THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William B. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000288

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Judge Exercise His Discretion Properly to Deny Appellants' Motion to Recuse?

II. Did the Trial Judge Exercise His Discretion Properly to Deny Appellants' Rule 15(b) Motion and Request for Related Jury Charge?

OBJECTIONS TO APPELLANTS' STATEMENT OF THE CASE

Respondent objects to those portions of the Statement of the Case which are argumentative, and which omit procedural matters addressed in this Brief.

STATEMENT OF FACTS

Respondent objects to those portions of Appellants' Statement of Facts which are argumentative and addresses additional facts in the body of this Brief.

ARGUMENT

I. The Trial Judge Properly Exercised his Discretion to Deny Appellants' Recusal Motion

Appellants contend Judge McKinnon erred in denying their motion for recusal, which they allege should have been granted because "[o]ne might reasonably question" his impartiality. They base this argument on the Judge's prior employment with the law firm of McGowan, Hood, and Felder ("McGowan firm"). The argument is completely without merit.

The specific grounds cited in the motion to recuse were: (1) Judge McKinnon practiced law from 2007 through 2016 with the McGowan firm, a firm known for its involvement with medical malpractice cases; (2) Judge McKinnon spent a majority of his career handling medical malpractice cases for plaintiffs; (3) the McGowan firm "has filed a number of medical malpractice cases against" Appellant Rock Hill Gynecological & Obstetrical Associates, P.A. ("OB Practice"), the former obstetrical practice of Appellant Dr. Miller, and some of his former

colleagues" when Dr. Miller was a "practicing member/partner" of the OB Practice; (4) Dr. Miller "has testified as an expert witness and as a practicing physician/witness" in deposition and trial in "more than one" of these cases;" (5) Judge McKinnon had been a plaintiff's attorney in more than one case in which Appellants' trial counsel had represented a medical defendant and/or the practice; and (6) the last trial which involved Judge McKinnon as a plaintiff's attorney and Appellants' trial counsel as defense attorney resulted in a direct verdict for the defense on the basis of a Daubert motion.[1] (R. pp. 1400 – 1402).

These specified grounds are feeble and would lead to absurd results. If the recusal principles advanced by Appellants were applied to criminal cases, Judge McKinnon's prior employment with the York County Solicitor's Office may require him to recuse from many General Sessions cases.

In their brief Appellants denigrate Judge McKinnon's non-recusal by cherry-picking phrases out of context. Appellants did not acknowledge (1) Judge McKinnon's past recusals were based on his personal choice, not because anyone may reasonably question his impartiality; (2) he had never been involved in any case with Dr. Miller in any capacity; (3) he is a friend and Sunday School class colleague of one of the physicians in Dr. Miller's former practice, who he sees every Sunday; (4) he would be impartial to both sides; and (5) he found that no one would reasonably question his impartiality. (R. p. 97, lines 3-8; 13-18; p. 100, lines 2-21) Appellants' counsel stated at the hearing that his "personal assessment" was that Judge McKinnon is "fair-minded and give[s] a fair trial." (R. p. 96, lines 21-22).

Never has a S.C. appellate court reversed a judgment because of non-recusal on grounds as weak as those advanced by Appellants. Denial of a recusal motion was upheld on

[1] Although not disclosed in the Motion to Recuse, Appellants' counsel admitted at the motion hearing that this directed verdict was reversed on appeal. (R. p. 96, lines 15-17)

appeal, despite much stronger grounds for recusal, in the following illustrative cases: *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995) (the wife's attorney had represented the trial judge in another matter); *Burgess v. Stearn,* 311 S.C. 326, 428 S.E.2d 880 (non-recusal was upheld despite *ex parte* communications); *Rogers v. Wilkens*, 275 S.C. 28, 267 S.E.2d 86 (1980) (the judge had been sued by the moving party in a 42 U.S.C. Section 1983 case which had been dismissed by the district court, with the dismissal affirmed on appeal); *Butler v. Sea Pines Plantation Company*, 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984) ("…[A]dverse rulings, even if erroneous, are insufficient to establish a trial judge's bias or prejudice….The record must clearly show prejudice, bias, capricious disbelief or prejudgment.") (Internal citations omitted.); and *Lyvers v. Lyvers*, 280 S.C. 361, 312 S.E.2d 590 (Ct. App. 1984) (in a domestic action, the trial judge had represented the attorney for the husband in in his own domestic action four years previously).

Rarely has a S.C. appellate court reversed a judgment based on non-recusal. Reversal has then been predicated on far more compelling evidence that a judge's impartiality might reasonably be questioned. For example, in *Ellis v. Proctor Gamble Dist. Co*., 315 S.C. 283, 433 SE2d 856 (1993), the non-moving party had submitted an eight-page *ex parte* brief to the trial judge after he had specifically requested that no briefs be submitted. The outcome of the primary claim was not addressed in the appellate decision. However, the Court reversed the trial judge's ruling on the counterclaim, as his key finding had no support in the record. The Court explained,

> … we find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. Accordingly, we find evidence of judicial prejudice in this case. *Cf Burgess v. Stearn, supra* [311 S.C. 326, 428 S.E.2d 880 (1993)] (no evidence of judicial prejudice where factual findings supported by record)." *Ellis, supra.*

A 5-4 majority of the United States Supreme Court has imposed an outer limit on non-recusal. In *Caperton v. Massey*, 556 U.S.868, 129 S. Ct. 2252 (2009), the Court reversed a decision

of the Supreme Court of Appeals of West Virginia, holding that due process mandated recusal of a justice on that case. The Court found significant the credible allegations of financial corruption.[2]

In reversing the West Virginia court, the U.S. Supreme Court noted "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." The Court held that recusal is required when there is proof of "a serious risk of actual bias - based on objective and reasonable perceptions." See *Caperton, 556 U.S. 868* 129 S. Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, S.Ct. 1456 (1975)).

Ellis and *Caperton* bear no resemblance to the issue raised in Appellants' motion for recusal. There is no allegation of any *ex parte* communication. There is no suggestion of a conflict of interest, bias, prejudice, or any type of corruption, financial or otherwise. There is no unsupported finding of fact. There is no assertion of a "probability" or " serious risk of actual bias - based on objective and reasonable perceptions." The only asserted ground for recusal is the contention that some might reasonably question Judge McKinnon's impartiality based on prior litigation activities of the law firm which employed him years ago and, to a lesser extent, prior legal work done by Judge McKinnon himself. To suggest these mandate recusal flies in the face of long-standing professional practice, state and federal caselaw.

Lastly, it is helpful to consider Subsection (b) of Canon 3E(1), CJC, Rule 501, SCACR. This sets forth one example of a ground for judicial disqualification. It provides that the judge must recuse if he or one of his former colleagues "served as a lawyer in the matter in

[2]*Caperton* involved an appearance of bribery on behalf of A.T. Massey Coal Co. ("Massey") by its chief executive, Don Blankenship ("Blankenship"). Mr. Caperton ("Caperton") had obtained a $50 million judgment against Massey, which had appealed. Pending appeal, Blankenship made personal contributions totaling $3 million dollars to the campaign of Brent Benjamin ("Benjamin"), who was seeking election to the West Virginia Supreme Court of Appeals. This was the same court before which Massey's appeal was pending. Benjamin won a close election and became a sitting justice on the Court. Caperton moved for Benjamin's recusal on the appeal. The justice denied the motion. Caperton's judgment was reversed by a 3-2 majority, with Benjamin casting the deciding vote. Caperton sought certiorari from the United States Supreme Court, which accepted the case and reversed the West Virginia decision on the basis that Benjamin should have recused.

controversy or the judge has been a material witness concerning it." They had not, of course, and there has been no contention to the contrary.

Although the disqualification rules in Canon 3E(1), *supra*, are not exclusive, the asserted grounds for disqualification of Judge McKinnon in this case do not remotely resemble any example provided in Canon 3E, *supra*. Work of Judge McKinnon and/or the McGowan firm on other malpractice cases, in which Appellant Dr. Miller was not a party, raises no reasonable question about Judge McKinnon's impartiality and fitness to serve.

II. The Trial Judge Properly Exercised His Discretion to Deny Appellants' Rule 15(b) Motion and Request for Related Jury Charge

A. Standard of Review

The South Carolina Supreme Court has consistently held that disposition of a Rule 15 motion is within the trial court's discretion. See, e.g., *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry,* 403 S.C.623, 632, 743 S.E.2d 808, 812 (2013) ("A motion to amend is within the sound discretion of the trial judge…." (Citing *Foggie v. CSX Transp., Inc.,* 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993)). "Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment…." However, rulings on such motions "are within the sound discretion of the trial judge." *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP). "Ordinarily, amendments to conform to proof should be liberally allowed." *Id., citing Soil Material Engineers, Inc. v. Folly Associates,* 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987). "However, if late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance…." *Id., citing National Time Share Sales, Inc. v. Maritime Ltd. Partnership*, 297 S.C. 43, 374 S.E.2d 678 (1988).

"Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Id., citing South Carolina State Highway Department v. Rural Land Co.*, 250 S.C. 12, 156 S.E.2d 333 (1967). This Court reversed in *Ball* because the prejudicial effect of granting the Rule 15(b) amendment constituted an abuse of discretion.

"Courts have wide latitude in amending pleadings." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997), citing *Porter Bros., Inc. v. Specialty Welding, Co.*, 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985). "While this power should not be used indiscriminately or to prejudice or surprise another party, the decision to grant an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." *Id.* "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry, supra*, citing *Anders v. Nash*, 256 S.C. 102, 180 S.E.2d 878 (1971); *Mylin v. Allen-White Pontiac, Inc.,* 281 S.C. 174, 314 S.E.2d354 (Ct. App. 1984). In this case there has been neither.

B. Appellants Expressed no Desire or Intent to Assert the Affirmative Statutory Defense from the Commencement of Suit in November 2009 Through at Least April 5, 2018

1. Respondents did not Plead the Affirmative Statutory Defense set forth in S.C. Code Section 15-32-230 ("Section 15-32-230 Defense, "Statutory Defense," "Affirmative Defense," or the "Defense").

Respondent commenced suit against Appellants by Summons and Complaint filed on November 25, 2009. (R. pp. 69 - 77). Appellants' Answer, filed January 13, 2010, did not plead the Section 15-32-230 Defense. (R. pp. 78 - 80).

The Section 15-32-230 Defense was enacted with an effective date of July 1, 2005. Thus, it had been in effect for four and one-half years before Appellants filed their Answer. If Appellants believed it had merit as applied to the facts of this case, they should have pled it from the beginning.

Respondent filed an Amended Complaint on November 29, 2012, to add Amisub of South Carolina, Inc, d/b/a Piedmont Medical Center (the "Hospital") as an additional defendant. (R. pp. 81 - 90). Appellants did not file or serve a responsive pleading to the Amended Complaint.

2. Appellants Expressed No Desire or Intent to Assert the Section 15-32-230 Defense Prior to Respondent's Settlement with the Hospital in April 2018

Settlement of Respondent's claim against the Hospital was approved in circuit court by Order dated April 5, 2018. (R. pp. 32 - 36). Prior to this settlement, no pleading, motion, deposition, or informal discussion put Respondent on notice of any purported desire or intent of Appellants to assert the Defense.

A timeline[3] of certain deposition dates and other key events during the litigation process through May 23, 2018, is set forth below. It identifies much of what transpired before Appellants first expressed, in the Spring of 2018, their desire or intent to seek leave to amend their Answer to assert the Section 15-32-230 Defense. Significantly, Appellants expressed no such desire or intent until after Respondent's settlement with the Hospital was court-approved on April 5, 2018.

This timeline establishes the following sequential time relationships: The deposition of Dr. Miller was taken over nine years and ten months before Appellants sought to assert the Defense, after

[3] Effective date of S.C. Code 15-32-230, July 1, 2005; Complaint filed on November 25, 2009 (R. pp. 69 - 77); Answer filed on January 12, 2010 (R. pp. 78 - 80); Offer of Judgment filed October 4, 2010 (R. pp. 1562- 1563); Deposition of Angela Patton taken on February 22, 2011; Deposition of Antwon Lumpkin taken on May 6, 2011; Deposition of Dr. Miller taken on February 22, 2012 (R. pp. 1564 - 1590); Deposition of Hospital nurse Stacy Bumgardner taken on November 20, 2012 (R. p. 1591); Respondent's Amended Complaint which added the Hospital as a Defendant filed November 29, 2012 (R. pp. 81 - 90); No Answer to Amended Complaint by Appellants; Deposition of Hospital nurse Julie Bibb, taken on February 15, 2013 (R. p. 1651); Deposition of Dr. Gurewitsch, Respondent's Maternal Fetal Medicine expert, taken on June 26, 2013 (R. pp. 1592 - 1650); Deposition of Dr. Lupo, anesthesiologist, taken on January 27, 2014 (R. p. 1662); Deposition of Dr. Mercado, neonatologist, taken on March 31, 2014 (R. p. 1663); Motions for Partial Summary Judgment to preclude the minor's direct recovery of her pre-majority medical expenses, the subsequent Orders granting the motions and appeal to this Court and the S.C. Supreme Court, which reversed the Orders, April 29, 2013 - October 4, 2017; Respondent's negotiation of settlement with the Hospital, approximately January-March 2018; Respondent's Petition for Order Approving Minor's settlement with the Hospital dated April 3, 2018 (R. pp. 1359 – 1363); Order Approving Respondent's Settlement with the Hospital dated April 5, 2018 (R. pp. 32 – 36); First expression of Appellants' desire or intent to move to amend to assert the statutory defense, made orally and informally between April 5, 2018 and May 23, 2018.

Respondent rested her case at trial, and more than six years before Respondent settled her claim against the Hospital. (R. pp. 32 – 36, 1564 – 1590). Depositions of every physician and labor and delivery nurse present at birth were taken more than seven years before Appellants' Rule 15(b) motion, and more than four years before the Hospital settlement. The Hospital moved for partial summary judgment on April 29, 2013, to preclude Respondent's minor from direct recovery of her pre-majority tort-related medical expenses (R. pp. 1284 - 1285). Appellants made a similar motion on May 24, 2013 (R. pp. 1286 - 1287). Dr. Edith Gurewitsch, Respondent's maternal-fetal medicine expert, was deposed on June 26, 2013. (R. pp. 1592 - 1650) Master in Equity S. Jackson Kimball granted the defense motions for partial summary judgment, affirmed following a Rule 59(e) hearing. (R. pp. 24-26).

An interlocutory appeal of this Order transpired from December 9, 2013, through October 24, 2017. This Court affirmed Judge Kimball by decision dated July 22, 2015. After granting a writ of *certiorari*, the S.C. Supreme Court reversed this Court's decision by its decision filed August 1, 2017, see *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252, 261 (2017). At oral argument, the Supreme Court chastised Appellants for their gamesmanship in using "gotcha" tactics. (R. p. 1665) (Video of oral argument, December 14, 2016, beginning at 21 minutes and 30 seconds).

A settlement with the Hospital was negotiated in early 2018 and court- approved on April 5, 2018. (R. pp. 32 – 36) Appellants thereafter provided their first notice to Respondent's counsel of their desire or intent to seek leave to amend their Answer to add the Defense. This occurred after the Hospital settlement was approved and before the deposition of Dr. Ernest, Appellants' maternal-fetal medicine expert, on May 24, 2018. (R. p. 1262, lines 9 – 12; p. 1274, line 15 – p. 1275, line 6).

In preparation for post-trial motion hearings, Respondent's counsel conducted a search in the depositions of Dr. Miller and Dr. Gurewitsch, and the corresponding word indices, to identify whether key statutory words were used in the depositions and, if so, in what context. (R. pp. 1564 - 1590; 1592 - 1691). The words searched were "emergency," "genuine," "gross," "immediate," "stable," "threat," and derivatives such as "emergent," "immediately," "stability," and the like. (R. pp. 1445 – 1446). This exercise demonstrated that no limiting words or phrases from the Section 15-32-230 Defense were used in these depositions, in the statutory context.[4] These depositions referred several times to an "obstetrical emergency," which Respondent has consistently conceded, but not to a "genuine emergency," in the statutory context. Once Dr. Gurewitsch referred to an "immediate" risk for brachial plexus injury. However, it was in the context of an obstetrician knowing that that she put the baby at risk of such injury by inappropriate manipulation of the baby's head, which represented an "immediate" risk because she knew she had used that improper manipulation, thereby risking the injury. (R. p. 1613) (Gurewitch deposition p. 53 lines 6-13) She also testified that the risk of hypoxic-ischemic brain damage is not immediate, but time-dependent, with increasing risks over time as the four-minute mark is reached, with no immediate risk until that time. (Id.)

The substance and timing of these depositions and related events confirm that Respondent's counsel had not first suspected or been put on notice that Appellants might later seek leave to add the Section 15-32-230 Defense until sometime after April 5, 2018. Conversations with Appellants' trial counsel between April 5 and May 24, 2018, provided the first inkling to Respondent that Appellants then desired or intended to seek leave to amend their Answer to add the Defense. Respondent's attorney planned to oppose the expected motion on prejudice grounds. He believed

[4] One deposition referenced "stable," but in the context of a dwelling structure for horses.

any such motion would be denied as lacking in merit and prejudicial to Respondent but *assumed at that time* that Petitioners would make the motion. (R. p. 1274 line 9 – p. 1276 line 15.) *But they never did* - until during trial after Respondent rested.

3. Respondent's Settlement with the Hospital

In strategizing about how best to present Respondent's claims at trial, her counsel had decided it would be advantageous to settle her claim against the Hospital before trial and proceed to trial against only the Appellants. When he made this decision, obtained consent and settlement authority from the client, there was no reason to expect that he would have to confront issues arising under the Defense at trial. *(Id.)* Negotiations in early 2018 led to a tentative settlement, subject to court approval.

Judge Hall approved the settlement between Respondent and the Hospital on April 5, 2018. (R. pp. 32 – 36) At this time Respondent had no reason to believe or expect Appellants would later seek leave to amend to add the statutory defense. Allowing Appellants to do so after this date would have prejudiced Respondent because, *inter alia*[5], her attorney would not have recommended settlement of the claim against the Hospital if he had been put on notice that the Appellants may later seek to add the Defense.

The claim against the Hospital was based on its *respondeat superior* liability for negligence of its nurse employees. By its express language, the Section 15-32-230 Defense applies only to physicians, not nurses or hospitals. There was no risk that this Defense would apply to Respondent's claims against the Hospital. If the Appellants had previously asserted the Defense, Respondent would not have settled with the Hospital. This is because her attorney believes it is

[5] For other ways in which Respondent would have been prejudiced, see pp. 18 - 20, *infra.*

advantageous to have at least one defendant at trial who has not been given qualified tort immunity by the statute.

C. *Appellants' Stated Desire or Intent to Amend Their Answer to Add the Section 15-32-230 Defense Expired in Less Than Six Months, and They Never Mentioned the Statute Again Until After Respondent Rested at Trial.*

1. Depositions of Appellants' Two Maternal-Fetal Medicine Experts.

Depositions of defense maternal-fetal medicine experts Dr. Ernest and Dr. Chauhan were taken on May 24, 2018, and May 31, 2018, respectively. Use of the words, "stable," "immediate threat," and various derivatives by Dr. Ernest and Dr. Chauhan corroborate that Appellants' counsel first mentioned informally to Respondent's that they desired or intended to seek leave to add the Section 15-32-320 Defense after the Hospital settlement and before Dr. Ernest's deposition. (R. p. 1262, lines 9 – 12; p. 1274, line 15 – p. 1275, line 6).

2. Trial and Appeal of *Flowers v. Giep,* 436 S.C. 281, 871 S.E.2d 604 (Ct. App. 2021), *cert.* denied (Sept. 7, 2022).

In the Summer of 2018, a conversation between Respondent's counsel and Attorney Lee Weatherly, an attorney who represented Dr. Giep in the *Flowers* case, revealed his belief that a stay order in shoulder dystocia mismanagement cases would be beneficial, pending resolution of *Flowers*. Mr. Weatherly requested the consent of Respondent's counsel to a stay order in a different case they were handling, *Pierce v. Palmetto Health*. Respondent's counsel consented, and the consent order was filed on July 3, 2018 (R. pp. 1666 - 1670).

3. Status Conference Regarding the Section 15-32-230 Defense and Judge Hall's Stay Order

Pursuant to this conversation with Mr. Weatherly and based on Appellants' informal notice of their purported desire or intention to seek leave to add the Section 15-32-230 Defense, Respondent moved

alternatively for partial summary judgment, using the *Flowers* reasoning, or a stay of trial. (R. pp. 1364 – 1366) Judge Hall held a status conference during which Appellants' trial counsel confirmed his desire or intent to assert the Defense. Judge Hall denied the motion for partial summary judgment and entered a Stay Order on October 31, 2018 (R. pp. 40 – 42).

D. *There Was No Further Indication from Appellants After October 31, 2018, that They Would Follow Through on Their Purported Desire or Intent to Seek Leave to Amend Their Answer to Raise the Section 15-32-230 Defense.*

After Judge Hall stayed the case, Respondent's counsel heard nothing further about any desire or intent of Appellants to seek leave to amend. Counsel had increasing doubts that they would do so, believing Appellants had presumably recognized the statutory defense was inapplicable to these facts, or a motion for leave to amend to assert an affirmative defense this late would be found prejudicial to Respondent.

1. Appellants' Representations to the Court at the Motion Hearing

There is disagreement about the representations made to Judge Hall by Appellants' trial counsel. Did Appellants tell Judge Hall they intended to move for leave to amend under Rule 15(a), SCRCP, to assert the affirmative Section 15-32-230 Defense? Or did they only imply they would do so by stating they would ask the trial judge to give a jury charge on the unpled Defense at trial?

Respondent's counsel recalls Appellants' trial counsel representing to Judge Hall his desire or intent to seek leave to raise the Defense in an Amended Answer. In contrast, Appellants' trial counsel represented in post-trial motion hearings that he had only informed Judge Hall that he would ask the trial judge to charge Section 15-32-230.

Whichever is correct does not aid the Appellants' position on appeal. If the former, Appellants abandoned their intent to file a motion for leave to amend to add the Defense. If the

latter, Appellants waived their rights under Rule 15(a), SCRCP, and subtly foreshadowed their intent to try to use Rule 15(b), SCRCP, as an ambush tactic. *See* p. 19-21, *infra*.

2. Corroboration of Appellants' Abandonment and Waiver of a Rule 15(a) Motion, and Intent to Use Rule 15(b) for an Improper Ambush

For over two and one-half years thereafter, Appellants filed no motion for leave to amend to assert the statutory defense and did not speak to Respondent about the subject. Appellants' associate counsel exchanged emails as a Rule 11 conference with Respondent's counsel to determine whether Respondent would consent to an amendment to Appellants' Answer to add affirmative defenses. Respondent's counsel responded by requesting clarification of which affirmative defenses Appellants wanted to add, because he was not going to consent to adding the affirmative statutory defense. Associate counsel responded that he would have to check with Appellants' trial counsel, Mr. Davis. After checking, associate counsel stated that Appellants were seeking consent to add certain statutory punitive damages defenses, which this Court had decided were affirmative defenses. The associate counsel confirmed that Mr. Davis was not seeking Respondent's consent to add the affirmative statutory defense. (R. p. 1274 line 17 – p. 1276 line 5) Respondent consented to an order which granted leave to amend the Answer to add punitive damages defenses. The Amended Answer was filed on September 3, 2020. (R. pp. 91-93) Appellants were continuously silent about the statutory defense by Appellants thereafter until they made their Rule 15(b) motion during trial on January 10, 2022, after Respondent had rested.

E. The Trial Judge Properly Denied Appellants' Guileful Attempt to Invoke Rule 15(b) After Respondent Had Rested.

1. The Parties Had Not Tried the Statutory Defense by Express or Implied Consent.

Appellants' argument that the statutory issues were tried conflates terms of art in the statute with the fundamental medical malpractice proof requirements. "Medical malpractice" is codified in S.C. as "doing that which the reasonably prudent health care provider … would not do or not doing that which the reasonably prudent health care provider … would do in the same or similar circumstances." S.C. Code of Laws Section 15-32-210(8) and 15-78-110(6). Caselaw to the same effect is extensive. Among other elements, a medical malpractice plaintiff must prove the standard of care, which must take into account the same or similar circumstances faced by the defendant health care provider.

In this case, 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[6], risks brain damage. Also, in the shoulder dystocia context, forceful manipulation of the head to the side or by twisting it can immediately cause brachial plexus nerve damage. In a 45 to 60 second shoulder dystocia, as in this case, there is no risk of serious harm unless the obstetrician manipulates the head forcefully and wrongfully. There is no risk of brain damage because of the short duration of the shoulder dystocia complication. (R. p. 1613) (Gurewitch deposition p. 53 6-13) The longer the passage of time, the greater the risk of possible brain damage from substantial oxygen deprivation.

In a shoulder dystocia/brachial plexus birth injury case, a plaintiff's attorney always confronts basic standard of care issues related to emergency and risk of harm. Respondent of course did so in this trial, to put up a *prima facie* case. Issues were addressed in this case related

[6]On the low end, some obstetricians say four to five minutes. On the high end some obstetricians say six to eight or more. The difference lies primarily upon assumptions about whether an umbilical cord might be completely compressed so as to block all blood flow, or, more likely, compressed to a lesser extent allowing blow flow to continue. Many pediatric neurologists say permanent brain damage is unlikely for a much longer time, but it is recognized as prudent in the obstetrical community to allow a large time cushion.

to (1) severity of the obstetrical emergency; (2) time factors; (3) the defendant's knowledge, training, and experience; (4) the baby's fetal heart tracing status; and (5) severity of the injuries, just as in all shoulder dystocia/brachial plexus nerve injury cases.

There is no clear bright line between the "same or similar circumstances" aspect of the 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. Among other limitations, Appellants must prove a "genuine emergency;" an "immediate threat" of death or serious bodily injury; and that "the patient is not medically stable." Because these phrases are not defined in the statute, it is unclear just how similar these statutory phrases are to the "same or similar circumstances" issues which arise in every medical malpractice case which involves an emergency. Undoubtedly, they overlap to a large degree. For Appellants to argue Respondent's addressing "same or similar circumstances" is the same as trying the issues in a Section 15-32-230 Defense is an exercise in obfuscation.

There is a monumental difference, however, between the "same and similar circumstances" which must be addressed in every medical malpractice case, and the similar elements in the Defense. If a physician defendant proved the statutory elements to the jury's satisfaction, then the plaintiff cannot prevail without proving gross negligence.

a. Voir Dire

Appellants argue Respondent addressed elements of the Section 15-32-230 Defense during *voir dire*. This is incorrect. Respondent's co-counsel had prepared questions to pose to the jury panel, one of which included the phrase, "some people believe a medical doctor should not be held responsible for treating a patient in an emergency;" and a similar question related to "intentional

harm." (R. p. 126, line 24 – p. 127, line 18). Judge McKinnon ruled that Respondent could not ask those questions. *Id*.

During colloquy the following phrases were used: "training;" "different from the statute;" and "what general emergency is as compared to emergents." Id. Because Appellants called the Court's attention to these words and phrases, they must find significance in these words and phrases, but why is unclear.

Regarding the latter phrase, "general" appears in the original transcript. Appellants quote the word as "genuine." If "genuine" was the word actually used, then "genuine emergency," a phrase in the statute, was used by co-counsel. However, its use in the statute hardly prohibits its use otherwise. Using "genuine emergency" is typical of the parlance used in other medical malpractice cases where there is no Section 15-32-320 issue. Its use in connection with "emergents" is most unclear. "Training" issues arise in every medical malpractice case. There is no clarity to which statute co-counsel was referring. Appellants construe it to be Section 15-32-230. Whichever statute might have been the intended reference is insignificant because the *voir dire* questions were not asked of the jury.

b. <u>Openings</u>

Appellants' trial counsel used several words and phrases which appear in Section 15-32-230, but in combination with other words and phrases which do not appear. These include "emergency," "immediate," "serious bodily," and "death." (R. p. 283) The first is termed "obstetrical emergency," which is not in the statute. "Immediate" was used to modify "danger," not "threat." Instead of "serious bodily injury," counsel said, "serious bodily harm." "Harm" and "injury" have similar import in this context, as do "danger" and "threat," but the words used by

counsel are not contained in the statute. This illustrates the overlap between "same or similar" and the statute.

c. Respondent's Case in Chief

Respondent called Dr. Miller. Appellants call the Court's attention to words and phrases such as "training;" "emergent;" "emergency." (R. pp. 415, 419) None suggest the Section 15-32-320 Defense was tried.

In direct examination of Dr. Duboe, Respondent's obstetrical expert, the following words and phrases were used: "trained;' "genuine emergency;" "emergency;" "training;" and "emergent." (R. pp. 308 - 309). Appellants called each to the Court's attention. All these are common in medical malpractice cases generally. "Genuine emergency" is used in the statute, but its use is hardly exclusive to it.

d. Appellants' Defense Case and Other Parts of Trial

When questioning Dr. Miller, his trial counsel asked leading questions that used words which appear in the statute. Just as in his opening, these questions often transposed words from the statute. Trying to distinguish between "same or similar circumstances" and words or phrases used in the statute and interjected by Appellants' counsel as part of a leading question is challenging. Even reading the transcript in hindsight, it is unclear when a "same or similar situation" question slips subtly into the realm of a statute-based question. The same challenges arise in virtually every part of the Record on Appeal highlighted by Appellants. Hairsplitting whether verbiage in this context is significant is of little benefit to Appellants. It is certainly not necessary to do so to recognize that Judge McKinnon exercised his discretion properly to deny Appellants' Rule 15(b) motion. The parties did not try Section 15-32-230 issues by express or implied consent.

2. Allowing a Rule 15(b) Amendment Would Not Have Subserved Presentation of the Merits.

Hypothetically, even if the statutory defense had been tried by implied consent, and it was not, the outcome should be the same. In conferring trial judges with broad discretion whether to allow amendments to conform to the evidence, Rule 15(b) directs that the court "shall do so freely 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.) Neither of these conditions supports granting the motion to amend.

Presentation of the merits would not be subserved by allowing an affirmative defense to be added during trial nearly twelve years after the Answer was filed, after the Respondent rested her case. The exact opposite is true. This would preclude Respondent from presenting any testimony concerning the merits of an unpled *affirmative defense.* By surprising Respondent with their intolerably late attempt to amend, the Appellants sought to catch Respondent unprepared to make *a prima facie* issue of gross negligence.

3. Allowing a Rule 15(b) Amendment Would Have Prejudiced Respondent.

If Respondent's counsel had been on timely notice of the affirmative defense, he could have attempted to avoid the statute completely. For example, he could have undertaken to marshal evidence to present a jury question about (a) whether the shoulder dystocia emergency had been created by Dr. Miller; or (b) whether causally significant negligence of Dr. Miller occurred prior to any "genuine emergency." Being denied these opportunities would have been prejudicial.

If Respondent's counsel had been on timely notice of a statutory defense, he could have prepared to marshal evidence of gross negligence during discovery. He deposed Dr. Miller and

other health care providers without notice of the statutory defense being applicable. These are the deponents who are most likely to possess useful information probative of gross negligence. Granting Appellants' motion would have prejudiced Respondent by denying her notice of the need to seek other evidence to support a meritorious expert opinion of gross negligence. This manner of prejudice does not vanish upon any later opportunity to identify new witnesses, especially with no notice of any need to address the gross negligence issue.

Petitioners' trial counsel's actions were inconsistent with any effort to try to assert the affirmative defense this late. Most telling was his filing a motion on August 6, 2020, to amend their Answer to add punitive damages defenses, *without simultaneously seeking leave to add the statutory defense*. When Petitioners' trial counsel deposed Dr. Duboe on March 15, 2021, he asked no questions about gross negligence and posed no questions which used key words or phrases from the statute. This seemingly confirmed that Petitioners would not try to raise the statutory defense. The greater the delay, the lesser the likelihood Appellants would try to assert the statutory defense, and the less likely they would prevail in the effort.

Appellants' argument that judicial estoppel applies lacks merit. The factual context demonstrates the elements of estoppel are not remotely met. For up to seven months in 2018 Respondent expected the Appellants to seek leave to amend and try to make the Defense an issue at trial. This is because their counsel said so. For many years before April 2018 there was no reason to suspect so. After October 2018 it became increasingly evident they would not do so. Their motion to amend their Answer in August 2020 to add punitive damage defenses without seeking to add the Section 15-32-230 Defense laid to rest any reasonable suspicion or expectation Appellants' trial counsel would pursue the issue. Respondents did not conceive of the brazen

gamesmanship it took to try to win the trial in advance by plotting a surprise Rule 15(b) motion years before.

The trial court properly exercised its discretion to deny Appellants' motion because of the prejudice to Respondent. It would have required Respondent to present additional evidence to meet elements of the Defense, including gross negligence. Other examples of prejudice are set forth above.

Motions to amend pleadings to conform to proof may be made upon motion of any party at any time, even after judgment. However, rulings on such motions are within the sound discretion of the trial judge. *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (citing Rule 15(b), SCRCP). There are numerous reasons why Judge McKinnon's exercise of discretion was sound. The trial judge's ruling will not be overturned without an abuse of discretion or unless manifest injustice has occurred. *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). There has been neither.

III. ADDITIONAL SUSTAINING GROUND: DENYING THE RULE 15(b) MOTION PREVENTED APPELLANTS FROM BEING REWARDED FOR THEIR UNJUST, DECEPTIVE GAMESMANSHIP AND "GOTCHA" TACTICS

Respondent has identified in this Brief much evidence of unjust and deceptive gamesmanship by Appellants' trial counsel. For brevity's sake, Respondent will not repeat those here but incorporate them by reference.

What Respondent will do is point out that similar tactics have been used previously in this very case. During oral argument of this case's interlocutory appeal in December 2016, the Supreme Court chastised Appellants' counsel for his "gotcha" tactics that led to that appeal:

R. Hawthorne "Thorne" Barrett (Appellants' Associate Counsel):

> The prejudice is the loss of that defense upon which the case was evaluated, upon which the strategy was developed, Your Honor. And so it's allowing this claim to come in from some, essentially from someone who was not, did not pursue it originally, but could have. And that's the problem. We've never had an explanation at any of the levels as to why the rule wasn't followed. And that brings me to the argument about the Rule itself.

Justice John Few:

> I mean, can I follow-up just a little bit about this prejudice thing. I mean I don't think your argument, your answer to the question addressed what prejudice is. Prejudice does not entitle you to play legal gotcha and allow someone to sit on your hands until the time runs and say AHA! You filed your pleadings wrong."

S.C. Supreme Court Video Portal
Oral Argument
Patton v. Miller,
December 14, 2016
Starting at 21:20, video time clock
(R. p. 1665)

"Gotcha" tactics are intended to gain an unfair advantage for one side and undermine the judicial system's attempt to resolve disputes on their merits. The tactics in this case were unjust and did not comport with the language or spirit of the SCRCP. The gamesmanship in scheming the Rule 15(b) motion in this case should not be rewarded.

CONCLUSION

For the reasons stated, Judge McKinnon exercised his discretion properly in all respects. The judgment below should be affirmed.

Respectfully submitted,

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