

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

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.

**RESPONDENT'S AMENDED RETURN TO APPELLANTS'
PETITION FOR WRIT OF SUPERSEDEAS**

INTRODUCTION

This is a birth injury case tried from January 4 through 14, 2022, with the Honorable William A. McKinnon presiding. Following a verdict of \$2.5 million dollars for Respondent, Judge McKinnon set off \$50,000 dollars from prior settlement with a co-defendant then added 8% *per annum* pursuant to Rule 68, SCRCF. On March 3, 2022, Judge McKinnon entered judgment accordingly for \$4,682,789.57 dollars.

Appellants thereafter filed a Motion for a Stay of Execution on the Judgment, and Respondent filed her Memorandum in Opposition. The Honorable Craig D. Brown granted the motion by Form Order filed on May 19, 2022, "with the condition that Appellants 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. *See Exhibit 1*, Order of the Honorable D. Craig Brown.

Pursuant to Rule 59(e), SCRPC, Appellants filed a Motion to Reconsider and Motion to Reduce Amount of Appeal Bond; and Respondent filed her Memorandum in Opposition. Judge Brown denied the motion by form Order dated June 1, 2022. *See Exhibit 2.*

Appellants filed another Rule 59(e) motion, styled Defendants' Motion to Reconsider Denial of Motion to Reduce Amount of Appeal Bond. Respondent filed her Memorandum in Opposition. Judge Brown denied this motion by Order dated June 10, 2022. *See Exhibit 3.*

Appellants then filed their Petition for Writ of Supersedeas before this Court on June 20, 2022. Respondent filed her Return to this Petition dated July 1, 2022. Respondent now submits this Amended Return to the Petition.

I. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION IN CONDITIONING ITS STAY ORDER ON A SUPERSEDEAS BOND OF \$6.25 MILLION DOLLARS.

The lower court properly exercised its discretion in conditioning its stay of execution on a *supersedeas* bond in an amount necessary “to protect the judgment entered and interest accrued” during the pendency of the appeal. *See Exhibit 1.* The court properly exercised its discretion in determining that the amount necessary to provide such protection is \$6.25 million dollars.

Judgment was entered in favor of Respondent against both Appellants on March 3, 2022, in the amount of \$4,682,789.57. *See Exhibit 4,* Order of Hon. William A. McKinnon, March 3, 2022. This judgment accrues post-judgment interest of 7.25% interest, compounded annually. S.C. Code of Laws Section 34-31-20 (2020); Order of the Supreme Court (2022-01-06-01).

The judgment plus interest accrued over five years exceeds \$6.25 million dollars. The updated judgment balance on March 3, 2023, will 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 will be \$5,022,291.81 plus 7.25%, or \$5,386,407.97. As of March 3, 2025, the updated balance will be \$5,386,407.81 plus 7.25%, or \$5,776,922.55. As of March 3, 2026, the updated balance will be \$5,776,922.55 plus 7.25%, or \$6,195,749.43. As of March 3, 2027, the judgment balance will be \$6,195,749.43 plus 7.25%, or \$6,644,941.26.

Estimating more than four years for the appeal to run its course is reasonable, if not conservative. The Covid pandemic has slowed down the progress of trials and appeals. The record reveals that in another appeal involving Respondent's counsel which has been pending before this Court for almost three years, oral argument has not yet been scheduled. Following oral argument, additional time will of course be required for the Court to issue its decision. Moreover, this is the type of case in which the non-prevailing party before this Court will almost certainly petition for a rehearing and then a writ of *certiorari*. More time will be required for this process and for the Supreme Court to rule on the petition. Given the unusual procedural factors and novel legal issue involved on appeal, it would hardly be surprising for the Supreme Court to issue a writ of *certiorari* in this case, as the Court already did in an interlocutory appeal on this very case. *Patton v. Miller*, 2015-UP-367 (S.C. Ct. App. Jul. 22, 2015); SC Sup. Ct. Opinion No. 27730, July 26, 2017. This would further extend the expected time for conclusion of the appeal. Although no one can be certain how long the appeals process will require, basing the amount of the *supersedeas* bond on an expectation that the appellate process will likely exceed four years represents a sound exercise of discretion by the lower court.

In arguing that Judge Brown abused his discretion by not exercising discretion, Appellants fault him for not expanding upon his reasoning to address in express terms Appellants' new arguments they had not preserved for his review. *See* Argument III, *infra*. That Judge Brown was

unpersuaded by these untimely arguments is plainly revealed by his rulings. Judge Brown's Form 4 orders and last Order dated June 10, 2022, reflect his consideration and analysis of the dispositive issues before him. These include inapplicability of the 2012 statutory cap on the amount of the *supersedeas* bond in this case; the amount of the judgment; the minimum interest which will most probably accrue before the appeal has run its course; and his efforts to strike a balance between the parties' conflicting interests to protect the financial interests of the Appellants *and* the Respondent during the appeal.

There is no requirement for the judge to elaborate on his consideration and analysis of non-dispositive issues, especially when untimely and not properly before him. *Id.* Judge Brown properly exercised his discretion in evaluating how to strike a fair and just balance to protect the financial interests of all parties. Even if this Court were to find any technical omission, it would be harmless based on the entirety of the Orders, and further consideration would lead to the same result.

II. APPELLANTS' PETITION SHOULD BE DENIED BECAUSE IT ATTEMPTS TO AVOID A MEANINGFUL *SUPERSEDEAS* BOND REQUIREMENT WHICH IS NECESSARY TO PROTECT THE INTERESTS OF ALL PARTIES.

Appellants' request to reduce the *supersedeas* bond requirement to only \$2 million dollars seeks to protect their interests on appeal and jeopardize Respondent's. The asserted grounds for this request lack merit.

A. The 2012 Statutory Cap on Supersedeas Bond Amounts is Irrelevant to this Case.

Appellants make the unwarranted argument that the Court should apply the statutory cap under S.C. Code Ann. § 18-9-130 to determine the maximum amount of the appeal bond to be required in this case. Doing so would disregard the General Assembly's express provision that its

enactment of a cap on the amount of appeal bonds would take effect on January 1, 2012, and only with respect to actions which accrue on or after that date.

This cap statute does not apply to the case *sub judice*. There was no cap on the amount of appeal bonds in existence when Respondent's cause of action arose on April 5, 2007, nor when she filed suit on November 25, 2009, nor for more than two years thereafter.

Appellants assert that the General Assembly was motivated to enact the cap statute by new policy considerations to lower the cost to a judgment debtor of pursuing an appeal. They then argue these policy considerations should apply retroactively to this case, even though the General Assembly proscribed retroactive application of the statute itself.

This argument is both illogical and contradictory. In advocating this result, Appellants would undermine the clear legislative intent of the statute they rely on for the cap, which rejects retroactive application. Appellants also seek to nullify the prior law which governs this case and the time-honored public policy it embraced.

Controlling law and policy in this case are those in effect on April 5, 2007, when the cause of action arose. These balance the rights and interests of both sides. By posting an appeal bond in the amount required by the court, an appellant judgment debtor may obtain a stay of execution on the judgment pending appeal. An appeal bond of sufficient size preserves a respondent judgment creditor's practical ability to recover on the judgment if affirmed on appeal. This law and policy rely on judicial discretion of the circuit court judge to condition a *supersedeas* order on a bond of sufficient size to protect the *financial interests of both sides* pending conclusion of the appeal.

B. Insurance Policy Limits Are Irrelevant to the Proper Amount of a *Supersedeas* Bond.

Appellants' proposal to use their \$2 million-dollar aggregate insurance policy limits to establish the amount of an appeal bond is nonsensical. Respondent's principal concern is to preserve her ability to recover the portion of her judgment *above policy limits*, not the policy limits themselves. Current value of the judgment exceeds aggregate policy limits by over \$2.79 million dollars. All post-judgment interest accrues to this figure, not the policy limits, thus increasing the personal liability of Appellants throughout the appeal process. A \$2 million dollar appeal bond would not provide Respondent any protection at all with respect to that portion of the judgment above insurance policy limits.

Conditioning a *supersedeas* order an appeal bond of an insufficient amount would not only allow dissipation or disappearance of Appellants' non-exempt assets. It would also frustrate Respondent's efforts to discover non-exempt assets in supplemental proceedings, assets which would otherwise be available toward satisfaction of the judgment. Without knowledge of Appellants' non-exempt assets, these may be removed from reach of the judgment under a cloak of darkness.

This result would cause Respondent irreparable harm. An adequate appeal bond is necessary to balance the rights and protect the interests of both sides. Requiring a \$6.25 million dollar appeal bond reasonably accommodates the conflicting interests of all parties.

III. GROUNDS ASSERTED FOR THE FIRST TIME IN APPELLANTS' RULE 59(e) MOTION IN THE LOWER COURT MUST NOT BE CONSIDERED

It is well-established that newly asserted grounds cannot be considered at the Rule 59(e) stage if they could have been asserted at the prior hearing. *See, e.g. First Citizens Bank & Tr. Co., Inc., v. Taylor*, 431 S.C. 149, 162, 847 S.E. 2d 249, 255-56 (Ct. App. 2020); and *Kan Enterprises, Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017), *reh'g denied* Sept.

22, 2017). Having sought to argue new grounds after the Rule 59(e) hearing *below*, Appellants now strive to do so again before this Court.

Appellants attached two affidavits to their Petition and made related arguments which they had not proffered or asserted before the Rule 59(e) motion stage below. *See Exhibit 5*, Defendants' Motion for Stay of Execution on the Judgement. These include the affidavits of Samuel McEwan of MAG Mutual Insurance Company and Appellant Dr. Miller. The affidavits must not be considered because they were not timely submitted prior to the Rule 59(e) hearing below.

It is in reliance on these affidavits that Appellants have formulated new arguments relating to a purported inability to pay for appeal bonds of a sufficient size to protect Respondent's interests. These arguments were not asserted prior to the Rule 59(e) hearing and should not be considered.

Appellants argue they may circumvent this well-established law because they "reserved the right to file other requests and make other motions regarding execution" if they were displeased by the outcome of the hearing below on their Motion to Stay Execution. This purported "reservation of rights" is a nullity because they had no such rights to reserve. Stated differently, controlling law precludes Appellants from asserting new grounds for a Rule 59(e) motion that could have been asserted at the prior motion hearing; and niceties of pleadings have no power to change this law.

Appellants seek to buttress their argument that this Court should disregard South Carolina law on the basis that Respondent did not object to their purported reservation of "rights." Appellants' contention has no merit. There is no requirement for any party to object to an opposing party's attempt to reserve "legal rights" which do not exist. Appellants cannot neuter controlling law and create new legal rights by asserting a reservation of such "rights."

Having not presented these affidavits nor asserted these arguments prior to the Rule 59(e) stage, they are at least as untimely now as they were in the lower court. The Court should disregard them.

IV. EVEN IF THESE AFFIDAVITS AND ARGUMENTS HAD BEEN TIMELY SUBMITTED, THESE NEWLY ASSERTED GROUNDS LACK MERIT

Respondent will address Appellants' newly asserted grounds if the Court for any reason decides to consider them. Appellants' new arguments contend that (1) MAG Mutual Insurance Company ("MAG Mutual") cannot be required to post an appeal bond in an amount greater than its \$2 million-dollar aggregate policy limits; (2) the amount of the bond should be reduced to policy limits because Dr. Miller cannot afford to purchase the part of a bond above policy limits; and (3) factors designated in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) support a stay order. All these new arguments lack merit.

A. The Law Does Not Preclude the Professional Liability Insurer from Purchasing an Appeal Bond Higher Than Its Policy Limits

Appellants try to make a case that their professional liability insurer, MAG Mutual, cannot be required to post an appeal bond in an amount higher than their policy limits. Counsel cites no legal authority in support of this assertion, which is plainly incorrect. As a factual assertion, counsel relies on the affidavit of Mr. Samuel McEwen. However, his affidavit does not support the defense argument. It merely states that "*the maximum amount*" of an appeal bond MAG Mutual "*will purchase*" is for its policy limits of \$2 million dollars. There is no legal or factual obstacle to prevent MAG Mutual from doing so. An insurer's *desire to avoid paying* or *unwillingness to pay for* an appeal bond higher than its policy limits is entirely different from being blocked from doing so by law.

It is curious that counsel for Appellants would argue against MAG Mutual's purchase of an appeal bond of \$6.25 million dollars or any amount above its policy limits. This argument runs counter to Appellants' own personal interests, which would be served by having their insurance company pay for the entire bond, not just enough to cover its policy limits.

Considering recent developments, the opposing interests of insured and insurer are even more stark. After the jury returned a verdict above his insurance policy limits, Dr. Miller retained personal counsel, Harry Goldberg, Esq., to assist in representing his post-trial interests. Through his personal counsel, Dr. Miller has accused MAG Mutual of bad faith. *See*, Email from Mr. Goldberg with attached exhibits, attached as **Exhibit 6**.

Upon information and belief, Mr. Goldberg accused MAG Mutual of bad faith in (1) not negotiating a settlement of this case within policy limits before trial; (2) not making any settlement offer; (3) not even contacting Respondent's attorney to determine if he was willing to entertain an offer or consider settlement; (4) not sending a company representative to sit through any part of trial to evaluate how well or poorly the defense was doing; and (5) not making any attempt to negotiate a settlement during trial, when it was at least reasonably clear the defense was not faring well. *Id.*

Upon information and belief, after the lower court conditioned its stay order on the purchase of a \$6.25 million dollar appeal bond, Mr. Goldberg instructed MAG Mutual to pay for the entire appeal bond and stated that its refusal under these circumstances would represent additional bad faith on its part. *Id.* These acts and omissions occurred after Respondent's lawyer had served a Tyger River letter in October 2018. *See*, **Exhibit 7**.

MAG Mutual's asserted unwillingness to purchase an appeal bond higher than its policy limits misses the mark of ascertaining the proper amount of an appeal bond. Moreover, MAG Mutual's reluctance to pay for an appeal bond in excess of policy limits should be evaluated in the context of Dr. Miller's bad faith allegations. The company's efforts to reduce the amount of the appeal bond to its policy limits are likely motivated, at least in part, by its desire to avoid additional allegations of bad faith based upon its refusal to purchase an appeal bond higher than its policy limits.

B. Dr. Miller's Financial Summary Affidavit Cannot Be Taken at Face Value and Provides No Reason to Reduce the Appeal Bond Amount.

Dr. Miller's financial affidavit provides no basis to reconsider the amount of the appeal bond. It raises more questions than answers. It makes vague assertions without any documentation. It is worthless without an opportunity to test its assertions and determine the existence and value of non-exempt assets and income. Respondent has had no opportunity to engage in supplemental proceeding discovery to elicit a full and accurate picture of his non-exempt assets otherwise subject to execution.

The affidavit fails to portray Dr. Miller's financial status reliably. It provides no documentation of mortgage or other debt. It does not address the likelihood that most of his debt is mortgage debt on the family home he prudently placed in his wife's name and did not list as an asset. Dr. Miller provided no statements or other records from banks or any other financial institutions. The affidavit provides no specific information at all about banking/financial/accounting/investment relationships, borrowing power, accounts at banks, stockbrokers, or other financial institutions. He provided no statements or records from banks, stockbrokers, or other financial institutions to document his assertions.

Dr. Miller's affidavit makes vague reference to a "retirement account," without even alleging it is an exempt retirement account such as an IRA, for example. It lacks sufficient detail to enable one to determine its value or evaluate its non-exempt status. Dr. Miller also withheld details about specific items of personal property he owns that may be valuable, such as automobiles, boats, other recreational vehicles, jewelry, art, wine collection, firearms, sporting goods, aircraft, collectibles, and the like.

Dr. Miller did not provide any information about the character and amount of his income, much of which may be non-exempt. He presented no income tax returns or accounting data which

would likely yield information relevant to his finances, non-exempt assets and income. He did not submit any employment contracts.

There are too many unanswered questions and too few specifics for Dr. Miller's affidavit to be considered a source of complete, accurate, and reliable information about his ability to purchase an appeal bond. Dr. Miller did not even contend that he lacked funds in "retirement accounts," employment income or borrowing power to pay a bond premium and/or a letter of credit to secure the interests of the bond issuer. Even if some of his assets are exempt from execution, they are still available to him to use to purchase a *supersedeas* bond.

Appellants argue that the bond amount should be reduced because Respondent presented no evidence to challenge the accuracy of Dr. Miller's affidavit. This argument is fallacious for three reasons: (1) unless and until Respondent pursues supplemental proceeding discovery, she has no ability to discover non-exempt assets or obtain proof that the affidavit contains false, incomplete and/or misleading assertions; (2) even without the benefit of supplemental proceeding discovery, she has pointed out that the affidavit falls well short of providing a complete, accurate and reliable snapshot of Dr. Miller's non-exempt assets and ability to purchase a bond; and (3) being untimely, the argument need not be addressed on the merits.

Upon information and belief, the second judgment debtor, Rock Hill Gynecology & Obstetrical Associates, P.A., was acquired by Piedmont Hospital and/or its parent corporation in 2016. Respondent lacks knowledge about the specifics of that transaction, whether there are undistributed assets of the acquired entity, and whether the hospital is liable for Respondent's judgment. Absent a sufficient appeal bond, Respondent should have the right to explore all these issues and execute against non-exempt assets.

Unless there is an appeal bond in place to protect Respondent’s interests completely, she should have the right to pursue supplemental proceedings and execution against non-exempt assets discovered. Otherwise, she faces the risk of significant and irreparable harm.

Respondent does not care who purchases the bond, MAG Mutual, Dr. Miller and/or Piedmont Hospital. Her concern is for this Court to preserve her rights to pursue supplemental proceedings and execution on her judgment against discovered non-exempt assets if an appeal bond for \$6.25 million dollars is not required and purchased.

C. The *Hilton* Factors Support a \$6.25 Million Dollar Bond.

To the extent *Hilton v. Braunskill, supra*, is relevant, it favors Respondent. In one sense it is inapposite because it does not relate to the proper amount of an appeal bond. Rather, it addresses whether a stay should be imposed at all. The case arises in a writ of *habeus corpus* context. To the extent it is considered applicable to this case, the decision raises doubts about whether a stay order should be imposed in this case *under any conditions*.

The United States Supreme Court decided the case in accord with guidance from what it described as “traditional standards governing stays of civil judgments.” The Court identified four factors: (1) whether the movant “has made a strong showing that he is likely to succeed on the merits;” (2) whether the movant “will be irreparably injured absent a stay;” (3) “whether issuance of the stay will substantially injure the other parties interested in the proceeding;” and (4) “where the public interest lies.” Each disfavors a stay order being imposed in this case.

(1) Appellants Are Not Likely to Succeed on the Merits.

Appellants’ primary argument on appeal is their disagreement with Judge McKinnon’s ruling that Appellants would not be allowed to amend their Answer to add a new affirmative defense *after* Respondent rested her case. Respondent is likely to succeed in this appeal.

Appellants' motion sought to amend their Answer to assert a defense under SC Code Section 15-32-230 ("genuine emergency statute"). Judge McKinnon recognized that allowing this new defense would not serve the ends of justice but would prejudice the Respondent. Judge McKinnon also correctly denied Appellants' related request to charge the statute to the jury, as the purported statutory defense is an affirmative defense which was not timely pled and not for jury consideration.

The motion to amend was based on the assertion by the Appellants that this statutory defense had been tried by express or implied consent of the parties, and their requested amendment should be allowed to conform to the evidence. These assertions are incorrect.

The Court properly denied the motion to amend for four reasons: (a) the statutory defense is an affirmative defense which *must* be pleaded; (b) Appellants waived this affirmative defense by not pleading it in their Answer filed on January 12, 2010 and not even seeking leave to add it by amendment until trial in January 2022 after the conclusion of Respondent's case at trial; (c) the statutory defense was *not* tried by express or implied consent of the parties; and (d) to grant the motion would not subserve the presentation of the merits but would prejudice Respondent.

(a) The Statutory Defense is an Affirmative Defense

An affirmative defense conditionally admits the allegations of the complaint but asserts new matter to bar the action. *O'Neal v. Carolina Farm Supply of Johnston, Inc.* 279 S.C. 490, 494, 309 S.E. 2d 776, 779 (Ct. App. 1983). The "genuine emergency" defense set forth in SC Code 15-32-230 is an affirmative defense. *Byrd v. McLeod Physician Associates II*, 427 S.C. 407, 831 S.E. 2d 152 (Ct. App. 2019).

That the "genuine emergency statute" is an affirmative defense was confirmed by the Supreme Court's reasoning in the recent case of *Garrison vs. Target Corp.*, Opinion No. 28080 (S.C. Sup. Ct. filed January 26, 2022). This case presented an issue whether S.C. Code Section 15-32-530, the punitive damages cap statute, was an affirmative defense which must be pleaded. The Court of

Appeals had held that it was. The Supreme Court reversed on the grounds that the punitive damages cap was “neither an affirmative defense nor an avoidance because it does not affect liability or require new matter to be asserted but instead limited the amount of damages a plaintiff can recover.”

Unlike the issue of the punitive damages cap in *Garrison*, the “genuine emergency statute” is an affirmative defense because it affects liability, not damages. It requires new matter to be asserted by prudent counsel, e.g., that the shoulder dystocia was not a “genuine emergency” which occurred in an “obstetrical suite;” and/or that there was no “immediate threat” of death or serious bodily injury; and/or that the minor was “medically stable;” and/or that Dr. Miller was “grossly negligent.”

(b) Appellants Waived the Affirmative Defense.

Appellants waived this affirmative defense because it was not pled in their Answer. Rule 8(c), SCRPC, requires affirmative defenses to be included in responsive pleadings. The Rule’s pertinent language is mandatory: “In pleading to a preceding pleading, a party **shall set forth affirmatively ... matter constituting an avoidance or affirmative defense....**” Rule 8(c), SCRPC (**Emphasis added.**) Furthermore, Rule 12 (b), SCRPC, provides in pertinent part that “**every defense** in law or fact” ... “**shall be asserted in the responsive pleading** thereto if one is required.” ... (**Emphasis added.**)

“If an affirmative defense is not pled, it is usually deemed to be waived.” *First Service Corp. of S.C. v. Cape*, 299 S.C. 147, 150, 382 S.E.2d 919,921 (1989), (citing 70 C.J.S. *Payment* Sections 63 and 68 (1987)). Appellants waived the affirmative defense by not pleading it in their 2010 Answer. They did not plead it in an Answer to the Amended Complaint which added the co-defendant hospital. Nor did they seek leave to amend their Answer to add the “genuine emergency statute” defense when they filed a Motion to Amend to add punitive damages defenses on September 3, 2020. The Amended Answer they subsequently filed added the punitive damages defenses but not the “genuine emergency statute.”

Appellants had nearly twelve years between their Answer and trial to move to amend their Answer to add the statutory defense *if* they perceived it to have merit. Either they recognized there was no merit in seeking leave to amend to add an affirmative defense this many years after filing their Answer, and/or they devised an ambush strategy to try to catch Respondent off-guard after she rested her case. The time they decided to make the motion, only after Respondent rested, reveals their calculation not to seek amendment until it was too late for Respondent to present evidence of gross negligence and/or other evidence tailored to sidestep the statute or otherwise avoid its harshness. It is difficult to conceive of more brazen gamesmanship. No matter what the defense's explanation of their motivation may now be for waiting nearly twelve years to try to amend their Answer after Respondent rested, waiver of the affirmative defense is especially appropriate in these circumstances.

The ends of justice were served by denying this motion. To rule otherwise would reward the attempt to sabotage the language and spirit of our procedural rules and encourage more of the same.

(c) “Genuine Emergency Statute” Issues Were Not Tried in This Case by Express or Implied Consent.

Rule 15(b), SCRCPP, which governs “Amendments to Conform to the Evidence,” does not support Appellants’ motion to amend to add an affirmative defense after Respondent rested. The Rule states:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the

result of the trial of these issues. **If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, 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. (Emphasis added.)**

Respondent did not try the “genuine emergency statute” defense by express or implied consent. There was extensive testimony that shoulder dystocia is an obstetrical emergency, and about specific factors involved with the shoulder dystocia in this case. However, such testimony is relevant to *standard of care* issues which arise in every case of shoulder dystocia mismanagement and does not represent trial of specific issues presented by the “genuine emergency statute.”

Respondent presented two obstetrics experts, Dr. Duboe and Dr. Gurewitsch. Dr. Duboe testified live. Most of Dr. Gurewitsch’s deposition testimony was published to the jury.

Respondent’s counsel asked Dr. Duboe questions at trial about the applicable standard of care and breaches thereof. He did not ask Dr. Duboe about gross negligence or any other issue arising specifically under the “genuine emergency statute.”¹ Testimony of Dr. Gurewitsch was presented by reading her discovery deposition into the record. The questions posed in her deposition were asked by defense counsel, not Respondent’s counsel. A verbatim transcript is available, which proves that this expert did not address gross negligence or other issues arising under the statute.

¹ The defense argues that Dr. Duboe’s testimony went beyond standard of care issues into the realm of certain statutory defense issues. Without a trial transcript to verify, no one can recite the exact words used by any witness other than Dr. Gurewitsch. There is no bright line between certain aspects of standard of care proof and some of the statutory phrases like “genuine emergency” and “immediate threat.” If Dr. Duboe’s testimony about standard of care issues overlapped any phrases in the “genuine emergency statute,” it was slight, inconsequential, and insufficient to imply consent to trial of the statutory defense. There was no mention of gross negligence, the single most important component of the statutory defense. In addition, Title 15, Article 3 of the S.C. Code is to be strictly construed, as it is in derogation of common law. *Byrd, supra.*

Respondent did not object to standard of care questions in the defense case. However, she did object whenever defense counsel posed questions which slid artfully from standard of care questions to use of one or more phrases contained within the “genuine emergency statute.” The Court overruled these objections, thus allowing the defense questions to be answered. However, Respondent’s objections to these questions negate the defense contention that the “genuine emergency statute” defense was tried by express or implied consent of Respondent.

Significantly, there was no reference to gross negligence in any testimony, opening statement or closing argument. Yet the “genuine emergency statute” requires a plaintiff to prove gross negligence in order to prevail, if the defense proves other elements of the statutory defense. It is difficult to understand the defense argument that the statutory defense was tried by consent, when the single most important component thereof, gross negligence, was not addressed to the jury in any manner.

The inconsistency of Appellants’ trial counsel’s arguments is striking. He argued in support of his motion for directed verdict on gross negligence that Respondent had not presented any evidence of gross negligence. This was true, so the trial court granted the motion. Hypocritically though, counsel now argues that the statutory defense was tried by implied consent, although he had already argued and benefitted from the fact that the single most important component of the statutory defense had not even been mentioned.

Rule 15(b) comes into play in this case only if the “genuine emergency statute” defense had been tried by express or implied consent. As demonstrated above, it had not been.

(d) Allowing the Amendment Would Not Have Subserved Presentation of the Merits but Would Have Prejudiced Respondent.

Hypothetically, even if the statutory defense had been tried by implied consent, as it was not, the outcome should be the same. In conferring trial judges with broad discretion whether to allow

amendments to conform to the evidence, Rule 15(b) directs that the court “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.” (Emphasis added.) Neither of these conditions supports granting Appellants’ motion to amend.

Presentation of the merits would not be subserved by allowing an affirmative defense to be added during trial nearly twelve years after the Answer was filed, after the Respondent rested her case. The exact opposite is true. Plaintiff would have been precluded from presenting any testimony concerning the merits of an *affirmative defense* which Defendants had not sought to assert until after Plaintiff rested her case.

The issues were joined when Defendants filed their Answer in January 2010. Defendants did not plead the statutory defense under S.C. Code 15-32-230 at that time, nor in 2018 when they represented to Judge Hall that they would undertake to do so, nor in 2020 when they amended their Answer to add punitive damages defenses. If their Motion to Amend had been granted at trial, Plaintiff would have been prejudiced in five ways.

First, she would have been victimized by what amounts to “*ex post facto*” pleading. That is, she would have been denied notice and an opportunity to be heard on an affirmative defense first asserted after her case-in-chief at trial was over.

Second, if Respondent’s counsel had been on timely notice of the affirmative defense, he could have attempted to avoid the statute completely. For example, he could have undertaken to marshal evidence to present a jury question about (a) whether the shoulder dystocia emergency had been created by Dr. Miller; or (b) whether causally significant negligence of Dr. Miller occurred prior to any “genuine emergency.” Being denied these opportunities would have been prejudicial.

Third, if respondent's counsel had been on timely notice of the affirmative defense, he could have attempted to marshal evidence of gross negligence during discovery and trial preparation. He deposed Dr. Miller and other health care providers without notice of the statutory defense being applicable. These are the deponents who are most likely to possess information probative of gross negligence, and on which an expert could support an opinion that Dr. Miller had been grossly negligent. Granting Appellants' motion would have prejudiced Respondent by denying her notice of the need to seek evidence which tended to support an expert opinion of gross negligence at the time these depositions were taken.

Fourth, granting the motion at any time after April 5, 2018, would have prejudiced Respondent due to court approval that date of her settlement of her claim against a co-defendant, Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Piedmont"). Respondent's counsel would not have recommended settlement of the claim against Piedmont if he had been aware that the Appellants may seek to add the statutory defense in the future by late amendment. This is because the "genuine emergency" statute does not apply to labor and delivery nurses or other non-physicians. More on this is addressed *infra*.

This settlement approval was up to seven weeks before Respondent had any reason to suspect Appellants may later try to amend their Answer. Silence of Appellant's trial counsel before this settlement, about a potential future attempt to add the statutory defense, evidences the ambush tactics of trial counsel.

In strategizing about how best to present Respondent's claims at trial, her counsel had decided it would be advantageous to settle her claim against Piedmont before trial and proceed to trial against only these Appellants. When he made this decision, and obtained consent and settlement authority from the client, there was no reason to expect that he would have to confront issues arising under the "genuine emergency statute" at trial against these Appellants.

The claim against Piedmont was based on its *respondeat superior* liability for negligence of its nurse employees. By its express language, the “genuine emergency statute” codified in S.C. Code 15-32-230 applies only to physicians, not nurses. There was no risk of a “genuine emergency statute” defense in Respondent’s claims against Piedmont. If the Appellants had already asserted the statutory defense or put Respondent’s counsel on notice they may try to do so by amendment, he would not have settled with Piedmont. This is because her counsel believes it is advantageous to have at least one defendant at trial who has not been given qualified immunity by the statute.

To provide detail and clarification of the various ways Plaintiff would have been prejudiced by granting Defendants’ motion to amend, a timeline is useful. Relevant events and the dates thereof are set forth as follows:

Effective date of S.C. Code 15-32-230, July 1, 2005.

Complaint filed on November 25, 2009.

Answer filed on January 12, 2010.

Offer of Judgment filed October 4, 2010.

Deposition of Angela Patton taken on February 22, 2011.

Deposition of Dr. Miller taken on February 22, 2011.

Deposition of Antwon Lumpkin taken on May 6, 2011.

Deposition of Piedmont nurse Stacy Bumgardner taken on November 20, 2012.

Appellant’s Amended Complaint to add Piedmont as a Defendant, filed November 29, 2012.

Deposition of Piedmont nurse Julie Bibb, taken on February 15, 2013.

Deposition of Dr. Gurewitsch, Respondent’s Maternal Fetal Medicine expert, taken on June 26, 2013.

Deposition of Dr. Lupo, anesthesiologist, taken on January 27, 2014.

Deposition of Dr. Mercado, neonatologist, taken on March 31, 2014.

Respondent's negotiation of settlement with Piedmont, approximately January-March 2018.

Respondent's Petition for Order Approving Minor's Settlement with Piedmont dated April 3, 2018.

Order Approving Respondent's Settlement with Piedmont dated April 5, 2018.

Deposition of Dr. Ernest, Appellants' Maternal Fetal Medicine expert, taken on May 24, 2018.

Deposition of Dr. Chauhan, Appellants' Maternal Fetal Medicine expert, taken on May 31, 2018.

Consent Order to Stay Trial in the case of Pierce v. Palmetto Health, filed July 3, 2018.

Respondent's Motion for a Partial Summary Judgment or Stay of Trial, filed October 8, 2018
Status Conference on October 31, 2018, in which Judge Hall ordered a Stay of Trial.

Appellants' Motion to Amend Answer to add punitive damages defenses, filed August 6, 2020.

Appellants' Amended Answer, which added punitive damages defenses, filed September 3, 2020.

Deposition of Dr. Duboe, Respondent's obstetrics expert, taken on March 15, 2021.

Trial from January 4-14, 2022.

Appellants' Motion to Amend to add the "genuine emergency statute" defense on January 10, 2022, after Respondent had rested her case.

These dates demonstrate that: (a) the affirmative statutory defense had been available to Appellants for four and one-half years before their Answer was filed, and should have been asserted then if defense counsel believed it had merit; (b) deposition of Dr. Miller was taken over ten years before Appellants sought to assert the "genuine emergency statute" defense; (c) following Respondent's Amended Complaint filed on November 29, 2012, to add Piedmont as an additional

defendant, Appellants did not raise the affirmative defense of the “genuine emergency statute,” in an Answer to the Amended Complaint, if they even filed an Answer to the Amended Complaint at all; (d) depositions of every physician and labor and delivery nurse present at birth were taken more than seven years before this attempt at late amendment; (e) depositions of defense trial experts were taken more than three years before the attempt; (f) over two and one-half years passed between Judge Hall’s Stay Order and Appellants’ motion to amend their Answer to add punitive damages defenses, without seeking to assert the affirmative defense.

To confirm when Respondent first suspected that the Appellants might possibly seek leave to amend their Complaint to add the “genuine emergency statute” defense, it is useful to examine whether any depositions of standard of care experts contained any of the key words and phrases from the “genuine emergency statute.” Respondent’s counsel has conducted a search in the word index of each deposition of the five standard of care experts referenced above, to identify whether key statutory words were used in the depositions and, if so, in what context. The searched words were “emergency,” “genuine,” “gross,” “immediate,” “real,” “stable,” “threat,” and derivatives such as “emergent,” “immediately,” and “stability.” This exercise demonstrates that no statutory words or phrases were used in these depositions, in the statutory context, before that of Dr. Ernest on May 24, 2018. However, no standard of care expert mentioned or was asked questions about gross negligence.

The substance and timing of these depositions evidence that Respondent’s counsel had not yet suspected or been led to expect that Appellant might later seek to amend their Complaint to add the “genuine emergency statute” defense until sometime between court approval of the Piedmont settlement and Dr. Ernest’s deposition seven weeks later. Statements by Appellants’ trial counsel during this time provided the first inkling that Appellants may seek to amend their Answer to add the statutory defense.

Respondent's counsel never expected that the Appellants would seek leave to amend their Answer to raise the "genuine emergency statute" defense until after court approval of the Piedmont settlement and before the deposition of Dr. Ernest. Counsel believed such any such motion would be denied as lacking in merit and prejudicial to Respondent but assumed *at that time* that Appellants would make the motion.

However, after Judge Hall stayed the case, Respondent's counsel heard nothing further about any intent of Appellants to seek leave to amend. Counsel had increasing doubts that they would do so, believing that even Appellants may have recognized their motion to assert an affirmative defense this late had no merit and would be seen as prejudicial to Respondent.

Appellants trial counsel's actions were inconsistent with any effort to try to assert the affirmative defense this late. Most telling was Appellants' filing a motion on August 6, 2020, to amend their Answer to add punitive damages defenses, *without simultaneously seeking leave to add the "genuine emergency statute" defense*. When they filed their Amended Answer, it said nothing about the statutory defense. When defense counsel deposed Dr. Duboe on March 15, 2021, he asked no questions about gross negligence and posed no questions which used key words or phrases from the statute. Counsel then had more reason to doubt a motion to amend would be forthcoming. He reasonably believed the greater the delay, the lesser the chance of the motion to amend being asserted.

Appellants now assert that Respondent's motion and the status conference with Judge Hall on October 31, 2018, put Respondent on notice of their intent to add the statutory defense, such that Respondent could not have been surprised by their oral Motion to Amend at trial. This ignores that (a) the statutory defense is an affirmative defense that should have been pleaded; (b) counsel believed a defense motion for leave to amend lacked merit under the circumstances; (c) Appellants' actions after the status conference were inconsistent with any purported intent to seek leave to add the statutory defense; (d) though counsel would not have been surprised if a motion to amend had been

filed in the late summer or autumn of 2018, or even early in 2019, it was quite surprising to be blindsided by a motion to amend more than three years later after the Respondent rested her case; (e) when prejudice exists, as in this case, any question of surprise is immaterial; and (f) ambush tactics of Appellants' trial counsel should not be rewarded

The trial court properly exercised its discretion to deny Appellant's Motion to Amend because of the prejudice to Respondent which would otherwise occur and for the other reasons set forth above. Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment, and are within the sound discretion of the trial judge. *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRPC). There are numerous reasons why Appellants' Motion to Amend was justly denied. The trial judge's ruling will not be overturned without an abuse of discretion or unless manifest injustice has occurred. *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

(2) Appellants Would Not Be Irreparably Harmed Absent a Stay.

Once a judgment debtor appeals, if there is no stay, the judgment creditor cannot enforce the sale of a judgment debtor's property without posting a bond under S.C. Code of Laws Section 18-9-130 (A)(2). This statute requires judgment creditors to post a bond of twice the appraised value of such property prior to the sale thereof. This bond requirement favors Appellants, and prevents them from being harmed, much less irreparably harmed, by sale of their property pending appeal. Under *Hilton*, this weighs against granting a stay order at all, much less one conditioned on an inadequate appeal bond.

(3) Granting a Stay Conditioned on an Appeal Bond of Less Than \$6.25 Million Dollars Would Cause Substantial Injury to Respondent.

In contrast, Respondent would be substantially and irreparably harmed in this case if she prevails on appeal, and non-exempt assets of the Appellants have by then been dissipated or removed from the reach of her judgment. These realities argue against any stay at all under the *Hilton* case, much less a stay with an insufficient bond.

(4) The Public Interest Favors an Adequate Appeal Bond if a Stay is Granted.

The public interest is served by protecting the financial interests of all parties pending resolution of an appeal. Appellants who seek a *supersedeas* to protect their financial interests have no grounds to complain when Respondent seeks an adequate appeal bond to protect her own financial interests.

Appellants seek to define the public interest as the 2012 statute which caps the amount of appeal bonds prospectively, but this cannot be the public interest for an action which arose in 2007. Public interest in this case is that which existed in 2007, more than four years before the 2012 statute came into effect. The law, policy and public interest protected the rights of all parties pending appeal, with stay orders to protect Appellants being conditioned on an appeal bond of sufficient size to protect the Respondent.

It is curious that Appellants would rely so heavily on the *Hilton* case as support for their attempt to limit the appeal bond to \$2 million dollars. *Hilton* did not address appeal bonds in any respect, just whether a stay should be ordered at all. Its factors support denial of Appellants' Petition for a Writ of Supersedeas without considering the size of an appeal bond. It follows that the *Hilton* factors support leaving the \$6.25 million dollar bond intact.

CONCLUSION

For these reasons, Appellants' Petition seeking to reduce the appeal bond to \$2 million dollars should be denied.

Respectfully submitted,

Anderson, South Carolina
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GRAHAM LAW FIRM, P.A.

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 Respondent