RECEIVED
Aug 31 2022
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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS

This Court should grant a writ of supersedeas and reverse the circuit court's orders requiring Appellants Dr. Gregory A. Miller ("Dr. Miller") and Rock Hill Gynecological & Obstetrical Associates, P.A. (the "Practice") (together, "Appellants") to post a $6.25 million bond stay execution on the judgment in this case, for the reasons stated in Appellants' petition. The circuit court failed to conduct the correct analysis in determining the appropriate amount of an appeal bond. It considered only the amount of the judgment and estimated interest, but failed to consider Appellants' means to pay for the bond, including Dr. Miller's assets and insurance policy limits. The circuit court's failure to consider the proper analysis is an abuse of discretion, and the Court should grant a writ of supersedeas.

Respondent's return is based on an incorrect legal foundation. Respondent asserts throughout her return—with no supporting authority—that she is entitled to an appeal bond of a sufficient amount "***to protect [her] interests completely***." *See, e.g.*, (Am. Return at 12) (emphasis

added). However, she is not so entitled. Instead, the law requires courts to consider a variety of factors in determining whether to grant a stay,[1] and then in determining how much the bond should be in conjunction therewith. Respondent's arguments are contrary to the law and should be rejected.

A proper application of the law regarding appeal bonds compels a finding that the circuit court abused its discretion in failing to set the appeal bond at a maximum of $2 million. This Court should therefore grant a writ of supersedeas, reverse the circuit court's orders, and reduce the amount of the required appeal bond to $2 million total.

Argument

I. The circuit court abused its discretion by failing to conduct the analysis required to determine the appropriate amount of an appeal bond.

Appellants explained the proper framework for analyzing whether to require an appeal bond and the amount of any bond required in their petition. *See* (Petition at 10–16). Courts must analyze these issues with an eye toward maintaining the status quo while avoiding the imposition of an undue financial burden on the judgment debtor, and courts should also consider several factors in their analysis concerning those issues. The circuit court's orders include no consideration of these points. *See Alexander v. Chesapeake, Potomac & Tidewater Books, Inc.*, 190 F.R.D. 190, 193 (E.D. Va. 1999) (requiring courts to "preserve the status quo while protecting the non-appealing party's rights pending appeal" and providing a full bond is not required when the posting of a full bond would impose an undue financial burden on the judgment debtor); *Morris v. Bland*, No. 5:12-CV-3177-RMG, 2015 WL 12911349, at *1–2 (D.S.C. Mar. 23, 2015) (same);

[1] Respondent does not contest that a stay should issue – but she argues the amount of bond required therefore.

Se. Booksellers Ass'n v. McMaster, 233 F.R.D. 456, 458–59 (D.S.C. 2006) (recognizing and applying the "*Hilton* factors" deriving from *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Respondent attempts to supply an analysis for the circuit court's ruling, arguing (1) the current version of South Carolina Code section 18-9-130, which imposes appeal bond caps, is "irrelevant" to this case; (2) insurance policy limits are irrelevant to the proper amount of an appeal bond; (3) Dr. Miller's affidavit should be disregarded; and (4) Appellants raised new arguments for the first time in a Rule 59(e) motion. *See* (Am. Return at 4–12). All of these arguments are invalid.

Appellants explained in their petition how a proper exercise of discretion should include consideration of South Carolina public policy codified in the current version of section 18-9-130. *See* (Petition at 2 n.1, 14–15); *see also Se. Booksellers Ass'n*, 233 F.R.D. at 458–59 (considering "where the public interest lies"). Respondent's only policy counter-argument is that the General Assembly "proscribed retroactive application of the statute." (Am. Return at 5). Respondent is incorrect. The General Assembly stated only that application of the statutory bond limits is mandatory in cases accruing on or after the effective date of the statute. *See* 2011 S.C. Laws Act 52 (H.B. 3375) ("This act takes effect January 1, 2012, and applies to all actions that accrue on or after the effective date."). Nothing in the statute or legislative history prohibits courts from considering the limits in cases as a public policy factor for matters accruing prior to the effective date. *See* (Am. Return at 4–5). A proper exercise of discretion in this case includes consideration of the ***current*** codified public policy.

There are reasons underlying the enactment of appeal bond caps. A judgment debtor's rights of appeal are infringed upon by a large appeal bond requirement, and some judgment debtors

have financial constraints with respect to appeal bonds. Those reasons should have been considered here, not disregarded as "irrelevant."

Respondent also argues Appellants' insurance policy limits should not be considered because the policy limits are less than the amount of the judgment, and she prefers a $6.25 million bond. (Am. Return at 5–6). She cites no authority supporting her argument. Regardless, the proper analysis requires consideration of ***Appellants'*** current ability to satisfy the judgment amount, not the *insurance carrier's* ability to purchase a larger bond. *See 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."). The only evidence is that the total insurance coverage in this action is $2 million. *See* (Aff. of Samuel McEwen ¶ 4, Ex. G to Petition for Writ of Supersedeas) ("The total coverage limit under this policy for purposes of this action is $2,000,000."). Respondent offers no basis for her implication that Appellants' ***current*** ability to satisfy the judgment somehow includes accessing more than $2 million from the insurance carrier. *See* (Am. Return at 8–9). Consequently, only the $2 million policy limits should be considered in evaluating their ability to purchase a bond without suffering an undue financial burden.[2]

Further, although Respondent urges this Court to disregard Dr. Miller's affidavit, she provides no legal or factual basis to do so. *See* (Am. Return at 10–12). Dr. Miller stated in the affidavit that his "assets total approximately $100,000." (Aff. of Dr. Miller ¶ 2, Ex. G to Petition for Writ of Supersedeas). Respondent claims Dr. Miller "withheld" information about the value

[2] Moreover, although Respondent appears to argue the merits of a hypothetical future bad-faith claim, *see* (Am. Return at 8–9), the issues before this Court are whether the circuit court abused its discretion in requiring a $6.25 million bond without addressing the proper considerations and whether a proper application of those factors requires that the bond amount be reduced to $2 million or less. The merits of any hypothetical bad-faith claim are not at issue here.

of personal property such as jewelry, firearms, or sporting goods, but Respondent provides no basis for her assertion. *See* (Am. Return at 10). Dr. Miller stated, under oath, the approximate amount of his ***total*** assets. (Aff. of Dr. Miller ¶ 2, Ex. G to Petition for Writ of Supersedeas). Respondent cites no law supporting her claim that such a sworn statement as to the total value of assets is somehow unreliable unless it includes a line-item accounting of Dr. Miller's assets. *See* (Am. Return at 10–11). To the contrary, under South Carolina law, Dr. Miller is competent to offer testimony as to the value of his assets. *See Cooper v. Cooper*, 289 S.C. 377, 379, 346 S.E.2d 326, 327 (Ct. App. 1986) ("In South Carolina, a property owner is ordinarily competent to offer testimony as to value of his property."). Respondent urges this Court to assume Dr. Miller's sworn statements are either not truthful or are inaccurate, but she provides no basis for this Court to question Dr. Miller's credibility.[3] Respondent's subjective dissatisfaction with the affidavit is not a ground to ignore the affidavit altogether or to find the affidavit insufficient. (Am. Return at 10–11). This Court should reject Respondent's arguments, and it should rely on the only evidence presented to the circuit court—Dr. Miller's sworn affidavit as to his total assets and liabilities.

[3] Moreover, although Respondent takes issue with the exclusion of retirement accounts from Dr. Miller's asset total, retirement accounts are exempt from attachment, levy, or sale by statute. *See* S.C. Code Ann. § 15-31-40(A) ("(A) The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by a court or bankruptcy proceeding: . . . (13) The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code. A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this item, 'Internal Revenue Code' has the meaning provided in Section 12-6-40(A). The interest of an individual under a retirement plan shall be exempt from creditor process and is an exception to Section 15-41-35. The exemption provided by this section shall be available whether such individual has an interest in the retirement plan as a participant, beneficiary, contingent annuitant, alternate payee, or otherwise. (14) The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974, as amended.").

Finally, Respondent argues this Court should not consider the affidavits of Samuel McEwen and Dr. Miller because "newly asserted grounds cannot be considered at the Rule 59(e) stage." (Am. Return at 6–7). Respondents either misperceive or misconstrue the procedural posture here, and this argument is also without merit.

Appellants did not raise new grounds in a Rule 59(e) motion. Appellants first filed a motion to stay execution on the judgment, and asked the circuit court to set the bond amount at $2 million based solely on the current statutory caps amounts (and thus, public policy concerns), rather than on any evidence. *See* (Ex. E to Petition for Supersedeas). Dr. Miller hoped not to have to make affidavit filings regarding his assets. The circuit court granted the stay, but rejected the request to order no bond or to set the bond amount at $2 million based on the current statutory caps, instead ordering a $6.25 million appeal bond. A motion to reconsider was filed as to that order, and was denied.

Concurrently with their motion to reconsider the first order of the circuit court, Appellants filed a ***second motion*** asking the circuit court to reduce and set the bond amount at $2 million **based on evidence** of the Appellants' assets and ability to pay for such a bond. *See* (Ex. G to Petition for Supersedeas). Importantly, nothing precludes a party from making more than one request or motion to stay execution and post a bond. The first motion was not supported by evidence. The second motion was a request to reduce the bond amount set by the court, and was based on evidence. The circuit court denied this motion days later, before any opposition was filed. A motion to reconsider was filed as to that order, and it too was denied.

Appellants noted the factors that must be considered in both motions, but the circuit court denied both motions without analyzing the factors. Appellants sought reconsideration of both rulings, noting that the circuit court did not provide a rationale for either ruling. *See* (*Id.*); *see also*

(Ex. H to Petition for Supersedeas). The circuit court then issued a written order explaining that is ruling was based on its finding that the current statutory caps are inapplicable and its consideration of the judgment amount and estimated accrual of interest. (Order Denying Defendants' Motion to Reconsider Denial of Motion to Reduce Amount of Appeal Bond, Ex. A to Petition for Supersedeas).

Appellants cited the affidavits of McEwen and Dr. Miller as part of their motion to reduce the amount of the appeal bond, not as part of their Rule 59(e) motion. *See* (Motion to Reconsider and Motion to Reduce Amount of Appeal Bond, Ex. G to Petition for Writ of Supersedeas). Accordingly, the affidavits and related arguments were properly before the circuit court and are properly before this Court.

The circuit court's ruling requiring a $6.25 million bond does not "reasonably accommodate[] the conflicting interests of all parties." *See* (Am. Return at 6). It serves only Respondent's interests, with no consideration of Appellants' interests or their ability to pay the judgment or obtain a bond. A proper analysis must consider both parties' interests. But the circuit court's order—at Respondent's urging—protects only Respondent's interests and ignores the undue financial burden Appellants will suffer. The circuit court therefore abused its discretion, and this Court should grant a writ of supersedeas.

II. The *Hilton* factors weigh in favor of granting a stay and requiring only a $2 million bond.

In *Southeast Booksellers Association*, the federal district court recognized the "*Hilton* factors" as important in analyzing whether to grant a stay conditioned upon the acquisition of a supersedeas bond for less than the full amount of the judgment. *See Se. Booksellers Ass'n*, 233

F.R.D. at 458–59 (citing *Hilton*, 481 U.S. at 776).[4] Thus, courts consider 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.* Each factor is satisfied in this case.

A. Appellants are likely to succeed on the merits of their appeal.

As Appellants argued in their petition, the trial court committed reversible error by denying Appellants' Rule 15(b) 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. *See* (Petition at 12). As to the *Hilton* factors, Respondent argues primarily that Appellants are not likely to succeed on the merits of this issue. *See* (Am. Return at 12–24). Respondent is incorrect. A proper application of the factors requires the bond amount to be set at $2 million.

i. Respondent is judicially estopped from arguing Appellants waived the statutory emergency defense.

Respondent first argues the defense of statutory emergency is an affirmative defense which must be pled, and Appellants waived the defense by not pleading it in their answer. (*Id.* at 13–15). However, Respondent is judicially estopped from taking this position.

[4] Respondent suggests the *Hilton* factors are "inapposite because [*Hilton*] does not relate to the proper amount of an appeal bond." (Am. Return at 12). Respondent is incorrect. Appellants do not rely on *Hilton* itself, but rather on cases in which courts relied on and applied the *Hilton* factors in determining whether to issue a stay while requiring an appeal bond for less than the full judgment amount. *See Se. Booksellers Ass'n*, 233 F.R.D. at 458–59; *Morris*, 2015 WL 12911349, at *2.

On October 8, 2018, Respondent filed a Motion for Partial Summary Judgment, or in the Alternative, an Order Granting a Stay or Trial Until Pending Appeals in Other Cases Resolve Material Issues Likely to Arise in this Case (hereinafter referred to as Respondent's "Motion to Stay"). *See* (Motion to Stay, Ex. C to Petition for Supersedeas). In the motion, Respondent first asked the circuit court to grant 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." (*Id.* at 1) (emphasis added). Respondent argued she was entitled to summary judgment on the following grounds:

> 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 involved,*** **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.

(*Id.*) (emphasis added). Notably, Respondent argued only the merits of the statutory defense; she did not assert that she was entitled to summary judgment on any procedural basis.

In the same motion, Respondent alternatively sought a stay of trial in this case on the ground that two appeals addressing "various novel and complex legal and medical issues arising under" section 15-32-230 were pending before this Court, and "***[t]hose issues also arise in this case***." (*Id.* at 2) (emphasis added). Respondent asserted that if this case went to trial while those appeals remained pending, "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." (*Id.*). Respondent further asserted that "[i]f 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." (*Id.*). Accordingly, Respondent took the position in the circuit court in October 2018—over three years before trial—that the defense of statutory emergency was at issue in this case and needed to be addressed on the merits. The circuit court denied Respondent's motion for partial summary judgment but ***granted the requested stay***. *See* (Form 4 Order Denying Summary Judgment, attached as Exhibit A; Form 4 Order Granting Motion for Stay, attached as Exhibit B).

Respondent is therefore judicially estopped from taking the position before this Court that Appellants waived the statutory emergency defense. "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. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). Once "a party has 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. These elements are satisfied here. Respondent takes two "totally inconsistent" positions: first, she took the position before the circuit court in her October 2018 Motion to Stay that the merits of the statutory emergency defense were at issue and would be tried, and second, she later took the position before the circuit court at trial and now before this Court that the statutory emergency defense had been waived and that she would have prepared her case differently had she known the defense would be at issue. Thus, the first, second, and fifth elements of judicial estoppel are satisfied. *See id.* Respondent succeeded in obtaining a stay of trial. Accordingly, the third element of judicial estoppel is satisfied. *See id.* Finally, Respondent's claim of surprise at trial that Appellants were raising the statutory emergency defense at trial is at odds with the position she took in October 2018 that the statutory emergency defense would be tried on the merits in this case. Accordingly, Respondent is judicially estopped from taking the position that Appellants waived the statutory emergency defense. *See id.* At minimum, the Court should reject the argument by Respondent that she was somehow surprised and prejudiced by the request to amend and add the defense about which the parties had talked about, made motions about, and argued about for months prior to trial.

ii. The statutory emergency defense was at issue throughout this case and was tried by express or implied consent.

Respondent's arguments that she was unfairly surprised by Appellants' request to amend after she rested her case at trial and that she was aware the statutory emergency defense was at issue at earlier stages of litigation but somehow unaware at other times are belied by the timeline of the litigation in this case.

Respondent points to April 2018 and argues she would not have settled with Piedmont (for $50,000) if she realized the statutory defense would be at issue. (Am. Return 19–23). She thus

points to this April 2018 settlement as evidence of prejudice to her by allowing an amendment to assert the statutory emergency defense. The history of this case shows otherwise. The trial court abused its discretion in denying Appellants' Rule 15(b) motion to amend to conform to the evidence and Appellants' request to charge the jury on the statutory emergency defense.

A defendant must prove three elements to establish the statutory emergency defense: "(1) the claim arises out of a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient was under an immediate threat of death or serious bodily injury." *Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 414, 831 S.E.2d 152, 155 (Ct. App. 2019). Deposition testimony prior to Respondent's settlement with codefendant Piedmont Medical Center in March 2018 addressed all three elements, as explained below. Respondent focuses primarily on the lack of evidence of gross negligence. (Am. Return at 16–17 & n.1). But once Appellants established evidence of each of the three elements, Respondent bore the burden to overcome the statutory defense by proving gross negligence. Appellants were not obligated to discuss gross negligence during depositions. Any failure to present evidence of gross negligence or inquire about gross negligence belongs to Respondent and cannot be a ground for finding ***Appellants*** failed to raise issues related to the statute. Respondent seems to suggest gross negligence cannot be at issue unless the words "gross negligence" are stated by a witness. (Am. Return 16–17). However, "gross negligence" is defined as "the failure to exercise slight care" or "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Plyler v. Burns*, 373 S.C. 637, 651, 647 S.E.2d 188, 196 (2007). It "is a relative term, and means the absence of care that is necessary under the circumstances." *Id.* A witness's testimony might present a jury question as to gross negligence in any number of ways without the witness or the examining attorney ever using the

phrase "gross negligence." Thus, the elements Appellants must prove to assert the statutory defense were plainly at issue in depositions prior to Respondent's 2018 settlement with Piedmont, and Respondent's claim that she did not know the defense was at issue until May 2018 should be rejected.

A timeline of this litigation illustrates the flaws in Respondent's arguments:

2011 through 2014: Fact Witnesses Addressed the Elements of the Defense

The parties deposed several fact witnesses between 2011 and 2014. The testimony of multiple witnesses touched on the elements Appellants must prove to prevail on the statutory emergency defense. For example, the parties deposed Julie Bibb, a nurse on duty during the delivery, on February 15, 2013. Ms. Bibb testified that a shoulder dystocia is an emergency and that the baby faces an immediate threat of death:

> Q. In delivery a baby and assisting a doctor during a shoulder dystocia and resolving a shoulder dystocia, things are needing to be done expeditiously; would you agree with that?
>
> A. I agree.
>
> Q. That's because the baby needs to be delivered as soon as possible, correct?
>
> A. Yes, exactly.
>
> . . .
>
> Q. Because the dangers to that baby can be that that baby can die; isn't that true?
>
> A. That's true.

(Feb. 15, 2013 Depo. of Julie Bibb at 148, attached as Exhibit C).

The parties deposed Respondent's expert Dr. Gurewitsch on June 26, 2013. Dr. Gurewitsch's testimony addressed all three elements of the statutory emergency defense:

(1) Dr. Gurewitsch testified that a shoulder dystocia is an obstetrical emergency, thus addressing whether the "genuine emergency" element of the defense is established. *See* (June 26, 2013 Depo. of Dr. Gurewitsch at 50–51, attached as Exhibit D).

(2) Dr. Gurewitsch testified that a shoulder dystocia is an emergency because "by the time the head is delivered, the umbilical cord is under stretch, and part of the body is in the birth canal. So it's no longer floating around where there is more amniotic fluid for protection. So the cord – the umbilical cord and, therefore, the blood supply to the baby is more vulnerable and variably compressed. . . . So because you can't know that, because it's variably compressed, that's where this concept of you pretty much only have four minutes to get the baby out." (*Id.* at 51). Dr. Gurewitsch thus addressed whether the patient is medically stable during a shoulder dystocia.

(3) Dr. Gurewitsch also testified that, during a shoulder dystocia, "the risk for injury to the brachial plexus is immediate." (*Id.* at 53). She further agreed with counsel that "[i]f during the attempt to . . . resolve the shoulder dystocia and it's unable to be effected in the four- to five-minute period and the baby is still not delivered, that increases the risk of . . . permanent brain damage to the baby due to lack of oxygen." (*Id.* at 53–54). Accordingly, Dr. Gurewitsch addressed whether the patient was under an immediate threat of death or serious bodily injury.

Thus, the elements of the statutory emergency defense were sufficiently probed in discovery by counsel for all parties, and Respondent's counsel should have been aware no later than 2013 that the defense was at issue.

April 2018: Plaintiff Settled with Codefendant Piedmont Medical Center

In April 2018, Respondent settled with codefendant Piedmont Medical Center for $50,000. *See* (April 3, 2018 Petition Seeking Approval of Partial Settlement, attached as Exhibit E; April 5, 2018 Order Approving Partial Settlement, attached as Exhibit F). Despite prior testimony from the above witnesses on the elements of Appellants' defense, Respondent's counsel now claims he did not know the statutory emergency defense would be at issue at the time of the settlement with Piedmont and would not have settled with Piedmont if he knew the defense was at issue. (Am. Return at 19–23). However, as set forth above, the elements ***Appellants*** must prove to prevail on the statutory defense were plainly at issue in the earlier depositions, and Respondent's counsel

therefore cannot plausibly assert that he lacked notice that the defense was involved at the time of the settlement with Piedmont.

May 2018: Respondent Deposed Appellants' Experts, Dr. Ernest and Dr. Chauhan

On May 24, 2018, and May 31, 2018, Respondent deposed Appellants' expert witnesses, Dr. Ernest and Dr. Chauhan, respectively. Respondent questioned the experts on issues related to the statutory emergency defense. Respondent admits as much in her amended return. (Am. Return at 22) (admitting Respondent's counsel knew the statutory emergency defense would be at issue by the May 24, 2018 deposition of Dr. Ernest); *see also* (May 24, 2018 Depo. of Dr. Ernest, at 122–32, attached as Exhibit G) (Respondent's counsel questioning Dr. Ernest regarding whether a "shoulder dystocia signifies that the patient is in immediate threat of death or serious bodily injury" and whether Dr. Ernest thought "there was both medical instability and immediate threat of death or serious bodily injury"); (May 31, 2018 Depo. of Dr. Chauhan, at 72–76, attached as Exhibit H) (Respondent's counsel questioning Dr. Chauhan regarding whether Dr. Chauhan had "any evidence to support that this child was medically unstable at any time after the decision was made to not go forward with the Cesarian delivery"); (*id.* at 83) (Respondent's counsel asking, "At the time shoulder dystocia is diagnosed, do you believe she is in any immediate threat of death or serious bodily injury?"). Thus, Respondent knew the defense was at issue and engaged in discovery related to the issue.

October 9, 2018: Respondent's Motion for Summary Judgment and Motion to Stay

As explained above in Part II.A.i, Respondent filed a motion on October 9, 2018, requesting that the circuit court grant summary judgment in favor of Respondent on the merits of "the expected statutory defense" under section 15-32-230 "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." (Motion to Stay at 1, Ex. C. to Petition for Supersedeas). In the alternative, Respondent sought a stay of trial until two appeals "resolve[d] material issues likely to arise in this case" related to the statute because at the trial of this case (according to Respondent's motion), "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." (*Id.* at 2). Accordingly, Respondent not only knew ***and expected*** that Appellants would raise the statutory emergency defense, she represented to the circuit court that the merits of the defense would be at issue at trial.

October 31, 2018: Status Conference and Order Granting a Stay

On October 31, 2018, the circuit court held a status conference regarding Respondent's Motion to Stay. At the status conference, trial counsel for Appellants told the circuit court that he would be requesting a charge on the statute at trial. The same day, the circuit court denied Respondent's motion for summary judgment but granted Respondent's request for a stay. *See* (Form 4 Order Denying Summary Judgment, Ex. A; Form 4 Order Granting Motion for Stay, Ex. B).

September 2020: Scheduling Order Allowing Respondent to Produce New Witnesses

In September 2020, over a year before trial, the circuit court entered a scheduling order requiring Respondent to "make a good-faith effort to disclose all witnesses by September 18, 2020," but allowing Respondent to "add additional witnesses beyond September 18, 2020," provided that she produce the witnesses for deposition prior to November 6, 2020. (Sept. 2020 Scheduling Order, attached as Exhibit I). Accordingly, to the extent Respondent had somehow failed to marshal evidence to combat the statutory emergency defense, Respondent had express

permission from the court to obtain and present new witnesses over a year before the January 2022 trial.

Decisions in Pending Appeals Addressing the Statute

On October 6, 2021, this Court issued its opinion in the second of the two cases addressing section 15-32-230 that were pending at the time of Respondent's Motion to Stay. *See Flowers v. Giep*, 436 S.C. 281, 871 S.E.2d 604 (Ct. App. 2021). The Court had decided the other case on July 3, 2019. *See Byrd*, 427 S.C. 407, 831 S.E.2d 152.

January 2022: Trial

The testimony presented at trial confirmed that the emergency statute was front and center. Examination of experts for both Respondent and Appellants 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. Respondent's expert Dr. Duboe was questioned by Respondent's counsel extensively on the point of whether the minor plaintiff's shoulder dystocia presented a *real* obstetrical emergency because of the relatively short time it took the Dr. Miller to resolve it by his various maneuvers. Dr. Duboe, upon being questioned by Respondent's 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 for 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. Dr. Miller, qualified as an expert in OB/GYN, opined that as soon as a shoulder dystocia is determined, the fetus is in immediate threat 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. Respondent's only other standard of care expert, Dr. 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 Appellants' 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. Respondent acknowledges that his objections to questions that "use[d] one or more phrases contained within the 'genuine emergency' statute" were overruled by the trial court. (Am. Return at 17). Moreover, although Respondent notes that the trial court granted a directed verdict in favor of Appellants after the close of all the evidence on the issue of gross negligence, (*id.*), trial counsel for Appellants recalls that Respondent argued against that motion.

The issue of the statutory emergency defense was consequently of no surprise to Respondent at trial, and she cannot show prejudice. Amendments are to be freely allowed under such circumstances, including amendments to add previously unpled affirmative defenses. *See Lee v. Bunch*, 373 S.C. 654, 660–61, 647 S.E.2d 197, 200–01 (2007) (affirming the granting of a motion to conform to the evidence to allow a previously unpled affirmative defense, and finding the plaintiff was not prejudiced by the amendment); *Soil & Material Eng'rs, Inc. v. Folly Assoc.,* 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987) (providing amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result). Moreover, by declining to charge the jury on section 15-32-230, the trial court failed to charge the jury with the controlling law, which is an abuse of discretion. *See Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000) ("Where 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."). Appellants were prejudiced by the failure to properly charge the jury because if Appellants' experts had been believed, the statutory requirements of 15-32-230 would have been met, and the jury would have awarded Appellants a defense verdict. *Ellison v. Simmons,* 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (providing an erroneous jury instruction is grounds for reversal if the appellant was prejudiced by the erroneous instruction). Because the trial court declined to charge the jury on the statute, this potential verdict result was wrongfully disallowed. The trial court therefore erred in denying Appellants' motion for a new trial.

iii. Respondent suffered no prejudice.

Respondent would have suffered no prejudice if the trial court granted Appellants' request to conform to the evidence. The parties tried the statutory emergency defense by express or implied consent and Respondent knew the defense was at issue for eight years prior to trial, and Appellants were therefore entitled to amend to conform to the evidence and to have the statutory emergency defense charged to the jury.

Respondent claims in her amended return that she was—or would have been—prejudiced in several ways. She first argues that she presented no evidence addressing the statutory emergency defense in her case-in-chief and therefore would have been deprived of the opportunity to do so if the trial court granted an amendment after Respondent rested. (Am. Return at 15–18). However, as explained above, the trial included a substantial amount of evidence related to the defense.[5]

[5] Respondent also could have sought to present rebuttal witnesses to address the defense. Moreover, to the extent she claims she somehow did not have such evidence at her disposal, she was entitled under Rule 15(b) to obtain a continuance. *See* Rule 15(b), SCRCP ("The court ***shall upon motion grant a continuance*** reasonably necessary to enable the objecting party to meet such evidence." (emphasis added)).

Respondent next argues she was somehow deprived of the opportunity to marshal evidence during discovery to combat the statutory emergency defense. This argument is meritless. The elements of the defense were raised in depositions beginning at least in 2013. Respondent questioned expert witnesses Dr. Ernest and Dr. Chauhan on the statutory emergency defense elements in May 2018, more than three years before trial, as she admits in her amended return. (Am. Return at 22). In September 2020, over a year before trial, the circuit court entered a scheduling order allowing Respondent to "add additional witnesses beyond September 18, 2020," provided that she produce the witnesses for deposition prior to November 6, 2020. (Sept. 2020 Scheduling Order, Ex. I). Thus, even if the Court accepts Respondent's assertion that she somehow was not aware the statute would be at issue before May 2018, Respondent was free to "marshal evidence" to combat the statutory emergency defense for another three and a half years. She cannot avoid application of the statute on the ground that she chose not to marshal better evidence.

The Court should reject Respondent's claim that she would not have settled with Piedmont had she known Appellants would raise the statutory emergency defense. *See* (Am. Return at 19–23). To start, there is no evidence regarding this statement. Counsel's argument does not constitute evidence. Further, the argument is incorrect in any event, because Respondent was on notice well before then that the defense was at issue, as explained above.

Respondent also cannot establish prejudice because she had express knowledge that the emergency defense was going to be tried, at the latest, in 2018—as revealed in her Motion to Stay—and thus had ***over three years*** to prepare to refute it. *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"). The trial court's denial of the Rule 15(b) amendment to conform to the evidence thus warrants a new trial.

Further, Respondent's experts offered evidence—in disagreement with Appellants' experts—that there was no genuine emergency for a period of time during the delivery. Had that testimony been believed, it would have given Respondent an argument that the case should still be submitted to the jury (although section 15-32-230 would have been charged) despite any failure on her part to present evidence of gross negligence. In other words, the fact that Respondent offered no evidence of gross negligence would not have terminated Respondent's case by virtue of the application of section 15-32-230. But the trial court's decision not to charge the statute, when the statute was well known by all—and in fact had been used by Respondent as a reason to continue the trial several years earlier—was unfair and deprived Appellants of a valid statutory defense. Accordingly, Appellants are likely to succeed on the merits of their appeal.

B. The remaining *Hilton* factors are satisfied.

Appellants explained in their petition how the remaining three *Hilton* factors are satisfied and warrant a reduction of the required appeal bond amount to $2 million. Respondent fails to refute Appellants' arguments.

Respondent contends she will be substantially injured if the Court grants Appellants' petition. (Am. Return at 24–25). However, she does not explain how she will be "substantially injure[d]" by a $2 million bond, other than her factually groundless suggestion that Appellants have assets that will be "dissipated or removed from her reach" and her legally groundless claim

that she is entitled to a bond sufficient to "protect [her] interests completely." (*Id.*). Respondent's contentions are without merit.

Finally, Respondent argues the public interest favors application of the pre-2012 version of South Carolina Code section 18-9-130. For the reasons explained in Appellants' petition for supersedeas, the public interest requires consideration of current public policy codified by the General Assembly. *See* (Petition at 14–15). The Court should therefore reject Respondent's arguments.

Conclusion

Appellants are likely to succeed on the merits of their appeal, and the *Hilton* factors are therefore satisfied. Accordingly, the circuit court—which failed to consider the required factors—abused its discretion in requiring more than a $2 million appeal bond. This Court should grant a writ of supersedeas, reverse the circuit court, and order a stay of execution contingent on the purchase of a $2 million 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 Appellants Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A.

Columbia, South Carolina
August 31, 2022

Exhibit A

(Form 4 Order Denying Plaintiff's Motion for Summary Judgment)

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), 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:

On consideration after hearing from the parties, Plaintiff's Motion for Partial Summary Judgment is denied, 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 10/31/2018 .

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/Daniel D. Hall 2753

Exhibit B

(Form 4 Order Granting Plaintiff's Motion to Stay)

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), 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:

On consideration after hearing from the parties, Plaintiff's Motion for Stay is granted, it is so ordered. A status conference will be scheduled in this matter in January 2019.

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 10/31/2018 .

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/Daniel D. Hall 2753

Exhibit C

(Excerpts from Deposition of Julie Bibb)

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

VIDEOTAPED DEPOSITION OF JULIE BIBB, R.N.

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.	C/A No.: 2009-CP-46-5195

DEPONENT: JULIE BIBB, R.N.

DATE: February 15, 2013

TIME: 10:43 a.m. to 4:21 p.m.

PLACE: Wingate Inn
760 Galleria Drive
Rock Hill, South Carolina

REPORTED BY:
AUDRA SMITH, RPR, FCRR
BRUCE A. MOODY, CLVS
CLARK & ASSOCIATES, INC.
P.O. Box 73129
Charleston, South Carolina 29415
Office: (843) 762-6294
Audra@Clark-Associates.com

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

GRAHAM LAW FIRM, P.A.
BY: MARY H. WATTERS
Post Office Box 550
Florence, South Carolina 29503

ON BEHALF OF THE DEFENDANT AMISUB OF SOUTH CAROLINA, INC. D/B/A PIEDMONT MEDICAL CENTER:

HOLCOMBE BOMAR, P.A.
BY: JOSHUA T. THOMPSON
100 Dunbar St, Suite 200
Spartanburg, South Carolina 29306

ON BEHALF OF DR. GREGORY A. MILLER:

DAVIS & SNYDER, P.A.
BY: ASHBY DAVIS
5 Hawthorne Park Court,
Greenville, South Carolina 29615

I N D E X

EXHIBITS

Q. For example, he has McRoberts. You didn't document that.

A. Correct.

Q. That doesn't mean, does it, Ms. Bibb, that just because you didn't document it, it wasn't done, correct?

A. Correct.

Q. That's just sort of a medical/legal teaching point, isn't it?

A. Yes.

Q. In delivering a baby and assisting a doctor during a shoulder dystocia and resolving a shoulder dystocia, things are needing to be done expeditiously; would you agree with that?

A. I agree.

Q. That's because that baby needs to be delivered as soon as possible, correct?

A. Yes, exactly.

MS. WATTERS: Object to the form.

Q. Because the dangers to that baby can be that that baby can die; isn't that true?

A. That's true.

MS. WATTERS: Object to the form.

Q. So in getting that baby out and doing everything you can as the nurse in the labor and delivery room assisting the physician and whoever else is there, midwife, whoever,

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I, Audra Smith, Registered Professional Reporter and Federal Certified Realtime Reporter do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness waived her right to read and correct said deposition and to subscribe the same.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand on March 5, 2013, at Charleston, Charleston County, South Carolina.

_____

Audra Smith, RPR, FCRR

Exhibit D

(Excerpts from Deposition of Dr. Gurewitsch)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)
)
ANGELA PATTON, AS NEXT)
FRIEND OF ALEXIA)
LUMPKIN, A MINOR)
Plaintiff) CASE NO.: 2009-CP-46-5195
v.)
GREGORY A MILLER, M.D.,)
et al.)
Defendant)
_____)

The deposition of EDITH D. GUREWITSCH, M.D. was taken on Wednesday, June 26, 2013, commencing at 8:43 a.m., at the Office of Gore Brothers Reporting & Video, at 20 S. Charles Street, Suite 901, Baltimore, Maryland 21201, before Dawn L. Venker.

REPORTED BY: Dawn L. Venker

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:
BY: EDWARD L. GRAHAM, ESQUIRE
Law Offices of Graham Law Firm, P.A.
383 W. Cheves Street
Florence, SC 28501
(843) 662-3281
Egraham@grahamlawfirm.com

ON BEHALF OF THE DEFENDANTS, GREGORY A. MILLER, M.D. and ROCK HILL GYN/OB, P.A.:
BY: ASHBY W. DAVIS, ESQUIRE
Law Offices of Davis Snyder & Williford, P.A.
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500
Adavis@davissnyder.com

APPEARANCES (Continued on The Next Page)

CONTINUED APPEARANCES:

ON BEHALF OF THE DEFENDANTS, AMISUB OF SOUTH CAROLINA, INC. d/b/a PIEDMONT MEDICAL CENTER:
BY: JOSHUA T. THOMPSON, ESQUIRE
Law Offices of Holcombe Bomar, P.A.
100 Dunbar Street, Suite 200
Spartanburg, SC 29306
(843) 594-5300
Jthompson@holcombebomar.com

INDEX
Deposition of EDITH GUREWITSCH, M.D.
June 26, 2013

brachial plexus injury that are not associated with shoulder dystocia actually represent very rare cases. They are sort of highlighted in the literature, but they are nine out of like ten to 100,000 births in a region. And they -- and they get published for that reason. But they are exceedingly rare. And maybe they couldn't find a cause in those cases.

Q Okay. All right. Is shoulder dystocia reasonably predictable?

A So that's a little bit of a double-edged question because it depends whether you are looking prospectively or retrospectively. Could it have been predictable versus -- versus will it end up in a shoulder dystocia.

Q Well, let's -- let's look prospectively. You are the delivering physician.

A So prospectively speaking, although there are the risk factors that I mentioned to you, obesity, excessive weight gain, diabetes, going past the due date, all of which are associated with macrosomia and are associated with delivery. Even so, if you take all such patients who have those risk factors, how many of them will end up with a shoulder dystocia, actually, very few. Far fewer than 50 percent.

Q Uh-huh.

A Okay. On the other hand, if you look back at shoulder dystocia cases and say how many of those were associated with those conditions, about 50 percent of them were. So -- so shoulder dystocia can occur in the absence of those risk factors, and -- and those risk factors, more often than not, will not end up in a shoulder dystocia.

Q So a shoulder dystocia reasonably --

A Predictable.

Q -- predictable in the --

A You can identify risk factors, but you would not make a specific management plan, or alter obstetric management unless you have extremes of those conditions.

Q In your opinion, did any of those extreme conditions exist prior to delivery in this case?

A In my opinion, they -- they did not. I mean she had a pretty high weight gain. She was not a diabetic. There was diagnosis of fetal macrosomia, but there was not a -- an indication to avoid a trial of labor and vaginal delivery.

Q Okay. I've heard and read, and I believe you have said under oath and in other depositions I've reviewed, that shoulder dystocia constitutes an obstetrical emergency?

A It does.

Q Why? Why -- why -- why do you and other physicians say shoulder dystocia is an obstetrical emergency? What -- what's the emergency?

A Okay. So the emergency is that by the time the head has delivered, the umbilical cord is under stretch, and part of the body is in the birth canal. So it's no longer floating around where there is more amniotic fluid for protection. So the cord -- the umbilical cord and, therefore, the blood supply to the baby is more vulnerable and variably compressed. It is not shut off, unless you clamped and cut the cord. But with contractions, with compression, with tight fit in the birth canal, as opposed to up in the uterus, you are at risk for some compression.

Now, most of the time the umbilical cord, which comes out, as we all know from our belly button, for lack of a better -- the umbilicus. That's what it is called, the umbilical cord. So, normally, it would be floating up in the -- in the uterus still. It's not in the birth canal. However, certain times, and you can't know this in advance, the -- part of the umbilical cord may either be just lying right next to the shoulders or around the body or around the neck, and so then it is in the birth canal.

So because you can't know that, because it's variably compressed, that's where this concept of you pretty much only have four minutes to get the baby out. It's not like we can just go get a cup of coffee, get somebody to consult, see what we should do, because you can't wait around for that to happen.

So it's not quite like a CPR event where the -- you know, there has been no heartbeat, no respirations, no nothing, no oxygen supply, and you have four minutes before a neurologic injury. And I think that's where that four-minute concept comes from. Because you can't really know to what degree it's being compressed. But unless it's completely interrupted, you really also don't know that it isn't actually okay.

The other complication that you have is the risk of a -- of some kind mechanical injury. And those would include fractures, as well as a brachial plexus injury or injury to the -- to the -- to the brachial plexus. But the -- that particular type of mechanical injury is from the tight fit and the manipulation that would be needed to get that tight fit overcome. And so that's also an emergency because you are at greater risk for injury and would need to respond or alter or correct what's going on in order to avert that mechanical injury to the baby.

Q If -- I'm not attributing any fault to the delivering physician -- the baby exceeds that four-minute mark, it's into the five, six-minute mark, is that baby now at significantly increased for hypoxic ischemic encephalopathy?

A Yes. So -- so the risk for injury to the brachial plexus is immediate because any manipulation you are going to do is pretty much evident right then and there.

Q Yes.

A As opposed to the risk of her asphyxia, which is time -- more time dependent. And so, yes, the longer the time goes on, the greater the risk.

Q And if -- if any particular infant gets into an hypoxic ischemic encephalopathy pattern where the oxygen to the brain has -- has -- is being shut down, that baby is at risk for suffering permanent brain damage, true?

A So I'm not sure what you mean by a hypoxic ischemic encephalopathy pattern. What do you mean by that?

Q Okay. If during the attempt to resolute -- resolve the shoulder dystocia and it's unable to be effected in the four- to five-minute period and the baby is still not delivered, that increases the risk of

brain -- permanent brain damage to the baby from lack of oxygen, true?

A Yes.

Q And that can result in significant permanent cerebral palsy and all the sequelae that flow from that, as well as death?

A Yes.

Q Would you agree that the more experience an OB-GYN has, the more experience he has delivering babies, typically, not always, but typically the better he will do in an obstetric emergency like a shoulder dystocia?

A Yes.

Q I mean this is -- this is not an ideal time to climb on a learning curve I would imagine. And everybody has got to have their first shoulder dystocia. And I -- I certainly appreciate that, but --

A Yes.

Q Okay.

MR. GRAHAM: Object to the form.

Q The more experience the OB has in resolving shoulder dystocia, the more experience he has in delivering babies, typically you would expect that he's going to do a better job when he encounters a shoulder dystocia?

A If he is the one with the primary hands on, yes.

Q Yes.

A Uh-huh. Yes. I'm sorry.

Q That's all right. When a physician, in attempting to assist a vaginal delivery, notices the turtle sign, is that typically his first indication I've got a shoulder dystocia?

A It can be.

Q Okay.

A But it really is not a definitive sign. It is more a suggestive sign. It's also not the most common thing. It doesn't happen with all shoulder dystocias.

Q Was there a turtle sign noted in this case? Do you remember?

A I don't think there was, or that I recall. It wasn't documented.

Q Okay. Okay. Do you recall from the records -- and if you need to look at them, I'm happy for you to do that -- what the first indication that Dr. Miller recorded that he believed he was encountering a shoulder dystocia? What -- what gave him the clue that he was dealing with this?

A It is what it really is for most people.

It's the failure to deliver the anterior shoulder. So what that actually means is -- probably easiest if I use my diagrams to show.

Q Yes, ma'am. Please. I'm going to give you all these exhibits. You use any that you wish.

A Okay.

Q Okay?

A All right. So what I'm pulling from here is -- they are on Exhibit -- it was marked 5.

Q Yes, ma'am.

A And if we can keep them in order -- we'll just say it. I'm on the second one, or 5B. And they are called cardinal -- cardinal movement. And -- well, the name of the exhibit is called cardinal movements. And what it has here is a picture of the -- the normal descent of the baby. And then the position of the shoulders right after the baby's head delivers. And so I'm focusing on the figure that's to the right on this -- I'm trying very hard to give a verbal description. On the right side of this figure. And it is a -- a view from the physician's perspective. So -- or the clinician's perspective. And what you have here is -- can I mark it?

Q Sure. Sure.

A Okay. So -- and I'm doing this upside

prospectively speaking, people can usually be within 5 pounds of force either way. And this is somebody who is 30 pounds of force in excess of what they would normally be aiming for.

On the other hand, if they are saying that their best judgment was that they needed 50 pounds of force to get this baby out and they've already been at this for five, six minutes trying to be gentle and nothing is working, so in their best judgment they went for greater force, I would have to evaluate that claim against the circumstances of the delivery. What was going on that would have said that's your best judgment.

Q And does the concept of best clinical judgment suggest that the clinician applying judgment should be complying with generally accepted standards of obstetrical practice?

A Yes.

Q Finally, there was a question by Josh about standard of care breaches by the hospital. And my question for you is, since you weren't there and you have -- have no personal knowledge as to whether or not fundal pressure was performed, if the jury were to find that fundal pressure was, in fact, performed, would that represent a breach of generally accepted standards

of practice by the -- by the folks involved, that is to say, the labor and delivery nurse and the obstetrician?

A That would be a breach of their standard of practice, but it would not be contribute -- causative of the injury.

Q Okay. Would -- would fundal pressure make the -- do you have an opinion as to whether or not fundal pressure, if applied, would have made the degree of shoulder impaction more severe?

A It would have been counterproductive by continuing to have the shoulder remain in the position that it's in and maybe hold it there more. And, yet, it would still be incumbent on the clinician who is applying traction under those circumstances to not bend the head downward and apply a lot of force. If they still kept the head in an axial position and applied no more than usual traction, they wouldn't -- one wouldn't cause the injury. They may not resolve the shoulder dystocia using that and they would have to go to something else, but they could still avoid an injury.

Q Right. Recognizing that the excessive traction by the obstetrician and the excessive degree of lateral traction applied by the physician was the direct cause of the brachial plexus birth injuries, would you, nevertheless, agree that in the event fundal

pressure had been applied in this case, that that would at least contribute to the -- to the outcome in the sense that it was counterproductive to the resolution of the shoulder dystocia?

A I mean we are getting several degrees away, but as -- so -- I think I would say no. Because you mean -- yes, I've said it's counterproductive, but I don't think you still would be causing an injury. Just not helping the situation.

Q Right. Right. If -- if --

A And I have to leave.

Q Okay. The direct cause then was the physician's traction?

A Yes.

MR. GRAHAM: Thank you. No further questions.

THE WITNESS: Okay.

(Deposition concluded at 12:03 p.m.)

STATE OF MARYLAND)
) ss
COUNTY OF HARFORD)

I, Dawn L. Venker, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified, do hereby certify that the above named, EDITH D. GUREWITSCH, M.D., was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that her deposition as set forth above, which was reduced to writing under my direction and control, is a true record of the testimony given and/or as corrected by said witness.

I certify that I am not of counsel, attorney, or relative of any party, or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand this 5th day of July, 2013.

_____
Dawn L. Venker
Notary Public

My commission expires
October 28, 2013

SIGNATURE OF DEPONENT

DEPONENT: EDITH D. GUREWITSCH, M.D.
DEPOSITION DATE: 6-26-13
REPORTER: DAWN L. VENKER
CASE CAPTION: ANGELA PATTON v. GREGORY A. MILLER, M.D.

(Please return both Signature of Deponent pages.)

I, the undersigned, EDITH D. GUREWITSCH, M.D., do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (CONTINUED)

DEPONENT: EDITH D. GUREWITSCH, M.D.
DEPOSITION DATE: 6-26-13
REPORTER: DAWN L. VENKER
CASE CAPTION: ANGELA PATTON v. GREGORY A MILLER, M.D.

_____

EDITH D. GUREWITSCH, M.D. Date

I, Dawn L. Venker, Notary Public for the State of Maryland at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

_____

Dawn L. Venker
My Commission expires:
October 28, 2013

Exhibit E

(Petition Seeking Approval of Partial Settlement)

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
Angela Patton, as Next Friend of Alexia Lumpkin, a minor, Plaintiff, vs. Gregory A. Miller, MD, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, Defendants.	)	VERIFIED PETITION SEEKING APPROVAL OF PARTIAL SETTLEMENT C . A. No. 2009-CP-46-5195

The Petition of Angela Patton, as guardian ad litem of her minor daughter, Alexia Lumpkin (hereinafter referred to as "A.L.") would respectfully show unto the Court as follows:

1. Petitioner is next friend and guardian ad litem of her minor daughter, A.L., who was born on April 5, 2007.

2. Petitioner has instituted the above-entitled action in order to recover for damages suffered by A.L. as a result of her delivery on April 5, 2007 which occurred at the hospital of Defendant, Amiub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Amisub").

3. Petitioner has alleged in her Complaint that at the time of delivery, an obstetrical complication known as shoulder dystocia occurred, wherein the infant's head is delivered but the body cannot follow because the baby's top shoulder is lodged behind the mother's pelvic bone. The allegation of Petitioner is that A.L. suffered a permanent injury to her brachial plexus nerves, affecting use of her left upper extremity. Amisub denies all allegations of negligence, on the part of its agents, servants or employees.

4. Defendant Amisub has offered the sum of $50,000.00 for a partial settlement of this action, but in exchange for a full and final release or Covenant Not to Sue as to Amisub, its agents, servants, or employees only. Petitioner does not intend to release co-defendant Dr. Miller and Rock Hill Gynecological Associates, P.A. and this action will continue on as against such defendants. Claims against the non-settling defendants Dr. Miller and his practice group are preserved and shall go forward.

5. Petitioner is the biological mother of A.L., and she and A.L.'s father, Antwon Lumpkin, are A.L.'s custodial parents. Petitioner instituted this action as A.L.'s next friend and has now been appointed as guardian ad litem for her minor child and thus has full authority to settle this claim upon Court approval.

6. Petitioner believes that the $50,000.00 settlement offered by Amisub is fair, reasonable, and that it is in the best interests of the minor child for the Court to approve the settlement.

7. Amisub is a self-insurer and also has an excess insurance policy well above the amount paid herein and sufficient to cover any recovery had in this case.

8. Petitioner alleges, and is well informed that the payment by Amisub of this partial settlement is not an admission of liability by Amisub, its agents, servants, or employees, nor is it an admission of any of the facts or circumstances out of which this lawsuit arises.

9. Petitioner has retained the Graham Law Firm, P.A. to represent the interests of her minor daughter in this case. After appropriate pleadings were filed and served, a substantial amount of discovery ensued and rulings concerning recovery of pre-majority medical expenses on behalf of the minor were appealed to the South Carolina Court of Appeals and subsequently to the

South Carolina Supreme Court. Substantial work by the attorneys involved has taken place and Petitioner is extremely pleased with the efforts of the Graham Law Firm, P.A. on behalf of A.L.

10. Petitioner's agreement with her attorneys provides for a 40 percent contingent fee of any gross recovery obtained, or in this instance $20,000.00, together with reimbursement of all litigation expenses. Here, the litigation expenses incurred thus far well exceed $50,000.00. However, if the attorneys' fees from the partial settlement were paid presently, and expenses partially reimbursed as provided for in the Legal Representation Agreement between Petitioner and her attorneys, the minor would have no recovery from the partial settlement. Consequently, Petitioner understands counsel has proposed to defer the earned fee of $20,000.00, until a subsequent recovery, if any, and to apply the $40,000.00 as partial reimbursement of litigation expenses incurred to date, and the remaining $10,000.00 would be paid to the guardian ad litem for the benefit of the minor. Petitioner believes this handling of the $50,000.00 is eminently fair and asks the Court to approve that as well as the attorneys' fee outlined on this partial settlement of the lawsuit.

11. Petitioner contends there is no valid Medicaid lien or subrogation claim, as the effect of the Supreme Court's ruling is that no recovery of pre-majority expenses shall be allowed as to Amisub. Notwithstanding that ruling, Petitioner understands any outstanding liens against A.L. or Petitioner and any outstanding medical bills and other expenses owed by A.L. and/or Petitioner, to the extent they are lawful and equitable, will be sole responsibility of Petitioner. Even though Petitioner contends such asserted liens are invalid, she nonetheless accepts responsibility for dealing with any issues that may arise in that respect.

12. Petitioner submits that no conservator is required as to this partial settlement, inasmuch as she will not receive more than $10,000.00.

13. WHEREFORE, Petitioner respectfully requests that the Court:

(1) Approve the partial settlement outlined above in all respects;

(2) Authorize Petitioner to consummate the settlement as outlined, and

(3) Grant such other and further relief as the Court deems just as proper.

GRAHAM LAW FIRM, P.A.

By: _____

Edward L. Graham
P.O. Box 550
Florence, SC
803.774.4444
Efax 1.800.859.7028
egraham@grahamlawfirm.net

Attorneys for Petitioner and
Guardian ad Litem

As attorney for Plaintiff/Petitioner, I hereby certify that it is my opinion that this Settlement is fair, reasonable and in the best interests of the minor.

GRAHAM LAW FIRM, P.A.

By: _____

Edward L. Graham
Attorneys for Plaintiff/Petitioner

March 30, 2018

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
Angela Patton, as Next Friend of Alexia Lumpkin, a minor, Plaintiff, vs. Gregory A. Miller, MD, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, Defendants.	)	VERIFICATION C. A. No. 2009-CP-46-5195

I, Angela Patton, as Petitioner, Next Friend, GAL, being first duly sworn, depose and say that I have read the foregoing Petition for Appointment as Guardian ad Litem; and know the contents thereof to be true based upon personal knowledge, except when stated upon information and belief, and in that event I believe the contents to be true and accurate.

Angela Patton, Petitioner, Next Friend, and GAL
of Alexia L., a minor under the age of 14

SWORN to and subscribed before me
this 30 day of March, 2018

Notary Public for South Carolina
My Commission Expires: 1-10-20

Exhibit F

(Order Approving Partial Settlement)

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
Angela Patton, as Next Friend of Alexia Lumpkin, a minor, Plaintiff, vs. Gregory A. Miller, MD, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, Defendants.	)	ORDER APPROVING PARTIAL SETTLEMENT OF ACTION C. A. No. 2009-CP-46-5195

This matter is before the Court upon petition of Angela Patton, as Natural Guardian, Next Friend, and Guardian ad Litem of Alexia Lumpkin (hereinafter "A.L."), a minor, pursuant to §62-5-433 of the Code of Laws of South Carolina (1976 as amended). Petitioner seeks approval of a partial settlement involving the minor and asks that the settlement be approved as to only one Defendant, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center (hereinafter "Amisub"). The Petitioner's claim against non-settling Defendants, Dr. Gregory Miller ("Dr. Miller") and Rock Hill Gynecological and Obstetrical Associates ("RHGOA") are not covered by this settlement, and shall remain active and go forward. Claims against all other parties besides Amisub, its agents, servants, or employees are not covered by this settlement preserved in all respects.

The action arises out of injuries allegedly sustained by the minor A.L. during her delivery on April 5, 2007. The Petitioner was admitted to the hospital of Amisub for labor and delivery and managed by Dr. Miller and assisted by employees of Amisub. It is alleged that during the

delivery complications known as shoulder dystocia arose and that A.L. was delivered with injuries to her brachial plexus nerves on the left, resulting in permanent impairment to her left upper extremity. The allegations of Petitioner are that Dr. Miller and Amisub employees jointly caused the injuries suffered by the minor A.L.

Amisub denies all material allegations of the Complaint, and has made the settlement offer herein described without admitting liability, nor admitting any of the facts or circumstances out of which this action arises. The partial settlement is an expeditious and inexpensive manner of disposing of a doubtful and disputed claim made against Amisub.

After hearing the testimony and statements of counsel, the Court finds that Amisub is self-insured up to a substantial sum, and also has an excess insurance policy, with coverage being more than adequate to cover the claims made herein. It further appears that Amisub has offered the sum of $50,000.00 to settle any claims made against it, or its agents, servants, or employees and that Petitioner and her attorneys feel it is in the best interests of the minor Plaintiff A.L. for the settlement to be accepted and approved by this Court. In exchange for the payment to be made, a Release or Covenant Not to Sue is to be executed by Petitioner, whereby she releases any and all claims which are made or could have been made against Amisub, its agents, servants, or employees. The action of Petitioner shall go forward as against remaining, non-settling Defendants and all her rights in that respect are preserved.

The minor's losses and damages she claims in the suit include permanent injury, disfigurement, functional impairments of her left upper extremity, as well as past and future medical expenses, which may be covered partially by Medicaid. As to Amisub, however, no medical expenses incurred by or on behalf of A.L. are claimed by Petitioner. The Supreme Court

has held that any such expenses, referred to as "pre-majority medical expenses" are not recoverable against Amisub, therefore no portion of the $50,000.00 paid is for any such expenses.

The Court finds that Petitioner and Antwon Lumpton are A.L.'s biological and custodial parents. Petitioner instituted this claim as Next Friend of the minor A.L., and has subsequently been appointed as Guardian ad Litem for the minor child and has full authority to settle this claim upon Court approval. Petitioner has expressed her belief that this partial settlement is fair, reasonable, and that it is in the best interests of the minor child for the same to be accepted and approved by this Court. Her able attorney joins in the recommendation, and this Court finds and concludes that it is indeed a fair and reasonable settlement and that it is in the best interests of the minor A.L. for the settlement to be approved by this Court.

The Court also finds that Petitioner retained the Graham Law Firm, P.A. to represent the interests of A.L., her minor daughter. The Retainer Agreement between counsel and Petitioner provides for a 40 percent contingent fee of any gross recovery obtained. In this instance, the attorneys' fee would be $20,000.00, plus reimbursement of litigation expenses, which well exceed $50,000.00. However, if the attorneys' fees from the partial settlement were paid now, and expenses partially reimbursed as provided in the agreement between Petitioner and counsel, the minor would have no recovery from the partial settlement. Petitioner's counsel have proposed, therefore, that they defer the earned contractual fee of $20,000.00 until a subsequent recovery, if any is made, and that $40,000.00 of the $50,000.00 settlement to be paid herein be used for partial reimbursement of litigation expenses incurred to date. The remaining $10,000.00 is to be paid to the Guardian ad Litem for the benefit of the minor. The Petitioner has expressed to the Court that she in agreement with that handling of the funds, and that she is quite pleased with the legal services provided for her and the minor by her attorneys and is satisfied that the litigation expenses

were reasonable and necessary in pursuing this action. Petitioner agrees with the proposed distribution, and requests the Court to approve the settlement and distribution.

It appears doubtful there is any Medicaid lien of any type, because this $50,000.00 partial settlement includes no recovery of the minor's pre-majority medical expenses. With regard to any claim against the present settling Defendant, the Supreme Court of South Carolina has fully and finally ruled that pre-majority medical and life care expenses may be asserted only by the parents of the minor A.L. This Court makes no finding with respect to medical expenses or life care expenses going forward in the litigation against non-settling Defendants.

Even though it appears to this Court there would be no basis for any Medicaid or other government lien or lien of any insurance carrier, healthcare plan, or provider, it is the responsibility under the agreement between the parties, for Petitioner to be responsible for any claimed lien, and that she shall indemnify and hold harmless Amisub from any lien claimed by an adverse party, as well as for all expenses and legal fees incurred by Amisub in resisting payment of such liens.

This Court finds that no conservator is required, inasmuch as the Guardian ad Litem will receive no more than $10,000.00 under the partial settlement.

IT IS THEREFORE, ORDERED as follows:

(1) This Court hereby approves the partial settlement of this action under the terms of which Petitioner shall be paid the total sum of $50,000.00 in the manner outlined above;

(2) The $50,000.00 shall be distributed by application of $40,000.00 thereof to costs advanced by Petitioner's attorneys, with the remaining $10,000.00 to be paid to the Petitioner for the benefit of the minor A.L.;

(3) Attorneys' fee of $20,000.00 for Petitioner's attorneys is hereby approved, with that fee to be paid out of any future recovery against non-settling Defendants;

(4) Upon payment of the settlement as outlined herein, Petitioner shall execute a Release of Amisub, its agents, servants, and employees or in the alternative, a Covenant Not to Sue fully exonerating Amisub of South Carolina, Inc., d/b/a Piedmont Medical and its agents, servants, and employees, but preserving Petitioner's rights against non-settling Defendants herein;

(5) Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center and its attorneys shall have no responsibility to trace or follow the application of the funds paid herein; and

(6) Granting such other and further relief as to the Court seems just and proper.

ALL OF WHICH IS SO ORDERED.

Daniel G. Hall

Presiding Judge
Sixteenth Judicial Circuit of South Carolina

York, SC
March 30, 2018

Exhibit G

(Excerpts from Deposition of Dr. Ernest)

STATE OF SOUTH CAROLINA
COUNTY OF YORK

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

ANGELA PATTON as Next Friend of ALEXIA LUMPKIN, a minor,

Plaintiff,

vs.

DR. GREGORY A. MILLER, ROCK HILL GYNECOLOGICAL & OBSTETRICAL ASSOCIATES, P.A. and AMISUB OF SOUTH CAROLINA, INC., d/b/a PIEDMONT MEDICAL CENTER,

Defendants.

VIDEOTAPED DEPOSITION OF: JOSEPH McDONALD ERNEST, III, M.D.

DATE: May 24, 2018

TIME: 9:38 a.m.

LOCATION: Davis Snyder Williford & Lehn, P.A.
5 Hawthorne Park Court
Greenville, South Carolina

TAKEN BY: Counsel for Plaintiff

REPORTED BY: Mary K. Stepp, Court Reporter

APPEARANCES OF COUNSEL:

Attorney for Plaintiff:

(Appearance via Telephone)
GRAHAM LAW FIRM, P.A.
BY: EDWARD L. GRAHAM, ESQUIRE
383 W. Cheves Street
Florence, South Carolina 29501
843.662.3281
egraham@grahamlawfirm.net

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

(Appearance in Person)
DAVIS, SNYDER, WILLIFORD & LEHN, P.A.
BY: ASHBY W. DAVIS, ESQUIRE
KEITH D. KNOWLTON, ESQUIRE
5 Hawthorne Park Court
Greenville, South Carolina 29615
864.335.3500
adavis@davissnyder.com

ALSO PRESENT:

Jack Marks, Three Point Oh, Inc., Videographer

(INDEX AT REAR OF TRANSCRIPT)

Q. The -- do you believe the diagnosis of shoulder dystocia signifies that the patient is in immediate threat of death or serious bodily injury?

A. Yes.

Q. Are you changing your sworn testimony from previous depositions and trial appearances?

A. I hope not.

Q. Has anything happened in the last two or three years that would change your opinion about whether or not a child is in immediate threat of death or bodily injury during the early stages of shoulder dystocia?

A. Well, I guess we would need to make sure we ask the same question now, as I've been asked in the past. There is -- there is a point at which the baby becomes medically unstable. And that point occurs at the time of shoulder dystocia because of the change in vital signs and the change in the oxygenation to the baby or the lack, thereof.

That does not mean that that baby will have an injury at that point. It simply means that the baby is in unstable condition. It's not -- does not mean the baby is being injured. Does not mean the baby will be injured. But there's an instability that happens immediately after the head is delivered,

when the umbilical cord and/or the arteries in the neck are obstructed from the pressure.

I have been asked that question before and I hope the implication or the understanding of my answer was that while the baby is not being injured for a -- at that point, it is unstable. And the injury could occur, depending on how long that situation remains unresolved.

Q. Do you deny having previously -- excuse me. Do you deny having previously testified under oath that at the beginning of a shoulder dystocia the child is not in immediate threat of death or serious bodily injury, but may eventually become an immediate threat of death or serious bodily injury, if the shoulder dystocia lasts more than a minute or two?

A. If you have the statement, I would be happy to have you read it to me and let me tell you what I thought I was saying. But I don't know that I've ever used those exact words.

I have been asked that question, as I said, and I hope what I conveyed was that while the condition of the baby, at the moment the shoulder dystocia begins, is not hurting the baby, the baby is in a situation that would be considered unstable because of the changes that are occurring to the

baby's body, and there is a great potential for significant injury in the immediate period following that.

Q. And when I asked that question, I was not purporting to quote your prior testimony word for word. I was just asking whether you denied giving sworn testimony tantamount to the words that I used.

A. I think tantamount is the key there. If you have my statement and can read it, then I can tell you whether or not that's what I believe. But I don't think I could do that without the context of the statement and the exact words, Mr. Graham.

Q. Okay. A moment ago you said that -- when I asked you about immediate threat, you said something like, at the very beginning the child may be okay, but the child will quickly become medically unstable. Did I summarize that correctly?

A. I don't think so, but we may need to have that read back, because I'm not sure that's what I said.

MR. GRAHAM: Okay. Mary, are you able to find that? It goes back maybe, I don't know, two to five questions ago.

THE REPORTER: Okay.

(The foregoing answer was read back by the

court reporter.)

MR. GRAHAM: Thank you.

BY MR. GRAHAM:

Q. Doctor, my question now is, do you distinguish between medical instability and immediate threat of death or serious bodily injury?

A. They tend -- those -- those terms can occur and frequently do occur at the same time. They -- I think they do have potentially a different meaning from a medical context, from a legal context. They may mean the same thing. But I think that medically, medical instability and immediate threat can be the same thing.

They -- I think in a shoulder dystocia case they are. I think in other situations, medical instability may not lead to an immediate threat. But I think in a shoulder dystocia case, they are the same thing and they do mean the same thing.

Q. All right. So, as I understand your testimony, in a shoulder dystocia context, you believe medical instability and immediate threat of death or serious bodily injury are basically interchangeable phrases?

A. Well, I guess a better way to answer that is, they happen at the same time in a shoulder

dystocia case, whereas they may happen at different times in a different situation. They really -- when you drill down to the meaning of those words, I think they probably, at least in the medical context, mean different things. But I think that they happen pretty much at the same time with a shoulder dystocia.

Q. All right. So let me -- let me try to express my understanding of your testimony again and see if I got it right this time. I believe what you told me is in a shoulder dystocia situation, any time there's medical instability, there's an immediate threat of death or serious bodily injury. Is that correct?

A. Well, what I said was that when there is a shoulder dystocia, there is an immediate change in the baby's vital signs, which I would interpret as an instability that can lead very quickly to bodily harm or death to the baby.

Q. And is that potential connection in the near future something that always exists in a shoulder dystocia situation or sometimes yes, sometimes no?

A. We can only answer that retrospectively in a specific condition -- situation. But I think

because we know that nerves can be damaged during that time of shoulder dystocia and because the brain can be injured in a relatively few minutes after that condition begins, I think we have to say that the medical instability is part of that immediate time when baby can be injured.

Q. All right. I'm still a bit confused. Are you -- are you telling me that in a shoulder dystocia situation, immediate threat and medical instability occur essentially at the same time and are tantamount to being the same basic concept?

A. No. I'm not saying they are the same concept, but I'm saying they have -- they are -- they are related. The medical instability, as I understand what happens in a shoulder dystocia, is that immediately after the baby's head is delivered, there's a change in the baby's vital signs because of compression of blood vessels. That is the medical instability. Heart rate goes up, blood pressure goes down, oxygen levels go down, CO2 goes up, baby starts becoming acidotic. That's the medical instability. That happens immediately.

Q. Okay. Does that also happen immediately in a normal vaginal delivery, uncomplicated by shoulder dystocia?

A. It -- it tends to not happen because the baby's head is not retained in the vagina the way a shoulder dystocia is. So there is pressure. Because it's such a short period of time, that would not lead to the same change in the baby's vital signs that a shoulder dystocia would lead to. Obviously, every single baby that delivers vaginally, all those routine deliveries for these many years of births in this world occur with a certain amount of pressure on the umbilical cord and/or the blood vessels in the neck.

If that is resolved by the routine process of birth, there's not an instability. If that persists, as it does in a shoulder dystocia, then the instability and the immediate threat of harm is what occurs.

Q. So, in this case, I gather you think there was both medical instability and immediate threat of death or serious bodily injury; is that correct?

A. Yes.

Q. Which came first?

A. In order to have immediate threat, there would have to be medical instability, but they happened very, very close together, if not at the same time. But if I had to pick one, I would say

that the instability happened and then the immediate threat followed closely behind that.

Q. And what do you mean by, closely behind it? Is that a matter of minutes? Seconds? Milliseconds?

A. I would say in this case it's probably a matter of seconds.

Q. Can you be more specific? How many seconds?

A. I can't be more specific, other than in this case they both occurred. I think we have evidence that that occurred, also, looking at the appearance of the baby after delivery. The baby was hypotonic. The Apgar scores were lower than expected. And the base excess was higher than expected. And all of those things indicate a baby that was undergoing a change in vital signs and medical instability.

So we not only have it expected in the context of shoulder dystocia, both instability and immediate threat, but we have the appearance of a baby that was undergoing and was experiencing medical instability with the potential for those areas of harm to the nerves and the brain based on the appearance of the baby after delivery.

Q. But the baby was not acidotic?

A. It had the appearance of a baby that was on the way to becoming acidotic and it had abnormal blood gases, but by the definition of 7.20 or less than that, it was not acidotic, but it did have an elevated base excess, which is the -- a component of becoming acidotic.

So the baby clearly had changes in both its labs and its appearance that showed the presence of medical instability, most likely related to the shoulder dystocia, which is what we would expect, given what shoulder dystocia does to a baby.

Q. Every baby that has ever been born vaginally has reduced oxygen intake during the delivery process, true?

A. There is a lower and a higher level of oxygen that is normal, but most babies that are born vaginally don't have a base excess of minus 13 and Apgars scores of 4 and 7, and most babies don't have a pH of 7.20. So while these are levels that are not technically acidotic, they are indications of an event that was occurring to this baby that was a result of the shoulder dystocia and the medical instability that it caused.

Q. In prior testimony you've made reference

to one or two articles that suggest brain damage can occur within two minutes of a certain event. Do you know what I'm talking about?

A. Well, you can have brain damage that occurs rapidly with an amniotic fluid embolus. I think there have been reported cases of brain damage that have occurred that quickly with shoulder dystocia, although we tend to not expect or at least not think the risk of brain damage is significantly increased until four or five minutes into the shoulder dystocia process.

Q. And in terms of those reports about damage after two years -- after two hours (sic), you have no knowledge of what the child's health was before the event, do you?

A. I do not have that personal knowledge, no.

Q. All right. Just a few more questions. When is the last time you delivered a baby?

A. October 2014.

Q. How long have you been doing expert work for the defense?

A. I've been an export -- I've been doing export -- expert work for plaintiffs and defense since about 1985. I started -- my first case was a plaintiff case. And that was around '85 or '86.

Q. When is the last time you testified for a plaintiff in a med-mal case?

A. The last deposition I gave was probably in the '80s. I've reviewed cases for plaintiffs since then, but I've not testified -- I've not been asked to testify, but I've not testified for a plaintiff since the '80s.

Q. Have you ever given an opinion in a shoulder dystocia case that asserted a breach of standard of care by a delivery attendant?

A. No, because I've never seen a case in which I felt that the attendant did anything other than the proper maneuvers and proper procedures.

Q. And your understanding of the facts in those cases was based largely on what the healthcare provider in question wrote in the records and testified to at his deposition, correct?

A. Yes. Along with what the nurses said, what the family may have said, what the situation was, and what I would expect and my experience of what I would expect given that situation. So there are a number of things that help me determine whether a provider has met the standard of care.

Q. How many new cases do you review per year?

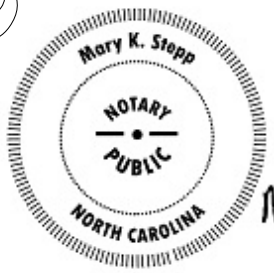
A. It varies from year to year. This year,

CERTIFICATE OF REPORTER

I, MARY K. STEPP, Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 30th day of May, 2018, at Campobello, Spartanburg County, South Carolina.



Mary K. Stepp, Notary Public
My Commission Expires:
March 1, 2028

SIGNATURE OF DEPONENT

DEPONENT: JOSEPH McDONALD ERNEST, III, M.D.
DEPOSITION DATE: May 24, 2018
REPORTER: MARY K. STEPP
CASE CAPTION: PATTON, ET AL., VS. MILLER, ET AL.

(Please return both Signature of Deponent pages)

I, the undersigned, JOSEPH McDONALD ERNEST, III, M.D., do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT (Continued)

DEPONENT: JOSEPH McDONALD ERNEST, III, M.D.
DEPOSITION DATE: May 24, 2018
REPORTER: MARY K. STEPP
CASE CAPTION: Patton, et al., vs. Miller, et al.

PAGE	LINE	CHANGE	REASON

_____

JOSEPH McDONALD ERNEST, III, M.D. DATE

I, Mary K. Stepp, Notary Public for the State of South Carolina at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

_____

Mary K. Stepp, Notary Public
My Commission Expire:
March 1, 2028

I N D E X

REQUESTED INFORMATION

Articles suggesting permanent injury to C5 through C8 can be caused by anything other than excessive traction or bending of the neck. (Pages 118-4 through 118-21.)

E X H I B I T S

Exhibit H

(Excerpts from Deposition of Dr. Chauhan)

STATE OF SOUTH CAROLINA COUNTY OF YORK Angela Patton as Next Friend of Alexia Lumpkin, a minor, Plaintiff v. Doctor 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

ORAL AND VIDEOTAPED DEPOSITION OF

SUNEET CHAUHAN, M.D.

May 31, 2018

Volume 1

ORAL AND VIDEOTAPED DEPOSITION OF SUNEET CHAUHAN, M.D., produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 31st day of May, 2018, from 5:45 p.m. to 10:32 p.m., via telephone, before Carl Richard Browning, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Esquire Deposition Solutions, 1001 McKinney, Suite 560, Houston, Texas, pursuant to the Rule 30 of South Carolina Civil Procedure.

A P P E A R A N C E S

FOR THE PLAINTIFF:

Mr. Edward L. Graham (Via Telephone)
GRAHAM LAW FIRM, P.A.
383 West Cheves Street
Florence, South Carolina 29501
(843) 662-3281

FOR THE DEFENDANTS:

Mr. Ashby W. Davis
DAVIS SNYDER WILLIFORD & LEHN
5 Hawthorne Park Court
Greenville, South Carolina 29615
(864) 335-3500

ALSO PRESENT:
Mr. Barrett Parker, Videographer

INDEX

EXHIBITS

what? Normal?

A. It's not knowable.

Q. Knowable?

A. Yes, sir.

Q. Got it. Do you have -- do you have any evidence to support that this child was medically unstable at any time after the decision was made to not go forward with the Cesarian delivery?

A. The child is unstable the moment shoulder dystocia is encountered.

Q. Please explain that answer.

A. So as you know, sir, shoulder dystocia is called a "sentinel event."

Even -- and things can change rapidly in the management of shoulder dystocia.

So once a shoulder dystocia -- shoulder dystocia, like abruption, uterine, cord prolapse is considered a sentinel event, which is linked with brain damage.

So any assessment of fetal wellbeing before shoulder dystocia is not reliable, because it's a dramatic and unpredictable change.

Q. But we know the child was medically stable at the beginning of shoulder dystocia, and we know that the child's pH was very good upon delivery --

A. And --

Q. -- correct?

A. -- no, sir. So you -- with -- that is being unfair to a clinician.

All we know is before the delivery, there was a bradycardia. So, though the baby is recovered, this baby is, let's say, is on the edge.

And then, once the shoulder dystocia, you have no way of knowing what's going on.

And so even though the baby has recovered, in my back of my mind if I was the clinician, I would be very cognizant of the fact that the baby did have a prolonged decel[sic].

Q. All right. But there were 10 minutes at -- excuse me. There were 15 minutes of reassuring strips immediately before the diagnosis of shoulder dystocia, right?

A. Plus before that, that was 10 minute abrad -- or deceleration.

Q. Right. Well, during the 15 minutes before the head delivered, during the period of time when you said there were accelerations and reassuring strips, are you claiming that the baby was medically unstable during that period of time?

A. At that moment, right before the head emerges,

I would consider the baby to be stable.

So within -- let's say there is a spectrum of stability. This baby's not as stable as baby who never had any decel.

Q. What does "medical stability" mean to you?

A. That at this moment, the PA -- the tracing looks fine. Though, this baby is different than babies who have had no decel.

Q. All right. So for at least 15 minutes before the head delivered, Alexia Lumpkin was medically stable?

A. At that moment.

Q. True?

A. Relatively speaking, yes.

Q. And then --

A. Yes, sir.

Q. -- and then -- I'm sorry. Go ahead.

A. No, you are right. I'm agreeing with the statement so far.

Q. Oh. Okay. And when the whole body delivered, Alexia Lumpkin was medically stable at that point --

A. No, we don't know that.

Q. -- with a pH --

A. No. The pH doesn't --

Q. -- right?

A. The pH is not back for at least 20 --

30 minutes. So at the time of delivery, the first thing you will have is the Apgar of four.

Q. Are you suggesting that the Apgar of four signifies medical instability?

A. No. You don't know. It depends on what it does at 5 minutes.

Q. Okay. And what was the 5-minute Apgar, seven?

A. Yes, sir.

Q. Given those Apgar-s at one and 5 minutes, do you believe this child was medically stable after delivery of the body?

A. At -- so Apgar of seven, to me, is acceptable. And that is, from hypoxic injury point-of-view, would considered it stable, or comforting is another way to put it. But that would be at 5-minute Apgar.

Q. Which is more important? One minute or five minutes?

A. For hypoxic injury, 5 minutes, sir.

Q. And then when the -- when the cord gases were reported back, those provide further evidence that the baby was medically stable at the time the body delivered, correct?

A. Yes. So that was the first objective -- or we call it "objective evidence" -- of fetal wellbeing. Let's say approximately 20 -- 30 minutes after delivery,

that the baby was stable. That would be a correct statement, sir.

Q. All right. But, even though those cord gases were not report until that time, they were taken very soon after the delivery, correct?

A. I don't know if there -- I didn't see any notation. But the cord pH are usually taken within 20 to 30 minutes of the deliveries than -- suggestion are the most common practice.

Q. Do you believe the reported cord gases reveal the condition of the baby at the time of birth?

A. Yes, sir.

Q. Okay. So no matter the time -- no matter what the time was that the cord gases were reported, the fact that they were 7.21, it would -- strike that.

Is that -- is that what you remember the cord gases being, 7.21?

A. I remember 7.2. And I wouldn't quibble if it was 7.21 or not.

Q. Okay.

A. But I remember it was 7.2.

Q. Okay. So no matter when the cord gases were reported, the fact that they were approximately 7.2 provides information that the baby was medically stable at the time of the birth, correct?

way?

A. I would never use the word, "unstable" in front of the jury, I promise.

Q. What does the word, "immediate" mean to you?

A. It depends on in reference to what. You have to give me clearer picture of the whole -- like if -- for lack of better word, you have to give me 360.

Q. Well, in terms of a child who's had a reassuring strip for 15 minutes before delivery of the head, and during that time she had accelerations, but then is diagnosed with shoulder dystocia.

At the time shoulder dystocia is diagnosed, do you believe she is in any immediate threat of death or serious bodily injury?

A. Let me see if I get this right.

So deceleration for 10-minute; normal tracing, or reassuring tracing for 15 minutes; shoulder dystocia, is the fetus or the child in immediate danger of harm or persistent injury?

Q. Death or serious bodily injury.

A. Yes. And the odds of having a serious persistent injury have gone up the moment the shoulder dystocia is diagnosed.

Q. How do you find -- how do you define "emergency"?

SIGNATURE OF DEPONENT

DEPONENT: SUNEET CHAUHAN, M.D.
DEPOSITION DATE: May 31, 2018
CASE CAPTION: Angela Patton v. Gregory A. Miller, M.D., et al.

(Please return both Signature of Deponents Sheets)

I, the undersigned, SUNEET CHAUHAN, M.D., do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

SIGNATURE OF DEPONENT(CONTINUED)

DEPOSITION DATE: May 31, 2018
REPORTER: CARL RICHARD BROWNING
CASE CAPTION: Angela Patton v. Gregory A. Miller, M.D., et al.

PAGE	LINE	CHANGE	REASON

_____

SUNEET CHAUHAN, M.D. Date

I, CARL RICHARD BROWNING, Notary Public for the State of TEXAS at Large, do hereby certify that the deponent was advised of his or her right to read and sign said deposition both verbally and in writing. If the deponent fails to execute and return foregoing Signature of Deponent pages within the thirty (30) days allowed pursuant to the Rules of Civil Procedure, the original transcript may be filed with the court.

_____

CARL RICHARD BROWNING
Texas CSR 4949
EXPIRATION DATE: 12/31/19

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Angela Patton as Next Friend of Alexia Lumpkin, a minor, Plaintiff v. Doctor Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, Inc. D/b/a Piedmont Medical Center, Defendants	)	CASE NO.2009-CP-46-5195

REPORTER'S CERTIFICATION
DEPOSITION OF SUNEET CHAUHAN, M.D.
May 31, 2018

I, Carl Richard Browning, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, SUNEET CHAUHAN, M.D., was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the deposition transcript was submitted on June 13, 2018 to the witness or to the attorney for the witness for examination, signature and return to me by July 12, 2018;

That the amount of time used by each party at the deposition is as follows:

Mr. Edward L. Graham - 03 HRS:57 MIN
Mr. Ashby W. Davis - 00 HRS:00 MIN

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes counsel for all parties of record:

Mr. Edward L. Graham, Attorney for Plaintiff
Mr. Ashby W. Davis, Attorney for Defendant

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Further certification requirements pursuant to Rule 203 of TRCP will be certified to after they have occurred.

Certified to by me this 13th day of June, 2018.

_____

Carl Richard Browning, Texas CSR 4949
Expiration Date: 12/31/19
5200 Arboles Street #3
Houston, Texas 77035
(713) 382-2948

Exhibit I

(September 1, 2020 Consent Scheduling Order)

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	C.A. NO.: 2009-CP-46-5195
Angela Patton, as Next Friend of AL, a minor, Plaintiff, v. Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates, P.A. Defendants.	**PROPOSED SCHEDULING ORDER**

This matter comes before the Court at the joint request of counsel for Plaintiff and Defendants by which all parties seek to enter into a Scheduling Order.

Noting the consent of the parties hereto, IT IS HEREBY ORDERED, that this Court's Scheduling Order for the above-captioned case, is as follows:

1. All lay witnesses and all experts shall be disclosed by Defendants no later than August 28, 2020.
2. All defense witnesses shall be deposed no later than September 2, 2020.
3. Plaintiff shall make a good-faith effort to disclose all witnesses by September 18, 2020; however, Plaintiff may add additional witnesses beyond September 18, 2020 PROVIDED that with any additional witnesses disclosed after September 18, 2020, Plaintiff shall provide at least two dates prior to November 6, 2020 that such additional witnesses can be available to be deposed via Zoom.
4. All witnesses for the Plaintiff shall be deposed no later than November 6, 2020.

5. In the event that either Plaintiff or Defendants elect to present at trial any witnesses, including expert witnesses by video trial deposition, all such video trial depositions shall be completed by no later than November 6, 2020.

6. Each party shall be responsible for the expenses and fees of their own expert witnesses.

7. Both Plaintiff and Defendants agree that either party may present any witnesses live via Webex at trial, wherein they may present their testimony on direct and cross examination utilizing that medium, or some other medium available and approved by the Court. Each party shall be responsible for arranging for their own witnesses' testimony via Webex or some other Court-approved medium in the event that any witness is unavailable to attend trial in-person. Each party also shall be responsible for notifying the Court as to which witnesses will appear via Webex or some other Court-approved medium no later than November 24, 2020. Further, even if a witness has been designated to be presented via Webex (or some other Court-approved medium), that witness may, instead, be presented live at trial, in person, provided that the Court and the other party is promptly notified of that change.

IT IS SO ORDERED this ____ day of _____, 2020.

_____
The Honorable Daniel Dewitt Hall
York County, S.C.

WE CONSENT:

s/Edward L. Graham
Edward L. Graham, Esq.
Graham Law Firm, P.A.
383 West Cheves Street
P.O. Box 550 (29503)
Florence, S.C. 29501

Attorney for Plaintiff

WE CONSENT:

s/Mitchell D. Appleby
Ashby W. Davis (SC Bar #1560)
Mitchell D. Appleby (SC Bar #103600)
Davis & Snyder, P.A.
5 Hawthorne Park Ct.
Greenville, S.C. 29615

Attorneys for Defendants

York Common Pleas

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

Case Number: 2009CP4605195

Type: Order/Scheduling Order

So Ordered

s/Daniel D. Hall 2753

RECEIVED
Aug 31 2022
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.

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 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): **Reply In Support of Petition for Writ of Supersedeas**

Served: Edward L. Graham
Graham Law Firm, P.A.
122 Donald Drive
Pendleton, SC 29670
egraham@grahamlawfirm.net

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

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

Jessica Trautman
Administrative Assistant

August 31, 2022

Jessica Trautman

From: Jessica Trautman
Sent: Wednesday, August 31, 2022 2:35 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--Appellate Case No. 2022-000288
Attachments: Miller - Reply in Support of Petition for Writ of Supersedeas.pdf

Counsel,

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

Thank you,

NELSON MULLINS

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