

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Larry Hyman, Circuit Court Judge

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,

Respondents.

REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner hereby replies to Respondents' Return to her Petition for Writ of Certiorari.

INTRODUCTION

The Petition for Writ of *Certiorari* addresses the extent to which S.C. Code Ann. § 15-32-230 (the "Statute") made material changes in the common law regarding liability for medical negligence. The Petition should be granted for three reasons.

First, the case presents a novel issue, i.e., the proper construction of the phrase in Section C, "[t]he limitation on physician liability ... ***shall only apply*** if the patient is not medically stable...." (Emphasis added.) Respondents argue Petitioner has raised no novel issue, but this is incorrect. Neither this Court nor the Court of Appeals has construed this phrase nor determined the criteria which should be used to distinguish a patient who is "medically stable" from one who is not. In their decision in this case, the Court of Appeals purported to be construing the Statute, but a careful reading shows that it did not in fact do so.

The plain language of the phrase explains that the statutory defense (1) ***shall only apply*** to claims of emergency patients who are "not medically stable" if all other statutory qualifications are met; but (2) does not apply when the patient is "medically stable." As neither S.C. appellate court has interpreted this legislative mandate to preserve common law rights for emergency patients who are "medically stable," Petitioner presents a novel issue which warrants issuance of a Writ of *Certiorari*.

Second, it is important from a public policy viewpoint for this novel issue to be authoritatively resolved. More than a million dollars is at stake in this case. Perhaps hundreds of millions of dollars or more are at stake in similar cases, depending on which emergency patients may recover upon proof of ordinary negligence, because they are medically stable, and which must prove gross negligence.

Both Bench and Bar would benefit from this Court's authoritative construction of the Statute. Uncertainty wastes judicial resources. By undermining efficient case evaluation by lawyers, it affects judges' medical malpractice trial caseloads. The uncertainty makes case development and trial presentation more complicated for lawyers and trial rulings more challenging for judges. In the interim, the lack of authoritative construction encourages more appeals. The public importance of resolving the novel issue supports granting the Writ.

Third, respectfully, the Court of Appeals used the wrong standard of review in adjudicating the appeal. Statutory construction is a legal issue which calls for *de novo* scrutiny, as noted in all appellate briefings by Petitioner. Conversely, Respondents argued before the Court of Appeals that the appeal was governed by a sufficiency of the evidence standard. See Final Brief of Respondents, p. 8. The Court of Appeals stated that it was performing statutory construction, but it never specifically addressed the meaning of "the patient is not medically stable" in the statutory context.

Respondents persuaded the Court of Appeals to focus erroneously on "sufficiency of the evidence." Perhaps as a result, the Court of Appeals did not rule on the issue at the heart of this appeal. The Court of Appeals acknowledged that statutory construction is a legal issue, but its opinion fell short of statutory construction.

Without construction of the phrase, "the patient is not medically stable," it is impossible to ascertain what evidence is necessary to prove medical instability. Yet, without construing the phrase, the Court of Appeals ruled that Respondents presented sufficient evidence of medical instability to create a jury question. Respectfully, this was error, which may have resulted from using the wrong standard of review. This error also justifies issuance of the Writ.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals Err in Not Strictly Construing the Statute’s Phrase, “the Patient is Not Medically Stable” as the Statute is Ambiguous, with Unclear Legislative Intent, and in Derogation of the Common Law?**
- II. Did the Court of Appeals Err in Not Ruling that Respondents’ Evidence was Insufficient, as a Matter of Law, to Create a Question of Fact for the Jury Whether “the Patient” was “Not Medically Stable?”**
- III. 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?**

STANDARD OF REVIEW

This Petition concerns statutory construction. Statutory interpretation is a question of law. City of Newberry v. Newberry Elec. Co-op., Inc., 387 S.C. 254, 256, 692 S.E.2d 510, 512 (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. 397 S.C. 532, 535, 725 S. E.2d 693, 695 (2012).

ARGUMENT

- I. The Court of Appeals Erred in Not Strictly Construing the Statute’s Phrase, the Patient is Not Medically Stable,” as the Statute is Ambiguous, with Unclear Legislative Intent, and in Derogation of the Common Law.**

The Statute plainly distinguishes patients in an emergency who are medically stable from those who are not. However, the Statute does not define "the patient is not medically stable" nor explain how to distinguish emergency patients who are stable from those who are not.

Petitioner requests this Court to determine the criteria upon which the distinction should be made. This Court should depart as little as possible from the common law in distinguishing medically stable emergency patients from those who are not. This is because the Statute is ambiguous, with uncertain legislative intent, and in derogation of common law. Relevant

dictionary definitions¹ reveal the plain, common usage of "stable." Medical stability exists as a matter of law when there is no genuine dispute that the patient resisted, withstood, and/or recovered quickly from such stress.

In this case, the uncontroverted, objective evidence reveals (1) a very healthy baby when shoulder dystocia was diagnosed; and (2) a baby just as healthy upon delivery sixty seconds later.

In using phrases like unstable “condition,” unstable “time,” and “couldn’t survive,” and discussing risks of harm, Respondents’ experts convinced these courts to use these concepts as a substitute for “the patient is not medically stable.” These concepts are inherent to the definition of “emergency.” If this Court allowed these concepts to satisfy the *medical instability* requirement, the phrase, “the patient is not medically stable,” would be superfluous, devoid of any meaning. It would eviscerate the Statute’s mandatory distinction between medically stable and unstable emergency patients. All emergency patients face unstable conditions, unstable times, and risks of harm. To deem these sufficient to create a factual issue for the jury would eliminate *medical instability* as an independent qualifier, contrary to legislative intent. If the General Assembly intended these to satisfy the medical instability requirement, they could have easily said so.

II. The Court of Appeals Erred in Not Ruling that Respondents’ Evidence was Insufficient, as a Matter of Law, to Create a Question of Fact for the Jury Whether “the Patient” was “Not Medically Stable”

A. Respondents’ Testimony Created No Jury Question of Medical Instability

It is uncontroverted that Jahmerican M. (“J.M.”) was in very good health before and after the sixty-second shoulder dystocia. All parties and experts agreed. *See* p. 13, of Amended Petition

¹ In the medical context, “stable” has been defined as “steady; not varying; resistant to change.” See, <https://www.medilexicon.com/dictionary/84246>. Merriam-Webster on-line does not provide a useful definition of “stable,” but defines “stability,” in pertinent part as: “the strength to stand or endure;” “the property of a body that causes it, when disturbed from a condition of equilibrium or steady motion to develop forces or moments that restore the original condition.” See, <https://www.merriam-webster.com>.

for Writ of *Certiorari*. Respondents' experts could not refute these facts because they were proven by unassailable, objective evidence from fetal heart monitor strips, Apgar scores and cord blood gases. All these test results were favorable and reassuring.

Respondents argue testimony for and against medical stability was presented at trial, thus providing support to uphold whatever decision the jury made on the issue. This is a straw man argument. As much as Respondents may wish this appeal turned on a "sufficiency of evidence" determination, rather than statutory construction, it does not. The Statute and the phrase, "the patient is not medically stable," must first be construed before there can be a meaningful evaluation of the sufficiency of Respondents' evidence.

In their Return Respondents quoted Dr. Chauhan's testimony about shoulder dystocia being an *unstable condition* and Dr. Duchowny's testimony about *unstable time*. They could point to no testimony from their experts to the effect that "*the patient* is not medically stable," because there was none. Their testimony on the subject amounted to no more than that shoulder dystocia is an unstable condition and time for all babies who encounter the birth complication, because of the risk of possible brain damage or death. This testimony has no relevance to strict construction of "*the patient* is not medically stable." They testified at length about all the possible risks to a baby from the shoulder dystocia condition, without addressing whether *this shoulder dystocia* caused *this baby* to be medically unstable.

Respondents' third expert, Dr. Robinson, gave alarmist testimony that a baby who encounters shoulder dystocia can be viewed as medically unstable because he can't breathe, and if he remains stuck in his mother's pelvis "he couldn't survive on his own."² (ROA 645, lines 19-23).

² Presumably this testimony refers to potential effects of a reduced delivery of oxygenated blood through a compressed umbilical cord. This testimony addresses the risk of harm qualifier and not patient instability. Its assumed facts may have theoretical relevance to another baby's clinical situation but no resemblance to J.M.'s. It ignores the fact that post-delivery testing proved J.M.'s medical stability as a matter of law.

Dr. Robinson's hypothetical bears no connection to J.M. or the actual facts of this case. His bizarre testimony is irrelevant to strict construction of "not medically stable."

Wordplay of Respondents and their experts avails them nothing. A risk of any degree of harm to a particular baby does not address the statutory qualifier that *the patient* must not be medically stable. Nor do fears, concerns or uncertainty. Respondents have attempted to equate these with medical instability. If their argument were accepted, it would maximize departure from the common law, which of course defies long-established principles of statutory construction.

B. There is No Merit to the Non-Substantive Issues Argued by Respondents

Respondents ascribe significance to statements made by Petitioner's counsel in his opening statement. The context of the sentence they quoted was his addressing potential testimony Respondents may present during trial, including their contention that J.M. was medically unstable. (ROA 67, line 13, through 68, line 11). Considering pre-trial proceedings, counsel expected the trial judge would allow the statutory defense to go forward. Counsel's language in opening, quoted in the Return, has no relevance to the substantive issues in this appeal.

Respondents argue that Petitioner failed to preserve some of her arguments. For example, they argue Petitioner failed to request the trial judge to charge definitions of "not medically stable," and similar statutory limitations. This argument misses the point.

The lack of definitions in the statute is problematic only in that it contributes to the Statute's ambiguity about the specific meaning and application of its qualifiers and restrictions. Once the ambiguities are resolved by using customary principles of statutory construction, the inapplicability of the Statute *in this case* is clear because the baby, J.M., was medically stable as a matter of law. Petitioner's objections to the statutory defense should have been sustained, and her

motion for directed verdict should have been granted. The statutory defense should have never been submitted for jury consideration, with or without definitions provided.

It is unclear why Respondents attribute significance to Petitioner's decision not to pursue an argument about Section B of the Statute after Flowers v Giep, 436 S.C. 281, 285-86, 871 S.E.2d 607 (Ct. App. 2021, cert. denied (Sept. 7, 2022)) was decided. Considering the outcome in Flowers, Petitioner chose not to pursue any further a similar issue she had previously briefed. Yet the Court of Appeals focused more on that issue than on the more significant issue, i.e. statutory construction of not medically stable.

Respondents' other preservation arguments are technical. The merits of this appeal are too important to be dismissed on technical preservation grounds, and there are good reasons for this Court to reach the merits.³

³ Respondents concede that Petitioners moved for a directed verdict in part based on inapplicability of Section 15-32-230. They further argue, however, that Petitioners 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). Moreover, 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).

Discussions in chambers and at bench conferences are not of record, but in this case, the trial judge had ruled against Petitioner 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 petitioners' 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. Repeated objections, on matters already ruled upon, may have been considered harassment. It was well understood by the judge and counsel that Petitioners' non-objection to the entirety of the verdict form was subject to and in light of the court's prior rulings. For these reasons, Petitioner requests the Court to deem the issue preserved.

This case involves life-changing injuries to a minor. This Court has held 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.

III. The Court of Appeals Erred 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.

Respondents had the burden of proving medical instability. It is irrefutable that J.M. was in a stable, healthy condition when his physician recognized his shoulder dystocia. His continued medical stability during the sixty second dystocia was not *confirmed* until he was delivered. There are no medical tests or other evidence to have verified his medical stability through these sixty seconds. Nor were there any test results or other evidence to suggest in any way that he had become unstable. Facts known after delivery prove he was medically stable during this short interval. Despite this reality, the trial judge gave an unqualified, unlimited hindsight charge, which instructed the jury not to consider any facts from the post-birth period in determining whether the physician made a "reasonable decision."⁴

The charge was erroneous and prejudicial for two reasons: (1) it instructed the jury to consider whether the physician made a "reasonable decision," instead of whether she complied with the standard of care; and (2) this led the jury to ignore facts which proved there had been no medical instability.

It makes good sense to require a hindsight charge in one context, i.e., in determining professional negligence. Facts which occur post-event are irrelevant to whether a professional breached a standard of care. This is of course because alleged professional negligence must be evaluated based on circumstances that existed at the time of the alleged negligence.

⁴ The trial judge gave the following hindsight charge to the jury: "In considering whether the defendant made a reasonable decision, you must consider the decision in relation to the facts as they existed at the time and not in the light of what hindsight may reveal." (R. p. 869-870). This charge was given over Petitioner's objection. (R. p. 712-713).

In other contexts post-event facts are critically important, even necessary. For example, most tort damages are incurred post-tort. Damages are an element of a tort cause of action and must be proven. Precluding a medical malpractice jury from considering post-birth damages evidence would be absurd. In this case post-birth facts are equally important because they prove medical stability as a matter of law.

To be clear, the trial judge should have granted Petitioner's motion for partial summary judgment on the statutory defense and made no charge on the statutory defense. Having denied the motion, he charged the jury on the Statute. In doing so he committed additional prejudicial error, compounding his more significant prior prejudicial error of allowing the jury to consider the statutory defense at all.

The erroneous jury charge provides helpful insight into how these courts misunderstood "not medically stable" should be construed. They failed to focus on medical instability of the patient as a separate and independent qualification for the statutory defense to apply. They mistakenly believed that testimony of "unstable condition," "unstable time," risks of harm and the like was probative whether *this baby* was "not medically stable" during the shoulder dystocia. They also failed to recognize the necessity of considering post-birth evidence which proves "the patient" was "medically stable" as a matter of law. They focused on generic characteristics of a shoulder dystocia which make it an emergency. They did not recognize the importance of focusing instead on (1) how this *shoulder dystocia* affected *this baby*; and (2) whether *this baby* was unstable before the shoulder dystocia was diagnosed and/or after it was resolved. If "not medically stable" is to be construed with minimal disruption to the common law, one or both must be present.

Respondents assert the Petitioner did not preserve her erroneous charge arguments. Certainly, these were not addressed as a separate question presented, under a separate heading, or

with the same word choices prior to filing the Petition for Writ of Certiorari. However, the erroneous charge arguments are intertwined with those relating to the failures of the trial court and the Court of Appeals to have properly construed the "not medically stable" phrase in the Statute. Denial of that motion and related post-trial motions has consistently been the primary focus of Petitioner's appeal.

CONCLUSION

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

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