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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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SC Court of Appeals

Larry Hyman, Circuit Court Judge

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Appellate Case No. 2019-001304

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Phillippa Smalling, individually and as Next Friend for Jahmerican M., a minor — Appellant,

v.

Lisa R. Maselli, M.D., both individually and as agent/employee of Carolina OB-GYN, — Respondents.

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**FINAL REPLY BRIEF OF APPELLANT**

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July 30, 2020

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## STATEMENT OF ISSUES ON APPEAL

1. Whether S.C. Code Section 15-32-230(A) is ambiguous and must be construed in accordance with standard principles of statutory construction?

2. Whether the trial court erred by not determining S.C. Code Ann. § 15-32-230 failed a as a matter of law?

## STATEMENT OF THE CASE

Appellants incorporate herein by reference the Statement of Case in their Brief of Appellants. Respondents note on page 4 of their initial brief that Appellants filed a Notice of Appeal with the circuit court on July 1, 2019 (R. pp. 982-983) and again on August 5, 2019. (R. pp. 979-981) The initial filing was done by Appellant's counsel's office in the erroneous belief that a clocked, filed copy needed to be served on Respondents' counsel. The effective filing was on the later date, when the appeal was timely commenced in accordance with applicable provisions of the SCACR.

## STATEMENT OF THE FACTS

Appellants incorporate herein by reference the Statement of Facts in their Brief of Appellants.

## STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the appellate court may correct only errors of law. *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011), *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). An issue regarding statutory interpretation is a question of law. *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control,*

390 S.C. 418, 425, 703 S.E.2d 246, 250 (2010). "Questions of statutory interpretation are questions of law, which the appellate court is free to decide without any deference to the court below." *Grier v. AMISUB of SC, Inc.* S.C. 532, 535, 725 S. E.2d 693, 695 (2012).

## OBJECTION TO RESPONDENTS' STANDARD OF REVIEW

This appeal presents issues of statutory construction. Questions of statutory interpretation are questions of law, which the appellate court is free to decide without any deference to the court below. *Grier v. AMISUB of S.C., Inc.,* 725 S.E.2d 693,695 (2012).

## ARGUMENT

### I. *The Court Must Construe S.C. Code § 15-32-230 in Accordance with Standard* Principles of Statutory Construction.

This appeal addresses the proper construction of S.C. Code § 15-32-230. The statute confers qualified immunity from medical malpractice liability of a physician, but only if a host of specified qualifying criteria are met.

Whether qualified immunity under the statute applies in a particular case depends upon (a) the particular care provided (unspecified "care" under Subsection (A) or "obstetrical care" under Subsection (B)); (b) whether the emergency situation was "genuine" under Subsection (A); (c) the location where care was provided (must be "in an emergency department or in an obstetrical or emergency suite"); (d) the time when care was provided (must be "prior to discharge from the emergency department or obstetrical or surgical suite"; (e) the category of patient to whom care was provided (must be, under Subsection (B), a patient who has not had a "previous doctor/patient relationship between the physician or a member of his practice with a patient" or "has not received

prenatal care"); (f) whether the patient at the time was "not medically stable"; and (g) whether the patient at the time was in "immediate threat of death" or "serious bodily injury."

When the statute applies, medical malpractice plaintiffs cannot recover without proving that the doctor was grossly negligent. When the statute does not apply, the case is governed by ordinary negligence provisions of the common law.

At issue in this appeal is the Court's construction of the statute, and how the statute relates to the pertinent facts of this case. Appellants submit that the statute is inapplicable to this case as a matter of law.

Section 15-32-230 provides:

> **Emergency medical and obstetrical care exceptions.**
>
> *(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.*

**A. The Statute is Ambiguous.**

If the statute is ambiguous ... Courts must construe the terms of the statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). Respondents apparently believe the statute is clear and unambiguous, but that is incorrect.

Subsection (A) contains certain undefined words and phrases which may have plain and common usage in isolation, but which are ambiguous and potentially superfluous in context. These include, inter alia, "genuine medical emergency situation;" "not medically stable;" and "immediate threat."

In their brief, Respondents concede that statutes must be "so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." Matter of *Decker*, 322 S.C. 215, 471 S.E.2d 462 (1995) (Initial Brief of Respondents, pp. 14-15) This principle is of key importance to proper construction of the statute in general, and particularly these phrases.

All emergency situations are "genuine," or they would not be emergency situations. For "genuine" not to be superfluous, it must be a statutory term of art with a meaning other than "real." Then what does "genuine" mean as a term of art in the statutory context? Absent authoritative construction by this Court, the trial bench and bar will be left to guess.

Similarly, medical instability and "immediate threat" of death or serious bodily injury are characteristics of all emergencies. For these phrases not to be superfluous, they must be terms of art with statutory significance other than their plain, ordinary meaning. Absent construction by the Court, the trial bench and bar are left in the dark.

Qualified immunity under Subsection (A) requires, *inter alia,* that the physician's care was provided in the emergency department, obstetrical or surgical suite. Subsection (B) does not address location.

Respondents assume without logic or argument that the legislature's silence on this point signifies (1) that Subsection (B) applies only to emergency patients outside of an emergency department, obstetrical or emergency suite; (2) unless and until the patient enters an emergency department, obstetrical or surgical suite; (3) at which time Subsection (A) takes control. (Initial Brief of Respondents, p. 13) This assumption is absurd. It purports to preserve common law rights of existing patients under (B) in all places other than emergency departments, obstetrical and surgical suites, then have such rights vanish upon entry to one of these. Yet the absurd notion of a favored patient losing favor by entering an emergency department, obstetrical or surgical suite is critically important to Respondents' proposed statutory construction. (Initial Brief of Respondents, pp. 13-16) Not only is Respondents' theory forced, but it requires construction of each subsection in isolation, disregarding the statute as a whole.

If the General Assembly had truly intended for (B) to apply outside of an emergency department, obstetrical or surgical suite, the authors could have easily added words to make that intent explicit. That they did not suggests a contrary intent for the immunity provisions of both (A) and (B) to be limited to care provided in the emergency department, obstetrical or surgical suite.

Subsection (C) confirms this intent. It twice refers to a liability "limitation" in the singular, not the plural, confirming that (A) and (B) refer to a single limitation on physician liability, not separate limitations in different locations. Its last sentence addresses both timing and location criteria and states that any qualified immunity applies only prior to the patient's discharge from the emergency department, obstetrical or surgical suite. If the legislature intended (B) to have no location restriction, why would (C) terminate potential immunity under (B) upon the patient's discharge from a qualifying location? Respondents have no better answer than their absurd

contention that an emergency patient transforms from a (B) patient to an (A) patient upon passing the threshold of an emergency department, obstetrical or surgical suite. Correct statutory construction does not lead to such absurd results.

In light of the foregoing, Appellants consider the statutory language to be clear and unambiguous about (B) having location restrictions, just like (A); i.e., that the location of care must be in an emergency department, obstetrical or surgical suite for there to be any potential qualified immunity. To the extent Respondents argue otherwise, however, there is presented a statutory construction issue for the Court.

An argument could presumably be made that ambiguity arises from (B)'s use of the phrase, "on an emergency basis," following (A)'s reference to a "genuine medical emergency." Respondents may argue these are two separate standards, but Subsection (C) supports a contrary conclusion.

As noted above in a different context, (C) refers in two places to "the limitation on physician liability" established by subsections (A) and (B). Use of the singular, "limitation," demonstrates legislative intent that the emergency language in (B) should be construed consistently with that in (A). Stated differently, (B)'s use of "on an emergency basis" can be considered a shorthand reference to (A)'s preceding use of "genuine medical emergency situation," even though the latter phrase remains ambiguous. To the same effect, (C) requires that the emergencies contemplated by (A) and (B) must have the same key characteristics, i.e., medical instability and immediate threat of death or serious bodily injury. To that extent, use of different wording to name the emergency is insignificant.

For all of these reasons, the statute contains ambiguities and opposing interpretations which require the Court's assistance with statutory construction.

**B. The Court Must Look Beyond the Plain Meaning of the Words Contained in Individual Subsections of a Statute to Determine the Purpose and Proper Operational Effect of the Statute as a Whole.**

In *Ranucci v. Crain*, 409 S.C. 493 (2014), the South Carolina Supreme Court addressed the proper construction of two related statutes, which contained internal cross-references. The lower court had interpreted the statutes in isolation, under the theory that each statute was clear and unambiguous, thus obviating any need for statutory construction. The Supreme Court reversed.

In its reversal, our Supreme Court recognized that these statutes were related, had been created for a singular legislative purpose, and must be construed *in pari materia* to enable proper statutory construction. "It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Ranucci*, 409 S.C. at 501 (quoting Joiner ex rel. *Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

The Supreme Court in *Ranucci* considered the legislature's internal cross-referencing of the statutes most significant, reflecting its intent for the statutes to be construed *in pari materia.* Id. Subsection (C) provides similar cross-referencing (A) and (B) in several respects addressed . These include (C)'s joint reference to (A) and (B) about their shared qualifying criteria of medical instability, immediate threat of death or serious bodily injury; and their same termination of potential immunity upon a patient's discharge from an emergency department, obstetrical or surgical suite. As in *Ranucci*, this cross-referencing confirms that its subsections must properly be interpreted *in pari materia.*

Note again that Subsection (C)'s "limitation on physician liability" is in the singular. This signifies that Subsections (A) and (B) must blde construed together as a joint limitation on liability, rather than separate and distinct limitations as argued by Respondents.

Well-settled principles of statutory construction require the court to ascertain the intent of the legislature and give it effect so far as possible within constitutional limitations. When a statute is related to or part of other legislation, designed as a whole, the court should strive to discover and effectuate that policy design. See *Gregg Dyeing Co. v. Query*, 166 S.C. 117, 123 (1931).

"The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes that are contemporaneous." *Id.* As subsections of Section 15-32-230, (A), (B), and (C) must be interpreted *in pari materia.* Even assuming *arguendo* that each subsection was clear and unambiguous, the Court cannot stop there. Our state Supreme Court found persuasive the Appellant's assertion in *Ranucci* that "a reviewing court must look beyond the plain language of individual subsections to discern the underlying purpose of the statutes and their operational effect." *Ranucci,* supra, at 499. This Court must follow this mandate.

## II. Properly Construed, the Statute Does Not Apply as a Matter of Law

### A. Section 15-32-230 Does Not Apply to Existing Patients Who Had Prenatal Care, and Respondents Concede That Appellant Was an Existing Patient Who Had Prenatal Care[1]

[1] As a preliminary matter, Appellants address Respondent's contention that Appellants did not preserve this ground for appellate review. Respondents concede that Appellants moved for a directed verdict in part based on inapplicability of Section 15-32-230.

Respondents further argue, however, that Appellants failed to preserve the issue for review by failure to object to the verdict form. This argument ignores that the appellate courts of this State do not require parties to engage in futile actions to protect their interests on appellate review. State v. Covert, 368 S.C. 188, 201, 628 S.E.2d 482, 489 (Ct. App. 2006). To the same effect, our State does not require counsel to harass the trial judge by making continued objections after an issue has been ruled upon. Dunn v. Charleston Coca-Cola Bottling Co., 426 S.E.2d 756 (S.C. 1993).

There is no doubt that the General Assembly intended these subsections of Section 15-32-230 to operate together to establish when qualified immunity would apply in various emergency situations and when it would not. *Ranucci* dictates that these subsections were not intended to be read as "separate and distinct," with subsection (A) applied in isolation to the exclusion of subsection (B).

In terms of the various ways qualified immunity may apply under the statute, Subsection (B) distinguishes between two categories of maternity patients. Physicians providing obstetrical care to patients with no previously established doctor/patient relationship, or those who had no prenatal care, may have qualified immunity. There is no qualified immunity, however, as to existing patients who received prenatal care. It is fair to refer to the latter as favored patients and the former as unfavored. To be sure, these phrases are not quotes from the statute, but the statute distinguishes between two categories of maternity patients, depending on whether there was a prior doctor/patient relationship and prenatal care. Existing patients who had prenatal care are

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Discussions in chambers and at bench conferences are not of record, but in this case, the trial judge had ruled against Appellants on the same subject, on the record, with clarity and emphasis.(R. p. 711, lines 7-24) Before this bench ruling, the trial court had denied appellants' motions for relief on the same point.(R. p. 932, Section B; pp. 938-942; pp. 949-951) To make repeated objections that had already been presented to the trial judge and denied on the record would have been a futility. Further, there was some risk that repeated objections, already ruled upon, may be considered harassment. It was well understood by the judge and counsel that Appellant's non-objection to the verdict form was subject to and in light of the court's prior rulings. For these reasons, the issue is preserved.

This case involves life-changing injuries to a minor. This Court has ruled that procedural rules are subservient to the court's duty to zealously guard the rights of minors. See Ex Parte Roper, 254 S.C. 558, 563, 176 S.E.2d 175, 177. Where an argument is neither clearly preserved nor clearly unpreserved, courts should resolve this dispute in favor of preservation. Johnson v. Roberts, 422 S.C. 406, 412, 812 S.E.2d 207,210 (Ct. App. 2018). Issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys and harming litigants." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282,285 (2012) An appellate court may address an unpreserved issue "for purposes of judicial economy." Bell v. Prog. Direct Ins. Co., 407 S.C. 565, 582 n.9, 757 S.E.2d 399, 407 n. 9 (2014). These authorities also argue in favor of preservation.

favored by preservation of their common law liability rights, and others are disfavored by statutory abrogation of their common law right to hold physicians accountable for obstetrical negligence.

Respondents concede that Section 15-32-230 is a statute in derogation of the common law, to be strictly construed to alter the common law as little as possible. (Initial Brief of Respondents, p. 11) Yet to accept Respondents' argument that Subsection (A) should be applied literally, without regard to the entire statute, would abrogate the common law excessively and unnecessarily.

The statute must be interpreted to incorporate all its provisions, including the preservation of common law liability rights for favored patients receiving obstetrical care in an obstetrical suite. Cf. *Ranucci* at 499-500. Just as it would be absurd to have common law rights vanish upon entry to a location, it would be absurd to confer qualified immunity on a physician under (A) yet simultaneously deny it under (B). Statutes cannot be construed to lead to absurd results.

"[W]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Whiteside v. Cherokee Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (citing Wilder v. South Carolina Hwy Dep't., 228 S.C. 448, 90 S.E. 625 (1955)). By force of logic, the same principle should be applied to subsections of a statute which is in derogation of the common law, where the more specific subsection is less offensive to the common law. Note the legislature's word choice in (A) of "care" generally, and (B)'s specific reference to "obstetrical care." In preserving common law rights of favored patients to recover upon proof of obstetrical negligence, (B) provides specificity that must prevail over, or at least survive (A)'s generality. Respondents located cases from 1825, 1848 and 1927 to try to lessen the significance of the rule that more specific subsections prevail over more general ones. Nonetheless, this rule of statutory

construction withstood the scrutiny of more recent times and retains its persuasive authority. *See Whiteside, supra; Wilder, supra.* The more specific subsection qualifies one more general and informs how they should be construed as a whole.

"Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement, prevails. *Ramsey v. County of McCormick,* 306 S.C. 393, 397, 412 S.E.2d 408, 410 (1991); *Feldman v. S.C. Tax Comm'n,* 203 S.C. 49, 51, 26 S.E.2d 22, 24 (1943). As Subsection (B) follows (A), the former must prevail over the latter. *Ramsey, supra,* demonstrates that the last legislative expression rule is not so rarely applied as Respondents claim. It serves the worthy purpose of giving effect to the legislature's final word on the subject.

Based on sound principles of statutory construction noted above, Section 15-32-230 must be read to preserve common law rights of favored patients receiving obstetrical care in an obstetrical suite. Respondents concede that Appellant was an established patient, and that she had prenatal care. (Initial brief of Respondents, p. 9). If the statute is properly construed to preserve the common law rights of such patients, Section 15-32-230 does not apply to this case as a matter of law.

### B. The Emergency Statute Does Not Apply Because, As a Matter of Law, There Was No Proof That This Infant Was "Not Medically Stable[2]"

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[2] As a preliminary matter, Appellants address Respondents' contention that Appellants did not preserve this ground for appellate review. Respondents concede that Appellants moved for a directed verdict in part because of Respondents' failure of proof of the medical instability component of Section 15-32-230. That is, Appellants moved for directed verdict because the statute, if properly construed, contains proof elements as to which Respondents failed to make a prima facie case. Respondents further argue, however, that Appellants failed to preserve the issue for review by failure to object to the jury form. Appellants assert that preservation was sufficient, based on the same authorities set forth in footnote 1.

Discussions in chambers and at bench conferences are not of record, but in this case, the trial judge had ruled against Appellants on the same subject, on the record, with vigor. (R. p. 806, line 21-p. 809, line 14)

Subsection (A) sets forth three distinct requirements that the defendant physician must prove if he seeks entitlement to qualified immunity under the statute. Each word and phrase must contribute independent meaning and purpose to avoid being superfluous. The criteria by which an emergency qualifies as a "genuine emergency" must therefore be distinct from those necessary to prove that "the patient is not medically stable;" and all these criteria must be distinct from those used to prove an "immediate threat" of death or serious bodily injury. Statutory construction which permits the same proof of one element to serve as proof of another is defective.

Proof that "the patient is not medically stable" requires proof of three components. First, focus must be on "*the* patient," not patients generally, not infants with their own shoulder dystocia complications, nor infants with cord compression, nor infants involved in labor and delivery generally, nor any other medical complication or emergency. Focus must not be on other patients who have suffered medical instability. The only patient that matters is the minor Appellant, "*the* patient."

Second, the word "is" signifies the present. Proof of medical instability *at the time of the genuine emergency* is required. Proof of a risk, uncertainty, unstable time, or unstable condition is not proof that *the patient* is medically unstable, and certainly not in the present. Nor does postulation of a fetus's inability to breathe before birth prove medical instability in the present. No fetus breathes before birth. If a non-breathing fetus is considered to be medically unstable for this reason, then all fetuses are medically unstable. That is an absurd result which cannot withstand the scrutiny of proper statutory construction.

Third, proof of medical instability must be proof of some instability above and beyond that which is present in any genuine medical emergency, or the phrase would be superfluous. At a very minimum there should be objective criteria to establish more medical instability than would be

expected in a typical genuine medical emergency. Yet every objective measure demonstrates medical stability, not a lack thereof. Fetal heart monitor strips were reassuring and demonstrated that the patient was in excellent medical condition before the shoulder dystocia occurred. Apgar scores and cord blood gases revealed a baby is excellent health when he was born 60 seconds later. These objective criteria prove that *the patient* was medically stable throughout. Speculation that a fetus may risk a lack of oxygen during a shoulder dystocia does not mean that *the patient* was medically unstable in the moment, particularly where postnatal tests demonstrate no oxygen loss.

Respondents rely on the testimony of three experts as proof of medical instability, but all missed the mark. Dr. Robinson cleverly told the jury that "You cannot be stable and not be able to breathe." (R. p. 705, lines 1-2) Many fetuses would disagree if they could talk, but they cannot talk or breathe. This expert admitted that the minor Appellant was born in excellent health, without any hypoxic adverse outcome. (R. pp. 642-643) He persisted in his assertion that excellent health before and after the sixty second dystocia had no bearing on whether the fetus was medically unstable during these sixty seconds. Whatever else one may say about Dr. Robinson's testimony, he provided no evidence whatsoever that *this patient*, in the moment, was medically unstable in the statutory sense. Speculation that a sixty second dystocia may cause harm does not prove medical instability in the statutory sense, even before recognizing that the speculation was proven wrong by the postnatal tests. If such speculation was competent proof, experts like Dr. Robinson could prove all fetuses being delivered to be medically unstable. The statute cannot be construed so broadly.

Respondents also proffer testimony of Drs. Chauhan and Duchowny to prove the patient was medically unstable. The testimony does no such thing. Dr. Chauhan spoke of an unstable *condition.* (R. p. 757, line 18-p. 758, line 9; p. 758, line 20-p. 759, line 2) The statute requires proof that "the patient is not medically stable." All genuine medical emergencies involve unstable conditions or

they would not be emergencies. Patients are not conditions. The statute focuses on stability of patients, not conditions.

To similar effect is Dr. Duchowny's testimony. He spoke of shoulder dystocia as a medically unstable time. (R. p. 914, part 23, lines 20-23; p. 911, part 8, lines 2-4; p. 913, part 22, lines 25-5) The statute's concern is focused on patients, not times.

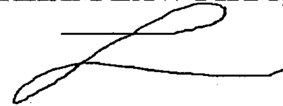
To be clear, this Appeal does not address a "classic battle of the experts." At issue are questions of law; i.e., the complete failure of Respondents to present statutorily meaningful evidence that *the patient,* at the moment, was medically unstable. Appellants are entitled to reversal because Respondents presented no *prima facie* evidence that the patient [is] not medically stable during the shoulder dystocia emergency.

## CONCLUSION

For the reasons stated, the judgment should be reversed, and the case remanded for a new trial with the statutory defense under S.C. Code Section *15-32-230* being precluded.

Respectfully submitted,

**GRAHAM LAW FIRM, P.A.**



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GEORGETOWN COUNTY
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Phillippa Smalling, individually and as Next Friend for Jahmerican M., a minor — Appellant,

v.

Lisa R. Maselli, M.D., both individually and as agent/employee of Carolina OB-GYN, — Respondents.

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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