

RECEIVED

Jan 23 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William B. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000288

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

v.

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

INITIAL BRIEF OF APPELLANTS

C. Mitchell Brown
Nicholas A. Charles
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 6

STATEMENT OF THE CASE..... 6

STATEMENT OF FACTS 10

 I. The “Genuine Emergency” Defense Under Section 15-32-230 10

 II. Background Facts and Assertion of Statutory Emergency Defense 11

 A. Pretrial Proceedings 11

 B. Appellants’ Motion for Recusal..... 12

 C. Trial..... 13

ARGUMENT 14

 I. The trial judge committed prejudicial error by failing to recuse himself from trying this medical negligence case in light of the unique circumstances below..... 16

 II. The circuit court erred by denying Appellants’ Rule 15(b) motion to amend to conform to the evidence to allow the statutory emergency defense under South Carolina Code section 15-32-230(A) to be properly tried and the jury charged accordingly 18

 A. Governing Standard Under Rule 15(b), SCRPC..... 18

 B. Judicial Estoppel Bars Respondent From Arguing Prejudice Under Rule 15(b)..... 20

 C. Respondent Has Waived Any Claim of Prejudice Related To A Rule 15(b) Amendment 22

 D. Respondent Has Otherwise Failed To Meet Her Burden of Demonstrating Prejudice Under Rule 15(b), SCRPC 26

CONCLUSION..... 34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Auto-Owners Ins. Co. v. Rhodes</i> , 405 S.C. 584, 748 S.E.2d 781 (2013)	21, 22
<i>Ball v. Canadian Am. Express Co.</i> , 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994).....	18
<i>Berberich v. Jack</i> 392 S.C. 278 (2011)	32
<i>Bunch v. Charleston & W.C. Ry. Co.</i> , 91 S.C. 139, 74 S.E. 363 (1912)	23
<i>Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II</i> , 427 S.C. 407, 831 S.E.2d 152 (Ct. App. 2019).....	<i>passim</i>
<i>Cothran v. Brown</i> , 357 S.C. 210, 592 S.E.2d 629 (2004)	21
<i>Cox v. Cox</i> , 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986).....	26
<i>D.A. Elia Constr. Corp. v. Lyco, Inc.</i> , No. CIV-89-232E, U.S. Dist. LEXIS 15760 (W.D.N.Y. 1991)	31
<i>Earthscapes Unlimited, Inc. v. Ulbrich</i> , 390 S.C. 609, 703 S.E.2d 221 (2010)	18, 20
<i>Ellis v. Procter & Gamble Distrib. Co.</i> , 315 S.C. 283, 433 S.E.2d 856 (1993)	16, 18, 29
<i>Ellison v. Simmons</i> , 238 S.C. 364, 120 S.E.2d 209 (1961)	33
<i>Flowers v. Giep</i> , 436 S.C. 281, 871 S.E.2d 604 (Ct. App. 2021).....	<i>passim</i>
<i>Garrison v. Target Corp.</i> , 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020).....	8
<i>Hayne Federal Credit Union v. Bailey</i> , 327 S.C. 242, 489 S.E.2d 472 (1997)	21

<i>Koon v. Fares</i> , 379 S.C. 150, S.E.2d 230, 234 (2008)	16
<i>Mallett v. Mallett</i> , 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996).....	16
<i>McKnight v. McKnight</i> , 283 S.C. 540, 324 S.E.2d 91 (Ct. App. 1984).....	29
<i>In re Murchison</i> , 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955).....	16
<i>Parker v. Spartanburg Sanitary Sewer Dist.</i> , 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005).....	19
<i>Patton v. Miller</i> , Appellate Case No. 2022-001521	19
<i>Pier View Condo. Ass'n v. Johns Manville, Inc.</i> 2022 U.S. Dist. LEXIS 38602 (D. S.C. 2022).....	32
<i>Pool v. Pool</i> , 329 S.C. 324, 494 S.E.2d 820 (1998)	18, 19, 26, 33
<i>Quinn v. Sharon Corp.</i> , 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Anderson, J., concurring).....	22
<i>Ross v. Paddy</i> , 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000).....	33
<i>State v. Cheatham</i> , 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002).....	16
<i>State v. Lynn</i> , 277 S.C. 222, 284 S.E.2d 786 (1981)	23
<i>State v. Wilkins</i> , 310 S.C. 81, 425 S.E.2d 68 (1911)	23
<i>Staubes v. City of Folly Beach</i> , 339 S.C. 406, 529 S.E.2d 543 (2000)	18
<i>Tanner v. Florence Cty. Treasurer</i> , 336 S.C. 552, 521 S.E.2d 153 (1999)	19
<i>State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms.</i> , 414 S.C. 33 (2015)	26

Woods v. Rabon,
295 S.C. 343 (Ct. App. 1988)26

Young v. Warr,
252 S.C. 179, 165 S.E.2d 797 (1969)25

Rules

SCACR 50116

SCRCP 15(b)18, 25

Statutes

S.C. Code Ann. § 15-32-230..... *passim*

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial judge committed prejudicial error by failing to recuse himself from trying this medical negligence case in light of the unique circumstances below.
2. Whether the trial judge committed reversible error by denying Appellants' motion to amend to conform to the evidence to allow the statutory emergency defense under South Carolina Code section 15-32-230(A) to be properly presented and the jury charged accordingly.

STATEMENT OF THE CASE

This is a medical malpractice action originally filed on November 25, 2009. Respondent sued Dr. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A. (the "Practice") (together, Dr. Miller and the Practice are referred to as "Appellants") 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. (Complaint, R. __).

After Appellants answered the original complaint, (Answer, R. __), Respondent served an offer of judgment on October 4, 2010, in which she offered to have judgment entered in her favor for \$1 million, (Offer of Judgment, R. __). Appellants did not accept the offer of judgment. On July 12, 2012, Respondent moved to consolidate this action and a separate action she had filed against Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Piedmont Medical Center"), (Mot. to Consolidate, R. __), and the circuit court granted consolidation, (Or. Consolidating Cases, R. __). Respondent filed an amended complaint on November 19, 2012. (Am. Compl., R. __).

Piedmont Medical Center moved for partial summary judgment in April 2013, arguing Respondent, as the parent of the injured minor plaintiff, was not entitled to recover any medical expenses incurred by the minor plaintiff prior to the time the minor plaintiff reached the age of majority. (Piedmont Mot. for Summ. J., R. __). Appellants filed a similar motion in May 2013.

(Appellants Mot. for Summ. J., R. ___). The circuit court granted partial summary judgment on August 2, 2013. (Or. Granting Partial Summ. J., R. ___). After the circuit court denied Respondent’s Rule 59(e) motion, Respondent appealed the partial summary judgment ruling on January 15, 2014. (Respondent’s Notice of Appeal, R. ___). Respondent’s appeal automatically stayed this case in the circuit court, and the case remained stayed until the South Carolina Supreme Court issued a remittitur on October 17, 2017. (Remittitur, R. ___).

After the remittitur, Respondent settled with Piedmont Medical Center for \$50,000 and, on April 3, 2018, filed a petition for court approval of the settlement. (Pet. for Approval of Partial Settlement, R. ___). The circuit court approved the settlement on April 5, 2018. (Or. Approving Partial Settlement, R. ___).

On October 8, 2018, Respondent filed a “Motion for Partial Summary Judgment, or in the Alternative, an Order Granting a Stay of Trial Until Pending Appeals in Other Cases Resolve Material Issues Likely to Arise in this Case.” (Mot. for SJ or Stay, R. ___). In that motion, Respondent asked the circuit court to grant 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,” and argued the statute did not apply to this case. (*Id.*). In the alternative, Respondent requested that the circuit court stay the trial of this case “until pending appeals in other cases resolve material issues likely to arise in this case.” (*Id.*). Specifically, Respondent argued the trial of this case should be stayed until two appeals¹ “address[ing] various novel and complex legal and medical issues arising under S. C. Code of Laws Section 15-32-230” were resolved to ensure the circuit court would “have

¹ Those appeals eventually became this Court’s decisions in *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) and *Flowers v. Giep*, 436 S.C. 281, 284, 871 S.E.2d 604, 606 (Ct. App. 2021).

guidance from the appellate courts about statutory definitions, applicability to certain fact patterns, and related matters.” (*Id.*). The circuit court² denied Respondent’s motion for partial summary judgment, (Or. Denying Partial MSJ, R. ___), but granted Respondent’s request for a stay on October 31, 2018, (Or. Granting Stay, R. ___).

During the stay, the circuit court held status conferences every few months from January 2019 through early 2020, each time ordering that a status conference be reconvened three months later. *See* (Or. Re Jan. 2019 Status Conf., R. ___; Or. Re Apr. 2019 Status Conf., R. ___; Or. Re July 2019 Status Conf., R. ___; Or. Re Sept. 2019 Status Conf., R. ___; Or. Re Jan. 2020 Status Conf., R. ___). In August 2020, Appellants moved to amend their answer to add affirmative defenses related to punitive damages, (Aug. 2020 Mot. to Amend, R. ___), and filed their amended answer in September 2020, (Am. Answer, R. ___)³. Appellants also requested a status conference and a scheduling order “limiting additional discovery due to the late stage of this case and . . . a deadline for which all *de bene esse* depositions, and any other depositions of any additional witnesses allowed to be completed, for no later than October 30, 2020 in order to allow for sufficient trial preparation.” (Aug. 2020 Mot. for Status Conference, R. ___). The circuit court entered a scheduling order on September 1, 2020, requiring that Respondent “make a good-faith effort to disclose all witnesses by September 18, 2020; however, Plaintiff may add additional witnesses beyond September 18, 2020” provided that she offer deposition dates for any additional witness prior to November 6, 2020. (Sept. 2020 Sched. Or., R. ___).

² This circuit court judge was not the same as the ultimate trial judge in this matter.

³ This in the wake of the Court of Appeals’ decision in *Garrison v. Target Corp.*, 429 S.C. 324, 373, 838 S.E.2d 18, 44 (Ct. App. 2020), regarding punitive damages caps, which case was later reversed on that point by the South Carolina Supreme Court, 435 S.C. 566, 582, 869 S.E.2d 797, 806 (2022).

In September 2021, the parties received notice that the case would be set for trial on January 4, 2022, and that Judge McKinnon had been designated as the trial judge. Prior to trial, Appellants moved for recusal of Judge McKinnon. (Mot. for Recusal, R. ___). The trial judge held a pretrial hearing on the motion for recusal on December 2, 2021, and orally denied the motion. (Pretrial Hearing Tr. at 7, R. ___).

The parties tried the case in January 2022. At the conclusion of the Respondent's case, Appellants moved to amend their Answer to conform to the evidence and assert the statutory emergency defense, coupled with a request that the Court charge the jury with the statutory emergency defense law. (Trial Tr. 805–07 (R. __.) Respondent objected. This motion was denied, 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. (Verdict Form, R. ___). After the verdict, Appellants moved for a new trial absolute on several grounds, including that:

(1) The circuit court erred in denying Appellants' Rule 15(b) motion to conform to the evidence and Appellants' request that the jury be charged on statutory emergency;
...

(4) The circuit court judge presiding over the trial erred in declining to recuse himself; *See* (Mot. for New Trial, R. ___; Memo. in Supp. of Mot. for New Trial, R. ___; Supplemental Memo. in Supp. of Mot. for a New Trial, R. ___). Appellants also requested that the circuit court apply the \$350,000 noneconomic damages cap pursuant to South Carolina Code section 15-32-220 on the ground that the verdict was against only one healthcare provider, Dr. Miller, and reduce the noneconomic damages award. *See* (Mot. for New Trial at 8–9).

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 the October 2010 offer of judgment, and entered judgment in the amount of \$4,682,689.57. *See* (Post-Trial Order and Judgment, R. ___). Appellants timely appealed (1) the March 3, 2022 Post-Trial Order and Judgment; (2) the jury verdict, related judgment, and evidentiary and other rulings at trial, including the issues related to the statutory emergency defense described above; and (3) the circuit court’s denial of Respondents’ motion for recusal. *See* (Notice of Appeal served and filed March 11, 2022).

STATEMENT OF FACTS

I. The “Genuine Emergency” Defense Under Section 15-32-230

Section 15-32-230 “provides physicians immunity from simple negligence in certain medical malpractice suits.” *Flowers v. Giep*, 436 S.C. 281, 284, 871 S.E.2d 604, 606 (Ct. App. 2021). The statute provides:

(A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.

(B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

S.C. Code Ann. § 15-32-230. The statute thus provides an affirmative defense protecting a physician from liability for ordinary negligence if the physician proves three required elements: (1) the claim arises out of a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient was under an immediate threat of death or serious bodily injury. *Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 414, 831 S.E.2d 152, 155 (Ct. App. 2019).

II. Background Facts and Assertion of Statutory Emergency Defense

Respondent sued Appellants for medical malpractice based on injuries suffered by the minor plaintiff during birth. During delivery of the minor plaintiff, a delivery complication known as shoulder dystocia occurred. Shoulder dystocia occurs during childbirth “when the baby’s shoulder catches against the mother’s pubic bone and fails to enter the pelvis, stalling the delivery.” *Flowers*, 436 S.C. at 284, 871 S.E.2d at 606. Respondent alleged the minor plaintiff suffered brachial plexus injuries caused by alleged mismanagement of the shoulder dystocia by Dr. Miller, the attending obstetrician during the delivery, which took place in an operating room at Piedmont Medical Center. *See generally* (Am. Compl., R. __; Trial Tr. 273–74, R. ____). Dr. Miller testified at trial that a shoulder dystocia “is an emergency and the baby’s life is on the line.” (Trial Tr. 665, R. __). If the shoulder dystocia is not resolved within four to five minutes, the baby may suffer brain damage. (Trial Tr. 688, R. ____).

A. Pretrial Proceedings

The parties deposed a number of witnesses during discovery. In 2013, the parties deposed Plaintiff’s expert Dr. Gurewitsch. Dr. Gurewitsch’s addressed all three elements of the statutory

emergency defense—specifically, whether 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, R. ___); *see also* (Trial Tr. 530, R. ___) (reading Dr. Gurewitsch’s deposition testimony to the jury at trial).

In 2018, Respondent 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* (Mot. for Partial Summary Judgment or a Stay, R. ___) (emphasis added). Respondent sought summary judgment on the merits of the defense, arguing it did not apply to the facts of this case. (*Id.*). In the alternative, Respondent sought a stay of this action until the appellate courts resolved two appeals (*Byrd* and *Flowers*, *supra*) in which section 15-32-230 was at issue. *See (id.)*. Respondent did not argue that the statutory defense had been waived by Appellants or was otherwise unavailable to Appellants on procedural or equitable grounds. *See (id.)*. The circuit court denied Respondent’s motion for summary judgment but granted Respondent’s request to stay the case. (Or. Granting Stay, R. ___). Ultimately, the two appeals were resolved by this Court regarding the statutory defense.

B. Appellants’ Motion for Recusal

In September 2021, the parties received notice that the case would be set for trial on January 4, 2022, and that Judge McKinnon had been designated as the trial judge. Prior to trial, Appellants moved for recusal of Judge McKinnon based on his prior work handling medical malpractice cases as for a “well-known law firm heavily engaged in representing plaintiffs in medical malpractice cases.” (Mot. for Recusal, R. ___). Appellants argued the law firm—McGowan, Hood & Felder—

had filed a number of lawsuits against Dr. Miller’s practice and partners, and Dr. Miller had testified as an expert witness in defense of his practice and partners in more than one of the cases filed by the trial judge’s former law firm. (*Id.*). The trial judge held a pretrial hearing on the motion for recusal on December 2, 2021, and orally denied the motion. (Pretrial Hearing Tr. at 7, R. ____). In doing so, the trial judge expressly found the recusal motion was not “baseless or frivolous” and indicated he would ordinarily grant the motion, but denied the motion because “there are only two [j]udges in York County” and if he set a precedent of recusing himself in cases involving his old law firm, he did not think it would be “fair to McGowan/Hood” because “there is only two Judges in York County.” (Pretrial Hearing Tr. at 7, R. ____). The circuit judge further explained that he did not find “that there is a reasonable belief that [he] would be partial to one side or the other in the case.” (*Id.*).

C. Trial

During trial, the statutory emergency issue was raised during *voir dire* discussions and opening statements, and evidence was presented addressing all three elements of the defense. (Trial Tr. 19–20, 176, 201, 202, 308, 312, 663–69, 687–88, R. ____). There are no contemporaneous or specific objections of record. 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. (Trial Tr. 201, 202, 308, 312, 663–69, 687–88, R. ____). Accordingly, because the statutory emergency defense was an issue at trial, Appellants moved at the close of Respondent’s evidence to amend their answer to conform to the

evidence and assert section 15-32-230 as a defense.⁴ (Trial Tr. 805–07, R. ____). Appellants also requested that the trial judge charge the jury on the statutory defense. (Trial Tr. 713, 716, R. ____). The trial judge denied the motion. (Trial Tr. 808, R. ____). The trial court thus did not charge the jury on the statutory emergency defense, and the jury returned a verdict in favor of Respondent, awarding \$1.5 million in economic damages and \$1 million in economic damages. (Verdict Form, R. ____).

Appellants moved for a new trial on several grounds, including that the trial judge erred in denying Appellants’ Rule 15 motion to amend. (Mot. for New Trial, R. ____). The trial judge denied the motion, finding that it was not until the defense called Dr. Miller in the defense case-in-chief that the statutory defense elements were raised and Respondent would be prejudiced for lack of opportunity to refute the defense. (Trial Tr. 714, R. ____) (Post-Trial Or. & Judgment at 2, R. ____).

ARGUMENT

Two critical errors below require a new trial. First, respectfully, the trial judge should have recused himself. The trial judge’s former law partners at McGowan Hood previously sued the same medical practice involved here when the trial judge was their law partner. Dr. Miller was a partner in the medical practice, and Dr. Miller served as an expert witness on behalf of the practice, in more than one of those malpractice cases. While expressly regretting that they had to do so, Appellants made the recusal motion illuminating these points. (R. ____). After Appellants raised the issue⁵, the trial judge stated that he would have recused himself if a sufficient number of other

⁴ In *Flowers, supra*, the statutory defense had likewise been added as a defense by way of amendment at the conclusion of the trial.

⁵ The trial judge did not raise these facts himself prior to the recusal motion. *See* Commentary, Canon 3(E) (“A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”).

judges were available. This rationale (evaluating number of circuit judges available in a circuit) is not a part of the recusal test. Nor was the trial judge's stated concern that he be able to continue to be available to try other cases in which McGowan Hood⁶ appeared, and that recusing himself in this case would set an unhelpful precedent. Unfortunately, as explained below, the trial judge made factual findings unsupported by the record with respect to the most critical ruling in this appeal.

Appellants were prejudicially deprived of use of the statutory emergency defense under South Carolina Code section 15-32-230(A) by denial of their Rule 15(b) motion to amend their pleadings to conform to the evidence. Respondent should be judicially estopped from claiming prejudice based on prior representations to the circuit court, and Respondent has otherwise waived any claim of Rule 15(b) prejudice for lack of sufficient objection. Respondent has also failed to demonstrate any such prejudice on the merits. Respondent knew that the statutory emergency defense was at issue in this case for *years* before trial, and the issue was amply borne out in discovery with experts witnesses for both sides. Respondent's counsel has acknowledged—on the record—that he knew about Appellants' intended use of the emergency statute and was expecting an amendment at some point, and Respondent had even been granted a motion to continue trial on that basis. (Post-Trial Hearing Tr. at 18–19, R. ____). Questions about the statutory defense were asked during jury selection, Appellants argued the issue—without objection—during their opening statement, and experts for both sides at trial were questioned about the emergency defense, also without specific or contemporaneous objection. Respondent also elicited testimony on recklessness and thus attempted to present a case sufficient to refute the emergency defense. Under these circumstances, Appellants' motion to amend to conform to the evidence, under Rule 15(b)'s

⁶ McGowan, Hood did not represent any party in this matter.

liberal standard to try cases on the merits, should have been allowed and the statutory emergency defense properly charged to the jury. The judgment below should be reversed, and the cause remanded for a new trial before a different circuit judge.

I. The trial judge committed prejudicial error by failing to recuse himself from trying this medical negligence case in light of the unique circumstances below.

“It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution.” *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996), citing *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955). Thus, in this state, it is “well settled [that] judges should recuse themselves where questions of impartiality or impropriety are raised.” *State v. Cheatham*, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). “A judge should disqualify himself in a proceeding in which impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party.” *Koon v. Fares*, 379 S.C. 150, 156, 666, S.E.2d 230, 234 (2008); see also Canon 3(E)(1)(a) of Rule 501, SCACR. Further, a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

Respectfully, the trial judge prejudicially erred by failing to recuse himself from presiding over the trial and thus denying Appellants’ November 15, 2021 motion seeking such relief. The trial judge was previously a partner handling plaintiff medical malpractice cases at McGowan, Hood and Felder in Rock Hill, South Carolina, between 2011 and 2016. During that same time period, the trial judge’s former law partners at McGowan, Hood and Felder sued, on behalf of clients, the same medical practice involved in this case, for *medical malpractice* also arising from *alleged negligent obstetrical care while Dr. Miller was a partner there*. Dr. Miller was also an

expert witness on behalf of the practice in more than one of those cases. (Motion for Recusal, R. ____).

The South Carolina Canons of the Judicial Code of Conduct 3(E)(1)(a) and (b) indicate that the trial judge's impartiality might reasonably be questioned under such circumstances and required his recusal. At the hearing on Appellants' recusal motion, the trial judge agreed that the motion was not baseless or frivolous but then applied an erroneous and irrelevant legal standard in denying Appellants' motion. (Pretrial Hearing Tr. at 7, R. ____). Specifically, the trial judge indicated that he had never denied a motion to recuse during his tenure on the bench, and if a sufficient number of other circuit judges were available to try the case below, he would have allowed the motion. (*Id.*). But the trial judge refused to recuse here since he erroneously believed that such action would create precedent that would require recusal in every case in which McGowan Hood appeared "and that is not fair to McGowan Hood."⁷ (*Id.*).

The trial judge erroneously construed Appellants' argument in an overly broad manner. Appellants contended only that recusal was required in this medical negligence case where the law partners of the trial judge sued the same medical practice involved in this case when Dr. Miller was a partner there and at the time when the judge was also their law partner. The trial judge's statements that the broader implications of a grant of the recusal motion would work to the disadvantage of his former law firm are, respectfully, improper considerations.

Further, the trial judge's impartiality is reasonably questioned here since his factual findings are unsupported by the record. For the detailed reasons explained *infra* at pp ____, the record does not support the trial judge's core finding and reasoning underpinning his decision to deny Appellants' Rule 15(b) motion to allow the statutory emergency defense under South

⁷ Again, McGowan Hood did not represent any party in this matter.

Carolina Code section 15-32-230(A) to be tried and charged to the jury. Under these circumstances, this Court should reverse and remand for a new trial with a different trial judge assigned. *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857.

II. The circuit court erred by denying Appellants’ Rule 15(b) motion to amend to conform to the evidence to allow the statutory emergency defense under South Carolina Code section 15-32-230(A) to be properly tried and the jury charged accordingly.

The circuit court committed reversible error by denying Appellants’ motion to amend to conform to the evidence pursuant to Rule 15(b) of the South Carolina Rules of Civil Procedure. That motion sought to properly allow the issue of statutory emergency under section 15-32-230(A) to be tried as an affirmative defense, by express or implied consent, on a record without prejudice. The trial court likewise erred by denying Appellants’ request to charge the jury with appropriate corresponding instructions. These rulings should be reversed and this case remanded for a new trial.

A. Governing Standard Under Rule 15(b), SCRPC

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 Appellants did. Rule 15(b), SCRPC; *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224–25 (2010). And when unpled issues are tried by the express or implied consent of the parties, “they shall be treated in all respects as if they had been raised in the pleadings.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 413, 529 S.E.2d 543, 546 (2000) (quoting Rule 15(b)). “Ordinarily, amendments to conform to proof should be liberally allowed.” *Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

The Supreme Court’s opinion in *Pool* governs here. In *Pool*, the plaintiff argued that an order directing the payment of attorney’s fees and private investigator costs was error because

defendant failed to raise them in his pleadings. *Pool v. Pool*, 329 S.C. 324, 325, 494 S.E.2d 820, 821 (1998). The Supreme Court concluded that the order was appropriate because a Rule 15(b) motion to amend was made and evidence regarding these issues was admitted at the full merits hearing. *Id.* at 327–28, 494 S.E.2d at 822. And even if evidence is properly objected to, the “focal inquiry” is whether the party opposing the amendment of the pleading to conform to the evidence can meet their burden to demonstrate prejudice. *Id.* The Supreme Court held “[t]he 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.” *Id.* at 328–29, 494 S.E.2d at 823. Thus, under *Pool*, if the party opposing the amendment was aware that the new issue was going to be litigated and had the opportunity to litigate it, there is no prejudice under Rule 15(b).

The Supreme Court explained that its prejudice analysis comports with Rule 15(b)’s “intended purpose to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel.” *Id.*; *cf. 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 Defendant wanted to supplement the complaint”); *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 287, 607 S.E.2d 711, 717 (Ct. App. 2005) (applying *Pool*’s prejudice analysis and 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”).

Respondent has erroneously tried to merge the standards for considering amendments under Rules 15(a) and Rule 15(b).⁸ For example, Respondent has pointed to the failure to initially

⁸ Respondent’s arguments in this regard are gleaned from their January 17, 2023 Return to Petition for Writs of Supersedeas and Certiorari involving the same parties now pending in the South Carolina Supreme Court. *See Patton v. Miller*, Appellate Case No. 2022-001521.

plead the statutory emergency defense and waiver thereby. Respondent has also pointed to Appellants' delay in moving to amend as a proper factor for assessing prejudice here. These arguments are without merit. Rule 15(a) addresses pre-trial amendments to the pleadings. Rule 15(b) addresses motions to amend made at trial to conform to the evidence. Appellants made a Rule 15(b) motion below, which the law of this state specifically authorizes. *Earthscapes Unlimited*, 390 S.C. at 615, 703 S.E.2d at 224–25. While delay or earlier failure to plead may be an appropriate consideration in the context of deciding a Rule 15(a) motion, Rule 15(b)'s analysis is distinct and for good reason. Rule 15(b) motions are- *by design*- made at trial in order to conform with the practical realities of the issues and evidence presented. This appeal challenges the circuit court's denial of Appellants' Rule 15(b) motion. As such, the correct prejudice analysis under Rule 15(b) examines whether there was a lack of notice that the new issue was going to be tried, and a lack of opportunity to refute it. The timing of the Rule 15(b) motion to conform was made precisely as intended- during trial after evidence and the issue were presented.

B. Judicial Estoppel Bars Respondent From Arguing Prejudice Under Rule 15(b)

Respondent should be judicially estopped from claiming any Rule 15(b) prejudice. Respondent was aware years before trial that Appellants intended to invoke section 15-32-230 as a trial 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. (R.) **These undisputed facts from 2018 illustrate that Respondent stood ready to litigate the emergency statute at trial on the existing pretrial record and sought more time to prepare.** Thus—as a threshold matter—judicial estoppel should have intervened and barred the trial court from allowing Respondent to take the contrary position during trial that the statutory emergency defense was a surprise and prejudicial.

“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 improper 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 are required:

- (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 criteria are fulfilled here. Respondent takes two “totally inconsistent” positions: first, she took the position before the circuit court in her October 2018 motion to stay the trial that the merits of the statutory emergency defense would be at issue in the trial, but later took the position at trial that she had no notice that the statutory emergency defense would have been at issue. Respondent successfully obtained a stay and thus received the benefit of additional trial preparation time based on her earlier 2018 position. Finally, Respondent’s claim of surprise at trial that Appellants were raising the statutory emergency defense is at irreconcilable odds with the position she took in October 2018 that the statutory emergency defense would be tried on the merits in this case, and that the trial needed to be continued in order for some pending

appellate decisions to issue from this Court regarding the statutory emergency defense. Thus, all elements of judicial estoppel are satisfied. *See id.*

Respondent's timeline of events set forth in their recent Supreme Court filing highlight the importance of invoking judicial estoppel here. Respondent concedes that statements by Appellant's trial counsel between April 5, 2018 and May 24, 2018 led her to believe that Appellant would seek to rely on the statutory emergency defense at trial. (Response to Return p. 25) Respondent contends that she would not have been prejudiced if a Rule 15(a) motion to amend had been made back then, but claims prejudice when a Rule 15(b) motion was made at trial.

The South Carolina Rules of Civil Procedure do not require a party to choose one exclusive method of making a motion to amend under Rule 15. Respondent won a motion to continue trial on the grounds that it was aware that Appellants were going to rely on the statutory emergency defense and she was granted years more time to prepare for trial. Such undisputed 2018 notice of Appellants' intended reliance on the emergency statute at trial cannot be turned on and off based on the exigency of the moment and the type of motion hearing at issue. The core purpose of judicial estoppel is to protect the integrity of the judicial process. *See Quinn v. Sharon Corp.*, 343 S.C. 411, 416, 540 S.E.2d 474, 477 (Ct. App. 2000) (Anderson, J., concurring). ("A Court must be able to rely on the statements made by the parties because truth is the bedrock of justice."). Respondent should have been judicially estopped from taking the position that the emergency defense was prejudicial for lack of notice and the Rule 15(b) amendment should have been allowed on this basis alone.

C. Respondent Has Waived Any Claim of Prejudice Related To A Rule 15(b) Amendment.

This record confirms Respondent's waiver of claiming Rule 15(b) prejudice in any event. The emergency statute was raised 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 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 Tr. 19–20, R. ___) (emphasis added). Then, during Appellants’ 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 176, R. ___) (emphasis added). This statement of Appellants’ position on the issues to be tried mirrors the emergency statute. *Respondent did not object to Appellants’ opening statement*, thereby impliedly agreeing to try the emergency issue and waiving the right to challenge it later under settled South Carolina law. *See State v. Wilkins*, 310 S.C. 81, 89, 425 S.E.2d 68 (1911) (a failure to make a contemporaneous objection stating the specific grounds during the opening statement confirmed that “[defendant] thereby lost his right to complain later on”); *Bunch v. Charleston & W.C. Ry. Co.*, 91 S.C. 139, 74 S.E. 363 (1912) (noting 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) (finding that a failure to make the required contemporaneous objection may not be “bootstrapped” by a subsequent motion or request).

The record further reveals that the jury heard substantial unobjected 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.⁹ (Defendants' Opening Statement, Trial Tr. 176, R. ___; Testimony of Dr. Duboe, Trial Tr. 201–02, R. ___; Testimony of Dr. Miller, Trial Tr. 308, 312, 663, 665, 667, 669, R. ___); (Testimony of Dr. Gurewitsch, Trial Tr. 530, R. ___; June 26, 2013 Depo. of Dr. Gurewitsch at 50–54, R. __ (read into evidence at trial); Testimony of Dr. Lupo, Trial Tr. 599, R. ___). Specifically, the examination of experts for both Respondent and Appellants included questions and answers squarely tracking the statutory elements. (Trial Tr. 201–02, 308, 312, 663–69, 687–88, R. ___). Respondent's own 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 Dr. Miller to resolve it by his various maneuvers. (Trial Tr. 201–02, R. ___). 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.*). Dr. Duboe acknowledged that shoulder dystocia places the fetus at risk of death or serious bodily harm. (Trial Tr. 199–201, R. ___). Respondent's 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. (Trial Trans. 530; Depo. of Dr. Gurewitsch at 50–54, R. ___). Dr. Lupo, Appellant's expert below, followed suit also without objection. (Testimony of Dr. Lupo, Trial Tr. 599).

⁹ The jury was thus left to wonder what all of that meant, since they were never charged with the law on the emergency statute.

Dr. Miller, qualified as an expert in OB/GYN, later 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. (Trial Tr. 663–69, 687–88, R. ___). It was not until this latter point of trial where Respondent, *for the first time*, attempted to object. (Trial Tr. 687-688) But the record does not reflect the nature of the objection or the trial judge's ruling thereon. When Dr. Miller was asked on direct examination whether shoulder dystocia is an obstetrical emergency, Respondent's counsel asked to approach the bench, where an unrecorded bench conference occurred. (Trial Tr. p. 687). Respondent's trial counsel then asked the same question with more specificity and Appellant's counsel stated "objection" without stating any grounds. (Id.) There is no indication the circuit court sustained or even ruled on the objection. (Id.)

Appellant's impermissible generalized objection made after an unrecorded bench conference was insufficient for purposes of establishing prejudice under Rule 15(b). Rule 15(b), SCRCF placed a clear burden on Respondent to have specifically objected "at the trial on the ground that it is not within the issues made by the pleadings." Rule 15(b), SCRCF (emphasis added). "Counsel [must] immediately object and to have *a record made of the statements or language complained of and to ask the court for a distinct ruling thereon.*" *Young v. Warr*, 252 S.C. 179, 200, 165 S.E.2d 797, 807 (1969) (emphasis added). The record establishes that none of this occurred. Respondent cannot rely on a late, generalized objection to establish Rule 15(b) prejudice.

Further, Appellants' standard of care experts later opined, *with no objection*, that a shoulder dystocia is an immediate obstetrical emergency that creates an immediate threat of death or serious

bodily harm to the fetus. (Trial Tr. 883, 899, 980, R. ____). See *State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms.*, 414 S.C. 33, 59 (2015) (“A generalized continuing objection. . . is wholly inconsistent with our law requiring a contemporaneous objection.”). Thus, Respondent’s introduction of evidence on the emergency defense from her own experts, coupled with the lack of a timely and sufficient objection when such argument and later evidence was presented, confirms the waiver of any Rule 15(b) prejudice under settled South Carolina law. See *Woods v. Rabon*, 295 S.C. 343, 348 (Ct. App. 1988) (Plaintiff’s allowance of evidence of the disputed claim to come in during trial without proper objection waives any claim of prejudice under Rule 15(b)); cf. *Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93 (Ct. App. 1986) (“A party cannot complain of an error which his own conduct has induced.”).

D. Respondent Has Otherwise Failed To Meet Her Burden of Demonstrating Prejudice Under Rule 15(b), SCRPC

Respondent cannot demonstrate prejudice under *Pool*. Respondent is unable to show that she lacked both notice that the statutory emergency defense would be tried and a chance to refute it. *Pool* at 328–29, 494 S.E.2d at 823. Instead, the record conclusively establishes that Respondent was well aware that the emergency issue was going to be litigated for some time and had ample opportunity to litigate it at trial. Specifically, Respondent’s knowledge that the statutory emergency defense would be tried is substantial and is as follows:

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

The parties deposed several fact witnesses between 2011 and 2014, whose testimony addressed the elements of the statutory emergency defense. For example, Dr. Gurewitsch’s June 2013 testimony—which was read into the record at trial, see (Trial Tr. 530, R. ____)—addressed all three elements of the statutory emergency defense. Specifically, Dr. Gurewitsch 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, R. ___). 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.¹⁰

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

On October 8, 2018, Respondent filed her motion for partial summary judgment or, in the alternative, for a stay. *See* (R. ___). 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.*) (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 basis¹¹.

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

¹⁰ Respondent’s counsel is quite 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).

¹¹ The statutory emergency defense had not been pled formally in Appellants’ Answer at that time. Further, the Respondent had already settled with Piedmont before this motion was made.

under” section 15-32-230 were pending before the Court of Appeals, and “[t]hose issues also arise *in this case.*” (*Id.* at 2, R. ___) (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,” and “[t]here 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. Respondent thus *knew and expected* that Appellants 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 Appellants told the circuit court that he would be requesting a charge on the statute at trial. The same day, the circuit court denied Respondent’s motion for partial summary judgment but *granted the requested stay*. See (Form 4 Order Denying Summ. J., R. ___; Form 4 Order Granting Motion for Stay, R. ___).

September 2020: Scheduling Order Allowing Plaintiff 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, R. ____). 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, this Court issued its opinion in the second of the two cases addressing section 15-32-230 that were pending at the time of Respondent’s motion to stay. *See Flowers*, 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). These pretrial events demonstrate knowledge that the emergency defense would be tried and provided ample opportunity to Respondent to prepare to refute it at trial.

The trial transcript solidifies Respondent’s knowledge of the issue and opportunity to refute it. The elements of the emergency defense were raised by Respondent during *voir dire* and in Appellants’ opening statement *without objection*. The issue was again addressed by both parties in questioning the Respondent’s opening expert on the elements of the defense, *also with no objection*. The trial court found that it was not until the defense called Dr. Miller in the defense case-in-chief that the statutory defense elements were raised. (Trial Tr. 714, R. ____). **This appeared to be the critical underpinning of the trial court’s Rule 15(b) ruling, but this finding is unsupported by the record and requires reversal here.** *See Ellis*, 315 S.C. at 285, 433 S.E.2d at 857 (noting evidence of judicial prejudice requiring recusal when the circuit judge’s factual findings are unsupported by the record); *McKnight v. McKnight*, 283 S.C. 540, 324 S.E.2d 91 (Ct. App. 1984) (an abuse of discretion occurs where the order is based upon findings absent

evidentiary support); (Defendants' Opening Statement, Trial Tr. 176, R. ___; Testimony of Dr. Duboe, Trial Tr. 201–02, R. ___; Testimony of Dr. Miller, Trial Tr. 308, 312, 663, 665, 667, 669, R. ___); (Testimony of Dr. Gurewitsch, Trial Tr. 530, R. ___; June 26, 2013 Depo. of Dr. Gurewitsch at 50–54, R. __ (read into evidence at trial); Testimony of Dr. Lupo, Trial Tr. 599, R. ___). Further, the circuit court did not account for Dr. Miller's testimony when he was called adversely during *Respondent's* case-in-chief. During that examination, Respondent invited the same testimony about the emergency statute from Dr. Miller. Dr. Miller testified as follows:

- A. *It is not an issue of training. This is strictly an issue for safety for that baby. The minute you diagnose shoulder dystocia every single literature source will say that is an emergent from that point forward.* It is an emergency whether you are a cop on a beat; it is an emergency whether you are a taxi car driver; it doesn't matter. You have got a baby's life on your hand. And bad things happen really quickly. Okay. You and this is where Dr. Duboe and I disagree. I disagree completely with six to eight minutes. That is a farce in my world. You have got four to five minutes. *This is a baby's life, whose life is on the line.* So you try to do things really, you try to have a routine protocol. *You are not going to wait five or six minutes before you get serious about a shoulder dystocia. That is one of the true classic obstetrical emergencies in our literature.*

Trial Tr. p. 308 (emphasis added). Thus, the circuit court's finding that Dr. Miller's testimony during *Appellant's* case-in-chief was the first time that such evidence was considered finds no support in this record for this additional reason.

Respondent may argue that the statutory emergency defense was not tried by express or implied consent, and argue that the arguments and evidence at trial merely went to standard of care and alleged breaches thereof. The record indicates otherwise. Respondent's opening statement perfectly mirrored the statutory emergency defense. Appellant's counsel addressed the jury, from the inception, 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 176, R. ___) (emphasis added). The statutory emergency defense provides, *inter alia*, that

(A) In an action involving a medical malpractice claim arising out of care rendered **in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite**, no physician may be held liable unless it is proven that the physician was grossly negligent.

S.C. Code Ann. § 15-32-230. Despite Respondent's opening statement hitting the bullseye within this statute, Respondent lodged no objection. Respondent instead remained silent and thus chose to try the issue by implied consent. *See D.A. Elia Constr. Corp. v. Lyco, Inc.*, No. CIV-89-232E, U.S. Dist. LEXIS 15760 at * 3 (W.D.N.Y. 1991) (sufficient Rule 15(b) notice where unpled legal issue raised in pretrial memorandum and opening statement). The above-quoted opening statement point is not merely a position on standard of care. Its relevance is to the statutory emergency defense.

Respondent also invited testimony from his own witness about a distinction between a "genuine emergency" depending on who is delivering the baby. On direct examination, Dr Duboe testified, as follows:

Q. ***Do you make a distinction between a genuine emergency of someone who does not receive obstetric training to manage a shoulder dystocia and an obstetrician who is trained to manage shoulder dystocia?***

A. Again, I think I do make that distinction. . .

(Tr. Trans. p. 202) (emphasis added). Thus, this portion of the record also shows that Respondent tried the statutory emergency issue by implied consent.

The record also demonstrates that Respondent tried to refute the statutory emergency defense at trial. After presentation of all evidence, Respondent’s counsel stated his understanding that no directed verdict had been granted on gross negligence or recklessness and counsel sought to re-brief the issues. (Tr Trans. 1028). Respondent’s counsel argued that the evidence he elicited from both Drs. Gureswich and Miller was sufficient to support the submission of recklessness to the jury. Respondent’s counsel argued that Dr. Miller “was aware of the danger, he consciously applied as much traction as he intended and that was a devastating amount of traction that caused a life changing injury to Alexia.” (Tr Trans. 1029) Respondent’s counsel stated his own view of gross negligence and its distinctiveness from recklessness.¹² (Tr Trans. 1032) But a showing of recklessness means that gross negligence has been satisfied and surpassed. *See Pier View Condo. Ass'n v. Johns Manville, Inc.* 2022 U.S. Dist. LEXIS 38602 (D. S.C. 2022) (“Under South Carolina law . . . reckless conduct is necessarily negligent and grossly negligent.”). Thus, if a plaintiff proves reckless conduct, it can obtain complete recovery—under its gross negligence claim. *Id.*; *see also Berberich v. Jack* 392 S.C. 278, 287 (2011) (“It is well settled that negligence may be so gross as to amount to recklessness.”).

Respondent thus attempted to prove a heightened culpability standard over simple negligence at trial and sought to submit the issue to the jury. Respondent cannot now legitimately claim any disadvantage in defending the merits of the emergency defense here. (Tr Trans. 1028-1032). The law of this state considers notice of the conforming defense and an opportunity to

¹² Respondent’s counsel informed the trial court that he is “not a fan of gross negligence as a target for me to try to prove because of how it is defined. But recklessness is a different matter, ” and “easier to prove.” (Tr Trans. pp. 1031-1032).

refute it in assessing a Rule 15(b) amendment request. Going beyond this and engaging in a scrutiny of Respondent's counsel's trial strategy is not an appropriate consideration.¹³

Consequently, by denying the motion to amend and Appellants' request to charge the jury on section 15-32-230, the trial court also failed to instruct the jury with the controlling law, which is an abuse of discretion. *See Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000) ("Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error."). Appellants were prejudiced by the failure to properly charge the jury because if Appellants' experts had been believed by the fact finder that there was temporally a genuine emergency, the statutory requirements of 15-32-230 would have been met, and the jury would have awarded Appellants a defense verdict. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (providing an erroneous jury instruction is grounds for reversal if the appellant was prejudiced by the erroneous instruction). Had section 15-32-230 been charged, Respondent would have had the argument that the case should still be submitted to the jury despite the failure on her part to present sufficient evidence of gross negligence (although she claimed to have presented evidence of recklessness). Such would have been based on her competing evidence that there was not yet a "genuine" emergency at the time of injury. But the trial court's decision not to charge the statute, when the statute was well known by all and had earlier been presented at trial, was unduly

¹³ Respondent's argument that his settlement strategy with Appellants' former co-defendant is adversely affected by an amendment to include the statutory emergency defense is likewise meritless. First, this argument is outside the purview of the Court's analysis under Rule 15(b) to assess whether Respondent had lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. *Pool* at 328–29, 494 S.E.2d at 823. Second, Respondent's settlement with the hospital was approved April 5, 2018. In October of 2018, Respondent was moving to stay the trial in this case based on the "expected" application of the statutory emergency defense. *See* Statement of the Case, *supra*.

prejudicial and deprived Appellants of a valid statutory defense. The trial court therefore erred. For these reasons, the trial court should have also granted Appellants a new trial on these same grounds. These rulings should consequently be reversed and this case remanded for a new trial where the statutory emergency defense is presented to and charged to the jury.

CONCLUSION

This Court should reverse the trial judge's failure to recuse and denial of Appellants' Rule 15(b) motion to amend to conform to the evidence, and the cause should be remand for a new trial before a different trial judge.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

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

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

Columbia, South Carolina

January 23, 2023

RECEIVED

Jan 23 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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

Appellate Case No. 2022-000288

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

v.

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

PROOF OF SERVICE

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

Pleading(s): **Initial Brief of Appellants'**

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

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

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

s/Meredith S. Keane

Meredith S. Keane
Senior Paralegal

January 23, 2023

Archived: Monday, January 23, 2023 2:10:17 PM

From: [Meredith Keane](#)

Sent: Mon, 23 Jan 2023 19:07:43

To: egraham@grahamlawfirm.net bradjordan@comporium.net adavis@davissnyder.com

Cc: [Meredith Keane](#) [Mitch Brown](#) [Lorin Lapidus](#) [Nick Charles](#)

Subject: Angela Patton, et.al v. Dr. Gregory A. Miller, et. al - Appellate Case No 2022-000288 - SERVICE Package

Importance: Normal

Sensitivity: None

Attachments:

[2023.01.23 Appellants Designation of Matter for Record on Appeal .pdf](#) [2023.01.23 Initial Brief of Appellants .pdf](#)
[2023.01.23 Proof of Service for Appellants' Designation of Matter .pdf](#) [2023.01.23 Proof of Service for Appellants' Initial Brief .pdf](#)

Counsel,

Enclosed for service in the above matter are:

Appellants' Initial Brief and Proof of Service

Appellants' Designation of Matter and Proof of Service

Service is being made pursuant to Supreme Court Administrative Orders 01-28-2022-01 and 05-06-2022-03.



MEREDITH KEANE SENIOR PARALEGAL

meredith.keane@nelsonmullins.com

MERIDIAN | 17TH FLOOR

1320 MAIN STREET | COLUMBIA, SC 29201

T 803.255.9564 F 803.256.7500

NELSONMULLINS.COM [VCARD](#)
