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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

William B. McKinnon, Circuit Court Judge

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Appellate Case No. 2022-000288

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

v.

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

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# FINAL REPLY BRIEF OF APPELLANTS

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## REPLY ARGUMENT

### I. Respondent's Brief Confirms That The Circuit Court Committed Reversible Error By Denying Appellants' Rule 15(B) Motion To Amend To Conform To The Evidence To Allow The Statutory Emergency To Be Considered by the Jury.

Respondent does not dispute the controlling legal standard under *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998) - that if the party opposing the amendment was aware that the new issue was on the table to be litigated and had the opportunity to refute it, there is no prejudice under Rule 15(b). That point is significant here. Respondent, in her brief, admits she was well aware- ***since at least 2018***- that Appellants sought to raise the statutory emergency defense in the litigation below. (Resp. Brief pp. 10-12). Further, instead of noting the lack of a pled statutory defense through proper objection and motion practice both during pre-trial and trial proceedings, Respondent allowed statutory emergency defense related evidence to be admitted and arguments to be made. Then, when Appellants' Rule 15(b) motion to conform was made, as effectively a housekeeping matter, Respondent claimed surprise. Her knowledge of Appellants' intent to rely on the subject emergency defense was no surprise. Respondent now argues that she was entitled to disavow that knowledge under Rule 15(b) at trial, and rely upon a feigned claim of prejudice. That argument fails for several reasons.

First, the doctrine of judicial estoppel was designed to preclude precisely what Respondent has done below. Respondent should be judicially estopped from claiming any Rule 15(b) prejudice because once "a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997). This is what Respondent has done below. In October 2018, Respondent admittedly moved to continue and stay the trial date because she knew that the statutory emergency defense ***was*** an issue in the case and would be argued at trial

by the Appellants. The circuit court granted her motion to see how the Court of Appeals would rule on the statutory emergency defense so the trial could move forward with the correct understanding of the defense in mind. This Court's ultimate construction and interpretation of the statutory emergency defense in *Flowers v. Giep*, 436 S.C. 281, 871 S.E.2d 604 (2021), *petition for rehearing den*ied, 2021 S.C. App. LEXIS 150 (2021), *petition for writ cert. denied,* 2022 S.C. LEXIS 120 (2022) and *Byrd v. McLeod Physician Assocs*. II, 427 S.C. 407 831 S.E.2d 152 (2019) were not aligned with Respondent's arguments and positions and no doubt disappointed Respondent.

Having then achieved a stay of the trial while waiting to see the contours of the statutory emergency defense laid out by the appellate courts, and then observing that those contours were inconsistent with Respondent's positions, it appears Respondent embarked on a new strategy – to claim that she had insufficient notice that the statutory emergency defense would be raised in this trial. The Court should summarily reject this argument. Respondent literally and successfully obtained the stay/continuance on the ground that she needed additional time to prepare for the trial that would involve the statutory emergency defense, and she needed to understand the interpretation of that defense to try her case. She then turned around at trial and said she was surprised and prejudiced by the raising of the statutory emergency defense in this case. This kind of argument finds no support in the law of this State and should not have been sanctioned by the circuit court[1].

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[1] Respondent's claims that Appellants' trial counsel engaged in "ambush tactics" should be rejected. It is Respondent who is advancing a hypertechnical argument regarding surprise and prejudice based on the Appellants' attempt to use the statutory emergency defense at trial when she knew full well the defense would be raised at trial and even moved to stay and continue the trial so that the contours of the defense could be understood and informed by this Court's appellate decisions.

The record further conclusively establishes that the statutory emergency defense was tried by implied consent and Respondent's brief fails to effectively rebut that point. Respondent repeatedly notes that the statutory emergency defense was not technically present in writing in the pleadings of the Appellants prior to trial. However, the very nature of a Rule 15(b) amendment assumes this to be true, and the motion is made at the conclusion of the trial. Respondent waived any claim of Rule 15(b) prejudice by failing to object in the opening statement of Appellants' counsel, and then by introducing evidence related to the statutory emergency defense when she called Dr. Miller adversely and thus invited the defense into the case. Waiver is also supported on this record by Respondent's failure to make timely and proper objections to Appellants' other evidence.

Respondent admits, in several instances, that "[A]ppellants' trial counsel used several words and phrases which appear in Section 15-32-230[.] (Resp. Brief p. 16); *see also* Resp Brief p. 17 ("When questioning Dr. Miller his trial counsel asked leading questions that used words which appear in the statute.") Respondent does not deny the lack of objection, and that point is critical. Respondent's brief states, in salient part, that "Rule 15(b) directs the court to do so freely [allow conforming amendments] when the presentation of the merits of the action will be subserved thereby and **the objecting party** fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." (emphasis added). (Resp. Brief p. 18)

Respondent argues that her lack of objection to: (1) Appellants' opening statements; (2) Dr. Miller's testimony; (3) Dr. Duboe's testimony; and (4) Dr. Gurewitsch's testimony were all justified because elements of her *prima facie* case below *also* involved obstetrical emergencies. To that end, Respondent states that "the defendant obstetrician was confronted with a well-known

complication of vaginal delivery known as shoulder dystocia. This is recognized as an obstetrical emergency, which if not resolved for four or more minutes, risks brain damage. (Resp. Brief p. 14) Respondent further contends that "[t]here is no clear bright line between the 'same or similar' circumstances aspect of obstetrical standards of care in this case and the conditional requirements the Appellants must satisfy to attain qualified immunity under the Section 15-32-230 Defense." (Resp. Brief pp. 15). Respondent further argues that "[u]ndoubtedly, they overlap to a large degree." (Id.)

Respondent's observations that an obstetrical emergency was front and center below actually strengthen Appellant's arguments here. A civil trial naturally involves elements of a claim ***and*** applicable defenses. This is particularly so when Appellants' trial lawyers were making *Defendants*' opening statement below, which was naturally explaining to the jury what the evidence will show *as far as the applicable defenses to the medical negligence claim.* So too with respect to Appellants' own evidence below. If using language directly from the statutory emergency defense during an opening statement and witness examinations does not trigger a duty to object to that material to avoid the inclusion of that defense at trial, then there would never be a duty to object under Rule 15(b) to avoid amendments conforming to the trial by implied consent.

The overlap Respondent draws between a claim and a defense in the obstetrical emergency context simply does not help her argument. Respondent waived any argument of Rule 15(b) prejudice by failing to object below and concedes the opening statement and evidence admittedly, at least, in part, addressed the statutory emergency defense. The fact that general aspects of "emergency" were addressed as a factual matter in Respondent's case-in-chief did not absolve Respondent of her duty to timely object to the inclusion of the statutory emergency ***defense***. Thus, during Appellants' opening statement, Respondent was required, under Rule 15(b), to make an

objection claiming prejudice on the basis of the statutory emergency defense. Respondent, however, instead sat back and permitted the statutory emergency defense to be tried by implied consent.

Respondent's failure to object to Appellants' opening statement is alone fatal. Appellants' opening statement undisputedly addressed and implicated the emergency defense statute. During Appellants' opening statement, counsel addressed the jury as follows: "**Let me talk to you about an emergency, <u>an obstetrical emergency. . .</u>** Was this an obstetrical emergency. ***<u>Was Alexia in immediate danger of serious bodily harm or death as a result of this shoulder dystocia.")</u>*** (*Id.* at 176, R. 283) (emphasis added). *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") Accordingly, on this record and for these reasons Respondent has failed to show that she lacked notice that the statutory emergency defense was on the table to be tried and otherwise waived any right to claim prejudice now. The first element of *Pool's* Rule 15(b) analysis falls squarely in Appellants' favor.

So too does the second element under *Pool*- Respondent necessarily had the opportunity to refute the statutory emergency defense. As a threshold concern, Respondent misconstrues the governing standard. Respondent claims that she would have been prejudiced by allowing the Rule 15(b) conforming amendment since doing so would have made her unable "to avoid the statute completely." (Resp. Br. p. 18). That is not the applicable legal principle. Respondent does not show Rule 15(b) prejudice by showing she was unprepared to conclusively win on the statutory emergency defense at trial. Rather, Respondent need only have had *the opportunity* to oppose the defense in order for the jury to then decide whether the defense applies. Here, Respondent not only

had the opportunity to refute the defense by offering evidence above ordinary negligence below; she *actually* offered such evidence. Respondent's brief does not dispute this point.

The record establishes that Respondent tried to offer evidence which could have been sufficient to refute the statutory emergency defense at trial. Respondent's counsel argued that the evidence he elicited from both Drs. Gurewitsch and Miller was competent to support the submission of recklessness to the jury. (Tr Trans., R. 1028-1029) Respondent's counsel stated his own view of gross negligence and its distinctiveness from recklessness.[2] (Tr Trans., R. 1032) A showing of recklessness means that gross negligence has been satisfied and surpassed. *See Pier View Condo. Ass'n v. Johns Manville, Inc.* 2022 U.S. Dist. LEXIS 38602 (D.S.C. 2022) ("Under South Carolina law. . . reckless conduct is necessarily negligent and grossly negligent."). Thus, if a plaintiff proves reckless conduct, it can obtain complete recovery—under its gross negligence claim. *Id.; see also Berberich v. Jack* 392 S.C. 278, 287 (2011) ("It is well settled that negligence may be so gross as to amount to recklessness."). Consequently, Respondent's later contention that she was unable to present additional evidence of a heightened culpability to try and defeat the statutory emergency defense lacks merit. She attempted to squarely marshal and present evidence of recklessness. The fact such attempt failed is not the salient inquiry. Respondent had the opportunity, as she exhibited here, to attempt overcome the statutory defense.

Respondent made further efforts to overcome the statutory emergency defense via the presentation of her expert witness Dr. Duboe. Dr. Duboe, upon being questioned by Respondent's counsel, opined that while a shoulder dystocia is an obstetrical emergency, it does not constitute a ***real*** emergency before about two minutes into the dystocia, because, in his opinion, a fetus has

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[2] 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., R. 1138-1139).

adequate oxygen reserves for at least two to four minutes before the fetus is in danger of some anoxic brain injury. (Trial Tr., R. 308-309). Dr. Duboe acknowledged that shoulder dystocia places the fetus at risk of death or serious bodily harm. (Trial Tr., R.306-308). This effort by Respondent was another attempt to argue the inapplicability of the statutory emergency defense, which only applies to "genuine" medical emergencies. S.C. Code. Ann. § 15-32-230.

Accordingly, since Respondent knew that the statutory emergency defense was on the table to be litigated and she had the opportunity to refute it (*and actually tried to do so*) there can be no prejudice *as a matter of law* under Rule 15(b). The statutory emergency defense was plainly tried by implied consent on this record. The circuit court's legal error denying Appellant's conforming motion to amend under Rule 15(b), SCRCP was an abuse of discretion.

While it is accurate that a Rule 15(b) ruling falls within the discretion of the circuit court, Respondent ignores two critical points. First, that the law overlays on that discretion the mandate that "leave [to amend pleadings] *shall be freely given when justice so requires* and does not prejudice any other party." (emphasis added). Rule 15, SCRCP. As shown above, the record confirms that there was no prejudice here *as a matter of law*. And, second, Respondent fails to acknowledge that "a trial court abuses its discretion when it. . . . *makes a factual finding unsupported by the evidence*." *Flowers v. Giep*, 436 S.C. 281 at 288, 871 S.E.2d at 608 (emphasis added); *Ex Parte Gregory*, 378 S.C. 430, 439, 663 S.E.2d 46, 51 (2008) (An "abuse of discretion occurs where [the] decision is controlled by error of law or is based on unsupported factual conclusions."). The record shows that the circuit court's **factual conclusion upon which its Rule 15(b) ruling was based was unsupported by the evidence**. The circuit court here erroneously found that it was not until the *defense* called Dr. Miller in the *defense* case-in-chief that the statutory defense elements were raised. (Trial Tr., R. 821). But this finding is not supported by

the record. Respondent raised the statutory emergency defense during voir dire, her own opening statement, the questioning of her own experts Drs Duboe and Gurewitsch, and during her adverse examination of Dr. Miller when he was called by Respondent. Based on the above, it was an abuse of discretion and thus error to deny the motion to conform under Rule 15(b). A new trial must therefore be ordered.

## II. The unique circumstances below illustrate the circuit judge's prejudicial error by failing to recuse himself from trying this medical negligence case.

Respondent's arguments as to why recusal was not error below are unavailing. First, Respondent attempts to analogize Appellants' argument to apply to *all* civil cases and states that such would be unworkable. Yet, Appellants did not seek for this circuit judge to recuse himself in all civil cases. The recusal question is highly fact intensive and must be addressed on a case-by-case basis.

Here, Appellants noted the circuit judge's prior professional association in a law firm that had brought obstetrical malpractice lawsuits against the Appellant medical group, and requested that the circuit judge recuse himself based the appearance created by these circumstances. In response, the circuit court stated he would otherwise grant the recusal request, but noted the problem of the small number of circuit judges available in the circuit, and that the broader implications of a grant of the recusal motion working to the disadvantage of his former law firm. Those were, respectfully, improper considerations on the recusal motion.

Respondent contends that "[r]arely has a S.C. appellate court reversed a judgment based on non-recusal." But this case presents unique circumstances which justify recusal such that rarely does not mean never. In South Carolina, a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." *Koon v. Fares*, 379 S.C. 150, 156, 666, S.E.2d 230, 234 (2008). The South Carolina Supreme Court has found recusal required where a

recusal motion was raised, and the circuit court's factual findings on the merits of the case are not supported by the record. *Ellis v. Procter & Gamble Distrib. Co*., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993).

As indicated in Appellants' opening brief, the record does not support the circuit judge's core finding underpinning his decision to deny Appellants' Rule 15(b) motion to allow the statutory emergency defense under S.C. Code. Ann. § 15-32-230(a) to be tried and charged to the jury. The circuit court erroneously found that it was not until the defense called Dr. Miller in the defense case-in-chief that the statutory defense elements were raised. (Trial Tr., R. 821). This grounded the circuit court's Rule 15(b) ruling, but this finding is unsupported by the record evidence below**.** *See Ellis*, 315 S.C. at 285, 433 S.E.2d at 857 (noting evidence of judicial prejudice requiring recusal when the circuit judge's factual findings are unsupported by the record). The statutory defense was plainly raised well prior to Appellants' case in chief below. *See* Defendants' Opening Statement, Trial Tr., R. 283; Testimony of Dr. Duboe, Trial Tr., R. 308-309; Testimony of Dr. Miller, Trial Tr., R. 415, 419, 770, 772, 776); (Testimony of Dr. Gurewitsch, Trial Tr., R. 637; June 26, 2013 Depo. of Dr. Gurewitsch, R. 1612-1614 (read into evidence at trial); Testimony of Dr. Lupo, Trial Tr., R. 706). Appellants had moved to recuse the circuit judge pre-trial, and Appellants re-raised the recusal issue in post-trial motions, which were denied. Respondent says nothing about this erroneous conclusion in response. Under the unique circumstances here, this Court should reverse for failure to recuse[3] under pursuant to *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857.

[3] Even if this court believes recusal is not required, it remains true that the circuit court's factual basis for denying the Rule 15(b) amendment is unsupported by the record. As such, the circuit court's reasoning is not a form of the exercise of discretion entitled to any deference, and in fact, must be rejected.

## **CONCLUSION**

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

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