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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.

RESPONDENT'S RETURN TO PETITIONERS' PETITION FOR WRIT OF *CERTIORARI* AND *SUPERSEDEAS*

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INTRODUCTION

This is a birth injury case tried from January 4 through 14, 2022, with the Honorable William A. McKinnon presiding. Following a verdict of $2.5 million dollars for Respondent, Judge McKinnon set off $50,000 dollars from prior settlement with a co-defendant then added 8% *per annum* pursuant to Rule 68, SCRCP. On March 3, 2022, Judge McKinnon entered judgment accordingly for $4,682,789.57 dollars. **Exhibit 1.**

Petitioners thereafter filed a Motion for a Stay of Execution on the Judgment, and Respondent filed her Memorandum in Opposition**.** The Honorable Craig D. Brown granted the motion by Form Order filed on May 19**,** 2022**, "**with the condition that Appellants must purchase a bond in the amount of $6.25 million dollars to protect the judgment entered and interest accrued**"** during the pendency of the appeal. **Exhibit 2**.

Pursuant to Rule 59(e), SCRCP, Petitioners filed a Motion to Reconsider and Motion to Reduce Amount of Appeal Bond; and Respondent filed her Memorandum in Opposition. Judge Brown denied the motion by form Order dated June 1, 2022. **Exhibit 3.**

Petitioners filed another Rule 59(e) motion, styled Defendants' Motion to Reconsider Denial of Motion to Reduce Amount of Appeal Bond. Respondent filed her Memorandum in Opposition. Judge Brown denied this motion by Order dated June 10, 2022. **Exhibit 4.**

Petitioners then filed their Petition for Writ of *Supersedeas* before the South Carolina Court of Appeals on June 20, 2022. Respondent filed her Amended Return to this Petition dated July 7, 2022. The Court of Appeals denied this petition by Order dated September 1, 2022.

Petitioners then filed their Petition for Full Court Review of Decision on September 6, 2022. Respondent filed her Return dated September 16, 2022. A three-judge panel of the Court of Appeals denied this petition by Order dated September 28, 2022.

Petitioners filed their Petition for Writ of *Certiorari* and *Supersedeas* before this Court on November 28, 2022. Respondent hereby files her Return in opposition.

QUESTION PRESENTED

Did the Court of Appeals Correctly Sustain the Lower Court's Exercise of Discretion to Condition its *Supersedeas* Order on a $6.25 Million Bond?

OBJECTION TO PETITIONERS' STATEMENT OF THE CASE

Respondent objects to Petitioners' Statement of the Case to the extent it contains disputed matter. Illustratively, on page 4 of their Petition, they state erroneously that Respondent recognized the statutory defense under South Carolina Code Section 15-32-230 was an issue for trial. On page 5, Petitioners contend that both sides contested the statutory defense during trial, also incorrect. Petitioners state that Respondent was not surprised by its motion to amend to assert the statutory defense *after Respondent rested at trial*. This is also untrue.

Despite Petitioners attempts to characterize its two Rule 59(e) motions as one, there were in fact two: (1) after obtaining its requested stay of execution order, Petitioners sought reconsideration of the amount of the bond on which the stay order was conditioned, and more extensive written analysis thereof; and (2) being discontent with denial of their first Rule 59(e) motion, Petitioners sought further Rule 59(e) reconsideration based on two affidavits not previously presented, new arguments based thereon, and their reiterated request for more extensive written analysis.

ARGUMENT

I. THE PETITION INVOLVES NO FACTOR SUFFICIENT TO WARRANT THIS COURT'S GRANT OF THE WRIT OF *CERTIORARI*.

A writ of *certiorari* is "not a matter of right, but of sound judicial discretion…." Rule 242(b), SCACR. It should be granted "only where there are special and important reasons." Id. Rule 242(b) identifies five illustrative examples, none of which are present here. There is no novel question of law. There was no dissent in the Court of Appeal's decision. That Court's decision does not conflict with any prior decision of this Court. No substantial constitutional issue is involved, either directly or indirectly. The decision by the Court of Appeals does not conflict with any decision of the United States Supreme Court.

Although these examples are not controlling, they illustrate the character of reasons warranting grant of the writ. The petition raises no issue of this character.

The petition before the Court addresses no more than the amount of a *supersedeas* bond on which a *supersedeas* order has been conditioned. This preliminary procedural matter does not affect the merits of the appeal.

The amount of the bond has been thoroughly reviewed prior to the petition before this Court. After the circuit court judge granted the conditional order staying execution on the judgment, Petitioners made *two* Rule 59(e) motions seeking to reduce the amount of the bond. Both were denied by the circuit court judge. The Chief Judge of the Court of Appeals thereafter denied their petition for writ of *supersedeas*, as subsequently did the full Court of Appeals. Petitioners' efforts to prolong further the disposition of this preliminary procedural matter do not warrant intervention by this Court.

II. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION TO CONDITION ITS STAY ORDER ON A *SUPERSEDEAS* BOND OF $6.25 MILLION DOLLARS.

The lower court properly exercised its discretion to condition its stay of execution on a *supersedeas* bond in an amount necessary "to protect the judgment entered and interest accrued"

during the pendency of the appeal. **Exhibit 2**. The court properly exercised its discretion in determining that the amount necessary to provide such protection is $6.25 million dollars.

Judgment entered in favor of Respondent against both Petitioners on March 3, 2022, was in the amount of $4,682,789.57. **Exhibit 1**. Upon entry, this judgment accrued post-judgment interest of 7.25% interest, compounded annually, pursuant to S.C. Code of Laws Section 34-31-20 (2020) and the Order of this Court (2022-01-06-01). By this Court's recent Order (2023-01-04-01), the current post-judgment interest rate has increased to 11.5%, compounded annually.

For the purposes of this Return, to be conservative, Respondent has calculated future interest accruals at the lower 2022 rate of 7.25% interest. At this annual compounded rate, interest accrued over four years would be $6,195,749.43; and over five years would be $6,644,941.26. At a rate of 11.5%, these numbers would be considerably higher[1].

Estimating more than four years interest accrual at 7.25% for the appeal to run its course is reasonable, if not conservative. Interest rates have increased significantly after the entry of judgment. The Covid pandemic over recent years slowed down the progress of trials and appeals. The record reveals that another appeal involving Respondent's counsel has been pending before the Court of Appeals for more than three years. In this case Petitioners' efforts to obtain a reduced *supersedeas* bond amount are now before this Court by Petition for a Writ of *Certiorari* and *Supersedeas* more than ten months after entry of the judgment.

Given the amount of the judgment and Petitioners' zealous advocacy on the preliminary matter of a *supersedeas* bond amount, this is the type of case in which the non-prevailing party on

[1] At the 2022 rate, the updated judgment balance on March 3, 2023, would be $4,682,789.57 plus 7.25%, or $5,022,291.81. (This figure and others in this paragraph are before administrative, filing and other court costs.) As of March 3, 2024, the updated balance would be $5,022,291.81 plus 7.25%, or $5,386,407.97. As of March 3, 2025, the updated balance would be $5,386,407.81 plus 7.25%, or $5,776,922.55. As of March 3, 2026, the updated balance would be $5,776,922.55 plus 7.25%, or $6,195,749.43. As of March 3, 2027, the judgment balance would be $$6,195,749.43 plus 7.25%, or $6,644,941.26.

the merits of the appeal before the Court of Appeals will surely petition for a rehearing and then a writ of *certiorari*. More time will be required for this process and for this Court to rule on the petition. This Court previously issued a writ of *certiorari* in an interlocutory appeal on this very case. *Patton v. Miller*, SC Sup. Ct. Opinion No. 27730, July 26, 2017. Although no one can be certain how long the appeals process will require, basing the amount of the *supersedeas* bond on expectations that the appellate process will likely exceed four years, and post-judgment interest will equal or exceed 7.25%, represents a sound exercise of discretion by the lower court.

In arguing that Judge Brown abused his discretion by not exercising discretion, Petitioners fault him for not expanding upon his reasoning to address in more specific terms Petitioners' new arguments, raised in a second Rule 59(e) motion, which they had not preserved for his review. *See* Argument III, *infra*.

That Judge Brown was unpersuaded by these untimely arguments is plainly revealed by his rulings. Judge Brown's Form 4 orders and last Order dated June 10, 2022, reflect his consideration and analysis of the dispositive issues before him[2]. Judge Brown balanced the financial interests on appeal by protecting (1) Petitioners' interests on appeal by granting their Motion for Stay of Execution on the Judgment; and (2) Respondent's interests by conditioning this Stay on a $6.25 million supersedeas bond "to protect the judgment entered and interest accrued" thereon during the pendency of the appeal. **Exhibit 2.**

There is no requirement for a judge to elaborate on his consideration and analysis of non-dispositive issues, especially when untimely and not properly before him. Judge Brown properly exercised his discretion in evaluating how to strike a fair and just balance to protect the financial

[2] These include inapplicability of the 2012 statutory cap on the amount of the *supersedeas* bond in this case; the amount of the judgment; the minimum interest which will most probably accrue before the appeal has run its course; and his efforts to strike a balance between the parties' conflicting interests by protecting the financial interests of both during the appeal.

interests of all parties. Even if this Court were to find any technical omission, it would be harmless based on the entirety of the Orders, and further consideration would lead to the same result.

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

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

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

Petitioners argue without merit that the Court should apply the later-enacted statutory cap under S.C. Code Ann. § 18-9-130 to determine the maximum amount of the appeal bond to be required in this case. Doing so would disregard the General Assembly's express provision that its enactment of a cap on the amount of appeal bonds would take effect on January 1, 2012, and only with respect to actions which accrue on or after that date.

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

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

This argument is both illogical and contradictory. In advocating this result, Petitioners would undermine the clear legislative intent of the statute they rely on for the cap, which rejects retroactive

application. Petitioners thereby seek to nullify the prior law which governs this case and the time-honored public policy it embraced.

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

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

Petitioners' proposal to use their $2 million-dollar aggregate insurance policy limits to establish the amount of an appeal bond is nonsensical. Respondent's principal concern is to preserve their practical ability to be paid on the judgment if affirmed on appeal. Current value of the judgment exceeds aggregate policy limits by over $2.95 million dollars. All post-judgment interest accrues to the judgment, not the policy limits, thus increasing the personal liability of Petitioners throughout the appeal process. A $2 million dollar appeal bond would not provide Respondent any protection at all with respect to that portion of the judgment above insurance policy limits.

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

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

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

It is well-established that newly asserted grounds cannot be considered at the Rule 59(e) stage if they could have been asserted at the prior hearing. *See, e.g. First Citizens Bank & Tr. Co., Inc., v. Taylor*, 431 S.C. 149, 162, 847 S.E. 2d 249, 255-56 (Ct. App. 2020); *Kan Enterprises, Inc. v. S.C. Dep't of Revenue*, 420 S.C. 596, 608, 803 S.E.2d 882, 888 (Ct. App. 2017), *reh'g denied* Sept. 22, 2017). In this case Petitioners waited until their ***second*** Rule 59(e) motion to try to introduce new evidence and make new arguments based thereon. Having sought to produce new evidence and argue new grounds at the Rule 59(e) hearing below, they now try again before this Court.

Petitioners attached two affidavits to their Petition and made related arguments which they had not proffered or asserted before the Rule 59(e) motion stage below. These include the affidavits of Samuel McEwan of MAG Mutual Insurance Company and Appellant Dr. Miller. The affidavits must not be considered because they were not even submitted prior to their **second** Rule 59(e) motion below[3].

It is in reliance on these untimely affidavits that Petitioners formulated new arguments about a purported inability to afford appeal bonds of a sufficient size to protect Respondent's interests. These arguments were not timely asserted and should not be considered.

[3] In their petition before this Court, Petitioners proffer excerpts from the trial transcript, and make new arguments based thereon, which have never been presented previously. To be sure, the transcript had not been created until after the Full Court of Appeal's decision below, but the proffer is not their first attempt to create an ever-evolving record with new arguments.

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

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

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

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

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

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

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

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

Considering recent developments, the opposing interests of insured and insurer are even more stark. After the jury returned a verdict above his insurance policy limits, Dr. Miller retained personal counsel, Harry Goldberg, Esq., to assist in representing his post-trial interests. Through his personal counsel, Dr. Miller has accused MAG Mutual of bad faith. *See,* Email from Mr. Goldberg with attached exhibits, attached as **Exhibit 5**.

Upon information and belief, Mr. Goldberg accused MAG Mutual of bad faith in (1) not negotiating a settlement of this case within policy limits before trial; (2) not making any settlement offer; (3) not even contacting Respondent's attorney to determine if he was willing to entertain an

offer or consider settlement; (4) not sending a company representative to sit through any part of trial to evaluate how well or poorly the defense was doing; and (5) not making any attempt to negotiate a settlement during trial, when it was at least reasonably clear the defense was not faring well. *Id.*

Upon information and belief, after the lower court conditioned its stay order on the purchase of a $6.25 million dollar appeal bond, Mr. Goldberg instructed MAG Mutual to pay for the entire appeal bond and stated that its refusal under these circumstances would represent additional bad faith on its part. *Id.* These acts and omissions occurred after Respondent's lawyer had served a Tyger River letter in October 2018. *See,* **Exhibit 6**.

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

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

Dr. Miller's financial affidavit provides no basis to reconsider the amount of the appeal bond[4]. It raises more questions than answers. It makes vague assertions without any documentation. It is

[4] The affidavit fails to portray Dr. Miller's financial status reliably. It provides no specificity or documentation of mortgage or other debt. It does not address the likelihood that most of his debt is mortgage debt on the family home he prudently placed in his wife's name and did not list as an asset. Dr. Miller provided no statements or other records from banks or any other financial institutions. The affidavit provides no specific information at all about banking/financial/accounting/investment relationships, borrowing power, accounts at banks, stockbrokers or other financial institutions. He provided no statements or records from banks, stockbrokers, or other financial institutions to document his assertions. Dr. Miller glossed over his personal property, as if all personal property is of minimal value. He withheld details about specific items of personal property with significant value he may own such as automobiles, boats, recreational vehicles, aircraft, jewelry, art, firearms, sporting goods, collectibles, and the like.

worthless without an opportunity to test its assertions and determine the existence and value of non-exempt assets and income. Respondent has had no opportunity to engage in supplemental proceeding discovery to elicit a full and accurate picture of his non-exempt assets otherwise subject to execution.

Dr. Miller's affidavit makes vague reference to a "retirement account," without even alleging it is an exempt retirement account such as an IRA, for example. It lacks sufficient detail to enable one to determine its value or evaluate its non-exempt status.

Dr. Miller did not provide any information at all about the character and amount of his income, much of which may be non-exempt. He presented no income tax returns or accounting data which would likely yield information relevant to his finances, non-exempt assets and income. He did not submit any employment contracts.

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

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

accept as probative that which lacks credibility on its face; and (4) being untimely, the argument need not be addressed on the merits.

Based on there being little South Carolina caselaw about appeal bonds, Petitioners seek to apply federal caselaw. The problem with doing so in the context of supersedeas bonds is the strikingly different language of Rule 62(d), SCRCP and Rule 62, FRCP. The former conditions supersedeas orders on posting of a bond, and there is no similar provision under the federal rule.

Nevertheless, the federal caselaw cited to by Petitioners provides them no support. *Southeastern Booksellers v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005) does not apply. Its two categories of exemption from federal appeal bonds are judgment debtors who are so wealthy that their ability to pay a judgment cannot be questioned, and those whose financial standing makes them unable to afford a satisfactory bond. These exceptions do not apply under state law. If they did, it avails Petitioner nothing. They do not argue the former, and their argument in favor of the second is based on no more than an attorney-crafted financial statement which is untested, incomplete and incredible.

Upon information and belief, the second judgment debtor, Rock Hill Gynecology & Obstetrical Associates, P.A., was acquired by Piedmont Hospital and/or its parent corporation in 2016. Respondent lacks knowledge about the specifics of that transaction, whether there are undistributed assets of the acquired entity, and whether the hospital is liable for Respondent's judgment.

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

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

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

If *Hilton* v. *Braunskill*, *supra*, is relevant, it favors Respondent. Its relevance is doubtful, as it addresses whether a *supersedeas* order should be imposed at all, not the amount of a bond. Moreover, the case arises in the context of a writ of *habeus corpus.* If applicable to this case, the decision raises doubts about whether a stay order should be imposed in this case ***under any conditions***.

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

1. Petitioners Are Not Likely to Succeed on the Merits.

Petitioners' primary argument on appeal is their disagreement with Judge McKinnon's denial of their motion for leave to amend their Answer to assert a defense under S.C. Code Section 15-32-230 ("statutory defense") *after Respondent rested her case.* Judge McKinnon recognized that allowing this new defense would not serve the ends of justice but would prejudice the Respondent. Judge McKinnon also correctly denied the related request to charge the statute to the jury, as the

purported statutory defense is an affirmative defense which was not timely pled and not for jury consideration.

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

The Court properly denied the motion to amend for four reasons: (a) the statutory defense is an affirmative defense which *must* be pleaded; (b) Petitioners waived this affirmative defense by not pleading it in their Answer filed on January 12, 2010, nor in responding to Respondent's amended complaint to add a new party, and not even seeking leave to add it by amendment until trial in January 2022 after the conclusion of Respondent's case at trial; (c) the statutory defense was *not* tried by express or implied consent of the parties; and (d) to grant the motion would not subserve the presentation of the merits but would prejudice Respondent.

(a) The Statutory Defense is an Affirmative Defense

An affirmative defense conditionally admits the allegations of the complaint but asserts new matter to bar the action. *O'Neal v. Carolina Farm Supply of Johnston, Inc.* 279 S.C. 490, 494, 309 S.E. 2d 776, 779 (Ct. App. 1983). The statutory defense set forth in S.C. Code 15-32-230 is an affirmative defense. *Byrd v. McLeod Physician Associates II,* 427 S.C. 407, 831 S.E. 2d 152 (Ct. App. 2019). It affects liability not damages. It requires new matter to be asserted by prudent counsel, e.g., that the shoulder dystocia was not a "genuine" emergency which occurred in an "obstetrical suite;" and/or that there was no "immediate threat" of death or serious bodily injury; and/or that the minor was "medically stable;" and/or that Dr. Miller was "grossly negligent."

(b) Petitioners Waived the Affirmative Defense.

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

"If an affirmative defense is not pled, it is usually deemed to be waived." *First Service Corp. of S.C. v. Cape, 299 S.C. 147, 150, 382 S.E.2d 919,921 (1989),* (citing 70 C.J.S. *Payment,* Sections 63 and 68 (1987)). Petitioners waived the affirmative defense by not pleading it in their 2010 Answer. They did not plead it as a response to the Amended Complaint which added the co-defendant hospital. **Nor did they seek leave to amend their Answer to add the statutory defense when they filed a Motion to Amend to add punitive damages defenses on September 3, 2020.** This decision by Petitioners was tantamount to confirmation that they would not assert the statutory defense.

Petitioners had nearly twelve years between their initial Answer and trial to move to amend their Answer to add the statutory defense ***if*** they perceived it to have merit. Either they recognized there was no merit in seeking leave to amend to add an affirmative defense this many years after filing their Answer, and/or they devised an ambush strategy to try to catch Respondent off-guard after she rested her case. By not moving to add the statutory defense when it sought leave to add punitive damages defenses in 2020, then moving to add the statutory defense only after Respondent had rested reveals a tactical ambush calculation. This is brazen gamesmanship which should not be rewarded. No matter what Petitioners' explanation of their trial counsel's motivation may now be for waiting so long, waiver of the affirmative defense is especially appropriate in these circumstances.

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

(c) Statutory Defense Issues Were Not Tried in This Case by Express or Implied Consent.

Rule 15(b), SCRCP, which governs "Amendments to Conform to the Evidence," does not support Petitioners' motion to amend to add an affirmative defense after Respondent rested. The Rule states:

> (b) **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. **If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings,** the court **may** allow the pleadings to be amended **and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.** (**Emphasis added.**)

In arguing without merit that the parties tried the statutory defense by express or implied consent, Petitioners conflate common law emergencies with statutory emergencies. There was indeed testimony that shoulder dystocia is an obstetric emergency, the importance of training, risks of harm and the like, and specific factors involved with the shoulder dystocia in this case. However, this was run-of-the-mill *standard of care* testimony. Standard of care in a medical malpractice context requires consideration of the same or similar circumstances with which a defendant physician was confronted[5]. When an emergency is present, it is inherent in the concept of "same or similar"

[5] Instructive is the relevance of an emergency if alleged in a motor vehicle wreck case. In the wreck case context, how a defendant acted in the emergency is embedded in the concept of "reasonable man," and is part of the defense. In a medical malpractice case, the "same or similar circumstances" of an emergency are embedded in the definition of "standard of care" for which the plaintiff bears the burden of proof.

circumstances and must be proven as part of the case-in-chief. This is a medical malpractice plaintiff's burden of proof. Such testimony does not represent trial of specific issues presented by the statutory defense.

Respondent presented two obstetrics experts, Dr. Duboe and Dr. Gurewitsch. Dr. Duboe testified live. Respondent's counsel asked Dr. Duboe questions at trial about the applicable standard of care and breaches thereof. This included the fact that shoulder dystocia is considered an obstetric emergency which becomes more dangerous with the passage of time. He did not ask Dr. Duboe about gross negligence or other issues arising specifically under the statute.[6]

Testimony of Dr. Gurewitsch was presented by reading portions of her discovery deposition into the record. The questions posed in her deposition were asked by defense counsel, not Respondent's counsel. Issues about obstetric emergency were addressed, but only in the context of the applicable standard of care, not that of the statutory defense. A verbatim transcript was filed, which proves that this expert did not address gross negligence or other issues arising under the statute

Respondent did not object to standard of care questions in the defense case. However, she did object whenever defense counsel posed questions which seemed about to slide artfully from standard of care questions to use of phrases contained within the statute. The Court overruled these objections, thus allowing the defense questions to be answered. However, Respondent's objections to these questions negate Petitioners' contention that the statutory defense was tried with Respondent's express or implied consent.

[6] The defense argues that Dr. Duboe's testimony went beyond standard of care issues into the realm of certain statutory defense issues. In a case like this there is no bright line between common law medical malpractice standard of care proof and some of the statutory phrases like "genuine emergency" and "immediate threat." If Dr. Duboe's testimony about standard of care issues overlapped any statutory defense terminology," it was slight, inconsequential, and insufficient to imply consent to trial of the statutory defense. There was no mention of gross negligence, the single most important component of the statutory defense. In addition, Title 15, Article 3 of the S.C. Code is to be strictly construed, as it is in derogation of common law. *Byrd, supra.*

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

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

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

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

Hypothetically, even if the statutory defense had been tried by implied consent, and it was not, the outcome should be the same. In conferring trial judges with broad discretion whether to allow amendments to conform to the evidence, Rule 15(b) directs that the court "shall do so freely when the presentation of the merits of the action will be subserved thereby ***and*** the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." (Emphasis added.) Neither of these conditions supports granting the motion to amend.

Presentation of the merits would not be subserved by allowing an affirmative defense to be added during trial nearly twelve years after the Answer was filed, after the Respondent rested her case. The exact opposite is true. This would preclude Respondent from presenting any testimony concerning the merits of an unpled *affirmative defense.*

If Petitioners' Motion to Amend had been granted at trial, Respondent would have been prejudiced in five ways. First, she would have been victimized by what amounts to "*ex post facto"* pleading. That is, she would have been denied notice and an opportunity to be heard on an affirmative defense first asserted after her case-in-chief at trial had concluded.

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

Third, if Respondent's counsel had been on timely notice of a statutory defense, he could have attempted to marshal evidence of gross negligence during discovery and trial preparation. He deposed Dr. Miller and other health care providers without notice of the statutory defense being applicable. These are the deponents who are most likely to possess information probative of gross negligence, and on which an expert could base an opinion that Dr. Miller had been grossly negligent. Granting Petitioners' motion would have prejudiced Respondent by denying her notice of the need to seek evidence which tended to support an expert opinion of gross negligence at the time these depositions were taken. This manner of prejudice does not vanish upon any later opportunity to identify new witnesses.

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

This settlement approval was up to seven weeks before Respondent had any reason to suspect Petitioners *might* later try to amend their Answer to assert the statutory defense. Silence of Petitioner's trial counsel before this settlement, about a potential future attempt to add the statutory defense, is further suggestion of ambush tactics by trial counsel.

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

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

To provide detail and clarification of the various ways Plaintiff would have been prejudiced by granting Defendants' motion to amend, a timeline is useful. Relevant events and the dates thereof are set forth below[7].

This timeline demonstrates that: (a) the affirmative statutory defense had been available to Petitioners for four and one-half years before their Answer was filed, and should have been asserted then if defense counsel believed it had merit; (b) deposition of Dr. Miller was taken over ten years before Petitioners sought to assert the statutory defense; (c) following Respondent's Amended Complaint filed on November 29, 2012, to add Piedmont as an additional defendant, Petitioners did not respond by raising the statutory defense; (d) depositions of every physician and labor and delivery nurse present at birth were taken more than seven years before this attempt at late amendment; (e) depositions of defense trial experts were taken more than three years before the attempt; (f) over two and one-half years passed between Judge Hall's Stay Order and Petitioners' motion to amend their Answer to add punitive damages defenses, without seeking to assert the affirmative defense.

Petitioners now assert that Respondent's motion and the status conference with Judge Hall in October 2018, suggested Respondent was on notice that Petitioners would seek leave to amend their

[7] Effective date of S.C. Code 15-32-230, July 1, 2005; Complaint filed on November 25, 2009; Answer filed on January 12, 2010; Offer of Judgment filed October 4, 2010; Deposition of Angela Patton taken on February 22, 2011; Deposition of Dr. Miller taken on February 22, 2012; Deposition of Antwon Lumpkin taken on May 6, 2011; Deposition of Piedmont nurse Stacy Bumgardner taken on November 20, 2012; Respondent's Amended Complaint which added Piedmont as a Defendant, filed November 29, 2012; No Answer to Amended Complaint by Petitioners; Deposition of Piedmont nurse Julie Bibb, taken on February 15, 2013; Deposition of Dr. Gurewitsch, Respondent's Maternal Fetal Medicine expert, taken on June 26, 2013; Deposition of Dr. Lupo, anesthesiologist, taken on January 27, 2014; Deposition of Dr. Mercado, neonatologist, taken on March 31, 2014; Respondent's negotiation of settlement with Piedmont, approximately January-March 2018; Respondent's Petition for Order Approving Minor's Settlement with Piedmont dated April 3, 2018; Order Approving Respondent's Settlement with Piedmont dated April 5, 2018; Deposition of Dr. Ernest, Appellants' Maternal Fetal Medicine expert, taken on May 24, 2018; Deposition of Dr. Chauhan, Appellants' Maternal Fetal Medicine expert, taken on May 31, 2018; Consent Order to Stay Trial in the case of Pierce v. Palmetto Health, filed July 3, 2018; Respondent's Motion for a Partial Summary Judgment or Stay of Trial, filed October 8, 2018; Status Conference on October 31, 2018, in which Judge Hall ordered a Stay of Trial; Petitioners' Motion to Amend Answer to add punitive damages defenses, filed August 6, 2020; Petitioners' Amended Answer, which added punitive damages defenses, *but not the statutory defense*, filed September 3, 2020; Deposition of Dr. Duboe, Respondent's obstetrics expert, taken on March 15, 2021; Trial from January 4-14, 2022; Petitioners' Motion to Amend to add the statutory defense on January 10, 2022, after Respondent had rested her case.

Answer to add the statutory defense, such that Respondent could not have been surprised by their oral Motion to Amend at trial. This ignores that (a) the statutory defense is an affirmative defense that should have been pleaded; (b) counsel believed a defense motion for leave to amend lacked merit under the circumstances; (c) Petitioners' actions after the status conference were inconsistent with any purported intent to seek leave to add the statutory defense; (d) though counsel would not have been surprised if a written motion for leave to amend had been filed in the summer or autumn of 2018, or even early in 2019, it was quite surprising to be blindsided by a motion to amend more than three years later after the Respondent rested her case; (e) when prejudice exists, as in this case, any question of surprise is immaterial; and (f) if the late motion to amend represents calculated ambush tactics, as seems likely, such must not be rewarded.

To confirm when Respondent initially suspected that the Appellants *might* possibly seek leave to amend their Complaint to add the statutory defense, it is useful to examine whether any depositions of standard of care experts contained any of the key words and phrases from the "genuine emergency statute.[8]" Respondent's counsel conducted a search in the word index of each deposition of the five standard of care experts referenced above, to identify whether key statutory words were used in the depositions and, if so, in what context. The searched words were "emergency," "genuine," "gross," "immediate," "stable," "threat," and derivatives such as "emergent," "immediately," and "stability." This exercise demonstrates that no statutory words or phrases were used in these depositions, in the statutory context, before that of Dr. Ernest on May 24, 2018. No standard of care expert mentioned or was asked questions about gross negligence.

[8] Petitioners quoted at length from Dr. Miller's testimony about a bradycardic event which motivated him to call for an emergency C-section. However, he then saw Respondent was fine, so he called off the C-section and delivered the child vaginally, encountering the shoulder dystocia. Much of this testimony intertwines a perceived obstetric emergency of bradycardia with shoulder dystocia, so as to be unclear whether Dr. Miller's use of statutory language was directed at one or the other. Similarly, the testimony of Dr. Lupo is beside the point, as she is an anesthesiologist.

The substance and timing of these depositions confirm that Respondent's counsel had not yet suspected or been led to expect that Petitioners might later seek to amend their Complaint to add the statutory defense until sometime between court approval of the Piedmont settlement and Dr. Ernest's deposition seven weeks later. Statements by Petitioners' trial counsel during this time provided the first inkling that Petitioners may seek leave to amend their Answer to add the statutory defense. *But they did not,* until after Respondent had rested. Counsel had believed any such motion would be denied as lacking in merit and prejudicial to Respondent but assumed *at that time* that Petitioners would make the motion.

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

Petitioners' trial counsel's actions were inconsistent with any effort to try to assert the affirmative defense this late. Most telling was his filing a motion on August 6, 2020, to amend their Answer to add punitive damages defenses, *without simultaneously seeking leave to add the statutory defense*. When Petitioners' trial counsel deposed Dr. Duboe on March 15, 2021, he asked no questions about gross negligence and posed no questions which used key words or phrases from the statute. This seemingly confirmed that Petitioners would not try to raise the statutory defense. The greater the delay, Respondent's counsel believed believed, the lesser the likelihood Petitioners would try to assert the statutory defense as intimated by their trial counsel back in 2018.

Petitioners miss the point when they argue judicial estoppel. The factual context demonstrates the elements of estoppel are not remotely met.

The trial court properly exercised its discretion to deny Petitioners' Motion to Amend because of the prejudice to Respondent which would otherwise occur and for the other reasons set forth above. Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment. However, rulings on such motions are within the sound discretion of the trial judge. *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP).

There are numerous reasons why Judge McKinnon soundly exercised his discretion to deny Petitioners' Motion to Amend. The trial judge's ruling will not be overturned without an abuse of discretion or unless manifest injustice has occurred. *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). There has been neither.

(2) Appellants Would Not Be Irreparably Harmed by the *Supersedeas* Being Conditioned on a Bond Deemed Adequate to Protect Respondent's Interests.

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

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

In contrast, Respondent would be substantially and irreparably harmed in this case if she prevails on appeal and non-exempt assets of Dr. Miller have been dissipated or removed from the

reach of her judgment. These realities argue against any stay at all under the *Hilton* case, much less a stay with an insufficient bond.

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

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

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

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

CONCLUSION

For these reasons, Appellants' Petition for Writ of *Certiorari* and *Supersedeas* should be denied.