STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Georgetown County
Court of Common Pleas

Larry Hyman, Circuit Court Judge

C/A No. 2016-CP-22-00863
Ct. App. Appellate Case No. 2019-001304
S.Ct. Appellate Case No. 2023-000708

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

Petitioner,

v.

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

Respondent.

RETURN TO PETITON FOR A WRIT OF CERTIORARI

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INTRODUCTION

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (b), SCACR. Rule 242 identifies appropriate considerations for the Supreme Court as to whether there are special and important reason sufficient to exercise its discretion to grant a writ of certiorari to review a decision of the Court of Appeals:

> The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> **(1)** Where there are novel questions of law.
>
> **(2)** Where there is a dissent in the decision of the Court of Appeals.
>
> **(3)** Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> **(4)** Where substantial constitutional issues are directly involved.
>
> **(5)** Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of those considerations are present in this appeal. The appeal does not present any novel questions of law. There is no dissent in the decision of the Court of Appeals. The decision of the Court of Appeals is not in conflict with a prior decision of the Supreme Court. There are no federal questions or constitutional issues.

This is a medical malpractice action in regards to the medical care the Defendant/Obstetrician rendered to her Patient/Mother when an obstetric emergency, known as shoulder dystocia, presented during delivery of her infant. The Defendant/Obstetrician denied all allegations of negligence and asserted the statutory emergency medical and obstetrical care exception which limits physician liability as provided in S.C. Code Ann. § 15-32-230:

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.

At trial, the parties presented testimony that created a classic battle of the experts which presented a sufficient evidentiary basis to submit the case to the jury with proper instructions on the applicable emergency obstetrical care exception, and special interrogatories to answer the specific elements under (C) necessary to establish the applicable exception under (A). The jury found that the Defendant had proven the elements of the exception, namely that the shoulder dystocia during delivery constituted a genuine medical emergency, the infant was not medically stable, and there was an immediate threat of death or serious bodily injury to the infant. The jury further found that the Plaintiff did not prove that the Defendant was grossly negligent.

The Plaintiff/Mother appealed from the jury verdict for the Defendant/Obstetrician, challenging the Trial Court's denial of a motion for directed verdict and submission of the statutory obstetrical care exception to the jury. The Court of Appeals has held that the Trial Court properly

denied the Plaintiff's motion for a directed verdict and correctly sent the § 15-32-230(A) exception to the jury. Smalling v. Maselli, 438 S.C. 588, 592, 884 S.E.2d 510, 512 (Ct. App. 2022).

The Plaintiff/Mother now petitions this Court to review the Court of Appeals' decision on the construction and application of the statutory exception and the sufficiency of the evidence on the question of whether the Patient was "not medically stable." The Defendant/Obstetrician respectfully submits that the Plaintiff/Mother's petition does not present any special or important grounds for reviewing the decision of the Court of Appeals and the petition should be denied.

STATEMENT OF THE CASE

This is a medical malpractice action arising out of the labor and delivery of a baby boy, Jahmerican M. (hereinafter referred to as Infant) on April 27, 2013. His mother, Phillippa Smalling (hereinafter referred to as Patient or Mother), brought this action on behalf of her minor child, seeking damages for a permanent brachial plexus nerve injury that the Infant suffered during delivery. She originally filed a summons and complaint on October 12, 2016, alleging that her Obstetrician, Dr. Lisa R. Maselli individually and on behalf of her practice (hereinafter referred to as Dr. Maselli or the Obstetrician) failed to properly manage and resolve a presentation of shoulder dystocia which occurred during the delivery. Thereafter, an amended complaint was filed to correctly identify the physician practice group. [ROA 31; Amended Complaint, filed March 23, 2017.]

Dr. Maselli filed an answer to the amended complaint, by which the Defendant denies the allegations of negligence and assert various defenses, including the limitation on liability found in the emergency medical and obstetrical care exception found in S.C. Code Ann. §15-32-230. [ROA 36; Answer to Amended Complaint, filed April 17, 2017.]

The case came to trial before the Honorable Larry Hyman, and a jury in the Georgetown County Court of Common Pleas on April 3-5, 2019. The Defendant made a motion for a directed verdict on liability at the close of the Plaintiff's case which was denied. [ROA 434-35; Tr. 425-26.] The Trial Court did, however, grant the Defendant's motion for a directed verdict on punitive damages. [ROA 435, 441; Tr. 426, 432.] At the close of the Defendant's case, the Defendant renewed her motion for directed verdict. [ROA 810; Tr. 801.] The Plaintiff also moved for partial directed verdict on the emergency medical and obstetrical care statute on two grounds: (1) the limitation of liability in §15-32-230(A) did not apply because of undisputed evidence that the plaintiff was an established patient who had received prenatal care, and (2) there was no evidence to meet the required element of medical instability under §15-32-230(C). [ROA 806-07; Tr. 797:21 – 798:7. ROA 809-10; Tr. 800:19 – 801:5.] The Trial Court denied all the motions for directed verdict. [ROA 809-10; Tr. 800:13-14, 801:7-11.]

The Trial Court charged the jury on the emergency medical and obstetrical care exception of §15-32-230(A), [ROA 867-68; Tr. 858:11-859:3], and presented a verdict form to the jury with special interrogatories regarding the elements of subsection (C). [ROA 876; Tr. 867.] The jury returned a verdict for Dr. Maselli, answering the questions as to the emergency medical and obstetrical care exception, as follows:

3. Did the Defendants prove by a preponderance of the evidence that the events of [Infant's] delivery constitutes a genuine medical emergency? YES

4. Did the Defendants prove by a preponderance of the evidence that [Infant] was not medically stable at the time of the events in question? YES

5. Did the Defendants prove by a preponderance of the evidence that there was an immediate threat of death or serious bodily injury to [Infant] at the time of the events in question? YES

6. Did the Plaintiff prove by a preponderance of the evidence that the Defendants were grossly negligent? NO

[ROA 4; Verdict. See also ROA 891; Tr. 882:8-23.]

After the jury rendered its verdict, the Plaintiff renewed her motion for a directed verdict and moved for a new trial absolute without stating any grounds or requesting any time to submit written motions. [ROA 895; Tr. 886:17-18.] The Trial Court denied the Plaintiff's motions from the bench. [ROA 895; Tr. 886:19-24.] The Plaintiff filed a Rule 59(e) motion for a new trial on April 15, 2019, and also filed an amended Rule 59(e) motion on April 16, 2019. [ROA 952, 959; Motion, Amended motion.] The Trial Court issued its order on June 27, 2019, denying both posttrial motions. [ROA 1; Order.] The Plaintiff filed a Notice of Appeal in the Circuit Court on July 1, 2019. [ROA 961; NOA.] The Plaintiff also filed a second Notice of Appeal in the Circuit Court on August 5, 2019. [ROA 958; NOA.]

The Court of Appeals issued its opinion affirming on November 2, 2022. Smalling v. Maselli, 438 S.C. 588, 592, 884 S.E.2d 510, 512 (Ct. App. 2022). The Plaintiff/Mother duly filed a petition for rehearing which was denied by Order of March 30, 2023.

STATEMENT OF THE FACTS

Phillippa Smalling became an obstetrical patient of Dr. Maselli's Group in 2012; her prenatal care proceeded without problems; and she was admitted to Georgetown Memorial Hospital for labor and delivery on Saturday, April 27, 2013, at 2:00 am. [ROA 473-74, 480; Tr. 64-65, 471.] By 7:59 am, when the Patient had reached 10 centimeters dilation and zero station, she was ready for delivery and she began pushing. [ROA 487, 492; Tr. 478, 483.] At 8:14 am, the Infant's head delivered and the nuchal cord was wrapped around it, but Dr. Maselli was able to reduce it within seconds without any trouble. [ROA 488, 500; Tr. 479, 491.] However, Dr. Maselli then recognized that they were facing a shoulder dystocia emergency. [ROA 493-94; Tr. 484:25-485:1.] As described by the Plaintiff's obstetrical expert "with a shoulder dystocia, the head comes

out and the baby gets stuck. The shoulders, which is the next part to come out after the head, doesn't come out; it's stuck by the boney structures of the pelvis." [ROA 171-72; Tr. 162:25 – 163:3.] At the time they entered stage two for delivery of the Infant, Dr. Maselli was being assisted by one obstetrical nurse.

Upon realizing that the shoulder was stuck, Dr. Maselli immediately called for help from an additional nurse and they took the appropriate measures to address this medical emergency and delivered the Infant within one minute. [ROA 494-95; Tr.485-86.] There was only 60 seconds from the delivery of the head to the delivery of the body. Postdelivery testing (APGAR scores and cord blood gases) showed that, with the relatively quick delivery, the Infant did not suffer any hypoxic injury from oxygen deprivation. [ROA 199, 898- 99, 902; Tr. 190, Def. Ex. 5, 8.] However, the Infant did have decreased movement of the right arm from a brachial plexus injury. [ROA 190, 899, 902; Tr. 181, Def. Ex. 5, 8.]

The application of the emergency medical and obstetric care statute, §15-32-230(A) & (C), involves the elements of whether the patients (Mother and/or Infant) were not medically stable and in immediate threat of death or serious injury during a genuine emergency situation. All the obstetrical experts who testified at trial agreed that shoulder dystocia is an unpredictable and unpreventable risk to any pregnancy. However, there were divergent opinions between the Plaintiff's and Defense experts as to each element. The Defense obstetrical experts testified that in the overwhelming majority of cases, shoulder dystocia cannot be predicted or prevented, and they also testified more specifically that this Patient's prenatal care was normal, and there was nothing in her chart to suggest that her shoulder dystocia would have been predictable or preventable. [ROA 637, 732; Tr. 628:11-18 (Dr. Robinson), Tr. 723:7-16 (Dr. Chauhan.] They opined that Dr. Maselli was facing a genuine emergency when the shoulder dystocia occurred during this Patient's

delivery. [ROA 638, 645, 752, 759; Tr. 629, 636, 743, 750.] The Plaintiff's obstetrical expert testified that in a general sense, shoulder dystocia is an unpredictable, acute, life threatening emergency, and that there were no red flags to predict or prevent shoulder dystocia in this case. [ROA 248, 240-41; Tr. 239:3-4, Tr. 231-32 (Dr. Pliskow).] However, Plaintiff's expert refused to admit that this case presented a genuine emergency. [ROA 246-48; Tr. 237-39.] Additional detail about these opinions will be discussed below regarding the disputed evidence that justified denying the Plaintiff's directed verdict motion.

All of the medical expert opinion evidence establishes that time was of the essence in delivering the Infant because it was only a matter of minutes before the Infant would have suffered brain damage or death. However, the Plaintiff's experts insisted that the Infant and Mother were medically stable and there was no risk of injury during the 60 seconds that it took Dr. Maselli to resolve the emergency and deliver the Infant. [ROA 124, 189-91; Tr. 115, 180-82.] In contrast, Defense experts opined that the Infant was not medically stable and that the risk was real and immediate even during those first 60 seconds because it was unknown whether the shoulder dystocia could be resolved and how long it would take. [ROA 640-42, 753, 757; Tr. 631-33; Tr. 744, 748.] The jury found that the Infant was not medically stable.

ARGUMENT

I. IDENTIFYING AND/OR CLARIFYING THE ISSUES PRESERVED FOR REVIEW

As a threshold matter, it is important to identify the questions available for review. On appeal, the Plaintiff/Mother made a statement of two issues on appeal:

> 1. Whether the trial court erred by not determining S.C. Code Ann.§ 15-32-230 failed as a matter of law.
>
> 2. Whether S.C. Code Section 15-32-230(a) is ambiguous and must be construed in accordance with standard principles of statutory construction.

Now in her Petition to this Court, she is attempting to present three issues for review:

> 1. Did the Could of Appeals Err in Not Strictly Construing the Statute, as it is Ambiguous, with Unclear Legislative Intent, and in Derogation of the Common Law?
>
> 2. Did the Court of Appeals Err in Not Properly Construing the Statute and in Not Ruling that "the Patient" Was "Medically Stable," as a Matter of Law?
>
> 3. Did the Court of Appeals Err in Not Ruling There Was Prejudicial Error in the Trial Judge's Giving a Hindsight Charge Without a Qualification that the Infant's Post-Birth Condition May Properly Be Considered on the Medical Stability Issue?

Rule 208(B)(1)(b), SCACR, provides in part that: "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." *See also* Buckson v. State, 423 S.C. 313, 321, 815 S.E.2d 436, 441 (2018) ("our law provides that issues must be raised in the Statement of Issues on Appeal"). Rule 242(d)(2), SCACR, also provides, in pertinent part, that: "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."

The Plaintiff/Mother did not set forth any issue about the hindsight charge in her statement of the issues on appeal nor did she present any argument in the body of her brief to challenge the hindsight charge. Accordingly, there is no issue about the hindsight charge preserved for review by this Court.

II. THE COURT OF APPEALS CORRECTLY CONSTRUED §15-32-230 AND PROPERLY CHARGED THE JURY ON SUBSECTIONS (A) AND (C).

The statute in question, S.C. Code § 15-32-230, was enacted as part of the South Carolina Noneconomic Damage Awards Act of 2005. As set forth above, §15-32-230 contains three subsections. Subsection (A) provides that a physician can be held liable only on proof of gross negligence when a medical malpractice claim arises "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." Subsection (B) provides

that a physician can be held liable only on proof of gross negligence in a more specific scenario when a medical malpractice claim involves emergency obstetrical care "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." Subsection (C) sets forth the elements that must be proven to establish the limitation on liability, as will be discussed separately below.

The Plaintiff/Mother argued in the Court of Appeals that the Legislature intended for sections (A) and (B) to apply together, and that the Obstetrician was not entitled to assert the emergency exception under (A) because she was an established patient at the time the emergency arose during delivery. Relying on the Court's prior decision in Flowers v. Giep, 436 S.C. 281, 285–86, 871 S.E.2d 607 (Ct. App. 2021), cert. denied (Sept. 7, 2022), the Court discussed the fact that subsections (A) and (B) provide "a defense against simple negligence in two separate and distinct scenarios." Thus, while subsection (B) was inapplicable given the fact that the Plaintiff/Mother was an established obstetrical patient at the time of the delivery, subsection (A) was applicable, and the Trial Court correctly charged the jury on the limitation of liability provided in subsection (A).

In her Petition, the Plaintiff/Mother appears to have shifted the focus of her statutory construction argument away from this point about subsection (B) and now states that: "The phrase, 'the patient is not medical stable' is the focus" of her petition. As referenced above, subsection (C) provides, in pertinent part, that:

> (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.

Plaintiff/Mother appears to be arguing that §15-32-230 should be construed to distinguish between emergencies with stable patients and emergencies with patients that are "not medically stable." However, it is clear that by charging the jury on the language of the statute,[1] the jury was properly instructed as to the elements that the Defendant/Obstetrician was required to prove and the special interrogatories also directed the jury's attention to each element, namely: (1) the existence of a "genuine medical emergency;" (2) whether the patient was "not medically stable;" and (3) whether there was "an immediate threat of death or serious bodily injury" to the patient.

As a point of issue preservation, it should be noted that the Plaintiff did not object to the instruction on the limitation of liability under subsection (A). Rather, the Plaintiff only objected "to the decision not to charge section B of the medical emergency statute." [ROA 711; Tr. 702:8-9. ROA 712; Tr. 703:1-7.] Further, the Plaintiff did not make any objection to the verdict form. [ROA 713; Tr. 704:18.] On appeal, the Plaintiff complained that the statute does not define "genuine emergency," "the patient is not medically stable" or "in immediate threat." [Appellant's brief, p. 16-18.] However, the Plaintiff did not raise any issue as to the lack of statutory definitions in her directed verdict motion, and she never asked the Trial Court to define those terms in the jury charge. Thus, she failed to preserve such issues for appeal. Byrd v. McLeod Physician Associates II, 427 S.C. 407, 831 S.E.2d 152, 157 (Ct. App. 2019) (argument not preserved for review where plaintiff did not request any charge to provide a definition of "medical stability.").

[1] [ROA 867-68; Tr. 858:11 – 859:3.]

III. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL COURT PROPERLY DENIED THE PLAINTIFF'S DIRECTED VERDICT MOTION AND SUBMITTED THE EMERGENCY MEDICAL AND OBSTETRICAL CARE EXCEPTION IN SUBSECTION (A) TO THE JURY WHERE THE EVIDENCE CREATED A QUESTION OF FACT FOR THE JURY AS TO WHETHER THE INFANT WAS "NOT MEDICALLY STABLE."

At trial, the Plaintiff moved for a directed verdict as to the element of medical instability, which the Trial Court denied and submitted that question to the jury with a special interrogatory. [ROA 807; ROA 809-10.] In answering the special interrogatory, the jury made a specific finding that the Infant was not medically stable. The Court of Appeals discussed the conflicting expert testimony and concluded that the opinions provided a sufficient basis for the jury to determine the elements of the exception were met.

Plaintiff/Mother argues in her petition that the Court of Appeals erred in not ruling that the patient was medically stable as a matter of law. However, under the applicable standard of review, the jury finding cannot be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Byrd, 831 S.E.2d at 154. Likewise, on review of a trial court's denial of a directed verdict/JNOV motion, the question is whether the evidence yields more than one reasonable inference. *Id*. The Court of Appeals properly followed those standards of review, and there is no special or important reason to grant a writ of certiorari to review that decision on the sufficiency of the evidence.

Again, as a threshold preservation point, it should be noted that the Plaintiff did not make any objection to the special verdict form that asked the jury to consider all the elements of subsection (C) – including whether the Infant was "not medically stable." [ROA 713; Tr. 704:18.] Thus, the Plaintiff waived any argument that she was entitled to a directed verdict on the obstetrical emergency exception. Byrd v. McLeod, 831 S.E.2d at 157; Stephens v. CSX Transp., Inc., 415

S.C. 182, 781 S.E.2d 534, 541 (2015). In any event, the evidence as summarized below created a question of fact for the jury as to whether the Infant was "not medically stable."

Plaintiff's obstetrical expert, Dr. Pliskow, testified that the Infant was medically stable based on the fetal monitoring strips prior to the onset of the shoulder dystocia and the post-delivery APGAR scores and blood gas studies. [ROA 189-90; Tr. 180:22-181:9.] He reasoned that the baby must have been stable during the 60 seconds that the head was stuck since it was stable before and after: "[T]he baby was stable coming in and stable coming out, would have been stable for at that one minute period of time from a oxygen, acid based standpoint." [ROA 191; Tr. 182:12-14.]

Defense obstetrical expert, Dr. Robinson testified that the Infant was medically unstable at the time the shoulder dystocia presented because he could not breathe with the head stuck. [ROA 645; Tr. 636:19-22.] He testified that the cord becomes compressed, oxygen flow is cutoff, "times ticking", and every second counts. [ROA 635, 639, 702; Tr. 626, 630, 693:7.] As he stated very simply: "You cannot be stable and not be able to breathe." [ROA 703; Tr. 694:1-2.] Dr. Robinson explained that the fact that fetal monitoring strips showed the Infant had a good heartrate going into the shoulder dystocia is not a marker of whether he was stable from an oxygen point when the head became stuck. [ROA 643; Tr. 634.] He further explained that the positive postdelivery scores/tests show that Dr. Maselli did a good job in managing the delivery to prevent any hypoxic adverse outcome, but those tests do not have any bearing on whether the Infant was stable during that critical of time while the head was stuck. [ROA 642-43; Tr. 633-34.]

Dr. Chauhan, another defense expert, also opined that a baby trapped in shoulder dystocia is in an unstable condition: "It is very unstable because we don't know what will happen within the next 45 seconds or a minute or the next minute." [ROA 757; Tr. 748:18-20.] His opinion further concurred with the view that the shoulder dystocia presented an unstable condition irrespective of

the strong fetal heartbeat, and that the good postdelivery scores/tests were, in fact, "a testament of their excellent clinical work in managing obstetrics." [ROA 758-59; Tr. 749-50:8-9.]

Defendant also presented expert testimony from Dr. Duchowny, a pediatric neurologist, regarding the medical stability of the infant. He opined that when the baby is hung up in the birth canal with a shoulder dystocia it is a medically unstable time. [ROA 914; Def. Ex. 31 - Duchowny Dep. 39:20-23.]

In Plaintiff's opening statement, her counsel stated that it was the jury's "job to think about and determine about whether that baby was stable during that one minute." [ROA 68; Tr. 59:10-11.] The Trial Court properly denied the Plaintiff's motion for a directed verdict and allowed the jury to make that determination of medical stability on based on the conflicting expert opinions they heard. The Court of Appeals properly affirmed the Trial Court's decision, and there is no special or important reason for this Court to grant a writ of certiorari to review those decisions on the sufficiency of the evidence.

CONCLUSION

WHEREFORE, based on the foregoing in addition to the arguments presented in her previously submitted Final Brief of Respondent, the Respondent Lisa R. Maselli, M.D. respectfully submits that the Court of Appeals properly affirmed the judgment entered on the jury verdict in her favor, and there are no special or important reasons to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ James B. Hood

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