

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Jan 27 2023

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

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

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

I. The Petition at Bar Involves Special and Important Issues Which Are Appropriate For This Court of Last Resort's Consideration

Respondent contends that the instant petition addresses no feature sufficient to warrant this Court's involvement.¹ But Respondent's Return demonstrates the opposite by showing the lack of South Carolina common law addressing the issues encompassed by the Petition here. *See* Resp. Ret. at p. 14 ("Based on their being little South Carolina caselaw about appeal bonds . . .") Respondent spends several pages of her return arguing that the circuit court properly exercised its discretion to set a \$6.25 million bond by calculating the judgment amount and interest rate in isolation. (Resp. Ret. pp. 4-6) Respondent, however, fails to cite authority to support this argument. Respondent next concludes that both the policy established by S.C. Code Ann. § 18-9-130 and insurance policy limits are irrelevant. Respondent then spends the remaining 11 pages of her Return applying the supersedeas bond factors set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), which she- in the first instance- contends are inapplicable. This again demonstrates a reason why certiorari is appropriate – a lack of governing standards for lower courts to follow in the supersedeas context from this Court.

¹ Respondent also contends that some of Petitioners' arguments/evidence are not preserved. This argument fails on multiple grounds. Petitioners satisfied their preservation obligation by asking the circuit court to explicitly rule on previously unaddressed issues surrounding the bond. *See Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) ("An issue is not preserved where the trial court does not *explicitly* rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." (emphasis added). This related to Petitioner's initial request to grant a stay of execution and to set the bond amount in accordance with the statute. When the Court granted the stay, but set a different bond amount (giving no reasoned basis), Petitioner concurrently moved under Rule 59e to reconsider that decision but also made a new motion based on evidence to reduce the bond amount fixed by the Court (the stay having been conditionally ordered now). There is nothing presenting such a procedure. There is no law or rule preventing a party from moving to modify an ordered bond amount. All issues are appropriately before this Court.

The Return confirms that there are insufficient guiding principles in South Carolina's common law to direct lower courts when setting supersedeas bonds. Federal courts and neighboring jurisdictions like North Carolina apply certain factors in making such a determination. These factors examine: (1) an appellant's ability to pay if the underlying judgment is affirmed; (2) the complexity of the collection process; (3) whether requiring a full bond poses an undue financial hardship on the appellant; (4) the amount of the limits of all applicable liability policies of the appellant; and (5) the aggregate net worth of the appellant. The circuit court here appeared to consider none of these factors. The order illustrates that the lower court's discretion was plenary and untethered to any pertinent directives from the appellate courts.² But "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). The law of supersedeas bonds should be tethered to articulable considerations and it respectfully within the province of this Tribunal of last resort to articulate them.

While S.C. Code Ann. § 18-9-130 caps the total amount of a supersedeas bond depending on the size and gross revenue of an appellant in cases filed after January 1, 2012, the importance of providing direction to the lower courts in this, and in other matters, persists. A cap on the bond still accords significant discretion to the trial court to decide where along the permissible continuum a supersedeas bond should fall. And here, Section 18-9-130 is not facially controlling due to the age of the case³.

² The circuit court's 6/10/22 and 6/20/22 Supersedeas Bond Orders are attached hereto as Exhibits A and B.

³ This does not mean the public policy recognized by the General Assembly in enacting the statute should not be considered in this case, which is the position advocated by the Respondent. Petitioner argued such public policy should have been afforded recognition by the circuit court, regardless of the effective date of the statute.

II. This Court Should Allow The Writs and Adopt a Multi-Prong Balancing Test For Guiding the Lower Court’s Supersedeas Analysis.

Respondent argues that the federal supersedeas test in *Southeast Booksellers* and guidance from other jurisdictions are irrelevant and should be rejected. Petitioner argues the opposite. These standards properly analyze whether to grant a stay conditioned upon the acquisition of a supersedeas bond for less than the full amount of the judgment as Petitioners sought here. South Carolina supersedeas law should therefore evaluate: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *Southeast Booksellers Association v. McMaster*, 233 F.R.D. 456, 458 (D.S.C. 2006). And as part and parcel of this analysis, the lower courts should also examine: (1) an appellant’s ability to pay if the underlying judgment is affirmed; (2) the complexity of the collection process; (3) whether requiring a full bond poses an undue financial hardship on the appellant; (4) the amount of the limits of all applicable liability policies of the appellant; and (5) the aggregate net worth of the appellant. *Southeastern Booksellers Ass’n*, 233 F.R.D. at 458-59; N.C. Gen. Stat. § 1-289(a2) (2021). A uniform approach like this one is needed in South Carolina. Such analysis ensures that supersedeas bonds are arrived at logically and fairly after a comprehensive balancing test to meet the particular facts of each case. Otherwise, the execution and bond process threaten to control the merits adjudication respecting the appeal.

Respondent finally argues that even when balancing the above criteria, they do not counsel in favor of a stay based on a lesser supersedeas bond. This argument fails for the reasons discussed below.

1. Likelihood Of Success On The Merits

Petitioners have made a strong showing that their appeal has merit⁴. First, Respondent's Return erroneously tries to merge the standards for considering amendments under Rules 15(a) and Rule 15(b). For example, Respondent has pointed to the failure to initially plead the statutory emergency defense and waiver thereby. Respondent has also pointed to Petitioners' delay in moving to amend as a proper factor for assessing prejudice here. But these arguments do not apply to a Rule 15(b) motion. 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. Petitioners 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 Petitioners' 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. *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998). The timing of the Rule 15(b) motion to conform was made precisely as intended- during trial after evidence and the issue were presented.

Respondent's argument that judicial estoppel is inapplicable also fails. Respondent's timeline of events set forth in their Return highlight the importance of invoking judicial estoppel here. Respondent concedes that statements by Petitioners' trial counsel between April 5, 2018 and May 24, 2018 led her to believe that Appellant would seek to rely on the statutory emergency

⁴ Petitioners just filed their initial merits brief with the South Carolina Court of Appeals.

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. This contention should be rejected.

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 Petitioners 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 Petitioners' 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.

Contrary to Respondent's argument on page 18 of her Return, the record also confirms her waiver of any Rule 15(b) prejudice. Petitioners' counsel addressed the jury, from the inception (in the opening statement), 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.**

(Trial Tr. at 176)⁵ (emphasis added). The statutory emergency defense provides, *inter alia*, that

⁵ Select Trial Transcript pages are attached hereto as Exhibit C.

(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 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"); *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 unples 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.

Further, Respondent's Return does 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 *Petitioners’* case-in-chief was the first time that such evidence was considered finds no support in this record for this additional reason. 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.

In fact, 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 by Petitioner’s counsel 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 Petitioners counsel stated “objection” without stating any grounds. (Id.) There is no indication the circuit court sustained or even ruled on the objection. (Id.)

Respondent’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.

Respondent also argues prejudice for lack of evidence to refute the emergency defense. But the record contradicts this assertion. The record shows that Respondent marshalled evidence sufficient to refute the statutory emergency defense at trial. First, Respondent argued the defense should not apply because the emergency was not “real” (or genuine). Second, 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.⁶ (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*

⁶ 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.

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 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.⁷ Accordingly, it is likely that the Court of Appeals will reverse the underlying judgment and remand the cause for a new trial. This feature weighs heavily in favor of ensuring *a reasonable* supersedeas bond that will not create undue financial harm to Petitioners before their appeal can be decided.

2. Whether Petitioner Will Suffer Undue Financial Hardship Absent A Stay Based on a Lesser Bond Amount, and Public Interest Concerns

Respondent first appears to challenge Dr. Miller’s financial affidavit. She argues that it should not be taken at face value, it raises for more questions than answers, contains vague assertions, and is worthless without an opportunity to test its assertions. Petitioners disagree with these criticisms, but concur that it is important to for the court to address the affidavit. The trouble is that the circuit court failed to do so. The circuit court likewise failed to address Petitioners’ net worth, the ability to pay, the applicable limits of the insurance policies, and whether a bond in the full amount will

⁷ 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.

cause them financial hardship. The public interest factor was also not addressed. All of these factors- which were presented below but unaddressed- weigh heavily in Petitioners favor and support establishing a substantially lower supersedeas bond. Instead, the circuit court mechanically calculated the bond based solely on a judgment calculator. South Carolina's supersedeas law requires a more comprehensive, thoughtful, and balanced approach. Broad discretion in the lower courts is understandable, but unbridled discretion without uniform and articulable standards with which to measure that discretion should not be sanctioned.

III. Conclusion

This Court should grant one or more of the pending writs, as needed to assume appropriate jurisdiction and power, adopt a multi-prong balancing test to guide the lower court's supersedeas analysis, and either remand for application of that test or direct that Petitioners are entitled to a stay of execution on the judgment contingent upon Petitioners' collective posting of a lower bond amount as outlined in the principal petitions.

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

Columbia, South Carolina

January 27, 2023