execution on the judgment. *See* Mot. to Stay Execution and Supp. Memo in Support of Mot. to Stay Execution, and Supplemental filing, attached as Exhibit E. Appellants argued the circuit court should exercise its discretion to grant a stay without requiring any bond or, as alternatives, require that Dr. Miller alone post a \$1 million bond or that Dr. Miller and the Practice each post a \$1 million bond. *See id.* Appellants further

argued that the circuit court should, as a matter of discretion, consider and apply the current statutory bond limits provided in South Carolina Code section 18-9-130,³ although those limits are not mandatory in this case because this case accrued some time before the effective date of the current statute. *See id.* Appellants reserved the right to file other requests and make other motions if the circuit court determined it would not grant a stay on the conditions proposed by Appellants. *See id.* In response, Respondent asserted that she had no objection to the stay so long as a sufficient bond was required to protect her interests, which she asserted could be protected only by a \$6.25 million bond. *See* Response to Mot. for a Stay of Execution, attached as Exhibit F. Respondent reached her \$6.25 million calculation by assuming the appeal will last five years and guessing at the rate post-judgment interest will continue to accrue during the pendency of the appeal. *See id.*

The circuit court held a hearing on May 18, 2022, on Appellants' motion. Appellants, relying on *Southeast Booksellers Association v. McMaster*, 233 F.R.D. 456, 458 (D.S.C. 2006), and the current statutory bond limits provided in section 18-9-130, explained that they were seeking an order setting the required appeal bond at \$2 million or less without having to place Dr. Miller's personal financial circumstances in the public record, but they would present such if the

³ Section 18-9-130 provides:

(A)(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or:

(a) twenty-five million dollars, whichever is less, for a business entity that employs more than fifty persons and has gross revenues exceeding five million dollars for the previous tax year; or

(b) one million dollars, whichever is less, for all other entities or individuals.

circuit court determined it would not limit the required bond to \$2 million or less. Appellants argued at the hearing that the appeal had merit, that the case was similar to that of *Flowers v. Giep*, Op. No. 5864 (2021), in that the statutory emergency defense was raised in a motion to conform to the evidence at trial in that case as well, and that there was no way Respondent could have been “surprised” by this motion to amend to conform to the evidence, given that Respondent had moved to stay the very trial in the case by reason of the *expected* assertion of the statutory emergency defense.

In a Form 4 order entered on May 19, 2022, the circuit court indicated it would grant the motion to stay execution on the judgment, but on the condition that Appellants “must purchase a bond in the amount of \$6.25 million . . . to protect the judgment entered and interest accrued during the pendency of the appeal.” See May 19, 2022 Form 4 Order, Ex. A. The circuit court provided no other rationale for its decision and did not address expressly the arguments raised by Appellants. Appellants moved to reconsider the court’s ruling pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on the ground that the circuit court’s rationale for its ruling was not set forth in its order.⁴ See Mot. to Reconsider and Mot. to Reduce Amt. of Appeal Bond filed May 27, 2022, attached as Exhibit G. Appellants simultaneously moved to reduce the amount of the appeal bond. See *id.* In support of the latter motion, Appellants presented an affidavit and insurance policy materials establishing the combined policy limits applicable to this action for Dr. Miller and the Practice is \$2 million. See *id.* (Aff. of Samuel McEwen and policy materials). Appellants also presented an affidavit from Dr. Miller explaining that he has approximately

⁴ See *Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) (“An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment.”); *Smith v. NCCI, Inc.*, 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006) (same).

\$100,000 in total assets, excluding retirement accounts and his home (which is owned by his wife), and approximately \$1.5 million in total liabilities. *See id.* (Aff. of Dr. Miller). As a result, he cannot purchase an appeal bond of any material amount, and a court order requiring him to do so would create an undue financial hardship for Dr. Miller and his family. *See id.* Similarly, the Practice has dissolved and lacks assets to satisfy the judgment or post an appeal bond.

The circuit court denied the motion to reconsider and motion to reduce the amount of the appeal bond in a Form 4 order on June 1, 2022, but provided no rationale for the ruling. *See* Form 4 Order entered June 1, 2022, Ex. A. Appellants thus moved to reconsider the denial of their motion to reduce the amount of the appeal bond on the ground that they were required to do so to preserve their arguments for appellate review due to the lack of rationale set forth in the June 1 order. *See* Mot. to Reconsider Denial of Mot. to Reduce Amt. of Appeal Bond filed June 6, 2022, attached as Exhibit H. The circuit court denied the motion to reconsider in a written order entered on June 10, 2022. *See* June 10, 2022 Order, Ex. A. The circuit court found it had discretion to set the bond amount because the current statutory cap in section 18-9-130 “is inapplicable to the case at hand” and found a \$6.25 million bond is appropriate “[c]onsidering the lengthy history of this case and the potential length of time this case may spend on appeal.” *Id.* The circuit court again did not expressly address the evidence submitted or the factors in *Southeast Booksellers Association*.

LEGAL STANDARD

Rule 241 of the South Carolina Appellate Court Rules permits a party to move “for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.”

A supersedeas should be used to “stay proceedings in the [circuit] court, to preserve the status quo pending the determination of the appeal . . . , and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990) (quoting 4A C.J.S. *Appeal & Error* § 662 at 494–95 (1957)) (alteration in original). This Court should exercise its power to “supersede an order of a circuit judge . . . when it is made to appear to be necessary to prevent irreparable injury or a miscarriage of justice.” *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 304, 69 S.E. 604, 606 (1910).

GROUND FOR SUPERSEDEAS

The circuit court abused its discretion in failing to set the required appeal bond amount at \$2 million or less. The court’s ultimate ruling, according to its June 10 order, is based on its findings that: 1) the current version of section 18-9-130 is “inapplicable,” and 2) the “lengthy history of this case,” and “the potential length of time this case may spend on appeal.” June 10, 2022 Order, Ex. A. Respectfully, the circuit court failed to engage in the required analysis or consider the evidence presented and therefore abused its discretion. A writ of supersedeas should thus be granted.

Because South Carolina lacks much established case law governing a circuit court’s exercise of discretion in setting the amount of an appeal bond, South Carolina courts should look to analogous federal case law. “In determining whether to issue a stay pending appeal on the basis of less than a full bond, a district court should act to ‘preserve the status quo while protecting the non-appealing party’s rights pending appeal.’” *Alexander v. Chesapeake, Potomac & Tidewater Books, Inc.*, 190 F.R.D. 190, 193 (E.D. Va. 1999); *Morris v. Bland*, No. 5:12-CV-3177-RMG, 2015 WL 12911349, at *1 (D.S.C. Mar. 23, 2015). To determine the “status quo,” the Court must

consider the judgment debtors' current financial situation. The object is to preserve the judgment creditor's current position, not to guarantee that she receives full payment of the judgment if she prevails on appeal. *Alexander*, 190 F.R.D. at 193 ("In other words, any security or bond offered by defendants in this case should simply reflect and preserve defendants' **current ability to satisfy the judgment.**" (emphasis added)). A full bond is not required when "the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden." *Alexander*, 190 F.R.D. at 193; *Morris*, 2015 WL 12911349, at *2. In such a scenario, the Court "must find some way 'to make the judgment creditor as well off during the appeal as it would be if it could execute at once, **but no better off.**'" *Alexander*, 190 F.R.D. at 193 (emphasis added) (quoting *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 800 (7th Cir. 1986) (Easterbrook, J., concurring)); see also *Morris*, 2015 WL 12911349, at *2 ("Under these circumstances, the Court finds a stay is warranted even absent a bond. Defendants are arguably insolvent and unable to post a bond. Plaintiff's ability to collect her judgment will not materially change while the appeal is pending.").

Courts in the Fourth Circuit have held an appeal bond should generally not be required at all "in either of two polar circumstances:" (1) "when the judgment debtor can currently easily meet the judgment and demonstrates that it will maintain the same level of solvency during appeal," or (2) "when 'the judgment debtor's present financial condition is such that the posting of a full bond would impose undue financial burden.'" See *Booksellers Ass'n*, 233 F.R.D. at 458 (quoting *Alexander*, 190 F.R.D. at 193). The circuit court here failed to consider (or if it did, there is no way of knowing it did) the evidence that an appeal bond greater than the \$2 million covered by the insurer imposes an undue financial burden on Dr. Miller.

The *Southeast Booksellers Association* court also recognized the “*Hilton* factors” in analyzing whether to grant a stay without a full supersedeas bond. *See Se. Booksellers Ass’n*, 233 F.R.D. at 458–59 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The *Hilton* factors include consideration of the following factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *Id.* The circuit court failed to consider these factors, but as Appellants asserted at the May 18 hearing, these factors weigh in favor of granting a stay of execution and requiring only a \$2 million bond.

First, Appellants are likely to succeed on the merits of their appeal. In the interest of brevity, Appellants will not argue the full merits here, but Appellants incorporate the arguments raised in the briefing they submitted in support of their new trial motion. *See* Mot. for New Trial and Related Briefing Filed by Appellants, Ex. D. Most importantly, the trial court committed reversible error by denying Appellants’ Rule 15(b), SCRPC motion to conform to the evidence which would have properly allowed the issue of statutory emergency—codified at S.C. Code Ann. § 15-32-230(A)—to be a defense, as it was tried by express or implied consent, and further by denying Appellants’ request at the charge conference to charge the jury with appropriate corresponding instructions pursuant to the statutory emergency defense. It is well-settled in South Carolina that Rule 15(b) permits a party to move to amend its pleading to add an unpled affirmative defense to conform to the evidence presented at trial as defendants did here. Rule 15(b), SCRPC; *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224–25 (2010). And when unpled issues are tried by the express or implied consent of the parties, “they shall be treated in all respects as if they had been raised in the pleadings.” *Staubes v. City of Folly Beach*, 339

S.C. 406, 413, 529 S.E.2d 543, 546 (2000) (quoting Rule 15(b)). South Carolina’s appellate courts have opined that a trial court abuses its discretion when it denies a Rule 15(b) motion when the opposing party had express knowledge that the case would be tried on the issue on which amendment was later sought and evidence on that issue was admitted at trial. *See Pool v. Pool*, 329 S.C. 424, 329, 494 S.E.2d 820, 824 (1998); *see also Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999) (reversing the denial of a motion to amend a complaint based on a lack of prejudice because the non-moving party “had notice that Petitioner wanted to supplement the complaint”); *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 287, 607 S.E.2d 711, 717 (2005) (reversing the denial of a motion to amend an answer to add a tort claims act defense as an abuse of discretion since the amendment sought “was not a surprise”).

Here, Respondent knew years before trial that Appellants intended to invoke section 15-32-230 as a defense and Respondent made filings characterizing the defense as “*expected*,” even moving to obtain a stay of the case pending a resolution of appeals in which the statute was at issue. Moreover, as explained above, both parties presented evidence at trial addressing the statutory emergency defense issues. The circuit court thus erred in denying Appellants’ Rule 15(b) motion and in failing to charge the jury on the statutory emergency issue. Accordingly, Appellants are likely to succeed on the merits of their appeal, and the first *Hilton* factor is satisfied. *See Se. Booksellers Ass’n*, 233 F.R.D. at 458–59.

Second, requiring a \$6.25 million bond (or failing to grant a stay in the absence of such a bond) will impose an undue financial burden on Appellants and deprive them of a meaningful opportunity to benefit from their meritorious appeal. Third, Respondent will not be substantially injured by a stay conditioned on the purchase of a \$2 million bond. The purpose of the bond is to ensure that Respondent’s ability to collect the judgment after appeal is the same as if she collected

the judgment now. *See Alexander*, 190 F.R.D. at 193; *Morris*, 2015 WL 12911349, at *1. Appellants lack the assets to satisfy the judgment now beyond the \$2 million covered by insurance, as demonstrated in the affidavits filed with Appellants' motion to reduce the amount of the appeal bond. *See Ex. G*. This was the only evidence submitted to the circuit court. The circuit court's decision to require a \$6.25 million appeal bond places Respondent in a better position than she would be in if she executed on the judgment now.

Third, as set forth in footnote 1, *supra*, the South Carolina General Assembly has recognized that the public's interest in the ability to use the appellate system in a money judgment scenario should not be impaired unfairly by a required posting of massive appeal bonds. While not *controlling* in this case due to when the claims here accrued, Section 18-9-130 is not "inapplicable" as the circuit court found. Rather, it is directly applicable as a "factor" to be considered per *Southeast Booksellers Association*, *supra*, and the authorities on which that case relies. It is apparent the circuit court did not consider the statute or its reflection of the public interest, as it should have. For more than ten years, section 18-9-130(A)(2) has limited the maximum appeal bond for an individual or a business such as the Practice to \$1 million. A statute is the General Assembly's expression of public policy. *See Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 420, 782 S.E.2d 757, 761 (Ct. App. 2016); *Perpetual Fed. Sav. & Loan Ass'n v. Willingham*, 296 S.C. 24, 28 n.2, 370 S.E.2d 286, 288 n.2 (Ct. App. 1988). The policy in South Carolina is to cap the amount of a supersedeas bond at \$1 million in circumstances like this case with like-situated appellants. Although application of the current version of section 18-9-130 may not be mandatory, a prudent exercise of discretion and consideration of the public interest would include application of the decade-old public policy codified by the General Assembly. The appropriate bond amount in this case, based on the judgment debtors' financial situation, happens

to align with the policy codified by the General Assembly. Accordingly, the circuit court abused its discretion by requiring a bond greater than \$2 million. The circuit court's only affirmatively stated ground is that the judgment plus predicted interest accrual during the appeal justifies a \$6.25 million bond. That is not, respectfully, an appropriate consideration of the bond amount and stay analysis.

Thus, the circuit court did not, expressly at least, consider any of the *Southeast Booksellers Association* factors although both parties relied upon *Southeast Booksellers Association* in their filings. A proper application of the *Southeast Booksellers Association* factors analysis results in a maximum \$2 million bond requirement, because that is the amount Appellants could pay to satisfy the judgment now. *See Alexander*, 190 F.R.D. at 193 (noting “any security or bond offered by defendants in this case should simply reflect and preserve defendants’ current ability to satisfy the judgment” and finding, “[a]t present, the record reflects that both defendants are arguably insolvent, and that their combined assets could not satisfy half the judgment, even putting aside their current liabilities. Yet, defendants did set aside \$16,175.50 for payment to plaintiffs in this case, which is all defendants appear able to pay in satisfaction of the current judgment. Thus, to put plaintiffs in the same position as they are now at the conclusion of appeal, defendants must secure that amount for plaintiffs’ benefit”); *Morris*, 2015 WL 12911349, at *2 (“[T]he Court finds a stay is warranted even absent a bond. Defendants are arguably insolvent and unable to post a bond. Plaintiff’s ability to collect her judgment will not materially change while the appeal is pending.”).

The factors courts must consider all weigh in favor of requiring no more than a \$2 million appeal bond to stay execution on the judgment here. The circuit court’s decision to require a \$6.25 million bond is an abuse of discretion, and the circuit court did not engage in the proper factors-

based analysis, nor did the circuit court apparently consider the only evidence placed before the circuit court on the undue financial burden factor. The Court should grant a writ of supersedeas, reverse the circuit court's abuse of discretion, and modify the bond amount to reflect that a stay is granted by the posting of a \$2 million bond.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant a writ of supersedeas and reduce the amount of the required appeal bond to \$2 million total.

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Columbia, South Carolina

June 20, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge
William B. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000288

Angela Patton, as Next Friend of Alexia L., a minor, ... Respondent,

v.

Dr. Gregory A. Miller and Rock Hill Gynecological &
Obstetrical Associates, P.A., ... Appellants.

VERIFICATION

I, Dr. Gregory A. Miller, verify that, to the best of my knowledge and belief, the facts set forth in the foregoing Petition for Writ of Supersedeas are accurate.

Executed on June 20, 2022.

SWORN to and subscribed before me

this 20 day of June, 2022

[Signature] (L.S.)

Notary Public for _____

My Commission Expires: _____

[Signature]
Gregory A. Miller, M.D.
Appellant

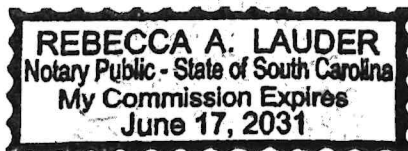


Exhibit A
(Certified Copies of Orders)

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009CP4605195

Angela Patton
PLAINTIFF(S)

Gregory A Miller et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS MATTER came before the Court for a hearing on Plaintiff's Motion for Administrative and Filing Costs and Disbursements, and Defendant Rock Hill Gynecological and Obstetrical Associates, PA's Motion for Stay of Execution of Judgment. Upon review of the record and after hearing the arguments of counsel, Plaintiff's Motion for Administrative and Filing Costs and Disbursements is hereby DENIED at this time, provided that Plaintiff may come back before the court seeking costs and disbursements when the case is concluded. Defendant's Motion for Stay of Execution of Judgment is GRANTED, with the condition that Defendants must purchase a bond in the amount of \$6.25 million dollars to protect the judgment entered and interest accrued during the pendency of the appeal. IT IS SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/19/2022 .

Drew Traylor for Gregory A Miller

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

CERTIFIED TRUE COPY

2022 JUN 20 AM 8:59

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

David Hamilton
by Wendy Brown, Admin. Asst.

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



York Common Pleas

Case Caption: Angela Patton VS Gregory A Miller , defendant, et al
Case Number: 2009CP4605195
Type: Order/Electronic Form 4

IT IS SO ORDERED

s/D. Craig Brown (2160)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009CP4605195

Angela Patton
PLAINTIFF(S)

Gregory A Miller et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

THIS MATTER came before the court by way of Defendants Gregory A. Miller, M.D., and Rock Hill Gynecological & Obstetrical Associates, P.A.'s motion for reconsideration of the Court's May 19, 2022 Order. In that Order, the Court denied Plaintiff's Motion for Administrative and Filing Costs and Disbursements and granted Defendant's Motion for Stay of Execution of Judgment with the condition that Defendants must purchase a bond in the amount of \$6.25 million dollars to protect the judgment entered and interest accrued during the pendency of the appeal. Defendants now seek a reduction in the amount of appeal bond required to stay execution on the judgment. Upon review of the Motion and the exhibits attached thereto, the Court respectfully DENIES Defendants' Motion to Reconsider and Motion to Reduce Amount of Appeal Bond. IT IS SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/01/2022 .

Drew Traylor for Gregory A Miller

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

CERTIFIED TRUE COPY
2022 JUN 20 AM 8:58
by David Hamilton, Admin Asst.
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



York Common Pleas

Case Caption: Angela Patton VS Gregory A Miller , defendant, et al
Case Number: 2009CP4605195
Type: Order/Electronic Form 4

IT IS SO ORDERED

s/D. Craig Brown (2160)

CERTIFIED TRUE COPY
 JUN 20 AM 8:58
 David Hamilton
 by Wendy Wilson, Admin. Asst.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT

) Civil Action number 2009-CP-46-05195

Angela Patton, as Next Friend of)
 Alexia L., a minor,)
)
 Plaintiff,)
)
 v.) **Order Denying Defendants' Motion to**
) **Reconsider Denial of Motion to Reduce**
) **Amount of Appeal Bond**
 Dr. Gregory A. Miller, and Rock)
 Hill Gynecological & Obstetrical)
 Associates P.A.,)
)
 Defendants.)

THIS MATTER came before the Court by way of Defendants' Motion to Reconsider Denial of Motion to Reduce Amount of Appeal Bond, filed June 6, 2022. The Hon. William A. McKinnon, Circuit Court Judge, entered judgment against Defendants in the amount of \$4,682,789.57 on March 3, 2022. This Court subsequently granted Defendants' Motion to Stay Execution on Appeal by Order dated May 19, 2022, and required Defendants to post a *supersedeas* bond in the amount of \$6.25 million. Defendants filed a Motion asking this court to reduce the amount of the *supersedeas* bond, which was denied by Order dated June 1, 2022.

Defendants now ask this Court to again reconsider the amount of the *supersedeas* bond. In light of the facts and law as state below, Defendants' Motion is DENIED.

It is within this Court's discretion whether to grant a motion to stay execution on a judgment, and if so, to fix the amount of the *supersedeas* bond required as a condition of any stay order. Rule 62(d), SCRCF; Rule 241(c)(2), SCACR. Although S.C. Code Ann. § 18-9-130 sets a cap of \$1 million on *supersedeas* bonds when the judgment debtor is an individual or a smaller business, the statutory cap is inapplicable to the case at hand. The legislative history is clear that the \$1 million cap applies only to those actions that accrue on or after January 1, 2012.

Plaintiff filed her Summons and Complaint on November 25, 2009, at which time there was no limit on the amount of a *supersedeas* bond which could be required as a condition to a stay order.

Post-judgment interest is to be compounded at a rate of 7.25% *per annum*. See S.C. Code Ann. § 34-31-20; Order of the Supreme Court 2022-01-06-01. At this rate, the judgment balance will be \$6,195,749.43 as of March 3, 2026, and \$6,644,941.26 as of March 3, 2027. Considering the lengthy history of this case and the potential length of time this case may spend on appeal, the Court finds it is appropriate to required Defendants to post a *supersedeas* bond in the amount of \$6.25 million.

IT IS SO ORDERED.

[electronic signature page to follow]



York Common Pleas

Case Caption: Angela Patton VS Gregory A Miller , defendant, et al
Case Number: 2009CP4605195
Type: Order/Stay of Execution of Judgment

IT IS SO ORDERED

s/D. Craig Brown (2160)

Exhibit B
(Notice of Appeal with POS)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William B. McKinnon, Circuit Court Judge

Civil Action No. 2009-CP-46-05195

Angela Patton, as Next Friend of
Alexia Lumpkin, a minor Respondent,

v.

Gregory A. Miller M.D. and
Rock Hill Gynecological &
Obstetrical Associates P.A. Appellants.

NOTICE OF APPEAL

Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A. (together, “Appellants”) appeal (1) the trial court’s March 3, 2022 Post-Trial Order and Judgment, including the Form 4 judgment attached to the order; (2) the jury verdict and related judgment and the evidentiary and other rulings adverse to Appellants during trial, including—but not exclusive of—the trial court’s denial of Appellants’ Rule 15(b), SCRCP, motion to conform to the evidence to allow the issue of statutory emergency (codified at S.C. Code Ann. § 15-32-230(A)) to be a defense at trial, and the subsequent denial of Appellants’ request at the charge conference to charge the jury with appropriate corresponding instructions pursuant to the statutory emergency defense; and (3) the trial court’s December 2, 2021 Form 4 order denying Appellants’ motion for recusal. Copies of the Post-Trial Order and Judgment, including the Form 4 judgment,

and the verdict form are attached hereto as Exhibit A. Appellants received written notice of the Post-Trial Order and Judgment on March 3, 2022.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Gregory A. Miller, M.D. and Rock Hill
Gynecological & Obstetrical Associates P.A.

Columbia, South Carolina

March 11, 2022

Other Counsel of Record:

Attorneys for Appellants Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A.

DAVIS & SNYDER, P.A.
Ashby W. Davis
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500

Attorneys for Respondent Angela Patton, as Next Friend of Alexia Lumpkin, a minor

GRAHAM LAW FIRM, P.A.
Edward L. Graham
122 Donald Drive
Pendleton, SC 29670
(864) 527-0483

JORDAN LAW FIRM, PC

D. Bradley Jordan
546 East Main Street
Rock Hill, SC 29730
(803) 817-7999

RECEIVED

Mar 11 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William B. McKinnon, Circuit Court Judge

Civil Action No. 2009-CP-46-05195

Angela Patton, as Next Friend of
Alexia Lumpkin, a minor

Respondent,

v.

Gregory A. Miller M.D. and
Rock Hill Gynecological &
Obstetrical Associates P.A.

Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., Attorneys for Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow by Regular U.S. Mail and by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleading(s): Notice of Appeal

Parties Served:

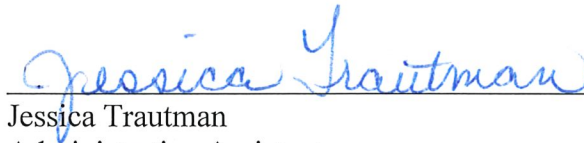
adavis@davisnyder.com
Ashby W. Davis, Esquire
Davis & Snyder, P.A.
5 Hawthorne Park Court
Greenville, SC 29615

egraham@grahamlawfirm.net

Edward L. Graham
Graham Law Firm, P.A.
122 Donald Drive
Pendleton, SC 29670

bradjordan@comporium.net

D. Bradley Jordan, Esquire
Jordan Law Firm, P.C.
546 East Main Street
Rock Hill, SC 29730



Jessica Trautman
Administrative Assistant

Columbia, South Carolina
March 11, 2022

Jessica Trautman

From: Jessica Trautman
Sent: Friday, March 11, 2022 1:06 PM
To: egraham@grahamlawfirm.net; bradjordan@comporium.net; adavis@davissnyder.com
Cc: Nick Charles; Mitch Brown
Subject: Angela Patton, et al. v. Gregory A. Miller M.D., et al--Civil Action No. 2009-CP-05195
Attachments: 2022.03.11 Notice of Appeal.pdf

Counsel,

Attached for service upon you in the above matter please find a Notice of Appeal. Service is made via email pursuant to the Supreme Court Order 2021-08-25-02.

Thank you,



JESSICA TRAUTMAN SENIOR ADMINISTRATIVE ASSISTANT
jessica.trautman@nelsonmullins.com

MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.5535 F 803.256.7500
NELSONMULLINS.COM



Nicholas A. Charles
T: 803.255.9663
nick.charles@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

1320 Main Street, 17th Floor
Columbia, SC 29201
T: 803.799.2000 F: 803.256.7500
nelsonmullins.com

RECEIVED

Mar 11 2022

SC Court of Appeals

March 11, 2022

Via Email: egraham@grahamlawfirm.net
and U.S. Mail

Edward L. Graham, Esquire
Graham Law Firm, P.A.
122 Donald Drive
Pendleton, SC 29670

Via Email: bradjordan@comporium.net
and U.S. Mail

D. Bradley Jordan, Esquire
Jordan Law Firm, P.C.
546 East Main Street
Rock Hill, SC 29730

RE: Patton, Angela v. Gregory A. Miller, MD, et al.
Civil Action No.: 2009-CP-46-05195
Our File No.: 072009/01500

Dear Counsel:

Please find enclosed for service upon you Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A.'s Notice of Appeal in the above matter.

Please let us know if you have any questions.

Very truly yours,

Nicholas A. Charles

NC;jlt
Enclosures

cc: C. Mitchell Brown, Esquire mitch.brown@nelsonmullins.com
Ashby W. Davis, Esquire adavis@davisnyder.com

Mar 11 2022

SC Court of Appeals

ELECTRONICALLY FILED - 2022 Mar 08 2:32 PM - YORK - COMMON PLEAS - CASE#2009CP4605195

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON
COUNTY OF YORK	)	PLEAS FOR THE SIXTEENTH
	)	JUDICIAL CIRCUIT
	)	
Angela Patton, as Next Friend of Alexia,	)	Case No. 2009-CP-46-05195
Lumpkin, a minor, Plaintiff,	)	
vs.	)	
	)	POST TRIAL ORDER AND JUDGMENT
Gregory A. Miller, MD, Rock Hill	)	
Gynecological & Obstetrical Associates,	)	
P.A., Defendants.	)	

This matter comes before the Court by the way of the Defendant's Motion for a New Trial, and in the alternative, Motion to Reduce the Non-economic Damages awarded by the jury along with the Plaintiff's Motion to Recover Interest, Administrative, Filing, and Other Court Costs pursuant to Rule 68, SCRPC. The Defendant's Motions for a New Trial and a Reduction of Non-economic Damages are DENIED. Plaintiff's request for interest pursuant to her Offer of Judgment is GRANTED, and judgment is entered accordingly.

In the Court's view no prejudicial errors were committed during trial as a matter of fundamental fairness to justify granting a new trial. *See Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921, 925 (Ct. App. 2008) (citing *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994)).

First, the Court ruled that the Emergency Medical and Obstetrical Care Exception in S.C. Code § 15-32-230 was an affirmative defense in which the Defendant should have amended the pleadings prior to trial. Under S.C. Rule of Civil Procedure 15 (b), "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the

merits.” Here, the Court did not allow the pleading to be amended during trial after the Plaintiff rested because the Court ruled that the Plaintiff would be prejudiced by this amendment which would have changed the Plaintiff’s necessary proof to prevail from simple negligence to gross negligence. The Court ruled that altering what the Plaintiff would need to prove to recover, after she had rested her case, would have been unfairly prejudicial. This is especially so when the request was made during the second week of trial in a case which has been pending for more than twelve years.

The Defendant cites *Lee v. Bunch*, 373 S.C. 654 (2007) for the proposition that the motion to amend should have been granted. That case actually favors Plaintiff. In *Lee*, our Supreme Court wrote: “The prejudice that would warrant denial of a motion to amend the pleadings is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it. . . . Prejudice occurs when the amendment states a new defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action” (internal citation omitted). In this case there is a both a “lack of opportunity to refute” the defense, because the motion was made after the close of Plaintiff’s case, and the motion to amend also would also require “additional or different evidence” because the Plaintiff would have to have expert testimony of gross negligence. Prejudice is clear under the *Lee* analysis.

Second, the denial of Defendants’ motion to exclude the expert causation opinion of Dr. Armenta was not a legal error. Even though Dr. Armenta was first formally disclosed as a causation expert less than 30 days prior to trial, the Defense was aware of this witness as a possible damages expert and was aware of other causation experts which they were prepared to cross-examine. In the Court’s view allowing Dr. Armenta to testify on causation did not

prejudice the Defendants. Further, even if it was error to allow Dr. Armenta to testify on causation, this testimony was cumulative to other testimony and does not warrant a new trial.

Third, the Court did not commit reversible legal error by permitting Dr. Resnik to physically examine the minor plaintiff in the jury's presence. The Court ruled that probative value of the examination was not substantially outweighed by the danger of unfair prejudice. See Rule 403. Consequently, the testimony and examination were allowed at trial.

Lastly, the Court's failure to recuse his Honor over this trial because the Court previously represented plaintiffs in medical malpractice cases at McGowan, Hood and Felder in Rock Hill¹, SC, the use of "safety rules" as references to the standard of care, the cumulative error doctrine, and the thirteenth juror doctrine are not grounds for a new trial.

The Defendant's Motions for a Reduction of Non-economic Damages based on the statutory caps is DENIED. SC Code 15-32-210(5) defines "health care provider" and "health care institution." Both defendants fall within the definition of "health care provider," which makes no distinction between providers who are directly liable and those whose liability is vicarious.

The non-economic damages cap of SC Code 15-32-220(C) provides:

In an action on a medical malpractice claim when final judgment is rendered against more than one health care institution, or more than one health care provider, or any combination thereof, the limit of civil liability for noneconomic damages for each health care institution and each health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, and the limit of civil liability for noneconomic damages for all health care institutions and health care providers is limited to an amount not to exceed one million fifty thousand dollars for each claimant...

¹ The Court notes its last day as an attorney with McGowan, Hood & Felder was in October of 2016, more than five years ago, and in any case, that firm had no involvement at all in the matter before the Court.

(emphasis added). Pursuant to SC Code 15-32-210(5), both Dr. Miller and his practice are “health care providers,” and therefore the cap is doubled. The fact that liability for the practice is vicarious is not mentioned in the statute as a factor to be considered and is immaterial. Pursuant to SC Code 15-32-220(F), the published inflation-adjusted cap in effect when the verdict was rendered in this case was \$479,064 per “health care provider”, or \$958,128 for two defendants. As the non-economic damage award after setoff was \$950,000, the cap has no bearing on the judgment in this matter.

Plaintiff sent a Rule 68 Offer of Judgment for \$1,000,000 which was filed on October 4, 2011. Giving the defendant the maximum possible five days for service, interest began accruing on October 11, 2010. Interest has therefore accrued on the verdict for eleven years and 143 days at 8% per annum. Interest on the verdict is \$196,000 per year and \$536.99 per day, for a total interest sum of \$2,232,789.57. The Court finds no support in South Carolina law for Defendant’s argument that the filing of an amended complaint nullified the offer of judgment.

Judgment is therefore entered for the Plaintiff, and against Defendants Gregory A. Miller, MD, Rock Hill Gynecological & Obstetrical Associates, P.A. in the amount of: \$4,682,789.57.

IT IS SO ORDERED.

York, South Carolina
March __, 2022

The Honorable William A. McKinnon
Resident Circuit Judge

Mar 11 2022

SC Court of Appeals

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-46-05195

Angela Patton, as next friend of Alexia Lumpkin, a minor

Gregory A. Miller, MD and

Rock Hill Gynecological & Obstetrical Associates,
P.A.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : Judgment is joint and several against both Defendants

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Angela Patton, as next friend of Alexia Lumpkin, a minor	Gregory A. Miller, MD and Rock Hill Gynecological & Obstetrical Associates, P.A.	\$4,682,789.57
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

/s William A. McKinnon

Circuit Court Judge

2761

Judge Code

March 3, 2022

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCp.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The “Information for the Judgment Index” section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the “Judgment in Favor of” column, enter the name of the party to whom the judgment is awarded. In the “Judgment Against” column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the “Judgment Amount” column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate “N/A” in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section “For the Clerk of Court Office Use Only” should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through “Circuit Court Judge” and indicate “Arbitrator” in the signature block.
9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title “Circuit Court Judge” below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the “Judgment Amount To Be Enrolled” box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.



York Common Pleas

Case Caption: Angela Patton VS Gregory A Miller , defendant, et al

Case Number: 2009CP4605195

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Angela Patton, as Next Friend of Alexia)
Lumpkin, a minor, Plaintiff,)
vs.)
Gregory A. Miller, MD, et al.,)
Defendants.)

IN THE COURT OF COMMON
PLEAS FOR THE SIXTEENTH
JUDICIAL CIRCUIT
Case No. 2009-CP-46-05195

VERDICT FORM

RECEIVED
Mar 11 2022
SC Court of Appeals

1. Did the Defendant breach the standard of care and proximately cause the injury?

YES ("Yes" or "No." If the answer is "yes", please continue to questions two and three. If the answer is "no", please stop here.)

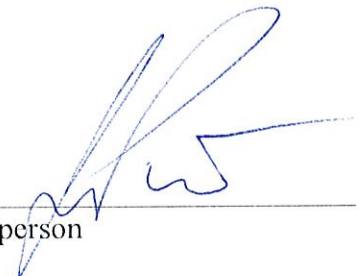
2. If the answer to question one was "yes", what amount of economic damages resulted?

\$ 1,500,000

3. If the answer to question one was "yes", what amount of non-economic damages resulted?

\$ 1,000,000

January 14, 2022


Foreperson

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2009CP4605195

Angela Patton
PLAINTIFF(S)

Gregory A Miller et al
DEFENDANT(S)

Mar 11 2022

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Defendant's Motion for Recusal is DENIED.

The Plaintiff's Motion to disqualify all members who are not fully vaccinated for Coronavirus from jury service is DENIED.

The Plaintiff's Motion for written jury questionnaire and attorney directed voir dire is GRANTED subject to the conditions discussed at the hearing on December 2, 2021: that each side will have 30 minutes of attorney voir dire excluding questions involving the facts of the instant case, and Plaintiff may provide the clerk with a written questionnaire taken from the federal court questionnaire and any additional questions the defense consents to.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/02/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



York Common Pleas

Case Caption: Angela Patton VS Gregory A Miller , defendant, et al

Case Number: 2009CP4605195

Type: Order/Electronic Form 4

So Ordered

/s William A. McKinnon, Chief Judge for
Administrative Purposes, 16th Cir., #2761

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2009CP4605195

Official File Stamp: 03-11-2022 02:32:11 PM
Court: CIRCUIT COURT
Common Pleas
York
Case Caption: Angela Patton VS Gregory A Miller , defendant, et al
Event(s): Notice/Notice of Appearance

Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
Filed by or on behalf of: Nicholas Andrew Charles

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Keith David Knowlton for Gregory A Miller et al
Ashby W. Davis for Gregory A Miller et al
David Bradley Jordan for Angela Patton
Edward L Graham for Angela Patton
Andrew Kurt Heitman for Gregory A Miller et al
Mitchell D. Appleby for Gregory A Miller et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Drew Traylor for Gregory A Miller

Exhibit C

(Plaintiff's Motion to Stay or for Partial Summary
Judgment)

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton, as Next Friend of
Alexia Lumpkin a minor,

Plaintiff,

vs.

Dr. Gregory A. Miller, and Rock Hill
Gynecological & Obstetrical Associates,
P.A.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
) C/A NO.: 2009-CP-46-5195
)
)
)

) **MOTION FOR PARTIAL SUMMARY**
) **JUDGMENT, OR IN THE ALTERNATIVE, AN**
) **ORDER GRANTING A STAY OF TRIAL UNTIL**
) **PENDING APPEALS IN OTHER CASES**
) **RESOLVE MATERIAL ISSUES LIKELY TO**
) **ARISE IN THIS CASE**
)
)
)
)

PLEASE TAKE NOTICE that the Plaintiff, Angela Patton, by and through her undersigned Counsel, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure moves for Partial Summary Judgment as this Plaintiff is entitled to judgment as a matter of law.

1. Plaintiff hereby moves for Partial Summary Judgment to preclude the expected statutory defense under **S. C. Code of Laws Section 15-32-230**, representing a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies. This statute fails to define its key words and phrases, including, *inter alia*, “genuine emergency,” “immediate threat,” and “medically stable.” Plaintiff asserts that the statute, properly construed, is immaterial to the facts and circumstances of this case. That is because the plaintiff was a patient of the defendants during her prenatal care; and this case involves, *inter alia*, no “genuine emergency” outside of Defendant Dr. Miller’s specialty practice. This motion is based upon such authorities and materials as will be presented to the court at or before the hearing of this motion.

2. In the alternative, Plaintiff moves for an Order granting a stay of trial until pending appeals in other cases resolve material issues likely to arise in this case. There are two appellate cases now pending before the S. C. Court of Appeals which address various novel and complex legal and medical issues arising under **S. C. Code of Laws Section 15-32-230**. Those issues also arise in this case. This case is currently scheduled to be tried for over a week, starting December 3, 2018. If then tried, many novel and complex medical and legal issues arising under the statute will require evidentiary rulings as well as rulings concerning many proposed requests to charge. There will be much disagreement about the correct definition of the key words and phrases, and the applicability of various interpretations of the statutory defense to particular fact patterns. Resolution of these thorny issues in any obstetrical negligence case is likely to be inconsistent with the rulings made by other trial and appellate courts about similar issues.

If this case is tried in December, an appeal of this case is virtually guaranteed from one or both sides, because the resolution of numerous issues in this case are highly unlikely to be consistent with presently unknown future rulings by our appellate courts in the two pending cases on appeal. Retrial is likely to be the result, with consequential expense to all litigants as well as the court. If trial is stayed until after such appeals are concluded, this court will have guidance from the appellate courts about statutory definitions, applicability to certain fact patterns, and related matters. A stay would minimize the likelihood of an appeal and retrial regarding novel statutory issues. A stay would thus serve the interests of judicial economy and preservation of judicial resources and would also allow the parties to avoid unnecessary duplicative costs. For these reasons, at least one other court has determined that a stay is desirable and has entered its order accordingly.

The parties have conferred and counsel for Defendant has informed Plaintiff he cannot consent to the Motion.

WHEREFORE, Plaintiff moves this Honorable Court to GRANT her Motion for Partial Summary Judgment to preclude the expected statutory defense under **S. C. Code of Laws Section 15-32-230**. Or, in the alternative, Plaintiff moves this Court to GRANT her Motion for an Order granting a stay of trial until pending appeals in other cases resolve material issues likely to arise in this case.

Respectfully submitted,

GRAHAM LAW FIRM, P.A.

By: /s Edward L. Graham
Edward L. Graham
Attorney for Plaintiff

Post Office Box 550
Florence, SC 29503

October 8, 2018

Exhibit D

(Defendants' Motion for New Trial (with all supporting briefing))

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON
PLEAS FOR THE SIXTEENTH
JUDICIAL CIRCUIT

Angela Patton, as Next
Friend of Alexia
Lumpkin, a minor

Plaintiff,

v.

Case No. 2009-CP-46-05195

Gregory A. Miller, MD, *et al.*,

Defendants.

DEFENDANT GREGORY A. MILLER M.D. AND ROCK HILL GYNECOLOGICAL & OBSTETRICAL ASSOCIATES PA'S MOTION FOR A NEW TRIAL OR, FAILING THAT, FOR STATUTORY REDUCTION OF NON-ECONOMIC DAMAGES

Pursuant to Rule 59 and all other applicable rules of the South Carolina Rules of Civil Procedure, Defendants Gregory A. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A. respectfully move the Court for a New Trial Absolute¹ as to the medical negligence claim filed against them by this Plaintiff, through her next friend. Failing an order of a new trial, these defendants alternatively move the Court pursuant to S.C. Code Ann. § 15-32-220 to reduce the non-economic damages awarded by the jury consistent with the statutory cap codified therein. In support of this motion, these defendants show the Court as follows:

PROCEDURAL HISTORY

This is a medical malpractice case arising from the delivery of the minor plaintiff on April 5, 2007. On January 4-14, 2022, the case was tried before The Honorable William McKinnon with a jury duly empaneled. The jury returned a verdict in favor of Plaintiff on her sole remaining

¹ Any new trial awarded would only be as to properly tried issues. The Court correctly granted directed verdict as to gross negligence at the close of Plaintiff's case, as Plaintiff failed to offer any evidence of gross negligence or recklessness by the Defendants.

claim for medical negligence and awarded \$1.5M in economic damages and \$1.0M in non-economic damages.

STANDARD OF REVIEW

Following a jury trial, a new trial may be granted to all or any of the parties and on all or part of the issues “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State.” Rule 59(a), SCRCPP. A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there. *Bowers v. Watkins Carolina Exp., Inc.*, 259 S.C. 371, 376, 192 S.E.2d 190, 192 (1972).

Nevertheless, the trial court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness. *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921, 925 (Ct. App. 2008) (citing *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994)).

LEGAL GROUNDS UNDER RULE 59(a), SCRCPP

The specific grounds for this motion for a new trial are based upon the following errors of law occurring at the trial and objected to by these Defendants, and upon irregularities preventing these defendants from having a fair trial²:

1. This Court committed reversible error by: (a) denying Defendants’ Rule 15(b), SCRCPP motion to conform to the evidence which would have properly allowed the issue of statutory emergency - codified at S.C. Code Ann. § 15-32-230(A) - to be a defense, as it was tried by express or implied consent; and further by (b) denying Defendants’ request - at the charge

² Defendants reserve any and all other objections, points, rights, and positions asserted below or which are otherwise permissibly asserted on appeal not mentioned herein, and expressly do not waive such by not including them in this motion.

conference- to charge the jury with appropriate corresponding instructions pursuant to the statutory emergency defense.

The trial testimony by experts for both Plaintiff and Defendants included questions and answers regarding whether the circumstances surrounding delivery of the minor plaintiff constituted a genuine obstetrical emergency, whether the patient was medically stable, and whether there was an immediate threat of death or serious bodily injury. To that end, Plaintiff's expert Dr. Fred Duboe was questioned by Plaintiff's counsel extensively on the point of whether minor plaintiff's shoulder dystocia presented a *real* obstetrical emergency because of the relatively short time it took the Defendant to resolve it by his various maneuvers. Dr. Duboe, upon being questioned by Plaintiff counsel, opined that while a shoulder dystocia is an obstetrical emergency, it does not constitute a *real* emergency before about two minutes into the dystocia, because, in his opinion, a fetus has adequate reserves until at least two to four minutes before the fetus is in danger of some anoxic brain injury. On cross examination, Dr. Duboe agreed that shoulder dystocia does place the fetus at risk of death or serious bodily harm. The Defendant physician, Dr. Miller, qualified as an expert in OBGYN, opined that as soon as a shoulder dystocia is determined, the fetus is in immediate risk of serious bodily harm or death and that such a condition creates instability for the fetus and constitutes a genuine medical emergency, disputing Dr. Duboe's opinion that it is not a *real* emergency until minutes after the condition is determined. Plaintiff's only other standard of care expert, Dr. Edith Gurewitsch, whose 2013 deposition in this case was published to the jury, agreed that shoulder dystocia, once determined, is an obstetrical emergency that places the fetus in immediate threat of death or serious bodily harm. Both of Defendants' standard of care experts opined that a shoulder dystocia is an immediate obstetrical emergency that creates an immediate threat of death or serious bodily harm to the fetus.

The evidence consequently presented a genuine factual dispute over the emergency issue that was tried by the express or, at least, implied consent of the parties, since it was extensively discussed at trial. The issue was also sufficiently probed in discovery by counsel for Plaintiff and counsel for Defendants with experts for both sides questioned at length on the same, dating back to 2013 (Dr. Gurewitsch), then to 2018 (Dr. Chauhan and Dr. Ernest), and again in March of 2021 when Dr. Duboe was deposed. Amendments are to be freely allowed by the Court under such circumstances. Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result. *Soil & Material Eng'rs, Inc. v. Folly Assoc.*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987).

At a hearing in chambers (combined with a status conference) before the Hon. Daniel Hall in October, 2018, initially scheduled as a hearing on Plaintiff's Motion to Stay pending decision by the South Carolina Court of Appeals on two medical malpractice cases on appeal involving the Emergency Statute having been charged to the jury (wherein shoulder dystocia and subsequent injury to the minor plaintiff was alleged to have been the result of negligence on the part of the Defendant doctor), Defense counsel specifically informed Judge Hall that Defendants would seek a S.C. Code Ann. § 15-32-230(A) emergency charge, which expressly alerted plaintiff to the same. One of the cases on appeal had even been litigated by Plaintiff's counsel in Florence County. In chambers, Judge Hall agreed that, as a trial judge, he preferred having some guidance from the appellate courts on the application of that statute in this case, in order to try to avoid some judicial error that may give some grounds for an appeal on whatever decision he made to charge the jury on the statute or not to charge it. Plaintiff counsel, pursuant to his Motion for Stay, requested that the trial date in this case be continued until such point as the appellate courts of this state had an opportunity to provide guidance on the statute. Judge Hall granted such relief in order to receive

guidance on interpreting 15-32-230, which has since been forthcoming. See *e.g. Flowers v. Giep*, 2021 S.C. App. LEXIS 121 (2021).

The issue of the statutory emergency defense was consequently of no surprise to plaintiff and denial of the Rule 15(b) amendment to conform to the unobjected to evidence warrants a new trial. Plaintiff cannot demonstrate any prejudice from allowing the amendment, and has the burden of proving prejudice under these circumstances. Plaintiff's experts offered evidence (disagreed with by Defendants' experts) that there was no "real" (genuine) emergency for a period of time during the delivery, which, had that testimony been believed, would have given the Plaintiff an argument that the case should still be submitted to the jury (although 15-32-230 would have been charged). In other words, the fact that Plaintiff offered no evidence of gross negligence would not necessarily have terminated Plaintiff's case by virtue of the application of 15-32-230. But the Court's decision not to charge the statute, when the statute was well known by all - and in fact had been used as a reason to continue the trial in this very case earlier - was unfair and deprived the Defendants of a statutory defense.

Thus, respectfully, this Court should grant a new trial and this defense, belonging to the Defendants, should be allowed to be asserted in that trial and the jury so charged. By declining to charge the jury on 15-32-230, the jury was not charged with the controlling law, which is an abuse of discretion, and a new trial must be granted. An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). Here, Defendants can show prejudice because if their experts had been believed, the statutory requirements of 15-32-230 would have been met, and the jury would have awarded the Defendants a defense verdict. Because

the Court declined to charge the jury on the statute, this potential verdict result was wrongfully disallowed.

2. Additional reversible legal error was committed by the denial of Defendants' motion to exclude the expert causation opinion of Dr. Armenta. Dr. Armenta was first formally disclosed as a causation expert *less than 30 days prior to trial* and this Court - at a December 17, 2021 status conference - expressed its reluctance with permitting the naming of experts in such close proximity to trial. But subsequently allowing such causation testimony resulted in unfair surprise and denied Defendants sufficient preparation for trial. Plaintiff's expert being mentioned only as "a possible damages" expert was inaccurate, vague, and failed to adequately narrow the causation opinion about which Dr. Armenta was to testify. The testimony thus was given in an environment that deprived Defendants of the ability to prepare cross-examination and present rebuttal evidence effectively. Such late-breaking discovery in a complex medical negligence case that has been ongoing for years is impermissible for want of these Defendants' ability to have properly prepared for trial and effectively cross-examine Dr. Armenta on the critical issue of causation. Such due process and notice concerns warrant a new trial.

3. This Court also committed reversible legal error by permitting - over Defendants' objection - Dr. Resnik to physically examine the minor plaintiff in the jury's presence to highlight and demonstrate her obvious deformities, pain, and physical limitations. The condition of plaintiff's limitations had all been amply proven prior to Dr. Resnick's live physical examination. But the demonstrative physical examination live before the jury should not have been permitted. The allowance of such a live examination at trial deprives the Defendants of proper discovery ability, and leads to trial by ambush, effectively stifling and blocking forms of cross-examination which would be otherwise available. There is no ability for another expert to conduct a like,

competing live examination of the Plaintiff. Moreover, the live examination became unduly prejudicial as the demonstration in front of the jury of a minor plaintiff naturally had the tendency to arouse a strong sense of sympathy of the jury for the plaintiff and passion, prejudice or resentment against the Defendants. As a result, it was, respectfully, error to allow that examination, and a new trial should be granted. *See* Rule 403, SCRCP.

4. Respectfully, this Court prejudicially erred by failing to recuse his Honor from presiding over the trial in this case. Here, his Honor was previously a partner handling plaintiff medical malpractice cases at McGowan, Hood and Felder in Rock Hill, SC during 2011-2016. During that same time period, his Honor's former law partners at McGowan, Hood and Felder sued, on behalf of clients, the same medical practice involved in the case at bar, for medical malpractice arising from obstetrical care. The South Carolina Canons of the Judicial Code of Conduct 3(E)(1)(a) and (b) (as well as all other applicable canons) indicate that his Honor's impartiality might reasonably be questioned under such circumstances and required his recusal here. Respectfully, therefore, a new trial should be granted before a different judge³.

5. This Court further committed reversible legal error by permitting plaintiff- over defendants' objections- to refer to the standard of care as "safety rules" throughout the trial. The standard of care is not a "safety rule." It is instead a standard described by the Court in its jury instructions to the jury. The Court's allowance of the description by Plaintiff of the standard of care as a "safety rule" was inaccurate, unduly prejudicial, and wrongly infected the trial because of its repeated use by Plaintiff's counsel. A new trial should thus be granted.

³ This new trial motion is based as well on any and all grounds previously raised in the motion to recuse as if incorporated therein verbatim. Further, because the Court ruled against Defendants on the motion to recuse, the Defendants request that His Honor rule on all other motions and arguments. Such should not be construed as a waiver of the recusal points, however.

6. A new trial should also be awarded under the cumulative error doctrine. *See Cock—N—Bull Steak House, Inc. v. Generali Insurance Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial.)

7. “13th juror doctrine”- this Court is empowered, as the hypothetical “13th juror” to disagree with the jury’s verdict “on the facts” and order a new trial. This grant of a new trial, when made purely on the facts and without reference to a legal issue, is effectively fully within the trial court’s discretion and not subject to reversal by the appellate courts⁴. Defendants move that this Court exercise its powers in this regard and order a new trial pursuant to this doctrine.

GROUND FOR STATUTORY REDUCTION OF NON-ECONOMIC DAMAGES

If this Court declines to order a new trial, then at minimum, it must reduce the non-economic damages in this matter. S.C. Code. Ann. § 15-32-220(C) decrees that:

⁴ The South Carolina Supreme Court has refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. *South Carolina State Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E. (2d) 778 (1975). The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror “hangs” the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 226 S.E. (2d) 696 (1976). When an order granting a new trial is before the appellate courts, the review of the same is limited to the consideration of whether evidence exists to support the trial court's order. *South Carolina Department of Highways & Public Transportation v. Mooneyham*, 275 S.C. 205, 269 S.E. (2d) 329 (1980).

In an action on a medical malpractice claim when final judgment is rendered against more than one health care institution, or more than one health care provider, or any combination thereof, the limit of civil liability for noneconomic damages for each health care institution and each health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, and the limit of civil liability for noneconomic damages for all health care institutions and health care providers is limited to an amount not to exceed one million fifty thousand dollars for each claimant, except as provided in subsection (E).

Here, the jury awarded plaintiff \$1.0M in non-economic damages, well above the statutory cap permissible under the procedural posture of this case. Thus, this Court should reduce the non-economic damages award consistent with the statutory mandate. The maximum non-economic damages allowable would be \$350,000 (increased for current times based on the statutory requirements), because there is a single claimant. The claimant claims a non-divisible injury as well.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that this Court grant their Motion for New Trial Absolute as to Plaintiff's claim for Medical Negligence or, failing that, to otherwise grant a reduction of non-economic damages pursuant to statute, and for such other and further relief as is just and proper. Defendants further reserve the right to amend this motion to the extent permissible by law and supplement this motion with a memorandum of law in support. Defendants respectfully request argument prior to any disposition of this motion by the Court.

Respectfully submitted, this the 24th day of January 2022.

[Signature on Next Page]

S/Ashby W. Davis
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January 24, 2022
Greenville, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton, as Next
Friend of Alexia
Lumpkin, a minor

Plaintiff,

v.

Gregory A. Miller, MD, *et al.*,

Defendants.

IN THE COURT OF COMMON
PLEAS FOR THE SIXTEENTH
JUDICIAL CIRCUIT

Case No. 2009-CP-46-05195

**DEFENDANT GREGORY A. MILLER M.D.
AND ROCK HILL GYNECOLOGICAL &
OBSTETRICAL ASSOCIATES PA'S
MEMORANDUM IN SUPPPORT OF
MOTION FOR A NEW TRIAL AND
OPPOSITION TO PLAINTIFF'S MOTION
TO RECOVER INTEREST AND COSTS**

I. PROCEDURAL HISTORY

This is a medical malpractice case arising from the delivery of the minor plaintiff on April 5, 2007. On January 4-14, 2022, the case was tried before The Honorable William McKinnon with a jury duly empaneled. The jury returned a verdict in favor of Plaintiff on her sole remaining claim for medical negligence and awarded \$1.5M in economic damages and \$1.0M in non-economic damages. This memorandum is submitted in further support of Defendants' post-trial motions and in opposition to Plaintiff's motion to recover interest and costs¹.

II. STANDARD OF REVIEW

Following a jury trial, a new trial may be granted to all or any of the parties and on all or part of the issues "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCF. A motion for new trial is not necessary to preserve for review on appeal a question which has been fairly and properly raised in the trial court and passed upon there. *Bowers v. Watkins Carolina Exp., Inc.*, 259 S.C. 371, 376, 192 S.E.2d 190, 192 (1972).

¹ Defendants assert all grounds in their motion. This Memorandum may further support only certain grounds. This does not mean any of Defendants' grounds are abandoned.

Nevertheless, the trial court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness. *Ex parte Kent*, 379 S.C. 633, 640-41, 666 S.E.2d 921, 925 (Ct. App. 2008) (citing *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 449, 450 S.E.2d 582, 584-85 (1994)).

III. ARGUMENT (NEW TRIAL MOTION)

A. THIS COURT SHOULD GRANT THESE DEFENDANTS A NEW TRIAL BECAUSE THE COURT ERRONEOUSLY DENIED THEIR RULE 15(B), SCRPC MOTION TO CONFORM TO THE EVIDENCE ON THEIR STATUTORY EMERGENCY DEFENSE- S.C. CODE ANN. § 15-32-230(A)- AND FURTHER COMMITTED PREJUDICIAL ERROR BY FAILING TO CHARGE THE JURY ON THE STATUTORY DEFENSE ACCORDINGLY.

This Court committed reversible error by: (a) denying Defendants' Rule 15(b), SCRPC motion to conform to the evidence which would have properly allowed the issue of statutory emergency-codified at S.C. Code Ann. § 15-32-230(A)- to be a defense, as it was tried by express or implied consent; and further by (b) denying Defendants' request to charge the jury with appropriate corresponding instructions pursuant to the statutory emergency defense.

It is well-settled in South Carolina that Rule 15(b), SCRPC permits a party to move to amend its pleading to add an unpled affirmative defense to conform to the evidence presented at trial as defendants did here. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224-25 (2010). And when unpled issues are tried by the express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings." *Staubes v. City of Folly Beach*, 339 S.C. 406, 413, 529 S.E.2d 543, 546 (2000), quoting Rule 15(b), SCRPC. To that end, the Court of Appeals has decreed, in salient part, that:

Leave to amend pleadings pursuant to Rule 15, SCRPC, shall be liberally and freely given when justice so requires and does not prejudice any other party. **The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. The party opposing the amendment has the burden of establishing prejudice.** **This**

rule strongly favors amendments and the court is encouraged to freely grant leave to amend.

Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276 (2005) (emphasis added). South Carolina’s appellate courts have opined that a trial court abuses its discretion when it denies a Rule 15(b), *SCRCP* motion when the opposing party had express knowledge that the case would be tried on the issue on which amendment was later sought and evidence on that issue was admitted at trial. The Supreme Court’s opinion in *Pool v. Pool*, 329 S.C. 424, 494 S.E.2d 820 (1998) is instructive on this point.

In *Pool*, a domestic relations matter, the wife argued that the Court of Appeals erred by affirming an attorneys’ fee award to the husband because he failed to request those in his initial pleadings. *Pool*, 329 S.C. at 325, 494 S.E.2d, 821. Husband, however, appropriately filed a Rule 15(b), *SCRCP* to amend his pleading, which was granted, and evidence regarding the issue was admitted. *Id.* at 327, 494 S.E.2d at 822. Critical to the Supreme Court’s affirmance, was that wife **“knew well before trial that [defendant] Husband was seeking attorney’s fees and costs.”** *Id.* at 329, 494 S.E.2d at 824. (emphasis added). Consequently, the Court concluded that wife necessarily could not show prejudice from the Rule 15(b) amendment, particularly in light of Rule 15’s “bias in favor of granting amendments.” *Id.*; see also *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999) (reversing denial of motion to amend complaint since there was no prejudice established by the non-movant as the County “had notice that Petitioner wanted to supplement the complaint[.]”); *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 287, 607 S.E.2d 711, 717 (2005) (reversing denial of motion to amend answer to add a tort claims act defense as an abuse of discretion since the sought amendment “was not a surprise to Parker.”)

So too here. Here, plaintiff cannot meet her required burden of establishing prejudice from the amendment to add the statutory emergency defense, and thus amendment should have been

granted. On October 8, 2018- *more than* **three years before trial-** **plaintiff** filed a motion to stay the trial proceedings in this matter until the Court of Appeals resolved pending appeals in different cases **resolving the precise statutory emergency defense regarding which defendants sought a conforming amendment at trial-** S.C. Code Ann. § 15-32-230. (Ex. A- Plaintiff’s Motion to Stay). Plaintiff’s motion specifically revealed that she understood that the emergency statute “represent[s] a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies.” *Id.* at p. 1. Plaintiff’s motion was expressly predicated on “***the [defendants’] expected statutory defense*** under S. C. Code of Laws Section 15-32-230.” *Id.* (emphasis added). Consequently, plaintiff moved “for an Order granting a stay of trial until pending appeals in other cases resolve material issues likely to arise in this case,” and explained that “[t]here are two appellate cases now pending before the S.C. Court of Appeals which address various novel and complex legal and medical issues arising under S. C. Code of Laws Section 15-32-230,” [and] [t]**hose issues also arise in this case.**” *Id.* at p. 2 (emphasis added); *cf. Flowers v. Giep*, 2021 S.C. App. LEXIS 121 (2021).

In fact, plaintiff was so confident that interpretive issues surrounding the emergency statute would arise at trial that she represented to this Court in the stay motion that :

[i]f this case is tried in December, an appeal of this case is virtually guaranteed from one or both sides, because the resolution of numerous issues in this case are highly unlikely to be consistent with presently unknown future rulings by our appellate courts in the two pending cases on appeal. Retrial is likely to be the result, with consequential expense to all litigants as well as the court. If trial is stayed until after such appeals are concluded, this court will have guidance from the appellate courts about statutory definitions, applicability to certain fact patterns, and related matters. A stay would minimize the likelihood of an appeal and retrial regarding novel statutory issues.

Id. at p. 2.

At an in-chambers hearing and status conference before the Hon. Daniel Hall in October, 2018, Defense counsel specifically informed Judge Hall that Defendants would seek a S.C. Code Ann. § 15-32-230(A) emergency charge, **as plaintiff's previously filed motion for stay had already recognized**. At the hearing, Judge Hall agreed that, as a trial judge, he preferred having guidance from the appellate courts on the application of the emergency statute in this case, in order to try to avoid error that may give some grounds for an appeal on whatever decision he made to charge the jury on the statute or not to charge it.² **Plaintiff counsel**, pursuant to his Motion for Stay, requested that the trial date in this case be continued until such point as the appellate courts of this state had an opportunity to provide guidance on the statute. Judge Hall granted such relief in order to receive guidance on interpreting 15-32-230, which has since been forthcoming. (Ex. B-Order Granting Motion to Stay).

Under these compelling circumstances, plaintiff should be judicially estopped from taking a contrary position now to protect the integrity of the judicial process. “Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597, 748 S.E.2d 781, 788 (2013) (quoting *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004)). Under the doctrine, a party is precluded from misrepresenting the facts in order to gain an unfair advantage, as plaintiff seeks to do here. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) Once “a party has

² When a transcript is lacking, the courts of this state may appropriately rely on counsel's representations to the Court because South Carolina attorneys are bound by several professional rules of candor contained in the SCACR. *USAA Prop. & Cas Ins. v. Clegg*, 377 S.C. 643, 651-52, 661 S.E.2d 791, 795-96 (2008); see also *State v. Cooper*, 2019 S.C. App. Unpub. LEXIS 55 at *2 n. 2 (Although some factual chronology was not in the record, “we accept counsel's representations to this Court.”)

formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Id.*

For the doctrine of judicial estoppel to apply, the following elements must be satisfied:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. at 598, 748 S.E.2d at 788. Judicial estoppel applies here.

This plaintiff in October 2018 specifically represented in a motion filed with this Court that she expected the statutory emergency defense to be invoked by defendants as those issues arise in this case and even successfully sought a stay of trial so this Court could get guidance from the appellate courts on the statute. But at trial, plaintiff suddenly claimed surprise from defendants’ motion to amend to add the emergency statute as a defense to conform to the evidence, and plaintiff argued that she would have prepared for her case differently if she had known defendants would seek to rely on the defense. These positions are polar opposites. In May 2018, plaintiff expressly acknowledged in her written motion that the statutory defense would be requested by defendants trial, but in January 2022, she claimed she had no idea that it would. Consequently, this Court should invoke the judicial estoppel to protect this Court’s integrity here. *See Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474, (2000) (Plaintiff’s claims of ownership over defendants’ corporation were barred by the doctrine of judicial estoppel because such subsequent factual claims were in direct contravention with plaintiff’s earlier assertions in the litigation).

Regardless of the application of judicial estoppel, the testimony presented at trial confirmed that the emergency statute was front and center, and the amendment should have been allowed.

Experts for both Plaintiff and Defendants included questions and answers regarding whether the circumstances surrounding delivery of the minor plaintiff constituted a genuine obstetrical emergency, whether the patient was medically stable, and whether there was an immediate threat of death or serious bodily injury. Plaintiff's expert Dr. Fred Duboe was questioned by Plaintiff's counsel extensively on the point of whether minor plaintiff's shoulder dystocia presented a *real* obstetrical emergency because of the relatively short time it took the Defendant to resolve it by his various maneuvers. Dr. Duboe, upon being questioned by Plaintiff counsel, opined that while a shoulder dystocia is an obstetrical emergency, it does not constitute a *real* emergency before about two minutes into the dystocia, because, in his opinion, a fetus has adequate oxygen reserves until at least two to four minutes before the fetus is in danger of some anoxic brain injury. On cross examination, Dr. Duboe agreed that shoulder dystocia does place the fetus at risk of death or serious bodily harm. The Defendant physician, Dr. Miller, qualified as an expert in OBGYN, opined that as soon as a shoulder dystocia is determined, the fetus is in immediate risk of serious bodily harm or death and that such a condition creates instability for the fetus and constitutes a genuine medical emergency, disputing Dr. Duboe's opinion that it is not a *real* emergency until minutes after the condition is determined. Plaintiff's only other standard of care expert, Dr. Edith Gurewitsch, whose 2013 deposition in this case was published to the jury, agreed that shoulder dystocia, once determined, is an obstetrical emergency that places the fetus in immediate threat of death or serious bodily harm. Both of Defendants' standard of care experts opined that a shoulder dystocia is an immediate obstetrical emergency that creates an immediate threat of death or serious bodily harm to the fetus. Further, Dr. Ernest, a qualified defense expert in OBGYN and Maternal Fetal Medicine, testified at trial that the fetus in this case, based on the post-delivery fetal blood labs with a base excess of minus 13, demonstrated solid evidence that the fetus in this case was

near death and likely would have died had Dr. Miller not delivered her when he did, clearly establishing the medical instability and immediate threat of death to the fetus in this case.

The evidence consequently presented a genuine factual dispute over the emergency issue that was tried by the express or, at least, implied consent of the parties, as it was extensively discussed at trial. The issue was also sufficiently probed in discovery by counsel for Plaintiff and counsel for Defendants with experts for both sides questioned at length on the same, dating back to 2013 (Dr. Gurewitsch), then to 2018 (Dr. Chauhan and Dr. Ernest), and again in March of 2021 when Dr. Duboe was deposed. Amendments are to be freely allowed by the Court under such circumstances. See *Soil & Material Eng'rs, Inc. v. Folly Assoc.*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App.1987) (Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result.) *Id.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct.App.1987) "Simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late. The question is one of prejudice to the opposing party."

The issue of the statutory emergency defense was consequently of no surprise to plaintiff, and she cannot show prejudice. As in *Pool, Tanner, and Parker*, plaintiff cannot establish prejudice because she had express knowledge that the emergency defense was going to be tried- as revealed in her motion to stay- and thus had over three years to prepare to refute it. This Court's denial of the Rule 15(b) amendment to conform to the unobjected to evidence thus warrants a new trial. Further, plaintiff's experts offered evidence (disagreed with by Defendants' experts) that there was no "real" (genuine) emergency for a period of time during the delivery, which, had that testimony been believed, would have given the Plaintiff an argument that the case should still be submitted to the jury (although 15-32-230 would have been charged). In other

words, the fact that Plaintiff offered no evidence of gross negligence would not necessarily have terminated Plaintiff's case by virtue of the application of 15-32-230. But the Court's decision not to charge the statute, when the statute was well known by all - and in fact had been used as a reason to continue the trial in this very case earlier - was unfair and prejudicial and deprived the Defendants of a valid statutory defense.

Thus, respectfully, this Court should grant a new trial and this defense, belonging to the Defendants, should be allowed to be asserted in that trial and the jury so charged. By declining to charge the jury on 15-32-230, the jury was not charged with the controlling law, which is an abuse of discretion, and a new trial must be granted. "Whe[n] a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). Here, Defendants can show prejudice because if their experts had been believed, the statutory requirements of 15-32-230 would have been met, and the jury would have awarded the Defendants a defense verdict. Because the Court declined to charge the jury on the statute, this potential verdict result was wrongfully disallowed. A new trial is therefore warranted under Rule 59, *SCRCP*.

B. THIS COURT'S DENIAL OF DEFENDANTS' MOTION TO EXCLUDE THE CAUSATION OPINIONS OF PLAINTIFF'S UNTIMELY UNDISCLOSED EXPERT- DR. ARMENTA- ALSO WARRANTS A NEW TRIAL

"Where a party fails timely to disclose the identity of an expert witness, the question of whether the witness' testimony may be received in evidence is left largely to the discretion of the trial judge." *Tribble v. Hentz* 285 S.C. 616, 618, 330 S.E.2d 560, 562 (Ct. App. 1985). But that discretion has its limits. The Court of Appeals has articulated that "[a] party's failure to provide

timely notice of a witness triggers the trial court's obligation to consider the [*Jumper*] factors.” *Burke v. Republic Parking Sys.*, 421 S.C. 553, 560, 808 S.E.2d 626, 629 (2017). Those requisite considerations are as follows:

(1) the type of witness involved; (2) the content of the evidence emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party.

Jumper v. Hawkins, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001). This Court failed to appropriately apply this mandatory analysis at trial. The application of this analysis illustrates that Dr. Armenta's expert causation opinion should have been excluded pursuant to defendants' motion to exclude at trial.

Dr. Armenta was first formally disclosed as a causation expert *less than 30 days prior to trial* and this Court- at a December 17, 2021 status conference- expressed its reluctance with permitting the naming of experts in such close proximity to trial. This Court thus effectively allowed defendants' motion in *limine* to exclude this novel expert opinion. But subsequently allowing such causation testimony at trial resulted in unfair surprise and denied Defendants sufficient preparation for trial. Plaintiff's expert being mentioned only as “a possible damages” expert was inaccurate, vague, and failed to adequately narrow the causation opinion about which Dr. Armenta was to testify. The testimony thus was given in an environment that deprived Defendants of the ability to prepare sufficient cross-examination and present rebuttal evidence effectively. Such late-breaking discovery in a complex medical negligence case that has been ongoing for years is impermissible for want of these Defendants' ability to have properly prepared for trial and effectively cross-examine Dr. Armenta on the critical issue of causation. Such due process and notice concerns warrant a new trial here. *See Arthur v. Sexton Dental Clinic*, 368 S.C.

326, 341 628 S.E.2d 894, 902 (Ct. App. 2006) (concluding that the respondent was significantly surprised and prejudiced when the appellant failed to give notice of two witnesses until the Friday before trial because the respondent was not able to depose the witnesses before trial).

C. PERMITTING PLAINTIFF'S PHYSICIAN WITNESS TO PHYSICALLY EXAMINE PLAINTIFF IN FRONT OF THE JURY WAS UNDULY PREJUDICIAL

This Court also committed reversible legal error by permitting- over Defendants' objection- Dr. Resnik to physically examine the minor plaintiff in the jury's presence to highlight and demonstrate her obvious deformities, pain, and physical limitations. The condition of plaintiff's limitations had all been amply proven prior to Dr. Resnick's live physical examination. But the demonstrative physical examination live before the jury should not have been permitted. The allowance of such a live examination at trial deprives the Defendants of proper discovery ability, and leads to trial by ambush, effectively stifling and blocking forms of cross-examination which would be otherwise available. There is no ability for another expert to conduct a like, competing live examination of the Plaintiff. Moreover, the live examination became unduly prejudicial as the demonstration in front of the jury of a minor plaintiff naturally had the tendency to arouse a strong sense of sympathy of the jury for the plaintiff and passion, prejudice or resentment against the Defendants. *Peters v. Hockley*, 152 Ore. 434, 53 P. 2d 1059 (1936) (abuse of discretion to allow demonstration of plaintiff's pain from witness stand by asking the plaintiff to raise arm, as this was calculated to arouse sympathy). As a result, it was, respectfully, error to allow that examination, and a new trial should be granted. See Rule 403, SCRCP.

IV. ARGUMENT (OPPOSITION TO PLAINTIFF'S POST-TRIAL MOTION FOR INTEREST AND COSTS)

On January 28, 2022 plaintiff filed a Rule 68 motion to recover interests and costs. Plaintiff contends that since she made an Offer of Judgment on October 4, 2010 and these defendants did

not accept the offer, plaintiff is entitled to court costs and interest at 8% computed on the amount of the verdict from the date of her Offer of Judgment to the entry of judgment. This argument lacks merit for two reasons.

First, Plaintiff served her Offer of Judgment on a complaint that was later superseded and rendered inoperative by her filing of an amended complaint. Consequently, the verdict- on which Rule 68(b) states that interest is to be calculated- was not rendered by the jury in plaintiff's favor on the earlier nullified complaint, which was rendered moot. Plaintiff filed her summons and complaint on November 25, 2009. (Ex C- Original Complaint). Less than a year later, plaintiff served her Rule 68 Offer of Judgment on October 4, 2010. (Ex D- Offer of Judgment). But, on November 29, 2012, plaintiff filed an amended complaint that added an additional party defendant. (Ex E- Amended Complaint).

The Court of Appeals has opined that an amended complaint supersedes an earlier filed complaint and thus "is no longer the operative pleading in the case." *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (1985). Thus, any questions related to the legal sufficiency or effectiveness of that superseded complaint are moot. *Id.* The text of Rule 68, SCRCP supports this conclusion as it states that "[a]ny party in a civil action . . . may file . . . a written offer of judgment . . . directed to the opposing party, *offering to take judgment in the offeror's favor*, or to allow judgment to be taken against the offeror for a sum stated therein . . ." (emphasis added). Under Rules 2 and 3 of the SCRCP, it is the filing of the complaint, which triggers the offer of judgment process, and any judgment is necessarily issued because of- and on- the complaint.

While defendants did not accept plaintiff's Offer of Judgment on plaintiff's original complaint, that pleading was rendered moot in 2012. Under such circumstances, Plaintiff should have exercised her prerogative to revive the offer of judgment process by "fil[ing] a subsequent

offer of judgment [on the amended complaint] in any amount which supersedes any earlier offer that was rejected by the offeree.” Rule 68(a), *SCRCP*. Otherwise, Rule 68 would operate in a way that squarely contravenes settled principles. An offer of judgment is triggered by the filing of a complaint and- if accepted- any judgment issued is rendered on that complaint. But plaintiff’s filing of her amended complaint rendered her earlier complaint and the directly connected offer of judgment on that complaint void. This Court, therefore, cannot impose interest and costs on the jury’s verdict rendered *pursuant to the amended complaint* because plaintiff failed to serve a subsequent Offer of Judgment related to the new operative pleading. An offer of judgment on a complaint that has been superseded is inoperative and rendered moot under *Schein*. Thus, this Court lacks the authority under such circumstances to apply Rule 68 costs and interest against these defendants in the manner that Plaintiff seeks here.

Second, plaintiff is otherwise barred from claiming any pre-judgment interest because she failed to plead for such relief in her amended complaint. It has been well established under South Carolina law that parties must plead for prejudgment interest in order for it to be recovered. See *McMillan v. S.C. Dep’t of Agric.*, 364 S.C. 60, 74, 611 S.E.2d 323, 330 (Ct. App. 2005) (“Prejudgment interest must be specifically pled in order to be recovered.”) “If no request for prejudgment interest is made in the pleadings, it cannot be recovered on appeal.” *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003) (citation omitted).

CONCLUSION

Based upon the foregoing, Defendants respectfully request that this Court grant their Motion for New Trial Absolute as to Plaintiff’s claim for Medical Negligence or, failing that, to otherwise grant a reduction of non-economic damages pursuant to statute and deny Plaintiff’s

motion for prejudgment interest and court costs, and for such other and further relief as is just and proper.

Respectfully submitted, this the 14th day of February 2022.

DAVIS & SNYDER, P.A.

s/Ashby W. Davis

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ATTORNEY FOR DEFENDANTS

Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	C/A NO.: 2009-CP-46-5195
Angela Patton, as Next Friend of	)	
Alexia Lumpkin a minor,	)	
	)	MOTION FOR PARTIAL SUMMARY
Plaintiff,	)	JUDGMENT, OR IN THE ALTERNATIVE, AN
	)	ORDER GRANTING A STAY OF TRIAL UNTIL
vs.	)	PENDING APPEALS IN OTHER CASES
	)	RESOLVE MATERIAL ISSUES LIKELY TO
Dr. Gregory A. Miller, and Rock Hill	)	ARISE IN THIS CASE
Gynecological & Obstetrical Associates,	)	
P.A.,	)	
	)	
Defendants.	)	
_____)	)	

PLEASE TAKE NOTICE that the Plaintiff, Angela Patton, by and through her undersigned Counsel, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure moves for Partial Summary Judgment as this Plaintiff is entitled to judgment as a matter of law.

1. Plaintiff hereby moves for Partial Summary Judgment to preclude the expected statutory defense under **S. C. Code of Laws Section 15-32-230**, representing a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies. This statute fails to define its key words and phrases, including, *inter alia*, “genuine emergency,” “immediate threat,” and “medically stable.” Plaintiff asserts that the statute, properly construed, is immaterial to the facts and circumstances of this case. That is because the plaintiff was a patient of the defendants during her prenatal care; and this case involves, *inter alia*, no “genuine emergency” outside of Defendant Dr. Miller’s specialty practice. This motion is based upon such authorities and materials as will be presented to the court at or before the hearing of this motion.

2. In the alternative, Plaintiff moves for an Order granting a stay of trial until pending appeals in other cases resolve material issues likely to arise in this case. There are two appellate cases now pending before the S. C. Court of Appeals which address various novel and complex legal and medical issues arising under **S. C. Code of Laws Section 15-32-230**. Those issues also arise in this case. This case is currently scheduled to be tried for over a week, starting December 3, 2018. If then tried, many novel and complex medical and legal issues arising under the statute will require evidentiary rulings as well as rulings concerning many proposed requests to charge. There will be much disagreement about the correct definition of the key words and phrases, and the applicability of various interpretations of the statutory defense to particular fact patterns. Resolution of these thorny issues in any obstetrical negligence case is likely to be inconsistent with the rulings made by other trial and appellate courts about similar issues.

If this case is tried in December, an appeal of this case is virtually guaranteed from one or both sides, because the resolution of numerous issues in this case are highly unlikely to be consistent with presently unknown future rulings by our appellate courts in the two pending cases on appeal. Retrial is likely to be the result, with consequential expense to all litigants as well as the court. If trial is stayed until after such appeals are concluded, this court will have guidance from the appellate courts about statutory definitions, applicability to certain fact patterns, and related matters. A stay would minimize the likelihood of an appeal and retrial regarding novel statutory issues. A stay would thus serve the interests of judicial economy and preservation of judicial resources and would also allow the parties to avoid unnecessary duplicative costs. For these reasons, at least one other court has determined that a stay is desirable and has entered its order accordingly.

The parties have conferred and counsel for Defendant has informed Plaintiff he cannot consent to the Motion.

WHEREFORE, Plaintiff moves this Honorable Court to GRANT her Motion for Partial Summary Judgment to preclude the expected statutory defense under **S. C. Code of Laws Section 15-32-230**. Or, in the alternative, Plaintiff moves this Court to GRANT her Motion for an Order granting a stay of trial until pending appeals in other cases resolve material issues likely to arise in this case.

Respectfully submitted,

GRAHAM LAW FIRM, P.A.

By: /s Edward L. Graham
Edward L. Graham
Attorney for Plaintiff

Post Office Box 550
Florence, SC 29503

October 8, 2018

Certificate of Electronic Notification

Recipients

Edward Graham - Notification transmitted on 10-31-2018 10:10:11 AM.

Ashby Davis - Notification transmitted on 10-31-2018 10:10:11 AM.

Keith Knowlton - Notification transmitted on 10-31-2018 10:10:11 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2009CP4605195

Official File Stamp: 10-31-2018 10:10:04 AM

Court: CIRCUIT COURT

Common Pleas

York

Case Caption: Angela Patton VS Gregory A Miller , defendant, et al

Document(s) Submitted: Order/Electronic Form 4 Granting Motion to Stay
Order/Electronic Form 4

Filed by or on behalf of: Daniel D. Hall

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Ashby W. Davis for Gregory A Miller et al

Edward L Graham for Angela Patton

Keith David Knowlton for Gregory A Miller et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

ELECTRONICALLY FILED - 2018 Oct 31 10:10 AM - YORK - COMMON PLEAS - CASE#2009CP4605195
ELECTRONICALLY FILED - 2022 Feb 14 1:46 PM - YORK - COMMON PLEAS - CASE#2009CP4605195

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Dr. Gregory A. Miller and Rock Hill
Gynecological & Obstetrical Associates,
P.A.,

Defendants.

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.:

2009-CP-46-05195

COMPLAINT
(Jury Trial Requested)

FILED-RECEIVED
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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

COMES NOW the Plaintiff, complaining of Defendants above named and would show unto the Court as follows:

1. Plaintiff Angela Patton is a citizen and resident of York County, South Carolina, and brings her action as Next Friend of her daughter, Alexia Lumpkin, (hereinafter, "Alexia ")
2. Defendant Gregory A. Miller (hereinafter, "Dr. Miller") is, upon information and belief, a citizen and resident of York County, South Carolina, who was, upon information and belief, at all times relevant to her action, a physician duly licensed to practice medicine within the State of South Carolina.
3. Defendant Dr. Miller held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.
4. Defendant Dr. Miller maintained an office in York County, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Dr. Miller was a shareholder, employee and/or agent of a professional association known as "Rock Hill Gynecological & Obstetrical Associates, P.A." (hereinafter, "Rock Hill Gynecology") and had an ownership, employment and/or contractual relationship with Defendant Rock Hill Gynecology.

6. Defendant Rock Hill Gynecology, and its predecessor(s) and/or successor(s), if any, was at all times relevant hereto, a professional association, which held itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical and gynecological care.

7. Defendant Rock Hill Gynecology is named as a party to this action by virtue of the acts and/or omissions of its shareholder(s), employee(s) and agent(s), within the course and scope of that respective ownership, employment and agency, for which it is liable to Plaintiff under the doctrine respondeat superior.

8. Prior to April 5, 2007, Angela Patton, mother of Alexia Lumpkin, became pregnant and submitted herself to the care and attention of Dr. Miller of Rock Hill Gynecological & Obstetrical Associates, P.A., for pre-natal and obstetrical care.

9. On April 5, 2007, Defendant Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton (hereinafter, "Angela") at the Piedmont Medical Center (hereinafter, "Hospital") in York County, S.C.

10. Alexia Lumpkin was a healthy baby prior to April 5, 2007, when her mother, Angela Patton, was admitted to the Hospital.

11. Dr. Miller took charge of the health care of Angela and her baby upon Angela's admittance to the Hospital.

12. The Defendant, Dr. Miller owed Angela Patton and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

13. Defendant Rock Hill Gynecology owed Plaintiff and her daughter a duty of providing obstetrical, nursing and support care consistent with generally accepted standards of obstetrical offices under similar situations.

14. Defendants breached their duties of care to Angela Patton and her daughter Alexia, and were negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Alexia sustained severe bodily injuries, losses and damages.

15. Defendant Dr. Miller was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of

shoulder dystocia;

- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia ;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, traction and/or torsion;
- (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (i) in mismanagement of labor and delivery;
- (j) in mismanagement of shoulder dystocia;
- (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;
- (l) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
- (n) such other failures and refusals as may be identified during discovery and the trial of her case.

16. Defendant Rock Hill Gynecology, its predecessor(s) and/or successor(s), if any, and the shareholder(s), agent(s), and employee(s) thereof, were negligent,

reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its shareholder(s), employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin.
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;
- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;

- (g) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in using improper delivery technique;
- (i) in using improper and excessive force, traction and/or torsion;
- (j) in allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;
- (n) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (o) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (p) such other failures and refusals as may be identified during discovery and trial of this case.

17. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, and Rock Hill Gynecological & Obstetrical Associates, P.A., Alexia

Lumpkin has sustained certain injuries, losses and damages, stated with particularity as follows:

- (a) Direct violent and traumatic injuries to various bodily shareholders of Alexia Lumpkin, including, but not limited to, permanent traumatic injury to the nerves which innervate her left shoulder and arm, commonly known as Erb's palsy;
- (b) Adverse effects on various other bodily shareholders and/or functions, such as gait, balance and skeletal and muscular symmetry;
- (c) Past and future medical expenses;
- (d) Life care management plan expense;
- (e) Permanent impairments and disabilities;
- (f) Disfigurement;
- (g) Physical pain and suffering;
- (h) Mental, emotional and psychological harm;
- (i) Adverse effect on the future employability, earnings and earning capacity;
- (j) Loss of enjoyment of life; and
- (k) such further injuries, losses and damages as may be revealed through discovery and trial of her case.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages

against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of her action; and for such other and further relief as her Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
Mary H. Watters
Post Office Box 550
Florence, S.C. 29503
Attorney for Plaintiff

November 20, 2009



Graham
Law Firm, P.A.

Edward L. Graham
Mary H. Watters

383 W. Cheves Street (29501)
P. O. Box 550
Florence, SC 29503

Telephone (843)662-3281
Facsimile (843) 665-0254

October 6, 2010

Ashby W. Davis, Esquire
Davis & Snyder, P.A.
5 Hawthorne Park Court
Greenville, South Carolina 29615

RE: Angela Patton, as Next Friend of Alexia Lumpkin v.
Gregory A. Miller, MD & Rock Hill Gynecological &
Obstetrical Associates, P.A.
C/A No.: 2009-CP-46-3144

Dear Mr. Davis:

Enclosed for service upon you as attorney for Gregory A. Miller, MD and Rock Hill Gynecological & Obstetrical Associates, P.A. is a filed copy of the Plaintiff's Offer of Judgment and Certificate of Service in the above referenced matter.

Should you have any questions, please do not hesitate to call.

With kindest regards, I am,

Sincerely yours,

Greta R. Elliotte
Paralegal to Edward L. Graham & Mary Watters

gre
Enclosure



STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

Angela Patton, as Next Friend of)
Alexia Lumpkin, a minor,)

Plaintiff,)

v.)

Gregory A. Miller, M.D., Rock Hill)
Gynecological & Obstetrical)
Associates, . P.A.)

Defendants.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

OFFER OF JUDGMENT

FILED-RECEIVED
2010 OCT -4 AM 8:54
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

TO: ASHBY W. DAVIS, ATTORNEY FOR DEFENDANTS, GREGORY A. MILLER, M.D. AND ROCK HILL GYNECOLOGICAL & OBSTETRICAL ASSOC., P.A.:

The Plaintiff above-named, by and through its undersigned attorney, hereby offers to have judgment entered in favor of the minor Plaintiff and against the Defendants for the sum of \$1,000,000.00 (ONE MILLION AND NO/100 DOLLARS) pursuant to Rule 68 of the South Carolina Rules of Civil Procedure and S. C. Code Ann. § 15-35-400. Within twenty days of notification of this offer, the Defendant may file with the Clerk of Court a written acceptance of this Offer of Judgment, at which time the Clerk shall enter judgment for the sum stated herein. If the Offer of Judgment is not accepted within twenty days of notification of same, the offer shall be considered rejected and no evidence of the offer will be admissible, except in a proceeding after trial to fix costs, interest, attorney's fees, and other recoverable monies. The Plaintiff retains the right to withdraw the Offer of Judgment at any time prior to its acceptance or prior to the date on which it would be considered rejected if appropriate notice is provided to Defendants and/or their counsel, pursuant to the South Carolina Rules of Civil Procedure.

The Plaintiff desires to allocate the judgment sum between cash payable to Plaintiff's attorney and cash payable to an annuity issued to fund certain periodic future payments. The Plaintiff's annuity broker is willing to work in good faith with the Defendant's annuity broker to protect the interests of each side.

If this Offer of Judgment is not accepted and the Plaintiff obtains a verdict or determination at least as favorable as the rejected offer, the Plaintiff shall be allowed to recover from the Defendants: (1) any administrative, filing, or other court costs from the date of the offer until entry of judgment and (2) an increase in the verdict or award of eight percent (8%) interest computed on the amount of the verdict or award from the date of the subject offer to the entry of judgment.

Respectfully submitted,

GRAHAM LAW FIRM, P.A.

By: _____

Edward L. Graham
Mary H. Watters
Post Office Box 550
Florence, South Carolina 29503
843-662-3281
Attorneys for Plaintiff

September 28, 2010
Florence, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒ mailing,
☐ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil Procedure.

This 6th day of October, 2010.

Marta R. Elliott

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

v.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

AMENDED COMPLAINT

FILED-RECEIVED
2012 NOV 29 AM 10:59
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

COMES NOW the Plaintiff complaining of Defendants above named and would show unto the Court as follows:

1. Plaintiff Angela Patton is a citizen and resident of York County, South Carolina, and brings her action as Next Friend of her daughter, Alexia Lumpkin, (hereinafter, "Alexia ")

2. Defendant Gregory A. Miller (hereinafter, "Dr. Miller") is, upon information and belief, a citizen and resident of York County, South Carolina, who was, upon information and belief, at all times relevant to her action, a physician duly licensed to practice medicine within the State of South Carolina.

3. Defendant Dr. Miller held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.

4. Defendant Dr. Miller maintained an office in York County, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Dr. Miller was a shareholder, employee and/or agent of a professional association known as "Rock Hill Gynecological & Obstetrical Associates, P.A." (hereinafter, "Rock Hill Gynecology") and had an ownership, employment and/or contractual relationship with Defendant Rock Hill Gynecology.

6. Defendant Rock Hill Gynecology, and its predecessor(s) and/or successor(s), if any, was at all times relevant hereto, a professional association, which held itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical and gynecological care.

7. Defendant Rock Hill Gynecology is named as a party to this action by virtue of the acts and/or omissions of its shareholder(s), employee(s) and agent(s), within the course and scope of that respective ownership, employment and agency, for which it is liable to Plaintiff under the doctrine respondeat superior.

8. Defendant Amisub of South Carolina d/b/a Piedmont Medical Center (hereinafter "Piedmont Medical Center") is named as a party to this action by virtue of its institutional acts and omissions as well as the acts and/or omissions of its employee(s), within the course and scope of that respective employment, for which it is liable to Plaintiff under the doctrine of respondeat superior.

9. Prior to April 5, 2007, Angela Patton, mother of Alexia Lumpkin, became pregnant and submitted herself to the care and attention of Dr. Miller of Rock Hill Gynecological & Obstetrical Associates, P.A., for pre-natal and obstetrical care.

10. On April 5, 2007, Defendant Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton (hereinafter, "Angela") at the Piedmont Medical Center (hereinafter, "Hospital") in York County, S.C.

11. Alexia Lumpkin was a healthy baby prior to April 5, 2007, when her mother, Angela Patton, was admitted to the Hospital.

12. Dr. Miller took charge of the health care of Angela and her baby upon Angela's admittance to the Hospital.

13. The Defendant, Dr. Miller owed Angela Patton and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

14. Defendant Rock Hill Gynecology owed Plaintiff and her daughter a duty of providing obstetrical, nursing and support care consistent with generally accepted standards of obstetrical offices under similar situations.

15. Defendant Piedmont Medical Center and its employees owed Plaintiff and her daughter a duty of providing hospital and nursing care and attention consistent with generally accepted standards of hospitals and nurses under similar situations.

16. Defendants breached their duties of care to Angela Patton and her daughter Alexia and were negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Alexia sustained severe bodily injuries, losses and damages.

17. Defendant Dr. Miller was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, traction and/or torsion;
- (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (i) in mismanagement of labor and delivery;
- (j) in mismanagement of shoulder dystocia;
- (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;

- (l) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
- (n) such other failures and refusals as may be identified during discovery and the trial of her case.

18. Defendant Rock Hill Gynecology, its predecessor(s) and/or successor(s), if any, and the shareholder(s), agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its shareholder(s), employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin.
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia

complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in using improper delivery technique;
- (i) in using improper and excessive force, traction and/or torsion;
- (j) in allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;
- (n) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's

health;

- (o) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
 - (p) such other failures and refusals as may be identified during discovery and trial of this case.
19. Defendant Piedmont Medical Center, its predecessor(s) and/or successor(s), if any, and the agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:
- (a) in failing and refusing to require its physicians, employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about labor and delivery generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin;
 - (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
 - (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to require its medical staff physicians to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in acquiescing in its medical staff physicians' use of improper delivery technique;
- (i) in acquiescing in its medical staff physicians' use of improper and excessive force, traction and/or torsion and in the nurse's use of fundal pressure;
- (j) in failing to properly train its nurses to avoid use fundal pressure in the presence of shoulder dystocia;
- (k) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of labor and delivery;
- (l) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of shoulder dystocia;

- (m) improper use of fundal pressure by the labor and delivery nurse;
 - (n) in acquiescing in its medical staff's failing and refusing to perform delivery by C-Section;
 - (o) in acquiescing in its medical staff's and labor and delivery nursing staff's failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health; and in the nurses' failing to so communicate;
 - (p) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
 - (q) such other failures and refusals as may be identified during discovery and trial of this case.
20. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Piedmont Medical Center, Alexia Lumpkin has sustained certain injuries, losses and damages, stated with particularity as follows:
- (a) Direct violent and traumatic injuries to various bodily shareholders of Alexia Lumpkin, including, but not limited to, permanent traumatic injury to the nerves which innervate her left shoulder and arm, commonly known as Erb's palsy;
 - (b) Adverse effects on various other bodily shareholders and/or functions, such as gait, balance and skeletal and muscular symmetry;

- (c) Past and future medical expenses;
- (d) Life care management plan expense;
- (e) Permanent impairments and disabilities;
- (f) Disfigurement;
- (g) Physical pain and suffering;
- (h) Mental, emotional and psychological harm;
- (i) Adverse effect on the future employability, earnings and earning capacity;
- (j) Loss of enjoyment of life; and
- (k) Such further injuries, losses and damages as may be revealed through discovery and trial of her case.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of her action; and for such other and further relief as her Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham

Mary H. Watters

Post Office Box 550

Florence, S.C. 29503

Attorneys for Plaintiff

July 3, 2012

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Angela Patton, as Next Friend of Alexia
Lumpkin, a minor,

Plaintiff,

vs.

Gregory A. Miller, MD, Rock Hill
Gynecological & Obstetrical Associates,
P.A.,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2009-CP-46-05195

**Defendant's
Memorandum
Regarding
Judgment Amount**

Now come Defendants, responding to the Court's request regarding the amount Defendants contend should be entered as a Judgment Amount in the above case, following the verdict of the jury rendered against these Defendants on January 14, 2022.

The filing of this Memorandum in no way waives any motion or position of the Defendants, and the Court should grant a new trial in this matter. That said, in accordance with the request from the Court, and in further accord with statutory caps mandates on judgments at Section 15-32-220 and the South Carolina Supreme Court's interpretation of caps generally in *Garrison v. Target Corp.*, Op. 28080, SC Sup. Ct. January 6, 2022 (caps are neither affirmative defenses or avoidance of liability; and requiring trial court to determine caps applicability) a single cap should apply to the noneconomic damages in this matter, as the sole health care provider found to be at fault for the injuries here was Dr. Miller. Because there is a \$50,000 set off which all agree, and because the unadjusted cap would be \$350,000, the Court should reform the noneconomic damages amount to \$300,000. Taking that figure of \$300,000 and adjusting it in accordance with the Consumer Price Index per Section 15-32-220(F), the total amount of non-economic damages would be \$429,064.00. Section 15-32-220(C) does not apply here because there was a single verdict against Dr. Miller, and no fault attributable to the actions of any other health care provider. While Dr. Miller's practice is stipulated to also be liable for the amount awarded as to Dr. Miller, that liability is purely vicarious, and there is no enhanced or separate cap for the practice. For the reasons set forth already, Defendants argue no prejudgment interest, including interest relating to the Offer of Judgment, should be awarded.

As a result, the total amount that should be awarded, *without* any interest added for the Offer of Judgment, and consistent with Defendants prior submissions regarding that issue, is \$1,929,064.00, representing the economic actual damages plus the non-economic damages as set forth above, as adjusted.

Per the request of the Court, and without waiving any prior position regarding the Offer of Judgment, using the above figure as the amount to be awarded *without* any interest per the Offer of Judgment, and calculating the above figure at 8%, the interest would be \$154,325.12 per year and the total through February 21, 2022 would be \$1,753,809.05, with a per diem rate of \$422.81. Therefore, the total amount of the award *with* interest per the Offer of Judgment, would be \$3,682,873.05, through February 21, 2022.

Respectfully submitted,

DAVIS AND SNYDER, P.A.

s/Ashby W. Davis

Ashby W. Davis (#1560)
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500

ATTORNEY FOR DEFENDANT

February 23, 2022

Greenville, SC

Exhibit E

(Motion for Stay of Execution and Supplemental memo In
Support)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	Civil Action No. 2009-CP-46-05195
Angela Patton, as Next Friend of Alexia	)	
Lumpkin, a minor,	)	
	)	DEFENDANTS' MOTION FOR A STAY
Plaintiff,	)	OF EXECUTION ON THE JUDGMENT
	)	
vs.	)	
	)	
Gregory A. Miller M.D. and Rock Hill	)	
Gynecological & Obstetrical Associates P.A.,	)	
	)	
Defendants.	)	

Pursuant to Rule 62 of the South Carolina Rules of Civil Procedure and section 18-9-130 of the South Carolina Code, defendants Gregory A. Miller M.D. and Rock Hill Gynecological & Obstetrical Associates P.A. (together, "Defendants") move for an order staying execution on or enforcement of the judgment during the pendency of Defendants' appeal.

PROCEDURAL HISTORY

This medical malpractice case was tried in January 2022. The jury found in Plaintiff's favor and awarded Plaintiff \$2,500,000 in damages. Defendants moved for a new trial on several grounds, and Plaintiff moved for costs and prejudgment interest from the date of her offer of judgment through entry of judgment on the verdict. On March 3, 2022, the Court denied Defendants' post-trial motions, granted Plaintiff's motion, and entered judgment for the Plaintiff in the amount of \$4,682,789.57. Defendants appealed on March 11, 2022.

ARGUMENT

Defendants request that the Court issue a stay of execution on the judgment until the appeal is resolved. Section 18-9-130 provides that a "notice of appeal from a judgment directing the

payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution.” S.C. Code Ann. § 18-9-130(A). The presiding judge may “require[] bond or other surety to guarantee the payment of the judgment pending the appeal.” *Id.* Rule 62(d) of the South Carolina Rules of Civil Procedure provides for a stay of execution after appeal if the appealing party “giv[es] a supersedeas bond”:

Stay Upon Appeal. When an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule and the South Carolina Appellate Court Rules. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the supersedeas as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Pursuant to section 18-9-130(A), the maximum supersedeas bond for an individual or a business entity that employs fifty persons or fewer or which has revenue of less than \$5 million is \$1,000,000. S.C. Code Ann. § 18-9-130(A)(1)(b).

Dr. Miller is an individual. Further, there was no verdict against anyone but Dr. Miller. There was an agreement of counsel at trial, for the sake of simplicity for the jury, that the P.A. would be responsible for paying a verdict rendered against Dr. Miller based on *respondeat superior* principles. The Court, over objection, has issued a judgment against both Dr. Miller and the P.A., and held that because of that judgment, the non-economic damages statutory cap does not apply to reduce the verdict here.

Notwithstanding the above, the Defendants request that the court issue a stay of execution until the appeal is resolved, and order that no bond is required. If the Court requires a bond, Defendants are willing to post the statutory maximum \$1,000,000 supersedeas bond, based on the verdict against Dr. Miller alone. If the Court decides that both Dr. Miller and the P.A. must separately post appeal bonds, which the Defendants argue is unwarranted and was not intended to

be the result of any agreement of counsel at trial, then the P.A. (which is now a dissolved entity having no revenues or employees) would also only be subject to procuring a bond of \$1,000,000. Thus, the Court should issue a stay of execution and of further enforcement of the judgment. Defendants' position is that no bond should be required, but if one is required, that only a \$1,000,000 bond be required under the circumstances here. Failing that, the Court should at minimum require only that both Dr. Miller and the P.A. post \$1,000,000 appeal bonds each to stop execution on the judgment.

CONCLUSION

Defendants respectfully request that the Court grant this motion and stay efforts to execute on the judgment pending a resolution of Defendants' appeal. Defendants' counsel consulted with Plaintiff's counsel prior to filing this motion, and Plaintiff's counsel stated he intends to execute on the judgment on Defendants and would not agree to a stay by consent. Should the Defendants prevail in their appeal, they intend to seek to tax all premium costs required to be paid for appeal bonds against Plaintiff.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

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Attorneys for Gregory A. Miller, M.D. and Rock Hill
Gynecological & Obstetrical Associates P.A.

Columbia, South Carolina

March 11, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	Civil Action No. 2009-CP-46-05195
Angela Patton, as Next Friend of Alexia	)	
Lumpkin, a minor,	)	
	)	DEFENDANTS' SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF
Plaintiff,	)	THEIR MOTION FOR A STAY OF
	)	EXECUTION ON THE JUDGMENT
vs.	)	
	)	
Gregory A. Miller M.D. and Rock Hill	)	
Gynecological & Obstetrical Associates P.A.,	)	
	)	
Defendants.	)	

This memorandum supplements and supports the Motion for a Stay of Execution on the Judgment filed on Friday, March 11, 2022. The relief sought in the motion stands. For clarity, however, the statute cited—S.C. Code Ann. § 18-9-130(A)(1)(b)—expressly applies as a matter of requirement by its terms to matters accruing on or after January 1, 2012. Therefore, Movant wishes to be candid and ensure the Court is aware of this, because this matter accrued sometime before that date.

This matter is as old as it is, for several reasons, but those reasons include an appeal taken by Plaintiff on January 15, 2014, and remitted to this Court on October 24, 2017, and a motion filed by Plaintiff to continue/stay the trial in this matter filed on October 8, 2018 and granted on October 31, 2018. Further, the pandemic and related court closures delayed this matter through no fault of Movant.

As a result of the age of this matter, and as result of the decisions by this Court which have affected the overall amount of the judgment, the judgment in this matter is larger than Movant argues it should have been (and, of course, Movant moved for a new trial absolute as well, and does not of course waive any of its prior positions by making these stay of execution filings). This

Court has the discretion to order execution stayed with no bond. The Court also has the discretion to order a stay of execution with a bond requirement. Movant argues that if any bond is required, it should be in the amount of the maximum \$1,000,000 for Dr. Miller and \$1,000,000 for the practice, as set forth in its prior motion. The Court has the discretion to issue this stay of execution order. *See, e.g., Harrison-Belk v. Rockhaven Cmty. Care Home, Inc.*, No. CV 3:07-54-CMC, 2009 WL 10710627, at *1 (D.S.C. Jan. 30, 2009) (interpreting a prior version of Rule 62(d) of the Federal Rules of Civil Procedure, which was analogous to the current Rule 62(d), SCRCF, and finding courts have discretion to issue a stay without requiring a bond); *Se. Booksellers Ass'n v. McMaster*, 233 F.R.D. 456, 457–58 (D.S.C. 2006) (same). Defendants reserve the right to file other requests and make other motions regarding execution should the Court determine it will not stay execution in accordance with the motion filed on March 11, 2022, and this supplemental memorandum.

Conclusion

An order staying execution on the judgment entered by this Court should be granted. No bond should be required. If a bond is required, a bond consistent with current law regarding appeal bond maximums should be considered and the same amounts ordered, and no more. There is no reason to treat this matter differently due to its age, especially given the fact that long periods of time in this litigation are directly attributable to motions and other legal filings made by Plaintiff.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

C. Mitchell Brown

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(803) 799-2000

Attorneys for Gregory A. Miller, M.D. and Rock Hill
Gynecological & Obstetrical Associates P.A.

Columbia, South Carolina

March 15, 2022

Exhibit F

(Plaintiff's Response to Motion for Stay of Execution)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
	)	C/A NO.: 2009-CP-46-5195
Angela Patton, as Next Friend of	)	
Alexia L. a minor,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
Dr. Gregory A. Miller, and Rock Hill	)	
Gynecological & Obstetrical Associates	)	
P.A.,	)	
	)	
<u>Defendants.</u>	)	

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION FOR A STAY OF EXECUTION
ON THE JUDGMENT**

COMES NOW PLAINTIFF, Plaintiff Angela Patton, as Next Friend and Guardian *ad litem* of Alexia L., a minor, by and through her undersigned counsel, and submits this Response to Defendants’ Motion for Stay of the Execution on the Judgment.

Introduction

This medical malpractice birth injury case was tried in York County from January 4-14, 2022. The jury returned a verdict in favor of Plaintiff for \$2.5 million. On March 3, 2022, following post-trial motions, the trial judge, the Honorable William A. McKinnon, entered judgment in favor of Plaintiff against both defendants in the amount of \$4,682,789.57. This figure does not include taxation of administrative, filing, and other court costs and disbursements.

Defendants filed a Motion for Stay of Execution on March 11, 2022, and a Memorandum in Support of the Motion on March 15, 2022. In these filings Defendants seek an order for stay of execution and to limit the amount of any required *supersedeas* bond to no more than \$2 million. This request to limit the *supersedeas* bond amount required as a condition to a stay order should be denied.

Plaintiff does not oppose a stay order if it is conditioned on Defendants' posting of a *supersedeas* bond sufficient to protect her legal and financial interests completely. Plaintiff asserts that a bond not less than \$6.25 million would be necessary to provide reasonable protection of her legal and financial interests pending appeal.

Law

It is within the Court's discretion (1) whether to grant a motion to stay execution on a judgment at all and, if so, (2) to fix the amount of the *supersedeas* bond to be required as a condition of any stay order. *See*, Rule 62(d), SCRC¹ and Rule 241(c)(2), SCACR².

In their memorandum Defendants assert that the Court has discretion to order a stay of execution on a judgment without requiring a *supersedeas* bond. There is no support for this proposition under S.C. law. Rule 62(d), SCRC¹, states "...a party, by giving a supersedeas bond, may obtain a stay...." By its terms, this Rule envisions posting of a *supersedeas* bond before an appellant may obtain a stay. The cases cited by Defendants to support their assertion were federal cases which do not provide Defendants with support³.

¹ Rule 62(d) states in pertinent part, **(d) Stay Upon Appeal.** When an appeal is taken, a party, *by giving a supersedeas bond, may obtain a stay subject to the ...* South Carolina Appellate Court Rules.... (Emphasis added.)

² Rule 241(c)(2), SCACR, instructs that "in determining whether an order [staying execution on the judgment] should issue pursuant to this Rule, the lower court...should consider whether such an order is necessary to prevent a contested issue from becoming moot."

³ The case of *SE Booksellers Ass'n v. McMaster*, 233 F.R.D. 456 (D.S.C. 2006), cited by Defendants, addressed circumstances under which a district court may have discretion to grant a stay with less than a full bond or no bond at all. The court pointed out that there was no Fourth Circuit precedent but found persuasive the analysis used by the Fifth Circuit and several district courts within the Fourth Circuit. The district court recognized that the purpose of requiring a full bond as a condition to a stay is to "preserve the status quo while protecting the non-appealing party's rights pending appeal," (citing *Alexander v. Chesapeake, Potomac and Tidewater Books, Inc.*, 190 F.R.D. 190, 192 (E.D.Va. 1999) (quoting *Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)). The only possible justification identified in *SE Booksellers* for not requiring a full bond is in those rare circumstances where there is proof that the judgment debtor (1) can easily meet the judgment and will retain the ability to do so on appeal; or (2) is in such dire financial straits that posting of a full bond would impose undue financial burden. *Id.* Neither apply to case *sub judice*. The district court in *SE Booksellers* required a full bond as a condition of a stay order even though the appellant was an officer of the State of South Carolina. This Court should do the same.

Amount of the *Supersedeas* Bond the Court Should Require

As an initial matter, it is worth noting that Defendants' Motion filed on March 11, 2022, misrepresented that there was a statutory cap of \$1 million on the amount of a *supersedeas* bond a court could require of a single judgment debtor. This was of course incorrect, as the effective date of S.C. Code of Laws Section 18-9-130 was not until January 1, 2012, as to cases accruing on or after that date. **Exhibit 1**, SECTIONS 6 and 7, pp. 6-7. Plaintiff filed her Summons and Complaint on November 25, 2009, at which time there was no limit on the amount of a *supersedeas* bond which could be required as a condition to a stay order.⁴

In this case the aggregate coverage limits of the Defendant's medical malpractice liability policies applicable to this case are \$2 million, far less than the current judgment balance. Dr. Miller's policy limit is \$1 million. Answer to Plaintiff's Interrogatory No. 3, **Exhibit 2**. The corporate defendant, Rock Hill Gynecological & Obstetrical Associates, P.A., has the same limit.⁵ Answer to Plaintiff's Interrogatory No. 3, **Exhibit 3**.

Post-judgment interest is to be compounded at 7.25% *per annum*. S.C. Code of Laws Section 34-31-20 (2020); Order of the Supreme Court (2022-01-06-01). The updated judgment

⁴ Defendants filed a memorandum on March 15, 2022, four days after filing their motion, in which they acknowledged that the statute they cited as limiting the amount of a *supersedeas* bond to \$1 million per judgment debtor did not apply to this case. In doing so, they stated that the statute "expressly applies as a matter of requirement by its terms" to matters which accrued after January 1, 2012. This odd phrasing appears purposeful. If it is intended to be an admission that this statute is inapplicable and irrelevant to this case, Plaintiff welcomes the admission. However, the careful wording appears to represent an argument that the Court should adhere to the statute even though it does not apply to this case. If so, that is a spurious assertion.

⁵ In their motion, Defendants mischaracterize the effect on the corporate defendant of the verdict against Dr. Miller. They suggest that the parties agreed for the corporate defendant to share responsibility for paying any verdict against Dr. Miller. The context of this phrasing also suggests it is purposeful, as a subtle contention that no *judgment* should have been entered against the corporate defendant. The distinction is important because Defendants are expected to argue on appeal that the non-economic cap was misapplied by miscounting the number of judgment debtors. This description of counsel's agreement is plainly incorrect. In open court, counsel for both sides agreed and stipulated that the corporate defendant's liability would rise or fall with that of Dr. Miller. Stated differently, if the jury found in favor of Plaintiff against Dr. Miller, counsel agreed that judgment would be entered against both him and the corporate defendant. Likewise, if the jury returned a defense verdict, judgment would be entered in favor of both defendants. In accordance with this agreement and stipulation, the verdict against Dr. Miller properly resulted in entry of judgment against both.

balance on March 3, 2023, would be \$4,682,789.57 plus 7.25%, or \$5,022,291.81. (This figure and others in this paragraph are before administrative, filing and other court costs and interest thereon are added.) As of March 3, 2024, the updated balance would be \$5,022,291.81 plus 7.25%, or \$5,386,407.97. As of March 3, 2025, the updated balance would be \$5,386,407.81 plus 7.25%, or \$5,776,922.55. As of March 3, 2026, the updated balance would be \$5,776,922.55 plus 7.25%, or \$6,195,749.43. As of March 3, 2027, the judgment balance would be \$6,195,749.43 plus 7.25%, or \$6,644,941.26.

Without an adequate supersedeas bond, affirmance of Plaintiff's judgment on appeal may be moot, to the extent she is unable to enforce her judgment. Plaintiff submits that a stay on execution of her judgment should be conditioned on a *supersedeas* bond, with corporate surety, in an amount not less than \$6,250,000.00. A lower amount would put the value of her judgment at unreasonable risk.

WHEREFORE, Plaintiff requests that stay of execution of the judgment be conditioned on provision of a bond, with corporate surety, in an amount not less than \$6,250,000.00.

Respectfully submitted,

Anderson, South Carolina

GRAHAM LAW FIRM, P.A.

March 21, 2022

By: s/Edward L. Graham
Edward L. Graham
Graham Law Firm
120 Donald Drive
Pendleton, SC

D. Bradley Jordan
Jordan Law Firm, PC
546 East Main Street
Rock Hill, SC 29730

Attorneys for Plaintiff

Exhibit G

(Motion to Reconsider and Motion to Reduce Amount)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	Civil Action No. 2009-CP-46-05195
Angela Patton, as Next Friend of Alexia	)	
Lumpkin, a minor,	)	
	)	DEFENDANTS' MOTION TO
	)	RECONSIDER AND MOTION TO
Plaintiff,	)	REDUCE AMOUNT OF APPEAL BOND
	)	
vs.	)	
	)	
Gregory A. Miller M.D. and Rock Hill	)	
Gynecological & Obstetrical Associates P.A.,	)	
	)	
Defendants.	)	

Defendants Gregory A. Miller, M.D. (“Dr. Miller”), and Rock Hill Gynecological & Obstetrical Associates, P.A. (“the practice”) respectfully move for reconsideration of the Court’s May 19, 2022 Form 4 order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Defendants also seek a reduction in the amount of appeal bond required to stay execution on the judgment. Defendants incorporate and reassert all their prior arguments related to the issues raised herein, whether made in written filings or during oral arguments. Defendants’ motions are further based on the following grounds:

1. The Court did not provide reasoning or rationale for its decision to grant Defendants’ motion to stay execution, but required Defendants to “purchase a bond in the amount of \$6.25 million dollars to protect the judgment entered and interest accrued during the pendency of the appeal.” Accordingly, for error preservation purposes, Defendants believe they should file this motion and seek an explanation of the Court’s rationale to preserve issues for appellate review. *See Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) (“An issue is not preserved where the trial court does not **explicitly** rule on an argument and the appellant does not make a

Rule 59(e) motion to alter or amend the judgment.” (emphasis added)); *Smith v. NCCI, Inc.*, 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006) (same).

2. Defendants previously requested that the Court issue a stay of execution without requiring the posting of an appeal bond. Because the Court required a \$6.25 million bond, it appears the Court rejected Defendants’ request. Defendants also requested, in the alternative, that the Court require an appeal bond of only \$1,000,000 to be posted by Dr. Miller, because the verdict in this case is against only Dr. Miller, but it appears the Court also rejected that request. Finally, Defendants also requested as another alternative that the Court, in exercising its discretion and in the public interest, follow the current version of S.C. Code Ann. § 18-9-130 and limit the required bond amount to \$2,000,000 total for Dr. Miller and the (now dissolved) practice, while acknowledging that this matter accrued prior to the effective date of that statute. It appears the Court also rejected this argument. However, the Court did not set forth any rationale for these decisions. Defendants therefore request that the Court reconsider these arguments and rule in Defendants’ favor by setting the bond requirement at \$2,000,000 or, failing that, provide a rationale for its disagreement with Defendants’ arguments.

3. Plaintiff agreed to a stay of execution but only if a bond was posted in the amount of “not less than \$6.25 million.” Plaintiff’s sole argument was this bond amount was needed to protect its judgment amount. This argument, if controlled by the statute, would of course be totally meritless due to the statutory bond maximums. The General Assembly has determined that requiring bonds such as those asked for by Plaintiff imposes unfairness on appellants and unfairly affects the right of appeal. The Court in its discretion could and should apply the same public interest/public policy point in setting the bond amount. Regardless, if the Court declines to do this, it should nevertheless reduce the bond amount to \$2,000,000 for the reasons below.

4. In conjunction with their original motion, Defendants explained they “reserve the right to file other requests and make other motions regarding execution should the Court determine it will not stay execution in accordance with the motion filed on March 11, 2022 [seeking a stay based on either no bond, a \$1,000,000 bond as to Dr. Miller only, or a \$2,000,000 total bond as to Dr. Miller and the practice] and [their] supplemental memorandum.” See Supplemental Memorandum filed March 15, 2022, at 2. Plaintiff did not oppose this reservation. In accordance with that reservation, Defendants request that the Court reduce the required bond amount to \$2,000,000 for the below additional reasons.

5. To post a bond, the insurance carrier must set aside assets equal to the amount of the bond. The totality of the carrier’s assets available to serve as collateral for a bond in this matter is \$2,000,000. Accordingly, the carrier cannot and is not obligated to pay for a bond in excess of \$2,000,000. See Affidavit of Sam McEwen and Mag Mutual policy materials, attached as Exhibit 1. As Defendants stated at the May 18, 2022 hearing, they hoped to avoid presenting details of Dr. Miller’s personal financial situation unless it became necessary to do so. The Court’s order requiring a \$6.25 million bond now renders it necessary to present Dr. Miller’s financial information pursuant to Defendants’ reservation in conjunction with their original motion. Dr. Miller cannot afford to post a bond of any significant amount because he lacks the assets to post as collateral. See Affidavit of Dr. Gregory Miller, attached as Exhibit 2. Thus, a \$2,000,000 bond purchased by the insurance carrier is all that Defendants can afford to post. To require Dr. Miller to post any additional bond beyond that which the insurance carrier here has agreed to post pursuant to its coverage would impose an undue financial burden on Dr. Miller. *See Se. Booksellers Ass’n v. McMaster*, 233 F.R.D. 456, 458 (D.S.C. 2006). By coincidence, that amount—\$1,000,000 in coverage for Dr. Miller and \$1,000,000 in coverage for the dissolved

practice—aligns with the statutory maximums provided by section 18-9-130. The Court should therefore reduce the required bond amount to \$2,000,000 for all of the reasons set forth herein and stay execution pending appeal.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

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Columbia, South Carolina

May 27, 2022

EXHIBIT 1

(Affidavit of Sam McEwen and Mag Mutual Policy Materials)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Angela Patton, as Next Friend of Alexia
Lumpkin, a minor,

Plaintiff,

vs.

Gregory A. Miller M.D. and Rock Hill
Gynecological & Obstetrical Associates P.A.,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Civil Action No. 2009-CP-46-05195

AFFIDAVIT OF SAMUEL R. MCEWEN

Samuel R. McEwen personally appeared before the undersigned officer duly authorized to administer oaths and, having been duly sworn, states as follows:

1. I am over the age of eighteen, suffer from no disabilities, and make the statements herein based upon personal knowledge unless stated otherwise below.

2. I am a claims executive with MAG Mutual Insurance Company ("MAG Mutual").

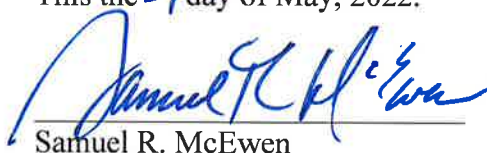
3. MAG Mutual issued an insurance policy to Dr. Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A. The policy and declarations pages are attached hereto as Exhibit A.

4. The total coverage limit under this policy for purposes of this action is \$2,000,000.

5. The \$2,000,000 coverage limit is therefore the maximum amount for which MAG Mutual will purchase an appeal bond to secure the judgment in this matter.

Further the Affiant sayeth not.

This the 24th day of May, 2022.



Samuel R. McEwen

Sworn to and subscribed before me
this 12th day of May, 2022

Leanne CA

Notary Public

My Commission expires: 12/15/2025



IMPORTANT CLAIMS INFORMATION

When you joined MAG Mutual Insurance Company you joined the largest and strongest physician-owned and physician-led mutual insurer in the Southeast. Our primary mission is to defend you with all of our efforts and resources against medical professional liability claims so you can continue to focus on providing quality patient care.

As our policyholder/owner you have our promise that we will be here when you need us, working closely with you in all phases of your defense. We strongly believe, and our record shows, that your active participation in the claims process is vital.

To help us provide you the claims service you deserve, we ask that you promptly call our Claims Department in Atlanta at 800-282-4882 whenever:

- You think a potentially litigious situation has developed with a patient.
- You receive a notice of a lawsuit, an attorney request for records, a subpoena to release medical information or a patient letter expressing dissatisfaction or demanding compensation.

After we discuss your situation, we will ask for a summary of the care and treatment of the patient. Once a claim is reported, we'll also need a copy of the patient's medical chart. Keeping us informed when these situations arise helps us prepare and use our resources more effectively for your defense.

We are very pleased that you are a policyholder and owner of MAG Mutual Insurance Company. Be assured we will do everything we can to meet our commitment to you.

Sincerely,



Matt Mitcham
Senior Vice President, Claims

PRIVACY POLICY MAG MUTUAL INSURANCE COMPANY

Information We Collect – In the course of our business, it is sometimes necessary to collect "nonpublic personal information" about people who seek insurance or financial services from us ("Customers"). We do not, however, collect any information unless it is required to serve our Customers and to conduct our business. We collect information from sources such as:

- Our Customers themselves;
- Consumer reporting agencies and other third parties authorized by a Customer to give us information (e.g., consumer reports, claims reports, medical reports and motor vehicle reports); and
- A Customer's transactions with us, our affiliates, and insurers or broker-dealers that we represent.

This Privacy Policy describes MAG Mutual's practices for protecting the personal information of our customers.

Use and Disclosure of Customer Information--

We do not disclose any nonpublic personal information about our Customers or former Customers to anyone outside our organization, except to effect a transaction authorized by the Customer or as required by law. We may disclose such personal information to our affiliates:

- To complete financial transactions authorized by a Customer;
- To service, process or administer business operations such as accounting, underwriting and claims; and
- To identify other products and services that may be beneficial to a Customer.

Sharing of Information with Service Providers-

From time to time, we may retain third parties to perform various support services for us. Such third parties may include insurance claims adjusters, attorneys, or mail houses. We may disclose limited amounts of Customer information to these parties so they can perform their services, but we do not

disclose any more information than is necessary.

Medical Information-- If we receive a Customer's health information, we do not share such information with third parties or affiliates except as required to service the subject Customer's policy, account, claim or contract; for legitimate insurance functions; as allowed by applicable laws governing privacy of health records; or with the Customer's authorization.

Confidentiality and Security of Customer's Information--

We go to great lengths to maintain the privacy and security of our Customers' personal information. We maintain physical, electronic and procedural safeguards to protect all the information we collect. We are careful to ensure that our employees follow strict policies and procedures to protect the confidentiality of our Customers' personal information, and our computer systems are configured in a way to prevent inappropriate access by third parties. Our employees are allowed access to a Customer's personal information only to the extent that they need to know that information to provide products or services to the Customer or for other legitimate business purposes.

Accuracy of Information-- It is important to us to keep a Customer's information current and accurate. If you believe that our records are inaccurate or incomplete, please contact us at 1-800-282-4882. We will investigate your concerns and correct any inaccuracies.

Changes to our Policy-- We do not foresee any reason to change our Privacy Policy, but business conditions may warrant a change from time to time. We will provide you with notice of any material or significant changes to the Policy before implementing them. If you have any questions about how we handle privacy and confidentiality issues, please contact us.

MAG Mutual ®

MAG Mutual Insurance Company - MAG Mutual Insurance Agency, Ltd.
MAG Mutual Healthcare Solutions, Inc. - MAG Mutual Financial Services, Inc.

Policy Number: PSL 1800044 07

MAG Mutual Insurance Company



Eight Piedmont Center, Suite 600 | 3525 Piedmont Road
Atlanta, Georgia 30305-1533 | www.magmutual.com
404.842.5600 | 800.282.4882 | FAX 404.842.5614

April 21, 2005

Re: Business Associate Agreement
HIPAA Privacy and Security Rule Compliance

Dear Policyholder:

As you are aware, physicians and others involved in the delivery of healthcare to patients must be in compliance with privacy and security regulations that implement the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") on and after April 21, 2005. Under HIPAA's privacy and security regulations, MAG Mutual Insurance Company is considered a "business associate" of the physicians that we insure for medical professional liability coverage.

HIPAA regulations require physicians to obtain contractual assurance as to how their business associates handle patient health information. In this regard, enclosed you'll find a Business Associate Agreement provided for you by MAG Mutual Insurance Company. MAG Mutual may never receive patient health information from many of its policyholders. However, to the extent that we may receive such information from you, this document outlines what MAG Mutual will and will not do with that information, and covers our commitment not to use or disclose it except as required or permitted by law or the Agreement.

There is no need for you to sign the Business Associate Agreement. However, you should keep the Agreement with other documentation that proves your compliance with HIPAA privacy and security regulations. Please forward these materials to the HIPAA privacy officer, security officer or compliance officer in your practice.

Sincerely,

A handwritten signature in black ink that reads 'Darrell O. Grimes'.

Darrell O. Grimes
President
MAG Mutual Insurance Company



BUSINESS ASSOCIATE AGREEMENT
HIPAA Privacy and Security Rules

THIS AGREEMENT and commitment is executed by MAG Mutual Insurance Company effective the 21st day of April 2005, and shall replace any Business Associate Agreement previously executed by MAG Mutual Insurance Company in favor of its policyholder.

MAG Mutual Insurance Company and its policyholder have an insurer/insured relationship by virtue of a professional liability insurance policy issued by MAG Mutual that covers the policyholder ("Insurance Policy"). MAG Mutual and its policyholder are committed to complying with the Privacy Rule and Security Rule (45 C.F.R. Parts 160, 162 and 164) under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Under the Rules, the policyholder is a "covered entity" and MAG Mutual is a "business associate" of the policyholder. MAG Mutual must use and/or disclose Protected Health Information in its performance of services under the Insurance Policy, and HIPAA permits the policyholder to disclose such information to MAG Mutual for the activities set forth herein. MAG Mutual agrees to abide by the assurances, terms, and conditions contained herein. This Agreement sets forth the manner in which Protected Health Information that is provided to, or received by, MAG Mutual from or on behalf of the policyholder will be handled and protected. MAG Mutual agrees as follows:

Section 1
Definitions

- 1.1 "*Business Associate*" shall mean MAG Mutual Insurance Company.
- 1.2 "*Covered Entity*" shall mean the MAG Mutual Insurance Company policyholder and any persons covered under the policyholder's Insurance Policy.
- 1.3 "*Designated Record Set*" shall have the same meaning as the term "Designated Record Set" in 45 C.F.R. Section 164.501.
- 1.4 "*Individual*" shall have the same meaning as the term "Individual" in 45 C.F.R. Section 164.501 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. Section 164.502.
- 1.5 "*Protected Health Information*" (PHI) shall have the same meaning as the term "Protected Health Information" in the Security and Privacy Rules, limited to the information received by Business Associate from, or on behalf of, Covered Entity.
- 1.6 "*Electronic Protected Health Information*" shall have the same meaning as the term "Electronic Protected Health Information" in 45 C.F.R. Section 160.103.

Section 2
Obligations and Activities of Business Associate

Business Associate agrees to the following:

- 2.1 *Not to Use or Disclose PHI Unless Permitted.* Business Associate agrees not to use, or further disclose, Protected Health Information other than as permitted or required by this Agreement or as required or allowed by law.

- 2.2 *Use Safeguards.* Business Associate agrees to use reasonable safeguards to prevent use or disclosure of the Protected Health Information other than as allowed by this Agreement or as otherwise required or allowed by law.
- 2.3 *Report Inappropriate Disclosures of PHI.* Business Associate agrees to report to Covered Entity any use or disclosure of the Protected Health Information not permitted by this Agreement or by law, of which it becomes aware.
- 2.4 *Compliance of Agents.* Business Associate agrees to require any agents, including subcontractors, to agree to the same restrictions and conditions that apply to Business Associate through this Agreement, provided that such agents perform a service that the Business Associate agreed to perform for, or on behalf of, the Covered Entity under the Insurance Policy and, to whom the Business Associate provides Protected Health Information.
- 2.5 *Access.* In the event that Business Associate maintains the Designated Record Set, Business Associate agrees to provide Covered Entity access to Protected Health Information in the Designated Record Set, during normal business hours, provided the Covered Entity delivers prior written notice to the Business Associate, at least five business days in advance, requesting such access but only to the extent required by 45 C.F.R. Section 164.524.
- 2.6 *Amendments.* In the event that Business Associate maintains the Designated Record Set, Business Associate agrees to incorporate any amendment(s) to Protected Health Information in the Designated Record Set that the Covered Entity directs, pursuant to 45 C.F.R. Section 164.526.
- 2.7 *Disclosure of Practices, Books and Records.* Unless otherwise protected or prohibited from discovery or disclosure by law, Business Associate agrees to make internal practices, books, and records available to the Covered Entity or to the Secretary of the U.S. Department of Health and Human Services or his/her designee, for purposes of the Secretary determining Covered Entity's compliance with the Privacy Rule but only to the extent such access is related to the use and disclosure of Protected Health Information received from the Covered Entity, or created or received by Business Associate on behalf of Covered Entity. Business Associate shall have a reasonable time within which to comply with such requests and, in no case shall access be required in less than five business days after the Business Associate's receipt of such request.
- 2.8 *Accounting.* Business Associate agrees to maintain sufficient documentation to allow it to provide to Covered Entity a list of any disclosures of Protected Health Information by the Business Associate or its agents so as to allow the Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 C.F.R. Section 164.528.
- 2.9 *Release of Documentation of Disclosures.* Business Associate agrees to provide to Covered Entity information collected in accordance with Section 2.8 of this Agreement, to permit Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 C.F.R. Section 164.528. Business Associate shall have a reasonable time within which to comply with such requests, and in no case shall access be required in less than five business days after the Business Associate's receipt of such request.
- 2.10 *Security of Electronic Protected Health Information.* Business Associate agrees to implement Administrative, Physical and Technical Safeguards, all as defined in 45 C.F.R. Section 164.304, that reasonably and appropriately protect the confidentiality, integrity, and availability of any Electronic Protected Health Information that it creates, receives, maintains, or transmits on behalf of Covered Entity, as required by the Security Rule. Business Associate shall ensure that any agent, including a subcontractor to whom it provides such information agrees to implement reasonable and appropriate safeguards to protect it. Business Associate shall also report to Covered Entity any Security Incident, as defined in 45 C.F.R. Section 164.304, of which it becomes aware regarding the Protected Health Information.

Section 3

Permitted Uses and Disclosures by Business Associates

- 3.1 *Use of PHI for Specified Purposes.* Under the Insurance Policy, the Business Associate provides the Covered Entity with insurance products and services, hereinafter "Services" that involve the use and disclosure of Protected Health Information, which may include Electronic Protected Health Information. These Services may include, among others, the provision of professional liability insurance; receiving and evaluating incidents, claims, and lawsuits; risk management; quality assessment; quality improvement; loss prevention tools; outcomes evaluation; protocol and clinical guidelines development; reviewing the competence or qualifications of health care professionals; evaluating practitioner and provider performance; conducting training programs to improve the skills of healthcare practitioners and providers; credentialing, conducting or arranging for medical review; arranging for legal services; conducting or arranging for audits to improve compliance; resolution of internal grievances; placing stop-loss and excess of loss insurance, and other functions necessary to perform these Services. Except as otherwise specified herein, the Business Associate may make any uses of Protected Health Information necessary to perform its obligations under this Agreement and under the Insurance Policy. Moreover, the Business Associate may disclose Protected Health Information for the purposes authorized by this Agreement: (a) to its employees, subcontractors, and agents, in accordance with paragraphs 3.2 through 3.4 of this Section below; or (b) as otherwise permitted by the terms of this Agreement or by law. All other uses not authorized by this Agreement or by law are prohibited.
- 3.2 *Use of PHI for Business Associate Management and Administration.* Business Associate may use Protected Health Information for the proper management and administration of the Business Associate or to carry out the legal responsibilities of the Business Associate.
- 3.3 *Disclosure Required by Law or With Reasonable Assurances.* Business Associate may disclose Protected Health Information for the proper management and administration of the Business Associate and to carry out its legal responsibilities, provided that disclosures are required by law, or provided that the Business Associate obtains the following reasonable assurances from the person or entity to whom the Protected Health Information is disclosed: (a) the PHI will remain confidential; (b) the PHI will be used or further disclosed only as required by law or for the purposes for which it was disclosed; and (c) the person or entity will notify the Business Associate of any instances of which the person or entity is aware in which the confidentiality of the information has been breached.
- 3.4 *Data Aggregation Services.* Business Associate may use Protected Health Information to provide data aggregation services to Covered Entity as permitted by 45 C.F.R. Section 164.504.

Section 4

Impermissible Requests by Covered Entity

Business Associate understands that the Covered Entity shall not request Business Associate to use or disclose Protected Health Information in any manner that would not be permissible under the Privacy Rule if done by Covered Entity, except that, Business Associate may use or disclose Protected Health Information for data aggregation or management and administrative activities of Business Associate as is otherwise permitted by law or by this Agreement.

Section 5
Term and Termination

- 5.1 *Term.* The term of this Agreement shall be effective during the term of the Insurance Policy between the Business Associate and the Covered Entity and shall terminate when all of the Protected Health Information provided by Covered Entity to Business Associate, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or, if it is not feasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this section.
- 5.2 *Termination for Cause.* Upon Covered Entity's knowledge of a material breach by Business Associate of this Agreement, Covered Entity shall provide an opportunity for Business Associate to cure the breach or end the violation. Covered Entity may terminate this Agreement, and Business Associate agrees to such immediate termination, if Business Associate has breached a material term of this Agreement and cure is not possible.
- 5.3 *Effect of Termination.* Upon termination of the Insurance Policy, the protections of this Agreement will remain in force and Business Associate shall make no further uses and disclosures of Protected Health Information except for the proper management and administration of its business or to carry out its legal responsibilities or as required by law.

Section 6
Miscellaneous Provisions

- 6.1 *Regulatory References.* A reference in this Agreement to a section in the Privacy or Security Rule means the Section in effect or as amended, and for which compliance is required.
- 6.2 *Amendment.* The Business Associate agrees to take such action as is necessary to amend this Agreement from time to time as is necessary, as determined by the Business Associate, for compliance with requirements of the Privacy and Security Rules and the Health Insurance Portability and Accountability Act, as determined by the Business Associate.
- 6.3 *Survival.* The rights and obligations of Business Associate under this Agreement shall survive the termination of the Agreement and the termination of the Insurance Policy.
- 6.4 *Interpretation.* Any ambiguity in this Agreement shall be resolved in favor of a meaning that permits Covered Entity to comply with the Privacy and Security Rules.

MAG Mutual Insurance Company



Darrell O. Grimes, President



MAG MUTUAL®
MAG MUTUAL INSURANCE COMPANY

P.O. Box 52979
Atlanta, Ga 30355-0979
404-842-5600 800-282-4882

Physicians and Surgeons Professional Liability Claims-Made Policy

Policy Number	Policy Period	
	From	To
PSL 1800044 07	07/01/2009	07/01/2010
	12:01 A.M. in Atlanta, GA	

Transaction
RENEWAL DECLARATION

Policy Issued To
Rock Hill GYN/OB Associates, PA
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

AGREEMENT AND ENDORSEMENTS

Who's Protected Total Premium		PREMIUM	
OTHER COVERAGE DETAIL			FORMS
See Forms and Endorsements for all Forms on Policy.			
Change Endorsements			
Blanket Employee Separate Lmts			PS-SEP
Professional Org Separate Lmts			PS-ORG-SEP
Policyholder Dividend			

TOTAL PREMIUM

FORMS AND ENDORSEMENTS	
PS-AMN-OS (01/05) PS-CHG79 (09/02) PS-GR-SC (05/08) PS-IA (05/08) PS-OR	
PS-SEP (05/08) PS-TOC (05/08)	

WHO'S PROTECTED

Who's Protected	Class Code	Retroactive Dates	Limit Layers (Each Loss/Aggregate)
Barbara L. Rowland, MD	801530	07/01/2002	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000
Christopher B. Benson, MD	801530	07/01/2002	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000
Gregory A. Miller, MD	801530	07/01/2002	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000
Joe C. Robinson, MD	801530	07/01/2002	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000
Robert C. McClelland, MD	801530	07/01/2002	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000
Roy N. Taylor, III, MD	801530	07/01/2002	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000
Ansley L. Hilton, MD	801530	08/07/2006	1,000,000/3,000,000
CURRENT LIMITS/PREMIUM			1,000,000/3,000,000

Authorized Representative *Don M. Coppola* Date 06/15/09



POLICYHOLDER DIVIDEND

MAG Mutual is proud to return this dividend as a sign of your company's financial strength. Thanks for being part of MAG Mutual's success.

Policyholder Name Rock Hill GYN/OB Associates, PA

Policyholder Number PSL 1800044 07

2009 Dividend, Paid on Policy Effective July 1, 2009

INDIVIDUAL APPORTIONMENT

Rowland, Barbara L., MD
Benson, Christopher B., MD
Miller, Gregory A., MD
Robinson, Joe C., MD
McClelland, Robert C., MD
Taylor, Roy N., III, MD
Hilton, Ansley L., MD

Total Policy Dividend:





MAG MUTUAL[®]
MAG MUTUAL INSURANCE COMPANY

Loss Excellence Appreciation Discounts

Policyholder Name Rock Hill GYN/OB Associates, PA

Policyholder Number PSL 1800044 07

INDIVIDUAL APPORTIONMENT

Barbara L. Rowland, MD
Christopher B. Benson, MD
Gregory A. Miller, MD
Joe C. Robinson, MD
Robert C. McClelland, MD
Roy N. Taylor, III, MD
Ansley L. Hilton, MD

Total LEAD Discount



The Loss Excellence Appreciation Discounts (LEAD) listed above are in recognition of the number of years you have practiced with no indemnity payments of more than \$10,000 and the number of years you have been insured by MAG Mutual Insurance Company.

Physicians receiving a part-time discount are not eligible for the LEAD Discount.

LEAD

06/15/09

Multi-Peril Medical Practice Policy**Claims-Made Policy**

This is a claims-made policy. Please read it carefully.

We've written this policy in clear, straight-forward English. Please read it and familiarize yourself with what it says. We, us, ours, and the Company mean MAG Mutual Insurance Company. If you have any questions, please contact us.

We've used examples in *italics* to help explain your policy. These are for clarification of intent and constitute a part of the policy contract.

How to find it

We've designed this Multi-Peril Medical Practice policy so it will cover your many and varied medical practice insurance needs. Here's a list of commonly referred to items in the same order as they appear in this policy.

DECLARATIONS PAGE**CLAIMS-MADE INSURING AGREEMENT**

How this policy protects you
Who's protected under this policy
Medical professional liability limits
Supplementary payments
Your retroactive date
When a claim is made
When a claim is covered
Your duties if you have a claim
Patient Pre-Treatment Arbitration Agreements
Violations of law

COVERAGES**A. Medical Professional Liability Coverages**

- * Individual coverage
- * Refusal to treat; abandonment coverage
- * Good samaritan coverage
- * Volunteer coverage
- * Clinical trials coverage
- * Vicarious liability for medical students and residents coverage
- * Informed consent coverage
- * Personal injury coverage
- * Medical Director administrative services coverage
- * Sexual misconduct defense
- * Medical information disclosure coverage
- * Limited contractual coverage
- * Quality assurance coverage
- * Referral or consultation coverage
- * Electronic medical records coverage
- * Electronic media coverage
- * Punitive damages coverage
- * Blanket locum tenens coverage

B. Professional Organization Coverages

- * Organization coverage
- * New associate(s) coverage
- * Sexual misconduct coverage for organizations
- * Chief administrative employee coverage
- * Employee coverage
- * Medical office premises liability coverage

C. Other Defense Cost-only Coverages

- * Medicare/Medicaid billing compliance Defense costs-only coverage
- * Medical license and other administrative Defense costs-only coverage
- * Clinical privileges defense costs-only coverage
- * Biomedical waste disposal defense costs-only coverage
- * OSHA defense costs-only coverage
- * ADA defense costs-only coverage

D. Termination by Managed Care Organization - Legal Costs**E. Emergency First Aid Coverage****ADDITIONAL BENEFITS**

- Optional reporting endorsement
- Death or disability benefit
- Leave of absence benefit
- Retirement benefit

GENERAL RULES FOR THIS POLICY

- Special Rights and Duties
- Your policy period
- Other insurance
- Premiums and risk classification
- Premium audit
- Policy changes
- Assignment and transfer
- Recovering damages from a third party
- Fraud and misrepresentation
- How state law affects this policy
- Suits against us
- Mutual insurance company
- Policy territory
- Cancellation provisions

MULTI-PERIL MEDICAL PRACTICE POLICY**CLAIMS-MADE INSURING AGREEMENT****How this policy protects you**

In consideration of the payment of the premium and your compliance with all terms of this policy, we'll provide insurance protection against medical practice claims for civil damages which are brought against you by or on behalf of your patients for providing, or failing to provide, medical professional services to your patients up to the Each loss limit that applies to the injured patient and for other covered activities. By medical professional services we mean only services provided personally by covered persons.

We'll investigate and defend any claim or lawsuit brought against you by or on behalf of your patients for claims for civil damages covered under this policy. We'll do this even if the claim or lawsuit is groundless or fraudulent. We have the right to investigate any claim or lawsuit if we think that's appropriate. Any claim or lawsuit may result in damages which exceed your policy limits. We won't settle any claim or lawsuit against you without your prior consent unless otherwise provided in this policy or endorsements to the policy. Your failure to give timely consent may prevent us from resolving the claim or lawsuit within your policy limits and could result in damages in excess of your policy limits.

If a claim or lawsuit involves allegations of matters not covered by this policy, we'll provide you with a defense while we investigate the facts. We reserve our right to discontinue defense and further defense costs and refuse payment of indemnity if we reasonably believe the claim or lawsuit falls outside of the scope of the coverage of this policy.

Who's protected under this policy

Each person listed in the "Who's protected" section of the Declarations Page is covered under this policy. The words "you", "your" and "yours" refer to these covered persons. We cover your chief administrative employee and certain other persons and organizations as specified in this policy or in endorsements to this policy.

For example, you provide obstetrical services to Ms. Jones. During delivery, Ms. Jones and the baby are injured. Claims are filed on behalf of Baby Jones, Ms. Jones and for the loss of consortium injury to Mr Jones. One Each Loss Limit applies to Baby Jones and one Each Loss Limit applies to Ms. Jones. Mr Jones' claim is a derivative claim and therefore shares in the Each Loss Limit for Ms. Jones.

Medical professional liability limits

Two limits apply to the amount we'll pay for medical professional liability claims. These limits are shown on the Declarations Page and defined policy below.

Aggregate Limit. This is the most we'll pay for the sum of all claims made during the policy period.

These limits apply separately to each person listed in the "Who's protected" section of the Declarations Page.

Each Loss Limit. This is the most we'll pay for any one loss. By loss, we mean all covered claims for civil damages resulting from a medical professional service, or series of services, causing injury or death, to any one patient, regardless of the number of:

You may purchase higher limits with our approval. Higher limits may have different retroactive dates.

- (1) persons injured; or
- (2) claims made; or
- (3) claimants making claims; or
- (4) subsequent related claims.

Supplementary payments

For "Medical Professional Liability Coverages" and "Professional Organization Coverages", we'll pay:

- (1) all expenses we incur to defend a claim or lawsuit, but we will not pay for attorneys you retain separately to advise you.
- (2) post-judgment interest on that part of any judgment that doesn't exceed the applicable Each Loss Limit accruing by operation of law and before we have paid, or deposited our portion of the judgment in court.
- (3) cost of appeal bonds or bonds to release property being used to secure a legal obligation. We'll pay premiums for bonds valued up to your Each Loss Limit.

By injury, we mean bodily injury, sickness, disease or death. Injuries to separate patients are considered separate losses, and separate Each Loss Limits apply. Any derivative claims from family members or estates share in the Each Loss Limit that applies to the injured patient.

(4) all reasonable expenses you incur at our request other than lost earnings while helping us to investigate or defend a claim or lawsuit against you. We'll reimburse you for lost earnings up to \$500 a day for your attendance at trial.

None of the Supplementary payments will reduce the limits of your coverage. But we won't provide any Supplementary payments after:

(1) your Each Loss Limit is paid; or

(2) your Aggregate Limit is paid. If this happens, your coverage ends. With our approval, you may apply for a new policy for an additional premium.

Your retroactive date

Your retroactive date is the earliest date for which we insure a covered activity. You may have various retroactive dates if you've purchased higher limits from time to time. Each different retroactive date determines the Each Loss Limit for which we insure a specific covered activity.

When a claim is made

A claim is made on the date you first report an incident or injury to us. An incident is an unexpected or unanticipated medical event or outcome.

When a claim is covered

A claim must meet two requirements to be covered under this policy:

(1) the claim must result from a covered activity provided or withheld on or after your retroactive date; and

(2) the claim must be reported to us by a covered person or organization for the first time during the policy period.

No claims or potential claims reported to a previous insurer or reported to us during a prior policy period may be made in this policy period. Any subsequent claims related to a previously reported claim are considered to have been made on the same date that the previous claim was reported even if the subsequent claim is reported in a different policy period. Any appeal of a judgment resulting from a claim shall be considered to be part of the original claim even if the appeal begins during a subsequent policy period.

Your duties if you have a claim

If a patient is injured or if a claim for damages for a covered activity is made against you or anyone for whose acts you're legally responsible, you must promptly notify us.

You and any other covered person named in the claim must:

(1) Tell us the details of what happened; the names and addresses of any injured people and any witnesses.

(2) Immediately send us all lawsuit documents if you're sued. Keep a copy of what you send us; use registered or certified mail and keep a receipt if you mail them to us. If you fail to do this, the lawsuit may go into default. We won't pay a default judgment against you or any other covered person or entity because of your failure to timely deliver the lawsuit documents to us.

(3) Cooperate in defending the claim and assist us in securing and giving evidence, preparing for and attending depositions, hearings and trials.

(4) Refrain, except at your own cost, from voluntarily making a payment, assuming any obligation, or incurring any expense without our consent (except as provided in section E. Emergency First Aid Coverage). If you do, we won't reimburse you, even if the cost would be covered by this policy.

(5) Refrain from meeting with any attorney or giving statements or depositions with respect to any patient care without first notifying us.

If you fail to comply with your duties under this section, your failure could seriously impair our ability to appropriately defend your claim and we may deny coverage under this policy.

Patient Pre-Treatment Arbitration Agreements

Claims brought by or on behalf of your patients pursuant to a pre-treatment arbitration agreement (patient agreements) are subject to the following conditions:

(1) The patient pre-treatment arbitration agreement in effect between you and the patient must be an agreement provided by or acceptable to us.

(2) We have the right to exercise all of your rights under such agreement including the choice of arbitrators and the conduct of the arbitration proceedings.

(3) If other defendants are named in the claim or lawsuit against you who are not parties to the patient pre-treatment arbitration agreement, we may decline to arbitrate and will defend the claim in such manner as we deem appropriate.

(4) Under the arbitration agreement, we have the right to settle any claim or lawsuit against you without your prior consent.

Violations of law

We'll cover you for claims for civil damages resulting from your violation of laws governing the standards of care in your medical practice and your duties to your patients, but we won't cover any claims for your acts which are in violation of any other law, statute, ordinance or regulation except as provided in section C. Other Defense Costs-Only Coverages.

COVERAGES**A. Medical Professional Liability Coverages**

Individual coverage. We'll cover you for claims for civil damages brought by or on behalf of your patients resulting from:

(1) your direct liability for you personally providing, or failing to provide, medical professional services to your patients. Patients include persons to whom you personally provided medical care and patients of others who have been referred to you for consultation or medical care.

(2) your vicarious liability for providing, or failing to provide, medical professional services to patients by anyone for whose acts you're legally responsible, except other physicians or surgeons unless otherwise provided in this policy or its endorsements.

For example, we'll cover your liability for the acts of your nurse working under your supervision. But we won't cover your vicarious liability for a physician who is your employee, partner or a member of your medical practice or a physician who provides medical professional services as an independent contractor.

Refusal to treat; abandonment coverage. We'll cover you for claims for civil damages arising out of allegations of wrongful transfer, refusal to treat or to accept a person as a patient, or for wrongful termination or abandonment of the care and treatment of a patient including claims for alleged violations of the Emergency Medical Treatment and Active Labor Act (EMTALA), but we won't pay any fines or penalties levied for EMTALA violation.

Good samaritan coverage. We'll cover you for claims for civil damages arising out of providing, or failing to provide, medical professional services to any injured person at the scene of an accident or emergency and/or failure to provide or arrange for further medical treatment for the injured person.

Volunteer coverage. We'll cover you for claims for civil damages arising out of your providing, or failing to provide, medical professional services to anyone for and at the request

of a hospital, school, religious entity, non-profit organization, or state or local governmental agency for which neither the requesting entity or organization nor you expect, charge or receive any compensation.

Clinical trials coverage. We'll cover you for claims for civil damages resulting from your medical professional services to your patients arising out of their participation in FDA approved clinical trials conducted by you. But we won't provide coverage for claims arising out of a defect, deficiency, inadequacy or dangerous condition in a product under clinical trial investigation.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

Vicarious liability for medical students and residents coverage. We'll cover you for your vicarious liability for providing, or failing to provide, medical professional services by medical students and/or residents when working in your medical practice under your supervision and while acting within the scope of a program approved by their educational institution.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

Informed consent coverage. We'll cover you for claims for civil damages arising from an allegation that you failed to obtain valid informed consent.

Personal injury coverage. We'll cover you for claims for civil damages arising out of personal injury to your patients resulting from:

- a. false arrest, detention or imprisonment;
- b. libel, slander or defamation of character;
- c. violation of an individual's right to privacy; and
- d. mental anguish, mental shock or humiliation.

But, we won't pay damages for personal injury arising out of sexual misconduct.

Medical Director administrative services coverage. We'll cover you as a medical director of a Health Care Entity for civil damages arising out of your Administrative Services pursuant to a valid written agreement. For the purposes of this Medical Director administrative services coverage, a "Health Care Entity" is an organization whose primary purpose is to provide

healthcare services to patients. A Health Care Entity does not include a health maintenance organization, preferred provider organization or an insurance company. However, for claims arising out of a related to your administrative duties as Medical Director, we won't cover you for any claims for damages for healthcare services provided or withheld by you to any person, or for any claims for damages you may incur related to or resulting from the direction or supervision of others regarding healthcare to any person, or for any claims related to access to, limitation of, or denial of healthcare to any person.

"Administrative Services" means services which are solely administrative in nature and are performed for a Health Care Entity such as developing staffing plans, providing recommendations to others regarding equipment purchased and maintenance, development of clinical protocols, or providing guidance on quality assurance.

Administrative Services do not include the services of any other agents, employees or independent contractors of any Health Care Entity, nor any services as a director, officer or trustee of the organization, or managerial services related in any way to employment, or to the execution of any contract.

The healthcare entity for which you provide administrative services as a Medical Director is not an insured under this policy.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

Sexual misconduct defense. We'll defend you against claims for civil damages arising out of your alleged sexual misconduct with your patients who are not your employees. We'll pay the legal fees, costs and expenses of such defense. But, we won't pay any judgment, settlement, fine or penalty amount resulting wholly or partially from your sexual misconduct. This limitation applies even if it is contended that such sexual misconduct occurred in the course of providing medical professional services. By sexual misconduct we mean any sexual act, intimacy, assault, molestation, harassment, exploitation, or any treatment, procedure, conduct, or behavior which is considered to be undue sexual familiarity.

Medical information disclosure coverage. We'll cover you for claims for civil damages resulting from the wrongful or unauthorized disclosure of patient confidential or privileged medical information to persons who are not otherwise entitled to it including claims for alleged violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) related to patient privacy, but we won't pay any fines or

penalties levied for HIPAA violation.

Limited contractual coverage. We'll cover you for claims for indemnification resulting from written contracts in which you agree to indemnify and hold harmless a healthcare entity for its expenses resulting solely from your alleged negligent providing, or failing to provide, medical professional services to your patients. But the healthcare entity does not become an insured under this policy even if you agree to this in the contract. For the purposes of this coverage, by healthcare entity we mean an organization whose primary purpose is to provide healthcare services to patients. Healthcare entities include hospitals, community health clinics, outpatient medical entities, health maintenance organizations and other managed healthcare organizations. Healthcare entities do not include federal, state, county and municipal governmental entities, insurance companies, skilled nursing or assisted living facilities, nor any entity whose primary business activity is not the delivery of healthcare services to patients.

Regardless of the terms of your contract with the healthcare entity, we won't cover any claims for damages or indemnification:

- (1) incurred by the healthcare entity when you were not solely negligent, or
- (2) incurred by the healthcare entity arising out of its own or others' alleged negligence, or
- (3) incurred by the healthcare entity for claims for which you are not covered under this policy.

For example, up to the limits of your coverage, we'll reimburse a healthcare entity found liable for a covered patient injury resulting solely from your negligence. But we won't pay any damages or expenses for it being found liable in denying access to treatment.

Quality assurance coverage. We'll cover you for your quality assurance activities when performed for the purposes of evaluating and improving the quality of healthcare services and for patient safety. We'll cover you when you participate as a member, a witness or a clinical practice advisor of a formal credentialing, peer review, or quality assurance board or committee formed by an organization for the purposes of improvement of patient safety or the quality of healthcare services delivered to patients. Quality assurance activities do not include your compensated services to an organization which reviews utilization, necessity and treatment issues related to controlling healthcare costs unless added by endorsement.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

For example, Dr. Smith applies for staff privileges at the hospital where you serve on the committee responsible for reviewing privileges. After investigation, the committee lawfully recommends not to grant privileges. Dr. Smith sues you, other committee members, and the Board of Directors of the hospital. We'll defend you and cover any amount you are required to pay, in excess of any other coverage for you from the hospital, up to the limits of your coverage.

Referral or consultation coverage. We'll cover claims for civil damages arising out of an allegation that you were negligent in recommending a physician or surgeon or other healthcare provider with whom you consulted or to whom you referred your patient for medical professional services.

Electronic medical records coverage. We'll cover claims for civil damages arising out of an allegation that you were negligent in placing, or causing to be placed, erroneous medical information in a medical chart or in an electronic medical record. We'll also cover you because of your reliance upon erroneous medical information in a medical chart or in an electronic medical record.

Electronic media coverage. We'll cover claims for civil damages arising out of your providing or failing to provide medical professional services to your patients through Internet based (including e-mail), interactive teleconferencing, interactive videoconferencing or other electronic media in those states in which you are properly licensed as a medical professional. But we won't cover you for claims for civil damages you may incur for medical professional services provided by others through such media communications unless otherwise provided in this policy or its endorsements.

Punitive damages coverage. We'll cover you for punitive damages, if assessed as part of a judgment against you for a claim covered by this policy and if our payment of punitive damages is not otherwise prohibited in your state, but we won't pay more than the limits of liability that apply.

Blanket locum tenens coverage. We'll provide up to 60 days of coverage during the policy period for duly licensed substitute physicians working in your place or non-physicians in the place of one of your employees covered by this policy on a temporary basis due to vacation, illness or other non-routine absence from your practice, but only if the contract with the temporary substitute person specifies that you will provide insurance coverage. A locum tenens substitute person must

have the same requisite license and qualifications as the person he or she is replacing. You cannot claim a "Leave of absence benefit" and employ a locum tenens physician. We won't cover temporary **additional** persons under this coverage.

We'll also provide coverage for a locum tenens substitute who was covered previously as a temporary substitute under the provisions of another insurer's prior claims-made policy maintained by you on or after the retroactive date stated in this policy.

This coverage does not increase the limits of your coverage. Your temporary locum tenens substitute shares the limits of your coverage.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

B. Professional Organization Coverages

Organization coverage. We'll cover your professional organization for claims for civil damages made against it resulting from the providing, or failing to provide, medical professional services to patients by covered persons for whose acts it is legally responsible. By "professional organization," we mean your proprietorship, partnership, professional association, or corporation. Your covered organization(s) share in the Limits of your coverage for no additional premium. You may purchase separate limits of coverage for your organization. If you do, we'll add the coverage by endorsement for an additional premium.

New associate(s) coverage. We'll cover, for a period of 30 days, any duly licensed physician or surgeon who becomes a partner, associate or employee of your professional organization during the policy period if you notify us of such individual and submit a completed application within 15 days of employment or association of that individual. We reserve our right to deny continuing coverage to such individual once underwriting information is reviewed by us. The limits of liability applicable to such individual are \$1,000,000 Each Loss Limit and \$1,000,000 Aggregate Limit for the 30-day period regardless of the limits on the Declarations Page. The retroactive date of this coverage shall be the date of employment and is limited to medical professional services provided or withheld in the course of employment with you.

Sexual misconduct coverage for organizations. We'll cover your professional organization for claims for civil damages against it arising out of the vicarious liability incurred by the professional organization to which two or more physicians or surgeons belong, resulting from the sexual misconduct of a person for whose acts it is legally liable. We will not cover claims against the organization if only one physician or surgeon is a member. We will not cover claims the professional organization incurs arising out of sexual misconduct against employees.

For example, the organization may be protected for its vicarious liability for a physician who commits sexual misconduct against a patient, but we won't provide coverage for the organization because of the physician's sexual misconduct against your employee nurse.

In applying limits of liability, all acts of sexual misconduct toward one person will be considered to be one loss. This organization coverage does not apply to any sexual misconduct which occurred after management knew, or reasonably should have known and failed to promptly investigate, or investigated but failed to act to stop such sexual misconduct.

Chief administrative employee coverage. For claims covered by this policy, your chief administrative management employee, by whatever title, is an additional insured person while acting within the scope of his/her duties. This coverage does not increase the limits of coverage of the policy. This employee shares the professional organization limits of coverage. If no professional organization is insured, this employee shares your individual limits of coverage.

Employee coverage. We'll extend your coverage to apply to all non-medical employees and also to certain medical professional employees while acting within the scope of their employment for you and while working under your supervision. **But, we won't cover the following employees unless these employees pay an additional premium and are added to your policy by endorsement:**

- *physician/surgeon assistants
- *certified nurse practitioners
- *employees who administer anesthesia
- *nurse midwives
- *medical doctors
- *osteopaths
- *podiatrists
- *chiropractors
- *dentists
- *psychologists
- *employees covered by a Separate Limits Endorsement

If you purchase an endorsement for separate limits of coverage for your organization, we'll extend coverage to also apply to physician/surgeon assistants and certified nurse practitioners without payment of additional premium for those employees.

This coverage does not increase the limits of your policy. These employees share the professional organization limits of coverage. If no professional organization is insured, these employees share your individual limits of coverage.

The endorsement(s) to provide separate or shared limits coverage for certain specified medical professional employees will supercede the terms of this employee section of the policy.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

Medical office premises liability coverage. We'll cover you for claims for civil damages because of bodily injury, property damage, or personal injury to your patients caused by an accident or injury arising out of the ownership, maintenance or occupancy of your medical office.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

C. Other Defense Costs-Only Coverages

We'll provide **defense costs-only** coverage as listed below. We won't pay any judgments, settlements, reimbursements, fines or penalties for these Other defense costs-only coverages. The Limits of coverage on the Declarations page **do not apply** to these Other defense costs-only coverages; **nor** does the Supplementary payments section apply.

These Other defense costs-only coverages have stated limits of defense costs-only coverage. Unless otherwise specified in endorsements to the policy, the most we'll pay to defend you under any one coverage in this Other defense costs-only coverages section is \$50,000. The most we'll pay for defense costs under all coverages combined in this Other defense costs-only coverages section during the policy period is \$100,000.

No claims may be made under this Other defense costs-only coverages section for which there is either knowledge of or commencement of a proceeding or action prior to the inception date of this policy.

Medicare/Medicaid billing compliance defense costs-only coverage. We'll defend you by providing **audit expense** and **legal defense** benefits for a civil action or administrative proceeding brought against you involving an alleged erroneous but non-fraudulent violation of any Medicare or Medicaid laws, rules or regulations relating to reimbursement for medical services.

An **Audit Expense Claim** must result from (1) a request by a Medicare/Medicaid authority or its representative to review patient records, or (2) a request by the same for the refund of a prior payment.

A **Legal Defense Claim** must result from a formal notice from a Medicare/Medicaid authority or its representative intending (a) to impose a civil monetary penalty, (b) to seek additional monetary damages, (c) to exclude you from the Medicare/Medicaid program, (d) to suspend future Medicare/Medicaid reimbursements, or (e) to initiate a formal investigation.

Either claim, **audit expense** or **legal defense**, must be reported to us by a protected person for the first time during the policy period.

Subject to a deductible of \$1,000 for each claim, the most we'll pay during the policy period for **audit expense** is \$20,000 and the most we'll pay for **legal defense** is \$30,000 regardless of the number of insured persons, number of claims, or number of billing charges involved in the investigation or proceeding.

Medical license and other administrative defense costs-only coverage. We'll defend you if you become subject to any formal action, hearing or proceeding before any governmental board, peer review organization (PRO), committee, agency or regulatory authority for matters of medical licensing, quality assurance, regulation and professional conduct or discipline which arise from a medical professional liability claim covered under this policy.

Clinical privileges defense costs-only coverage. We'll defend you if you become subject to any formal action, hearing or proceeding before any hospital board or committee, or other healthcare organization for matters of clinical privileges which arise from a medical professional liability claim covered under this policy.

Biomedical waste disposal defense costs-only coverage. We'll defend you for claims for bodily injury or property damage allegedly resulting out of your medical practice operations for biomedical waste disposal. Such operations include handling, storage, treatment, transportation, processing

or disposal of biomedical waste. Biomedical waste includes pathological waste, biological waste, cultures and stocks of infectious agents, contaminated animal carcasses and body parts, chemotherapy waste, and discarded medical materials and equipment such as needles, scalpel blades and clamps.

Biomedical waste does not include hazardous waste or radioactive waste. We won't pay for any costs you incur for monitoring, cleaning up, containing, treating, detoxifying or neutralizing any biomedical waste, hazardous waste or radioactive waste.

OSHA defense costs-only coverage. We'll defend you during an investigation by the Occupational Safety and Health Administration (OSHA) for the purpose of determining deficiencies in your office practice. Notice of the investigation must be received by you during the policy period.

ADA defense costs-only coverage. We'll defend you against patient claims for alleged violations of the Americans with Disabilities Act (ADA) if the allegations concern either: (1) the physical accessibility or construction of your medical office premises; or (2) a refusal to provide medical professional services to a disabled person.

D. Termination by Managed Care Organization - legal costs.

We'll reimburse legal costs you incur up to \$25,000 when a final decision is rendered by a court or an arbitrator that a managed care organization terminated its provider contract with you for the sole reason that you advocated appropriate medical care with or on behalf of your patients. But, we won't provide legal representation for you under this coverage.

E. Emergency First Aid Coverage

We'll reimburse you for your out-of-pocket expenses up to \$5,000 each person for emergency medical expenses due to a bodily injury caused by an accident on your medical office or outpatient surgical premises regardless of fault. We won't reimburse you for emergency medical expenses for you, your employees, or physician associates.

Insurance under this coverage is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

ADDITIONAL BENEFITS**Optional reporting endorsement**

Your medical practice coverage may end because you or we choose to cancel or not renew it. If this happens, you have the right to buy an optional reporting endorsement that extends the time for reporting claims. If you owe us premium at termination, you must first pay us the premium owed before you can exercise your right to buy this endorsement.

A claim must meet two requirements to be covered under the reporting endorsement:

(1) the claim must result from a covered activity provided or withheld on or after your retroactive date and before your coverage ended; and

(2) the claim must be reported to us by you for the first time while the reporting endorsement is in effect.

Your written request and premium payment for this option to purchase the reporting endorsement must be made within 30 days after your coverage ends. The premium will be based on the rules and rating plans we're using on the first day of the current policy period. This option may be exercised by any protected person or organization on behalf of another.

For example, you and Dr. Brown are insured under the same policy which includes SHARED limits for your organization. Dr. Brown resigns to practice medicine in another state. When Dr. Brown's individual coverage ends, no claims can be made under the policy for Dr. Brown or for the organization for its vicarious liability from Dr. Brown's acts. If Dr. Brown buys a reporting endorsement, he and the organization may share in the limits of coverage provided by the reporting endorsement. If Dr. Brown chooses not to buy a reporting endorsement, then the organization may choose to insure its vicarious liability by paying an additional premium. If neither the organization nor Dr. Brown purchase coverage to extend the time for reporting claims, then coverage ends for both Dr. Brown and the organization for his acts.

Death or disability benefit

If you are a physician or surgeon listed in the "Who's protected" section of the Declarations Page or an employee specifically named on a separate limit employee endorsement attached to this policy and you die or become disabled while this policy is in effect, we'll issue the reporting endorsement without requiring the payment of any additional premium. By disability, we mean total and permanent disability resulting in your complete inability to practice medicine due to sickness or

injury. In order to qualify, disability must continue for a period of six (6) consecutive months while your policy is in effect.

If you have tested seropositive for Human Immunodeficiency Virus (HIV) and decide to fully retire from the practice of medicine, you are eligible for total and permanent disability. No waiting period is required. Upon acceptable confirmation, we will terminate your policy and issue the optional reporting endorsement without requiring payment of any additional premium.

In order to obtain a waiver of the premium for the reporting endorsement, acceptable proof of your death or disability must be sent to us in writing.

Recovery from disability. If you recover from total and permanent disability and return to the practice of medicine, either full-time or part-time, you may apply for reinstatement of your policy according to the rules and rating plans we are using at the time.

Leave of absence benefit

If you are a physician or surgeon listed in the "Who's protected" section of the Declarations Page or an employee specifically named on a separate limit employee endorsement attached to this policy, you may take leave(s) of absence from the practice of medicine for any reason(s) up to a total of twelve (12) months while insured with us. The leave of absence must be for a continuous period of more than 45 days and commence only after you have been continuously insured with us for at least one year immediately preceding the leave of absence. The most we will allow for the sum of all leaves of absence while you are insured is twelve months. We'll waive your premium payments during your leave(s). You cannot employ a locum tenens substitute while taking advantage of this benefit. You must notify us upon your return to practice.

Retirement benefit

If you are a physician or surgeon listed in the "Who's protected" section of the Declarations Page or an employee specifically named on a separate limit employee endorsement attached to this policy, we'll issue the reporting endorsement without requiring the payment of any additional premium if you have:

- (1) fully and permanently retired from the practice of medicine; and
- (2) been continuously insured with us for at least five years immediately preceding your retirement; and
- (3) attained the age of 55, and

Policy Number: PSL 1800044 07

MAG MUTUAL INSURANCE COMPANY

(4) met your premium payment(s) obligation.

(5) For those meeting requirements (1), (3) and (4) above, but not (2), a 20% credit will be applied to the reporting endorsement premium for each complete year you have been continuously insured with us immediately preceding your retirement.

Return to practice. Notify us if you resume the practice of medicine, either full-time or part-time, and you may apply for reinstatement of your policy according to the rules and rating plans we are using at the time.

In order to receive the retirement benefit for the reporting endorsement, proof of your retirement must be sent to us in writing promptly following your retirement.

This retirement benefit is not applicable to reporting endorsements for organizations. Separate limits for organizations can be maintained under a reporting endorsement by the payment of premium for such extended coverage.

GENERAL RULES FOR THIS POLICY

Special rights and duties

The individual or organization to whom this policy is issued and who is listed under the **"Policy issued to"** section of the Declarations Page has special rights and duties. These special rights and duties are explained in the following sections of the General Rules:

- *Premium and risk classification
- *Policy changes
- *Mutual insurance company (3) "dividends"
- *Cancellation provisions

Your policy period

All references to time mean the time at the mailing address of the person or organization to whom this policy is issued shown on the Declarations Page.

This policy begins at 12:01 a.m. on the effective date. If this policy replaces a policy ending at noon, rather than 12:01 a.m., you'll be covered at noon when coverage under the old policy ends.

Any endorsement added to this policy after its effective date becomes effective at 12:01 a.m. on the date shown on the added endorsement, unless specifically indicated otherwise.

Your policy will end at 12:01 a.m. on the expiration date. If all or part of this policy is cancelled for any reason before that date, the policy or that part of the policy will end at 12:01 a.m. on the cancellation date.

Other insurance

A medical practice claim that's covered under this policy may also be covered under other insurance available to you, either with this Company or other companies. Insurance under this policy is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgements. If all other valid insurance and self-insurance limits of coverage are excess, we'll pay that portion of your loss which the Each Loss Limit of your coverage under this policy is to the total of all limits that apply. But we won't pay more than the limits of your coverage under this policy.

Premiums and risk classification

We calculate the premium for your risk classification for this policy using information available at the time. If the information is incomplete or incorrect, we have the right to recalculate your premium. The individual or organization listed under "Policy issued to" has a duty to pay this premium or we won't be obligated under this policy. You also have a duty to notify us in writing within 30 days if your medical practice

changes so we can determine your risk classification and what premium you owe us. We have the right to adjust premiums at any time based on rates and rating plans in effect at the time.

Premium audit

You must keep accurate records of the information we'll need to calculate your premium. You agree to send us copies of these records at any time we request them.

Policy changes

This policy can only be changed by a written endorsement which is made a part of the policy. The endorsement must be countersigned by one of our Authorized Representatives.

Nothing else, including notice to any employee or officer of the Company or knowledge by them or anyone else, or statements or promises by them or anyone else, will change this policy or waive any of its terms or stop us from asserting any of our rights under it.

We may make changes in our standard insurance policy forms from time to time. These changes must conform to state law and are filed with the state commissioner of insurance. The changes may either broaden or restrict your coverage. While your policy is in effect, you will automatically receive the benefit of any broadened coverage, if we can make the changes to your policy without increasing your premium. If we make changes which are more restrictive, you won't be affected until your policy is renewed. We'll notify the individual or organization listed under "Policy issued to" of the more restrictive changes 45 days before they become effective under your renewal policy.

Assignment and transfer

Neither you nor anyone else covered under this policy can assign or turn over any interest related to this policy or coverage without our written consent attached to this policy.

But if you die, your interest will transfer to your legal representative, and he or she will be covered until the end of the policy period.

Recovering damages from a third party

Any individual or organization covered under this policy may have the right to recover all or part of a loss from someone other than us. Because of this, each covered individual or organization must do all that's possible to preserve any right of recovery available. If we make a payment under this policy, that right of recovery will belong to us. If we recover more than we've paid, the excess will belong to whomever had the loss. But we'll deduct our expenses first.

Policy Number: PSL 1800044 07

MAG MUTUAL INSURANCE COMPANY

Fraud and misrepresentation

We expect you to be completely honest and candid with us. We have relied on your representations to determine your premium and eligibility for issuance or renewal of this insurance.

If any protected individual conceals or fails to disclose any important information, misleads us, or attempts to defraud or lie to us about any matter concerning this insurance, either before or after a claim, we may deny coverage under this policy.

How state law affects this policy

This policy is issued according to laws of the state shown in the mailing address of the person or organization to whom this policy is issued shown on the Declarations Page. Any part of this policy that conflicts with the law in that state is automatically changed to conform to that law.

Suits against us

You agree not to sue us to recover under this policy unless you've lived up to all its terms. You agree not to sue us until the amount of your liability to others has been finally determined either by trial or by a written agreement signed by us and by the party making a claim against you. Once your liability has been determined by judgment or by written settlement agreement, the party making the claim may be able to recover under this policy, up to the limits of your coverage. If you do sue us, you agree to do so within 12 months from the date your liability to others has been finally determined, but in no event after three (3) years from the end of the policy period during which the dispute arises.

Mutual insurance company

Mutual insurance companies have special rules which govern their organization, membership, and insurance policies. The following rules apply to and are a part of this policy:

(1) this policy is nonassessable.

(2) Each individual listed in the "Who's protected" section of the Declarations Page is a member of the Company and, as such, entitled to cast one vote each, either in person or by proxy, at any and all member meetings of the Company. The annual meeting of members will be held each year upon such date, time and place as may be determined by the Company's Board of Directors. Notice of the date, time and place of the annual meeting will be sent to all members according to applicable laws.

(3) This policy is participating with respect to any distribution of dividends to the extent and in the manner such dividends may be declared by our Board of Directors. Any distribution of dividends will be made to the individual or organization to whom this policy is issued and who is listed under the "Policy issued to" section of the Declarations Page.

Policy territory

This insurance applies to medical professional services provided or withheld in any jurisdiction in which you are properly licensed as a medical professional. But the claim or lawsuit must be filed within the United States of America its territories or possessions, Puerto Rico or Canada.

Policy Number: PSL 1800044 07

MAG MUTUAL INSURANCE COMPANY

Cancellation provisions

You can cancel this policy in whole or in part at any time. We can also cancel this policy, but our right to cancel has some restrictions which are described below.

How you can cancel. To cancel this policy or any part of it, you must deliver the policy, or the part you want cancelled to us or any of our authorized agents. If this isn't possible, notify us by mail and include the future date you want coverage to end. You'll get a refund for the unused premium, calculated according to short-rate tables or formulas in our rating plan filed with the Commissioner of Insurance.

How we can cancel. (a) If your policy is a renewal or has been in effect 90 days or more, we can cancel prior to the expiration date for any of the following reasons.

- (1) Non-payment of premium;
- (2) Material representation of fact which, if known to us, would have caused us not to issue the policy;
- (3) Substantial change in the risk assumed, except to the extent that we should reasonably have foreseen the change or contemplated the risk in writing the policy;
- (4) Substantial breaches of contractual duties, conditions, or warranties; or
- (5) Loss of our reinsurance covering all or a significant portion of the risk, or where continuation of the policy would imperil our solvency or place us in violation of the insurance laws of

the State. Prior to cancellation for this reason, we shall notify the Commissioner at least 60 days before your coverage will end.

(b) Cancellation under item (1) of subsection (a), nonpayment of premium, is not effective unless written notice of cancellation has been delivered or mailed to you not less than 10 days prior to the proposed effective date of cancellation. Cancellation under items (2) through (5) of subsection (a) of this section is not effective unless written notice of cancellation has been delivered or mailed to you not less than 30 days prior to the proposed effective date of cancellation. Notice of cancellation shall state the precise reason for cancellation.

(c) If your policy has been in effect less than 90 days and is not a renewal, we can cancel for any reason and we'll mail notice at least 30 days before your coverage will end.

How we can non-renew. We agree to notify you if we intend not to renew this policy by mailing to you at the address shown in the policy, written notice of such intent not less than 30 days prior to the expiration date of this policy. Notice of non-renewal shall state the precise reason for non-renewal.

Mailing the cancellation notice - unused premium. Mailing of this notice to the last known address will be proof you were notified of the cancellation or non-renewal. As soon as possible, we'll return any unused premium, calculated on a daily pro-rata basis. However, the cancellation will be effective whether or not you've been paid or offered the unused premium.


President


Secretary

**MAG MUTUAL®**

MAG MUTUAL INSURANCE COMPANY

P.O. Box 52979

Atlanta, Ga 30355-0979

404-842-5600

800-282-4882

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**EXCLUSION FOR BARIATRIC SURGERY
AMENDATORY ENDORSEMENT**

MAG Mutual Insurance Company

Policyholder Rock Hill GYN/OB Associates, PA	Policy Number PSL 1800044 07	Endorsement effective date July 1, 2009
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This endorsement changes your policy. Please read it carefully.

What this endorsement does

This endorsement excludes Bariatric surgical procedures for the treatment of obesity.

We will not cover you or your organization for any claims for civil damages resulting from or in connection with your direct or vicarious liability for providing bariatric surgical procedures for the treatment of obesity or assisting with such surgical procedures including but not limited to gastric banding, vertical banded gastroplasty, laparoscopic adjustable gastric banding (LAGB), jejunoileal bypass, biliopancreatic diversion (BPD), Roux-en-Y gastric bypass and other open or laparoscopic bariatric surgical procedures for the treatment of obesity.

This exclusion does NOT apply:

- (1) To your direct or vicarious liability as a physician or surgeon supporting, rather than performing, the surgical procedure. For example, we will provide coverage to *Anesthesiologists, Cardiologists and other specialties providing support services during the surgical procedure*; or
- (2) To your direct or vicarious liability for providing or failing to provide emergency corrective surgery to bariatric patients of other surgeons; or
- (3) To your direct or vicarious liability for providing or failing to provide follow-up medical or surgical services on an on-call or coverage basis to bariatric patients of other surgeons.

Other terms

This endorsement forms a part of the Multi-Peril Medical Practice Policy and is subject to all of its other terms, conditions and exclusions.

Important: If you intend to perform bariatric surgical procedures for the treatment of obesity, please contact your agent or The Company immediately so that we might make special underwriting arrangements for your insurance coverage.

**PROFESSIONAL ORGANIZATION
SEPARATE LIMITS ENDORSEMENT**

MAG Mutual Insurance Company

Policy issued to Rock Hill GYN/OB Associates, PA	Policy number PSL 1800044 07	Endorsement effective date July 1, 2009
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This endorsement changes your policy. Please read it carefully.

Who's protected

Organization name
Rock Hill GYN/OB Associates, PA

Class code
809990



What this endorsement does

At your request and in consideration of the payment of the additional premium shown above, this endorsement provides a separate limit of coverage for the organization named in the "Who's protected" section of this endorsement and adds the additional coverages described below.

Limits of coverage	Organization Each loss limit	Organization Aggregate limit	Retroactive Date
	\$1,000,000	\$3,000,000	07/01/2002
Total Limits of coverage	\$1,000,000	\$3,000,000	

These limits apply separately to the organization listed in the "Who's protected" section of this endorsement. If additional organizations are named in other endorsements to the policy, those organizations SHARE in these limits. Only one Each Loss limit applies to the organization even if multiple physicians are involved in the medical professional services(s) rendered to an injured patient.

Organization coverage. The organization listed in the "Who's protected" section of this endorsement is covered for claims for damages resulting from the providing or withholding of medical professional services to patients by anyone for whose acts it's legally responsible, unless such coverage is limited or excluded by any other endorsement. It is also covered for its vicarious liability from employees or members who terminate individual coverage on or after the retroactive date, but only while this policy and this endorsement are in effect.

For example, your organization has a separate limit of coverage and one of your patients sues you and your organization as the result of surgery you performed. We'll defend you and pay any judgment against you up to the limits of your individual coverage, unless this coverage is limited or excluded by some other endorsement. We'll also defend your organization and pay any judgment against it up to the Organization Each loss limit. Any other partners who are sued solely because they are members of the organization are also covered with this same Organization Each loss limit.

Other Terms

This endorsement forms a part of the Multi-Peril Medical Practice Policy and is subject to all of its other terms, conditions and exclusions.

**BLANKET EMPLOYEE FOR SEPARATE
LIMITS ORGANIZATIONS ENDORSEMENT****MAG Mutual Insurance Company**

Policy issued to Rock Hill GYN/OB Associates, PA	Policy number PSL 1800044 07	Endorsement effective date July 1, 2009
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This endorsement changes your policy. Please read it carefully.

What this endorsement does

This endorsement extends coverage to the medical professional employees described below. But we'll cover these employees only while acting within the scope of their employment for you and while working under your supervision.

Who's covered

All employees except:

- employees who administer anesthesia
- nurse midwives
- employees listed in the "Who's protected" section of the Employee Separate Limits Endorsement
- medical doctors
- osteopaths
- podiatrists
- chiropractors
- dentists

Insurance under this cover is excess of and payable only after all other valid insurance and self-insurance limits of coverage have been exhausted paying settlements and judgments.

Limits of your coverage

This endorsement does not increase the limits of your coverage. These employees share the organization limits of coverage.

Other Terms

We will extend the period for reporting claims for covered employees who terminate, but only while this endorsement and this policy are in effect.

This endorsement forms a part of the Multi-Peril Medical Practice Policy and is subject to all of its other terms, conditions and exclusions.

**PRESERVATION OF LIMITS
ENDORSEMENT****MAG Mutual Insurance Company**

Policy issued to

Rock Hill GYN/OB Associates, PA

Policy number

PSL 1800044 07

Endorsement effective date

July 1, 2009

This endorsement changes your policy. Please read it carefully.**What this endorsement does**

In consideration of the payment of the additional premium, it is agreed that limits shown below apply, but only for medical professional services provided or withheld during the period shown below.

The higher limits shown below are in addition to the limits of your coverage shown on the Declarations Page.

Who's protected	Retroactive Date	Ending Date	Higher Each Loss Limit	Aggregate Limit
Rock Hill GYN/OB Associates, PA	07/01/02	07/01/03	1,000,000	1,000,000

This endorsement will remain in effect continuously, but terminates with the policy or your termination from the policy unless you exercise your right to purchase a reporting endorsement or become eligible for a free reporting endorsement.

Other terms

This endorsement forms a part of the Multi-Peril Medical Practice Policy and is subject to all of its other terms, conditions and exclusions.

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Barbara L. Rowland, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29730

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

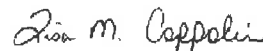
Retroactive Date:

07/01/2002

TOTAL LIMITS

1,000,000 / 3,000,000

Please inquire directly with the insured for individual restrictive endorsements that may apply. This Certificate of Insurance neither affirmatively nor negatively amends, alters or extends the coverage afforded by the policy described above. In the event of cancellation of the described policy, MAG Mutual will make reasonable effort to notify the party at whose request this certificate was issued, but MAG Mutual shall not be liable in any way for failure to give such notice.



Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Piedmont Healthcare System
Attn: Medical Staff Office
222 S. Herlong Ave.
Rock Hill SC 29732-1190

Name and mailing address of insured:

Barbara L. Rowland, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29730

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

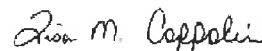
Retroactive Date:

07/01/2002

TOTAL LIMITS

1,000,000 / 3,000,000

Please inquire directly with the insured for individual restrictive endorsements that may apply. This Certificate of Insurance neither affirmatively nor negatively amends, alters or extends the coverage afforded by the policy described above. In the event of cancellation of the described policy, MAG Mutual will make reasonable effort to notify the party at whose request this certificate was issued, but MAG Mutual shall not be liable in any way for failure to give such notice.



Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Springs Memorial Hospital
Attn: Medical Staff Office
800 W. Meeting St.
Lancaster SC 29720-2298

Name and mailing address of insured:

Barbara L. Rowland, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29730

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

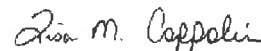
Retroactive Date:

07/01/2002

TOTAL LIMITS

1,000,000 / 3,000,000

Please inquire directly with the insured for individual restrictive endorsements that may apply. This Certificate of Insurance neither affirmatively nor negatively amends, alters or extends the coverage afforded by the policy described above. In the event of cancellation of the described policy, MAG Mutual will make reasonable effort to notify the party at whose request this certificate was issued, but MAG Mutual shall not be liable in any way for failure to give such notice.



Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Surgery Center at Edgewater
Medical Staff Svcs
800 W Meeting St
Lancaster SC 29720

Name and mailing address of insured:

Barbara L. Rowland, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29730

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

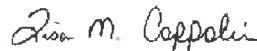
Retroactive Date:

07/01/2002

TOTAL LIMITS

1,000,000 / 3,000,000

Please inquire directly with the insured for individual restrictive endorsements that may apply. This Certificate of Insurance neither affirmatively nor negatively amends, alters or extends the coverage afforded by the policy described above. In the event of cancellation of the described policy, MAG Mutual will make reasonable effort to notify the party at whose request this certificate was issued, but MAG Mutual shall not be liable in any way for failure to give such notice.



Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Christopher B. Benson, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

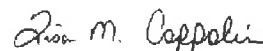
Retroactive Date:

07/01/2002

TOTAL LIMITS

1,000,000 / 3,000,000

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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Piedmont Healthcare System
Attn: Medical Staff Office
222 S. Herlong Ave.
Rock Hill SC 29732-1190

Name and mailing address of insured:

Christopher B. Benson, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

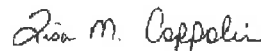
Retroactive Date:

07/01/2002

TOTAL LIMITS

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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Surgery Center at Edgewater
Medical Staff Svcs
800 W Meeting St
Lancaster SC 29720

Name and mailing address of insured:

Christopher B. Benson, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

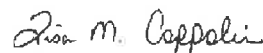
Retroactive Date:

07/01/2002

TOTAL LIMITS

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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

South Fulton Medical Center
Attn: Medical Staff Office
1170 Cleveland Avenue
East Point GA 30344

Name and mailing address of insured:

Gregory A. Miller, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

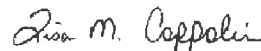
Retroactive Date:

07/01/2002

TOTAL LIMITS

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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Gregory A. Miller, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

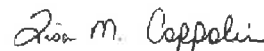
Retroactive Date:

07/01/2002

TOTAL LIMITS

1,000,000 / 3,000,000

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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Piedmont Healthcare System
Attn: Medical Staff Office
222 S. Herlong Ave.
Rock Hill SC 29732-1190

Name and mailing address of insured:

Gregory A. Miller, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

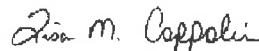
Retroactive Date:

07/01/2002

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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Springs Memorial Hospital
Attn: Medical Staff Office
800 W. Meeting St.
Lancaster SC 29720-2298

Name and mailing address of insured:

Gregory A. Miller, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

1,000,000/3,000,000

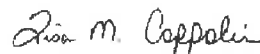
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MAG Mutual Insurance Company
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Atlanta, GA 30355-0979

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Medical Staff Svcs
800 W Meeting St
Lancaster SC 29720

Name and mailing address of insured:

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Suite 145
Rock Hill, South Carolina 29732

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July 1, 2009

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July 1, 2010

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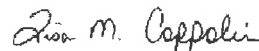
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Authorized Representative

MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Joe C. Robinson, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

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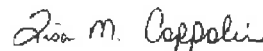
Retroactive Date:

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PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Piedmont Healthcare System
Attn: Medical Staff Office
222 S. Herlong Ave.
Rock Hill SC 29732-1190

Name and mailing address of insured:

Joe C. Robinson, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

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Effective Date:

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Expiration Date:

July 1, 2010

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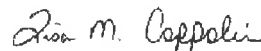
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Atlanta, GA 30355-0979

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Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Robert C. McClelland, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

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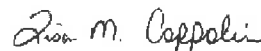
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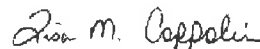
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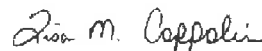
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MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Roy N. Taylor, III, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

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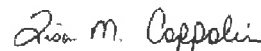
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Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Piedmont Healthcare System
Attn: Medical Staff Office
222 S. Herlong Ave.
Rock Hill SC 29732-1190

Name and mailing address of insured:

Roy N. Taylor, III, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

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Policy Number:

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Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

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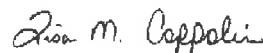
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PO Box 52979
Atlanta, GA 30355-0979

CERTIFICATE OF INSURANCE**MAG Mutual Insurance Company****Certificate issued to:**

Carolinas HealthCare System
Attn: Medical Staff Services
P.O. Box 32861
Charlotte NC 28232-2861

Name and mailing address of insured:

Ansley L. Hilton, MD
1721 Ebenezer Road
Suite 145
Rock Hill, South Carolina 29732

This is to certify that MAG Mutual Insurance Company has issued a Physicians and Surgeons Professional Liability Insurance Policy to the insured listed above, subject to the provisions of the current policy contract and any endorsements.

Policy Number:

PSL 1800044 07

Effective Date:

July 1, 2009

Expiration Date:

July 1, 2010

Limits**Each loss /Aggregate limit**

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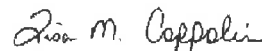
Retroactive Date:

08/07/2006

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MAG Mutual Insurance Company
PO Box 52979
Atlanta, GA 30355-0979

EXHIBIT 2

(Affidavit of Dr. Gregory Miller)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Angela Patton, as Next Friend of
Alexia L., a minor,

Plaintiff,

v.

Dr. Gregory A. Miller and Rock Hill
Gynecological & Obstetrical Associates,
P.A.,

Defendants

IN THE CIRCUIT COURT

Civil Action No.: 2009-CP-46-5195

AFFIDAVIT OF GREGORY A. MILLER

PERSONALLY appeared before me, Gregory A. Miller, who first being duly sworn,
deposes and says:

1. I am Gregory A. Miller and I am a Defendant in the case of Patton vs. Gregory Miller MD & Rock Hill OBGYN.
2. My assets total approximately \$100,000.00 excluding any funds in my retirement accounts and excluding my home which is owned by my wife.
3. My liabilities, including mortgages, credit cards, school loans for children, and tax liabilities total approximately \$1,500,000.00.
4. As a result, I am not in a position to post an Appeal Bond of any material amount, and any requirement by the Court that I do so would create an undue financial hardship on me and my family.

Further Deponent sayeth not.



Gregory A. Miller

Sworn to and before me
this 26th day of May, 2022

Lena Cody Wolfe
Notary Public for North Carolina
My Commission Expires: Sept 16, 2024

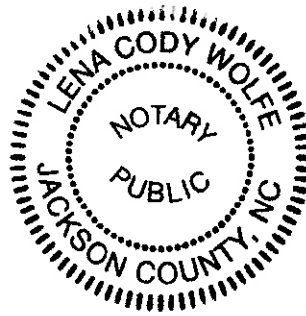


Exhibit H

(Motion to Reconsider re Motion to Reduce Amount)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	Civil Action No. 2009-CP-46-05195
Angela Patton, as Next Friend of Alexia	)	
Lumpkin, a minor,	)	
	)	DEFENDANTS' MOTION TO
Plaintiff,	)	RECONSIDER DENIAL OF MOTION TO
	)	REDUCE AMOUNT OF APPEAL BOND
vs.	)	
	)	
Gregory A. Miller M.D. and Rock Hill	)	
Gynecological & Obstetrical Associates P.A.,	)	
	)	
Defendants.	)	

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants Gregory A. Miller, M.D. ("Dr. Miller"), and Rock Hill Gynecological & Obstetrical Associates, P.A. (together, "Defendants") respectfully move for reconsideration of the Court's June 1, 2022 Form 4 order denying Defendants' motion to reduce the amount of the required appeal bond.

Defendants are **not** seeking a second reconsideration of the denial of their May 27 Rule 59(e) motion. As stated in conjunction with that motion, Defendants originally hoped to avoid the need to present evidence on the financial capacities of Dr. Miller, and thus had moved for a stay based on the posting of no bond, a \$1 million bond, or on the existing statutory maximum bond limits in the interests of public policy, recognizing that the Court had discretion to set the bond at those limits, notwithstanding the fact that the statutory maximums were not mandated in this case. The Court declined to do so. The Court has ruled on that and declined to reconsider the ruling. There is no need for further reconsideration motions in that scenario.

After receiving the initial ruling of the Court respecting the motion set forth above, in which the Court chose to set the bond amount at \$6.25 million, Defendants moved the Court to reduce

the bond amount. The Court has declined. Defendants believe they are obligated to seek reconsideration of the denial of their May 27 motion to reduce the amount of the appeal bond.

The June 1 order did not explain the Court's rationale for denying that motion. Thus, out of an abundance of caution, Defendants seek reconsideration of the Court's denial of the motion to reduce the amount of the appeal bond, based on the arguments made in that motion and the supporting affidavits and other information attached thereto. *See Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) ("An issue is not preserved where the trial court does not **explicitly** rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." (emphasis added)); *Smith v. NCCI, Inc.*, 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct. App. 2006) (same). *Home Medical Systems v. SC Dept. of Rev.*, 382 S.C. 586, 677 S.E.2d 582 (2009). Defendants therefore respectfully request that the Court reconsider its denial of Defendants' motion to reduce the amount of the required appeal bond.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Gregory A. Miller, M.D. and Rock Hill
Gynecological & Obstetrical Associates P.A.

Columbia, South Carolina

June 6, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge
William B. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000288

RECEIVED

Jun 20 2022

SC Court of Appeals

Angela Patton, as Next Friend of Alexia L., a minor, ... Respondent,

v.

Dr. Gregory A. Miller and Rock Hill Gynecological &
Obstetrical Associates, P.A., ... Appellants.

PROOF OF SERVICE

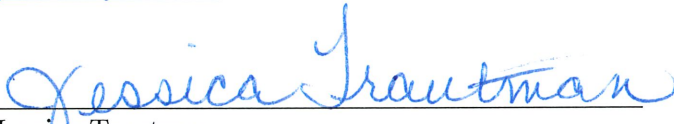
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, Attorneys for Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A., do hereby certify that on June 20, 2022, I served all counsel in this action with a copy of the pleading(s) hereinbelow by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleading(s): **Petition for Writ of Supersedeas**

Served: Edward L. Graham
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Jessica Trautman
Administrative Assistant

June 20, 2022

Jessica Trautman

From: Jessica Trautman
Sent: Monday, June 20, 2022 2:05 PM
To: egraham@grahamlawfirm.net; bradjordan@comporium.net; adavis@davissnyder.com
Cc: 'Nick Charles'; Mitch Brown
Subject: Angela Patton, et al. v. Gregory A. Miller M.D., et al--Civil Action No. 2022-000288
Attachments: Miller - Petition for Writ of Supersedeas.pdf

Counsel,

Attached for service upon you in the above matter is a Petition for Writ of Supersedeas. Service is made via email pursuant to the Supreme Court Order 2021-08-25-02.

Thank you,



JESSICA TRAUTMAN SENIOR ADMINISTRATIVE ASSISTANT
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