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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

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

Appellate Case No. 2022-001521

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

v.

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

PETITION FOR WRIT OF CERTIORARI AND SUPERSEDEAS

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Pursuant to the South Carolina Appellate Court Rules, Petitioners Dr. Gregory A. Miller ("Dr. Miller") and Rock Hill Gynecological & Obstetrical Associates, P.A. (the "Practice") (together, "Petitioners") hereby seek a Writ of Certiorari to review the Court of Appeals' denial of Petitioners' Petition for Writ of Supersedeas. This Court should grant Certiorari, reverse the rulings below, grant a writ of supersedeas and modify or instruct the circuit court to modify its orders requiring the posting of $6.25 million bond to stay execution on the instant judgment during pendency of the appeal.

Introduction

This is case alleging medical malpractice which resulted in a Plaintiff's verdict and a judgment for $4,682,689.57, which is on appeal. After appeal, the Respondent took action to execute on the judgment. Petitioners moved to stay execution, with no requirement for a bond, or, in the alternative, a maximum bond of $2 million (consisting of $1 million as to the individual, Dr. Miller, and $1 million as to the Practice (now a dissolved entity)). Petitioners' motion conformed with the core public policy embodied in the current maximum statutory bond limits.[1]

In a Form 4 Order, the circuit court granted a stay of execution, but ordered that it would require Petitioners to purchase a $6.25 million bond[2]. The circuit court did not expressly rule on Petitioners' arguments and the evidence presented. Petitioners moved to reconsider this Order and simultaneously moved that the bond amount be reduced, based on two affidavits submitted

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

[2] Respondent does not quarrel with the stay of execution, but demands the bond be at $6.25 million or more.

regarding the insurance policy limits (totaling $2 million) and Dr. Miller's financial circumstances. These motions were denied by Form 4 Order two business days later, with no explanation for the denial and no reference to the affidavits submitted. Thus, Petitioners on June 6, 2022 moved to reconsider the order declining to reduce the bond. This motion was also denied by Order dated June 14, 2022. In the June 14 Order, the circuit court held that section 18-9-130 was "inapplicable" and that the $6.25 million bond is appropriate "[c]onsidering the lengthy history of this case and the potential length of time this case may spend on appeal." The circuit court again failed to address Petitioners' arguments or the evidence presented below. The Court of Appeals summarily denied Petitioner's Writ of Supersedeas to stay execution, and subsequently denied rehearing/full court review.

The appeals bond process did not operate as it should have below. Appeal bonds should not subject South Carolina appellants with meritorious appeals to an undue financial burden before their appeal has been heard. Respectfully, the courts below failed to engage in an appropriate analysis regarding the bond amount, and gave no weight to the *only* evidence presented below on the undue financial burden created by the bond amount ordered. Certiorari review of the ruling below is appropriate in light of the dearth of common law instructing lower courts on proper considerations when setting appeals bonds. Here, it appears the circuit court failed to exercise its discretion at all, and thus abused it. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015). The lower court rulings also contravene this Court's opinion in *Pool v. Pool*, 329 S.C. 424, 329, 494 S.E.2d 820, 824 (1998), on the intertwined issue of whether a Rule 15(b) amendment to conform to the evidence was proper. This Court of last resort sits as the institutional guardian of South Carolina law and its intervention is required here. Writs of certiorari and supersedeas should issue and the appeal bond required for this matter should be reduced to $2 million.

Question Presented for Review

Did the Court of Appeals err in denying Petitioners' request for a writ of supersedeas and modification of the circuit court's orders requiring a $6.25 million appeal bond?

Statement of the Case

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

I. Pretrial Proceedings

Respondent filed her original complaint on November 25, 2009, and an amended complaint in November 2012. The circuit court granted partial summary judgment in favor of Petitioners in 2013. Respondent appealed the ruling on January 15, 2014, which automatically stayed the case in the circuit court while the appeal remained pending. The Supreme Court remitted the case to the circuit court in October 2017, and trial court proceedings resumed. In 2018, Respondent—recognizing that Petitioners would assert the issue of statutory emergency as a defense—moved for partial summary judgment "to preclude the *expected* statutory defense under S.C. Code of Laws Section 15-32-230, representing a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies." *See* Respondent's Motion for Partial Summary Judgment or a Stay, Exhibit C to Petition for Supersedeas (emphasis added). In the alternative, Respondent sought a stay of this action until the appellate courts resolved two appeals in which section 15-32-230 was at issue. *See id.* The circuit court granted Respondent's request to stay the case. This

case ultimately proceeded to trial in January 2022, sometime after the Court of Appeals issued its final opinion in *Flowers v. Giep*, 436 S.C. 281, 871 S.E.2d 604 (Ct. App. 2021), *cert. denied*, 2022 S.C. LEXIS 120 (S.C., Sept. 7, 2022) regarding the construction of the statutory emergency defense.

II. Trial

During trial, both parties raised the statutory emergency issue and presented evidence addressing it. (Trial T. pp. 19-20, 176, 201, 202, 308, 312, 663-69, 687-88)[3]. Expert testimony for both parties included questions and answers regarding whether the circumstances surrounding delivery of the minor plaintiff constituted a genuine obstetrical emergency, whether the patient was medically stable, and whether there was an immediate threat of death or serious bodily injury. (Id. at pp. 201, 202, 308, 312, 663-69, 687-88). Thus, Petitioners properly moved pursuant to Rule 15(b) of the South Carolina Rules of Civil Procedure to amend their answer to conform to the evidence and assert the statutory emergency doctrine as a defense and for a commensurate jury charge. (Id. at pp. 805-807). The trial judge (not the same judge who had previously stayed the case on request to stay from Respondent) denied the motion. (Id. at pp. 808).

III. Post-Trial Proceedings

After the verdict, Petitioners moved for a new trial absolute on multiple grounds including that "[t]he circuit court erred in denying Petitioners' Rule 15(b) motion to conform to the evidence and Petitioners' request that the jury be charged on statutory emergency.; Mot. for New Trial and Related Briefing Filed by Petitioners, Exhibit D to Petition for Supersedeas.

[3] In accordance with Appellate Court Rule 242(e), fn 2, no appendix is contemporaneously filed with this Petition. However, attached to this Petition are relevant pages from the trial and post-trial transcripts which were first delivered to the parties on November 23, 2022, and which confirm earlier reported events by memory that occurred at trial.

The circuit court denied the new trial motion, ruled the cap on noneconomic damages must be doubled because it found the judgment should be entered against two healthcare providers (Dr. Miller and the Practice), applied a $50,000 setoff, added interest from the date of an earlier offer of judgment, and entered judgment in the amount of $4,682,689.57. Exhibit B to Petition for Supersedeas (Post-Trial Order and Judgment, attached to Notice of Appeal). Petitioners appealed. *See* March 11, 2022 Notice of Appeal, Ex. B to Petition for Supersedeas.

After the appeal, Respondent sought to execute on the judgment. Accordingly, Petitioners moved for a stay of execution on the judgment. *See* Mot. to Stay Execution and Supp. Memo in Support of Mot. to Stay Execution, and Supplemental filing, Exhibit E to Petition for Supersedeas. Petitioners argued the circuit court should exercise its discretion to grant a stay without requiring any bond or, as alternatives, require that Dr. Miller alone post a $1 million bond or that Dr. Miller and the Practice each post a $1 million bond. *See id.* Petitioners further argued that the circuit court should consider and apply the current statutory bond limits provided in South Carolina Code section 18-9-130, although those limits are not mandatory in this case because this case accrued some time before the effective date of the current statute. *See id.* Petitioners reserved the right to file other requests and make other motions if the circuit court determined it would not grant a stay on the conditions proposed by Petitioners. *See id.* In response, Respondent asserted that she had no objection to the stay so long as a sufficient bond was required to protect her interests, which she asserted could be protected only by a $6.25 million bond. *See* Response to Mot. for a Stay of Execution, Exhibit F to Petition for Supersedeas. Respondent reached her $6.25 million calculation by assuming the appeal will last five years and guessing at the rate post-judgment interest will continue to accrue during the pendency of the appeal. *See id.*

The circuit court held a hearing on May 18, 2022, on Petitioners' motion. Petitioners, relying on *Southeast Booksellers Association v. McMaster*, 233 F.R.D. 456, 458 (D.S.C. 2006), and the current statutory bond limits provided in section 18-9-130, explained that they were seeking an order setting the required appeal bond at $2 million or less without having to place Dr. Miller's personal financial circumstances in the public record, but they would present such if the circuit court determined it would not limit the required bond to $2 million or less. Petitioners argued at the hearing that the appeal had merit, that the case was similar to that of *Flowers v. Giep*, in that the statutory emergency defense was raised in a motion to conform to the evidence at trial in that case as well, and that there was no way Respondent could have been "surprised" by this motion to amend to conform to the evidence, given that ***Respondent*** had moved to stay the very trial in the case by reason of the *expected* assertion of the statutory emergency defense.

In a Form 4 order entered on May 19, 2022, the circuit court indicated it would grant the motion to stay execution on the judgment, but on the condition that Petitioners "must purchase a bond in the amount of $6.25 million . . . to protect the judgment entered and interest accrued during the pendency of the appeal." *See* May 19, 2022 Form 4 Order, Exhibit A to Petition for Supersedeas. The circuit court provided no other rationale for its decision and did not address expressly the arguments raised by Petitioners. Petitioners moved to reconsider the court's ruling pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on the ground that the circuit court's rationale for its ruling was not set forth in its order.[4] *See* Mot. to Reconsider and Mot. to Reduce Amt. of Appeal Bond filed May 27, 2022, Ex. G to Pet. for Supersedeas. Petitioners

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

simultaneously moved to reduce the amount of the appeal bond. *See id.* In support of the latter motion, Petitioners presented an affidavit and insurance policy materials establishing the combined policy limit applicable to this action for Dr. Miller and the Practice is $2 million. *See id.* (Aff. of Samuel McEwen and policy materials). Petitioners also presented an affidavit from Dr. Miller explaining that he has approximately $100,000 in total assets, excluding retirement accounts and his home (which is owned by his wife), and approximately $1.5 million in total liabilities. *See id.* (Aff. of Dr. Miller). As a result, he cannot purchase an appeal bond of any material amount, and a court order requiring him to do so would create an undue financial hardship for Dr. Miller and his family. *See id.* Further, as stated, the Practice has now dissolved.

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

IV. Petition for Writ of Supersedeas

Petitioners filed a petition for writ of supersedeas on June 20, 2022.[5] Respondent filed an initial return on July 1, 2022, then filed an amended return on July 7, 2022. The Court of Appeals accepted Respondent's amended return over Petitioners' objection. Petitioners filed a reply in support of their supersedeas petition on August 31, 2022. A single judge denied Petitioners' supersedeas petition the next day, on September 1, 2022. The judge found "the circuit court properly exercised its discretion in determining the amount of bond," but provided no analysis or explanation. *See* Sept. 1, 2022 Order Denying Supersedeas. Petitioners then filed a petition for full court review, which a three-judge panel of the Court of Appeals denied on September 28, 2022.[6] This Court should grant certiorari and reverse the Court of Appeals and circuit court.

Argument

The rulings below should not stand. The age of the case and speculation it will last another five years cannot- in itself - justify a bond that imposes an undue financial burden on Petitioner and undermines his meritorious appeal. Because South Carolina lacks much established case law governing a circuit court's exercise of discretion in setting the amount of an appeal bond, South Carolina courts should look to analogous federal case law. *See State v. Durant*, 430 S.C. 98, 107, 844 S.E.2d 49, 54 (2020) ("Because of the absence of South Carolina case law. . . we are guided by decisions from two federal circuits.") "In determining whether to issue a stay pending appeal on the basis of less than a full bond, a district court should act to 'preserve the status quo while protecting the non-appealing party's rights pending appeal.'" *Alexander v. Chesapeake, Potomac*

[5] Petitioners previously served and filed their notice of appeal related to the merits on March 11, 2022.

[6] Pursuant to Rule 242(d)(1), SCACR, Counsel for Petitioners thus certify that a petition for rehearing/full court review request was made and finally ruled upon by the Court of Appeals.

& Tidewater Books, Inc., 190 F.R.D. 190, 193 (E.D. Va. 1999); *Morris v. Bland*, No. 5:12-CV-3177-RMG, 2015 WL 12911349, at *1 (D.S.C. Mar. 23, 2015). To determine the "status quo," the Court must consider the judgment debtors' current financial situation. The object is to preserve the judgment creditor's current position, not to guarantee that she receives full payment of the judgment if she prevails on appeal. *Alexander*, 190 F.R.D. at 193 ("In other words, any security or bond offered by defendants in this case should simply reflect and preserve defendants' ***current ability to satisfy the judgment***." (emphasis added)). A full bond is not required when "the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden." *Alexander*, 190 F.R.D. at 193; *Morris*, 2015 WL 12911349, at *2. In such a scenario, the Court "must find some way 'to make the judgment creditor as well off during the appeal as it would be if it could execute at once, ***but no better off***.'" *Alexander*, 190 F.R.D. at 193 (emphasis added) (quoting *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 800 (7th Cir. 1986) (Easterbrook, J., concurring)).

Courts in the Fourth Circuit have held an appeal bond should generally not be required at all "in either of two polar circumstances:" (1) "when the judgment debtor can currently easily meet the judgment and demonstrates that it will maintain the same level of solvency during appeal," or (2) "when 'the judgment debtor's present financial condition is such that the posting of a full bond would impose undue financial burden.'" *Se. Booksellers Ass'n*, 233 F.R.D. at 458 (quoting *Alexander*, 190 F.R.D. at 193). The Fourth Circuit is not alone here. For example, North Carolina trial courts setting an appeal bond to stay execution of a judgment, must consider the amount of the judgment, the net worth of the appellant, and the limits of all of appellant's applicable liability policies. N.C. Gen. Stat. § 1-289(a2) (2021). *cf. Clinkscales v. Clinkscales,* 243 S.C. 377, 380, 134 S.E.2d 216, 217 (1963) ("The rule applied in the North Carolina. . . is supported by sound

reason and the decided weight of authority elsewhere . . . and we adopt it."). The circuit court here failed to consider and rule on the evidence that an appeal bond greater than the $2 million covered by the insurer could result in an undue financial burden on Dr. Miller.

I. The *Hilton* factors weigh in favor of granting a stay and requiring only a $2 million appeal 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 v. Braunskill*, 481 U.S. 770, 776 (1987)). Those factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies." *Id.* The circuit court failed to consider these factors, but each factor is amply satisfied here.

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

Petitioners are likely to succeed on the merits of their appeal. The circuit court committed reversible error by denying Petitioners' Rule 15(b), SCRCP motion to conform to the evidence which would have properly allowed the issue of statutory emergency under 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 Petitioners' request to charge the jury with appropriate corresponding instructions. *See* Mot. for New Trial and Related Briefing Filed by Petitioners, Ex. D to Petition for Supersedeas. It is well-settled in South Carolina that Rule 15(b) permits a party to move to amend its pleading to add an unpled affirmative defense to conform to the evidence presented at trial as defendants did here. Rule 15(b), SCRCP; *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221,

224–25 (2010). And when unpled issues are tried by the express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings." *Staubes v. City of Folly Beach*, 339 S.C. 406, 413, 529 S.E.2d 543, 546 (2000) (quoting Rule 15(b)). A trial court abuses its discretion when it denies a Rule 15(b) motion when the opposing party had express knowledge that the case would be tried on the issue on which amendment was later sought and evidence on that issue was admitted at trial. *See Pool v. Pool*, 329 S.C. 424, 329, 494 S.E.2d 820, 824 (1998); *see also Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999) (reversing the denial of a motion to amend a complaint based on a lack of prejudice because the non-moving party "had notice that Petitioner wanted to supplement the complaint"); *Parker v. Spartanburg Sanitary Sewer Dist*., 362 S.C. 276, 287, 607 S.E.2d 711, 717 (2005) (reversing the denial of a motion to amend an answer to add a tort claims act defense as an abuse of discretion since the amendment sought "was not a surprise"). Here, Respondent knew years before trial that Petitioners intended to invoke section 15-32-230 as a defense and ***Respondent*** made filings characterizing the defense as "***expected***;" even moving to obtain- *and obtaining*- a stay of the case pending a resolution of appeals in which the statute was at issue. A timeline of this litigation illustrates that Respondent was on ample notice of the statutory emergency defense:

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

The parties deposed several fact witnesses between 2011 and 2014. Their testimony addressed the elements of 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: Feb. 15, 2013 Depo. of Julie Bibb at 148, Ex. C to Reply in Supp. of Pet. for Supersedeas.

The parties also deposed Respondent's expert Dr. Gurewitsch on June 26, 2013. Dr. Gurewitsch's testimony addressed all three elements of the statutory emergency defense. Specifically, he testified that that a shoulder dystocia is an obstetrical emergency, whether the patient is medically stable during a shoulder dystocia, and whether the patient was under an immediate threat of death or serious bodily injury. See June 26, 2013 Depo. of Dr. Gurewitsch at 50–54, Ex. D to Reply in Supp. of Pet. for Supersedeas. Thus, the elements of the statutory emergency defense were amply probed in discovery by all parties, and Respondent's counsel was charged with notice no later than 2013 that the defense was at issue[7].

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, Ex. E to Reply in Supp. of Pet. for Supersedeas; April 5, 2018 Order Approving Partial Settlement, Exhibit F to Reply in Supp. of Pet. for Supersedeas. As explained above, the elements Petitioners must prove to assert the statutory emergency defense were plainly at issue in the earlier depositions.

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

On May 24, 2018, and May 31, 2018, Respondent deposed Petitioners' expert witnesses, Dr. Ernest and Dr. Chauhan, respectively. Respondent questioned the experts on issues related to the statutory emergency defense, as she admitted to the Court of Appeals. (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,

[7] Respondent's counsel is very familiar with the statutory emergency defense, and was in 2013. *See, e.g., 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). (discussing statutory emergency defense raised in that case by pleading in 2013).

Ex. G to Reply in Supp. of Pet. for Supersedeas (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, Ex. H to Reply in Supp. of Pet. for Supersedeas (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

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 Pet. 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.***

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 the Court of Appeals, 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 Summ. J., Ex. A to Reply in Supp. of Pet. for Supersedeas; Form 4 Order Granting Motion for Stay, Ex. B to Reply in Supp. of Pet. for Supersedeas. Respondent thus knew ***and expected*** that Petitioners would raise the statutory emergency defense, and 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 Petitioners 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 Summ. J., Ex. A to Reply in Supp. of Pet. for Supersedeas; Form 4 Order Granting Motion for Stay, Ex. B to Reply in Supp. of Pet. for Supersedeas.

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, Ex. I to Reply in Supp. of Pet. for Supersedeas). 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 trial.

Decisions in Pending Appeals Addressing the Statute

On October 6, 2021, the Court of Appeals 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*, 436 S.C. 281, 871 S.E.2d 604. The court had decided the other case on July 3, 2019. *See 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).

January 2022: Trial

The emergency statute was raised even before any evidence was presented at trial. During a discussion about *voir dire* questions, the trial court noted that there was a proposed question which inquired whether a medical doctor should not be held responsible for treating a patient in

an emergency. In response, Respondent's counsel's indicated that the question "is different from *the statute.* We have a legal issue that we plan to raise about what a genuine emergency is as compared to emergents." (Trial T pp. 19-20) (emphasis added). Then, during Petitioner's opening statement, counsel addressed the jury as follows:

> Let me talk to you about an emergency, an obstetrical emergency
> . . .
>
> Was this an obstetrical emergency. Was Alexia in immediate danger of serious bodily harm or death as a result of this shoulder dystocia.

(Id. at p. 176). Respondent' did not object to defendants' opening statement, thereby impliedly agreeing to try the issue. *See Bunch v. Charleston & W.C. Ry. Co*., 91 S.C. 139, 74 S.E. 363 (1912) (because the failure to object is a waiver, an improper argument of counsel that is not objected to at the time cannot be complained of later); *see also State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981) (a failure to make the required contemporaneous objection may not be "bootstrapped" by a subsequent motion or request); *State v. Wilkins*, 310 S.C. 81, 89, 425 S.E.2d 68 (1911) (Failure to make a contemporaneous objection stating the specific grounds during the opening statement confirmed that "Wilkins thereby lost his right to complain later on.").

The testimony admitted at trial confirmed that the emergency statute was front and center. (Trial T. pp. 19-20, 176, 201, 202, 308, 312, 663-69, 687-88). Examination of experts for both Respondent and Petitioners included questions and answers mirroring the statutory inquiries. (Id. at pp. 201-202, 308, 312, 663-69, 687-88). Respondent's expert Dr. Duboe unquestionably invited involvement of the emergency statute at trial as he was probed 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. (Id. at pp. 201-202). 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. (Id. at pp. 201-202). 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. (Id. at pp. 663-69, 687-88). 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 is an obstetrical emergency that places the fetus in immediate threat of death or serious bodily harm. Both of Petitioners' standard of care experts opined that a shoulder dystocia is an immediate obstetrical emergency that creates an immediate threat of death or serious bodily harm to the fetus.

The 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); *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."). Petitioners were prejudiced by the failure to properly charge the jury because if Petitioners' experts had been believed, the statutory requirements of 15-32-230 would have been met, and the jury would have awarded Petitioners 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).

The trial court made several mistakes and mishandled the statutory emergency defense in the trial. Despite the elements of the defense being raised in Petitioners' opening statement without objection, and despite questioning by both Petitioners' and Respondent's counsel of the opening expert witness of the Respondent on the elements of the defense (with no objection) the trial judge stated his mistaken view that it was not until the defense called Dr. Miller in the defense case in chief that the statutory defense elements were raised. (Tr. 714, ll. 3-8). This was incorrect. The jury heard much testimony and points regarding "obstetrical emergency" and much debate among the witnesses and counsel as to whether there was a "real" or "genuine" emergency during the delivery of the baby, but then the jury was never charged on the controlling law[8]. The jury was thus left to wonder what all of that was even about. The trial court therefore erred in denying Petitioners' motion to amend, committed error in failing to properly charge the jury, and the trial court should have granted Petitioner's new trial motion.

[8] Defendants' Opening Statement, Tr. pp. 176, Dr. Duboe, Tr. pp. 201-202, Dr. Miller, Tr. pp. 308, 312, 663, 665, 667, 669; Dr. Gurewitsch, Tr. p. 530, June 26, 2013 Depo. of Dr. Gurewitsch at 50–54 (read into evidence at trial); Dr. Lupo, Tr. p. 599.

i. Respondent is judicially estopped from arguing Petitioners waived their statutory emergency defense.

Respondent argued to the Court of Appeals that Petitioners waived the statutory emergency defense. However, Respondent is judicially estopped from taking this position. "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 then before the Court of Appeals 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 Petitioners 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 Petitioners waived the statutory emergency defense. *See id.*

ii. Respondent would not have been prejudiced by Petitioners' amendment.

"The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998). And it is the responsibility of the party opposing an amendment to establish prejudice. *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988). Here, Respondent has failed to show such prejudice and the record conclusively belies any assertion of such. Respondent knew that the statutory emergency defense was at issue for eight years before trial and the issue was amply borne out in discovery with experts witnesses for both sides. Respondent's counsel has repeatedly acknowledged- on the record- that they knew about Petitioner's intended use of the emergency statute and were expecting an amendment at some point. (Rule 59 Tr. pp. 18-19). Under these circumstances, Petitioners were entitled to amend to conform to the evidence and to have the statutory emergency defense charged to the jury in order to avoid the manifest injustice that occurred below.

Respondent thus 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. 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 Petitioners' 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 Petitioners of a valid statutory defense. Accordingly, Petitioners are likely to succeed on the merits of their appeal.

B. The remaining *Hilton* factors are satisfied.

The remaining three *Hilton* factors are satisfied and warrant a modification of the required appeal bond amount to $2 million. First, requiring a $6.25 million bond (or failing to grant a stay in the absence of such a bond) will impose an undue financial burden on Petitioners and deprive them of a meaningful opportunity to benefit from their meritorious appeal. The only evidence is that Dr. Miller has approximately $100,000 in total assets and $1,500,000 in liabilities. *See* Aff. of Dr. Miller, Ex. 2 to Motion to Reduce Amount of Appeal Bond, Ex. C to Pet. for Supersedeas. Based on those facts, requiring Dr. Miller to somehow purchase a $6.25 million appeal bond imposes an undue financial burden. Second, Respondent will not be substantially injured by a stay conditioned on the purchase of a $2 million bond. The purpose of the bond is to ensure that Respondent's ability to collect the judgment after appeal is the same as if she collected the judgment now. *See Alexander*, 190 F.R.D. at 193; *Morris*, 2015 WL 12911349, at *1. The only evidence is Petitioners lack the assets to satisfy the judgment now beyond the $2 million covered

by insurance, as demonstrated in the affidavits filed with Petitioners' motion to reduce the amount of the appeal bond. *See* Ex. G to Pet. for Supersedeas. The circuit court's decision to require a $6.25 million appeal bond places Respondent in a better position than she would be in if she executed on the judgment now.

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

judgment plus predicted interest accrual during the appeal justifies a $6.25 million bond. That is not, respectfully, an appropriate consideration of the bond amount and stay analysis.

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

The factors courts must consider all weigh in favor of requiring no more than a $2 million appeal bond to stay execution on the judgment here. The circuit court's decision to require a $6.25 million bond is an abuse of discretion, and the circuit court did not engage in the proper factors-based analysis, nor did the circuit court apparently consider the only evidence placed before the circuit court on the undue financial burden factor. The Court of Appeals erred in finding the circuit court properly exercised its discretion in determining the bond amount. It did not.

Conclusion

This Court should grant certiorari, reverse the Court of Appeals, and grant a writ of supersedeas directing that Petitioners are entitled to a stay of execution on the judgment contingent upon Petitioners' collective posting of a $2 million appeal bond.

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