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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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., ... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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Introduction

Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates P.A. ("Petitioners") respectfully petition this Court to grant a Writ of Certiorari to review the Court of Appeals' Opinion filed on July 23, 2025, which, among other things, affirmed the circuit court's Rule 15(b) ruling in favor of Respondent. *See Patton v. Miller,* Op. No. 2025-UP-253 (S.C. Ct. App. filed July 23, 2023) ("Opinion" or "Slip Op," attached as Exhibit A). Certiorari should be granted on the grounds that the Court of Appeals' ruling stands at irreconcilable odds with prior opinions of this Court and the subject matter of the issues at bar involves legal principles of major significance to the jurisprudence of this State relating to operation of this state's rules of civil procedure.[1]

Certificate by Counsel

The Court of Appeals ruled on Petitioner's Petition for Rehearing on August 15, 2025.

Questions Presented for Review

I. **Whether a Motion To Amend Under Rule 15(b), SCRCP Which Seeks To Try A Case On An Unpled Defense Should Be Granted Where The Party Opposing The Rule 15(b) Amendment Had Sufficient Notice That The New Issue Would Be Tried And Had An Opportunity To, and Did, Refute That Defense At Trial?**

II. **Whether Delay In Making A Rule 15(a) Motion for Pretrial Amendment To The Pleadings Is An Appropriate Consideration Determining Whether Granting A Rule 15(b) Amendment Would Result In Prejudice To The Non-Moving Party?**

[1] Petitioners further incorporate into this Petition all prior arguments raised in its briefing and at oral argument below as well as in its Petition for Rehearing and does not abandon such arguments here.

Statement of the Case

A. Procedural History

This is a medical malpractice action. Respondent sued Dr. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A. (the "Practice") (collectively, "Petitioners") based on injuries suffered by the minor plaintiff allegedly as a result of a delivery complication known as shoulder dystocia. (Complaint, R. 69).

Respondent moved to consolidate this action and a separate action she had filed against Amisbub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Piedmont"), (Mot. R. 1280), and the circuit court granted consolidation. (Or. R. 1).

Piedmont Medical Center moved for partial summary judgment in April 2013, arguing Respondent, as the parent of the injured minor plaintiff, was not entitled to recover any medical expenses incurred by the minor plaintiff prior to the time the minor plaintiff reached the age of majority. (Piedmont Mot. R.1284). Petitioners filed a similar motion in May 2013. The circuit court granted partial summary judgment on August 2, 2013. (Or. Granting Partial Summ. J., R. 15). Respondent thereafter appealed the partial summary judgment ruling on January 15, 2014. (Respondent's Notice. R. 1652). Respondent's appeal automatically stayed this case until this Court issued a *remittitur* on October 17, 2017. (Remittitur, R. 1664). After the *remittitur*, Respondent settled with Piedmont Medical Center for $50,000 and, on April 3, 2018, filed a petition for court approval of the settlement. (Pet. for Approval, R. 1359). The circuit court approved the settlement on April 5, 2018. (Ord, R. 32).

On October 8, 2018, Respondent filed a "Motion for Partial Summary Judgment, or in the Alternative, an Order Granting a Stay of Trial Until Pending Appeals in Other Cases Resolve Material Issues Likely to Arise in this Case." (Mot. for SJ or Stay, R. 1364). In that motion, Respondent asked the circuit court *"to preclude the expected statutory defense under S.C. Code of Laws Section 15-32-230*, representing a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies," and argued the statute did not apply to this case. (*Id.*)(emphasis added). In the alternative, Respondent requested that the circuit court stay the trial of this case "until pending appeals in other cases resolve material issues likely to arise in this case." (*Id.*). Specifically, Respondent argued the trial of this case should be stayed until two appeals[2] "address[ing] various novel and complex legal and medical issues arising under S. C. Code of Laws Section 15-32-230" were resolved to ensure the circuit court would "have guidance from the appellate courts about statutory definitions, applicability to certain fact patterns, and related matters." (*Id.*). The circuit court[3] denied Respondent's motion for partial summary judgment, (Or. MSJ, R. 37), but granted Respondent's request for a stay on October 31, 2018. (Or. Granting Stay, R. 40).

[2] Those appeals eventually became the Court of Appeals' decisions in *Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 414, 831 S.E.2d 152, 155 (Ct. App. 2019) and *Flowers v. Giep*, 436 S.C. 281, 284, 871 S.E.2d 604, 606 (Ct. App. 2021).

[3] This circuit court judge was not the same as the ultimate trial judge in this matter.

During the stay, the circuit court held status conferences every few months from January 2019 through early 2020, each time ordering that a status conference be reconvened three months later. *See* (Or. Re Jan. 2019 Status Conf., R. 43; Or. Re Apr. 2019 Status Conf., R. 46; Or. Re July 2019 Status Conf., R. 49; Or. Re Sept. 2019 Status Conf., R. 52_; Or. Re Jan. 2020 Status Conf., R. 55). In August 2020, Petitioners moved to amend their answer to add affirmative defenses related to punitive damages, (Aug. 2020 Mot. to Amend, R. 1309), and filed their amended answer in September 2020. (Am. Answer, R. 91)[4]. Petitioners also requested a status conference and a scheduling order "limiting additional discovery due to the late stage of this case and . . . a deadline for which all *de bene esse* depositions, and any other depositions of any additional witnesses allowed to be completed, for no later than October 30, 2020 in order to allow for sufficient trial preparation." (Aug. 2020 Mot. for Status Conference, R. 1367). The circuit court entered a scheduling order on September 1, 2020, requiring that Respondent "make a good-faith effort to disclose all witnesses by September 18, 2020; however, Plaintiff may add additional witnesses beyond September 18, 2020" provided that she offer deposition dates for any additional witness prior to November 6, 2020. (Sept. 2020 Sched. Or., R.58).

In September 2021, the parties received notice that the case would be set for trial on January 4, 2022, and that Judge McKinnon had been designated as the trial

[4] This was in the wake of the Court of Appeals' decision in *Garrison v. Target Corp.*, 429 S.C. 324, 373, 838 S.E.2d 18, 44 (Ct. App. 2020), regarding punitive damages caps, which case was later reversed on that point by this Court. 435 S.C. 566, 582, 869 S.E.2d 797, 806 (2022).

judge. Prior to trial, Petitioners moved for recusal of Judge McKinnon. (Mot. for Recusal, R. 1400). The trial judge held a pretrial hearing on the motion for recusal on December 2, 2021, and orally denied the motion. (Pretrial Hearing, R. 100).

The parties tried the case in January 2022. At the conclusion of the Respondent's case, Petitioners moved to amend their Answer to conform to the evidence and assert the statutory emergency defense, coupled with a request that the Court charge the jury with the statutory emergency defense law. (R. 912-914) Respondent objected. This motion was denied, and the jury returned a verdict in favor of Respondent on her claim for medical negligence and awarded $1.5 million in economic damages and $1 million in noneconomic damages. (Verdict Form, R. 1671). After the verdict, Petitioners moved for a new trial absolute on several grounds, including that:

> (1) The circuit court erred in denying Petitioners' Rule 15(b) motion to conform to the evidence and Petitioners' request that the jury be charged on statutory emergency;
>
> . . .
>
> (4) The circuit court judge presiding over the trial erred in declining to recuse himself;

See (Mot. for New Trial, R. 1409; Memo. in Supp. of Mot. for New Trial, R. 1419; Supplemental Memo. in Supp. of Mot. for a New Trial, R. 1503).

The circuit court denied the motions. (Post-Trial Order and Judgment, R. 65). Petitioners timely appealed. The Court of Appeals filed its opinion fully affirming the trial court's rulings on July 23, 2025. The petition for rehearing was denied on August 15, 2025. Petitioners now timely file their Petition for Writ of Certiorari with this Court pursuant to SCACR 242.

B. Essential Facts

1. The "Genuine Emergency" Defense Under Section 15-32-230

Section 15-32-230 "provides physicians immunity from simple negligence in certain medical malpractice suits." *Flowers v. Giep*, 436 S.C. 281, 284, 871 S.E.2d 604, 606 (Ct. App. 2021). The statute provides:

> (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.

S.C. Code Ann. § 15-32-230. The statute thus provides an affirmative defense protecting a physician from liability for ordinary negligence if the physician proves three required elements: (1) the claim arises out of a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient was under an immediate

threat of death or serious bodily injury. *Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II*, 427 S.C. 407, 414, 831 S.E.2d 152, 155 (Ct. App. 2019).

Shoulder dystocia occurs during childbirth "when the baby's shoulder catches against the mother's pubic bone and fails to enter the pelvis, stalling the delivery." *Flowers*, 436 S.C. at 284, 871 S.E.2d at 606. Respondent alleged the minor plaintiff suffered brachial plexus injuries caused by alleged mismanagement of the shoulder dystocia by Dr. Miller, the attending obstetrician during the delivery, which took place in an operating room at Piedmont Medical Center. *See generally* (Am. Compl., R. 81). Dr. Miller testified at trial that a shoulder dystocia "is an emergency and the baby's life is on the line." (R. 772). If the shoulder dystocia is not resolved expeditiously, the baby may suffer brain damage. (R. 795).

2. Pretrial Proceedings regarding the Emergency Defense

In 2013, the parties deposed Plaintiff's expert Dr. Gurewitsch. Dr. Gurewitsch's addressed all three elements of the statutory emergency defense—specifically, whether a shoulder dystocia is an obstetrical emergency, whether the patient is medically stable during a shoulder dystocia, and whether the patient was under an immediate threat of death or serious bodily injury. *See* (Depo. of Dr. Gurewitsch, R. 1612-1614); *see also* (R. 637) (reading Dr. Gurewitsch's deposition testimony to the jury at trial). Dr. Gurewitsch testified affirmatively to all three.

In 2018, as noted, Respondent moved for partial summary judgment "to preclude the *expected* statutory defense under S.C. Code of Laws Section 15-32-230, representing a liability shield for negligently inflicted harm in the context of certain

alleged obstetrical emergencies." *See* (Mot. for Partial Summary Judgment or a Stay, R. 1286) (emphasis added). Respondent sought summary judgment on the merits of the defense (even though at that time it had not technically been pled by Petitioners), arguing it did not apply to the facts of this case. (*Id.*). In the alternative, Respondent sought a stay of this action until the appellate courts resolved two appeals (*Byrd* and *Flowers, supra*) in which section 15-32-230 was at issue. *See* (*id.*). Respondent did not argue that the statutory defense had been waived by Petitioners or was otherwise unavailable to Petitioners on procedural or equitable grounds. *See* (*id.*). The circuit court denied Respondent's motion for summary judgment but granted Respondent's request to stay the case. (Or. Granting Stay, R. 40). Ultimately, the two appeals were resolved by this Court regarding the statutory defense, but this Court did not complete its work until *Flowers v. Giep*, was decided on October 6, 2021. *Flowers v. Giep*, 436 S.C. 281, 871 S.E.2d 604 (2021)

3. Petitioners' Motion for Recusal

In September 2021, the parties received notice that the case would be set for trial on January 4, 2022, and that Judge McKinnon had been designated as the trial judge. Prior to trial, Petitioners moved for recusal of Judge McKinnon based on his prior work handling medical malpractice cases for a "well-known law firm heavily engaged in representing plaintiffs in medical malpractice cases." (Mot. for Recusal, R. 1400). Petitioners argued the same law firm—McGowan, Hood & Felder—had filed a number of lawsuits against Dr. Miller's practice and partners, and Dr. Miller had testified as an expert witness in defense of his practice and partners in more than

one of the cases filed by the trial judge's former law firm. (*Id.*). The trial judge held a pretrial hearing on the motion for recusal on December 2, 2021, and orally denied the motion. (Pretrial Hearing Tr. at 7, R. 100). In doing so, the trial judge expressly found the recusal motion was not "baseless or frivolous" and indicated he would ordinarily grant the motion, but denied the motion because "there are only two [j]udges in York County" and if he set a precedent of recusing himself in cases involving his old law firm, he did not think it would be "fair to McGowan/Hood" because "there [are] only two Judges in York County." (Pretrial Hearing Tr. at 7, R. 100). The circuit judge further explained that he did not find "that there is a reasonable belief that [he] would be partial to one side or the other in the case." (*Id.*).

4. Trial

During trial, the statutory emergency issue was raised during *voir dire* discussions and opening statements, and evidence was presented addressing all three elements of the defense. (R. 126-27, 283, 308-09, 415, 419, 770-776, 794-95). There are no contemporaneous or specific objections of record. Expert testimony for both parties included questions and answers regarding whether the circumstances surrounding delivery of the minor plaintiff constituted a genuine obstetrical emergency, whether the patient was medically stable, and whether there was an immediate threat of death or serious bodily injury. (R. 308, 309, 415, 770-776, 794-95). Accordingly, because the statutory emergency defense was an issue at trial, Petitioners moved at the close of Respondent's evidence to amend their answer to

conform to the evidence and assert section 15-32-230 as a defense.[5] (R. 912-914). Petitioners also requested that the trial judge charge the jury on the statutory defense. (R. 820, 823). The trial judge denied the motion. (Trial Tr. 808, R. 915).

Petitioners moved for a new trial on several grounds, including that the trial judge erred in denying Petitioners' Rule 15 motion to amend. (Mot. for New Trial, R. 1409). The trial judge denied the motion, finding that it was not until the defense called Dr. Miller in the defense case-in-chief that the statutory defense elements were raised and Respondent would be prejudiced for lack of opportunity to refute the defense. (R. 821)(Post-Trial Or. & Judgment at 2, R. 2). This finding by the trial judge was factually inaccurate.

Argument

The meaning of prejudice under Rule 15(b) of the South Carolina Rules of Civil Procedure has proven to perplex the lower courts. The trial courts have applied a blend of Rule 15(a) and 15(b) standards from Court of Appeals cases that conflate one with the other and run contrary to this Court's directives, thus compounding the problem. At this point, litigants who want to make a Rule 15(b) amendment, and the trial courts that are charged to rule on such motions, seemingly have insufficient direction on how to proceed. Only this Court can bring clarity to a point of law which directly affects all civil litigants operating in this state's motion practice, whether

[5] In *Flowers, supra*, the statutory defense had likewise been added as a defense by way of amendment at the conclusion of the trial.

they are plaintiffs or defendants, and in all areas of substantive law. Thus, this petition for certiorari should be granted.

A. Standards Governing Certiorari Review

This Court provides guidance and clarification when the law is unclear, applied inconsistently, or when the Court of Appeals misunderstood and misapplied precedent. Rule 242 of the South Carolina Appellate Court applies, and this Court should grant the writ because the Court of Appeals' decision conflicts with the prior precedent of this Court and if left uncorrected, such conflict will continue.

B. The Court of Appeals Failed to Apply Controlling South Carolina Supreme Court Rule 15(b) Jurisprudence.

In its Opinion, the Court of Appeals affirmed the circuit court's order denying Petitioner's Rule 15(b) motion to amend to add South Carolina's statutory emergency defense. *See* S.C. Code. Ann. § 15-32-230. The Court of Appeals concluded that the statute was not tried by implied consent because "[n]either party offered testimony targeting the issues in the statute beyond whether shoulder dystocia was an emergency, [and] interpret[ed] the relevant testimony as being targeted to the general standard of care rather than the issues related to the requested statutory defense." *Slip Op.* at p. 3.

As it was advocated by Respondent to do, the Court of Appeals decided the Rule 15(b) issue on appeal under the prejudice standard *set forth by its own opinion* in *Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994). *Slip Op.* at p. 4; *Resp. Brief* pp. 5-6, 20. Under *Ball*, the Court of Appeals concluded that prejudice automatically results under Rule 15(b) "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.* Applying *Ball*, the Court of Appeals found prejudice below because the Rule 15(b) amendment would have stated a new defense that would have required Respondent to introduce new or different evidence to prevail in the amended action, but Respondent, in the Court of Appeals' view, failed to introduce such evidence necessary to have prevailed. *See Slip Op* at p. 4. The Court of Appeals also cited to its own opinion in *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000) for the points that its view of Respondent's evidence "did not point conclusively to the statutory defense Dr. Miller claims was tried by consent," and "allowing this amendment after Respondent rested would have been manifestly prejudicial because Respondent's lawsuit would no longer be viable if the jury found there was a genuine emergency." *Slip Op.* at p. 4.

Relying on *Ball* and *Dunbar*, the Court of Appeals focused on the evidence Respondent admitted and attempted to develop, what that evidence was, and how that evidence may be interpreted to determine whether prejudice exists. Basically, the Court of Appeals looked at whether Respondent might not prevail to determine whether she would be prejudiced.[6]

But as Petitioners pointed out in their filings below, this is the wrong legal standard. The 1994 Rule 15(b) prejudice test in *Ball* was since modified and modernized by this Court's opinions in *Pool v. Pool*, 329 S.C. 324, 325, 494 S.E.2d 820, 821 (1998) and *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007). Under this Court's

[6] If this were the standard, no amendments would ever be allowed.

directives, "[t]he prejudice Rule 15 envisions is *a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it*." *Id.* at 328–29, 494 S.E.2d at 823. (emphasis added). In considering potential prejudice to the opposing party, this Court has designated the touchstone of the Rule 15(b) inquiry as to "whether the opposing party has had the opportunity to prepare for the issue now being raised formally." Thus, under *Pool*, if the party opposing the amendment was aware that the new issue was going to be litigated and had the opportunity to refute it at trial, ***there is no prejudice*** under Rule 15(b). *See Pool*, 329 S.C. at 325, 494 S.E.2d at 821 (Since, the non-movant in *Pool* knew well before trial that Husband was seeking attorney's fees and costs[, she] "cannot show prejudice from the trial court's granting [the] motion to amend[.]") Likewise in *Lee*, which applies the same two-prong test, this Court held that no Rule 15(b) prejudice resulted on the affirmative defense of comparative negligence since plaintiff "was well aware that alcohol would be an issue in the case by virtue of the trial court's pre-trial hearing, and he undoubtedly attempted to present a case that minimized the effect his alcohol consumption might have in assigning fault." *Lee*, 373 S.C. at 661, 647 S.E.2d at 201. Thus, this Court's rulings in *Pool* and *Lee* established a two-prong examination which balances principles of notice with the realities of our adversarial system. The Court of Appeals unquestionably failed to apply these governing principals from *Pool* and *Lee*.

The Court of Appeals' Opinion also erroneously decreed that the evidence offered at trial must "point conclusively" to the statutory emergency defense to be tried by implied consent. This novel rule is also unsupported by this Court's

precedent. *Armstrong v. Collins*, 366 S.C. 204, 230 ,621 S.E.2d 368 (2005). Instead, all that is required is "sufficient evidence in the record indicating that the [statutory emergency defense] was an issue at trial." *Id.*

This Court has directed "that it is incumbent upon the court of appeals to apply th[e Supreme Court of South Carolina'[s] precedent." *State v. Phillips*, 416 S.C. 184, 194 (2016); S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). That not being done below, it is this Court's institutional role to bring guidance, clarification and correction in a situation like this when the law of Rule 15(b) prejudice has become unclear and Court of Appeals' cases have created an inconsistent and unworkable standard. Since one of the core objectives of civil proceedings is to uniformly apply the law, this Court should take the opportunity to define and explain the parameters of Rule 15(b) prejudice. *Id.* Absent a clarifying doctrinal statement, civil litigants will continue to have difficulty understanding how to maneuver through amendments at trials in South Carolina. Rule 15(b) prejudice law should now be set, cases from the Court of Appeals contrary to this Court's precedent should be expressly overruled, and this Court of last resort is the only tribunal fit for the task.

C. This Court Should Clarify Existing Cases Which Conflate Rule 15(a) and 15(b) As the Court of Appeals Opinion Did Below.

The Court of Appeals' Opinion charts an additional perilous course for South Carolina's Rule 15(b) jurisprudence which further warrants this Court's intervention. The Opinion below eviscerates Rule 15(b) by effectively rendering trial amendments unavailable if the movant was aware of the defense before trial. The Opinion below

provides that if a party making a Rule 15(b) motion at trial has prior knowledge of an affirmative defense before trial, that ***party ought to instead file a Rule 15(a) motion by formally moving to amend the pleading before trial***. Thus, Rule 15(b) is unavailable to make a statutory defense an actual issue in trial. But Petitioners made a Rule 15(b) motion below, which South Carolina law specifically authorizes. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224–25 (2010). While delay or earlier failure to plead may be an appropriate consideration in the context of deciding ***a Rule 15(a)*** motion, Rule 15(b)'s analysis is distinct and for good reason. Rule 15(b) motions are -by design- made at trial in order to conform with the practical realities of the issues and evidence presented. This case now imposes -and conflates- a traditional Rule 15(a) consideration of delay in making the motion to amend with a Rule 15(b) amendment, which by design can impose no such requirement. As such, the correct prejudice analysis under Rule 15(b), under *Pool* and *Lee*, examines whether the non-movant has a lack of notice that the new issue was going to be tried, and a lack of opportunity to refute it, ***not whether the movant was aware of the defense before trial***. The timing of the Rule 15(b) motion to conform was made precisely as intended below - during trial and after evidence and the issue were presented. The merger of Rule 15(a) and 15(b)'s standards and imposition of a new delay feature under Rule 15(b), are unsupported by any precedent in this state, and further warrant certiorari.

D. This Court Should Bring Clarity To Rule 15(b) Jurisprudence Under the South Carolina Rules of Civil Procedure and Reverse the Court of Appeals.

Application of this Court's controlling Rule 15(b) prejudice test confirms reversible error below. The *Pool* test leads to the inescapable conclusion that the circuit court, which also relied on the *Ball* standard below, got it wrong. The record conclusively establishes that Respondent was well aware that the emergency defense issue was going to be litigated for some time and had ample opportunity to refute the defense at trial, and actually did refute it. For example, on October 8, 2018, Respondent filed the "Motion for Partial Summary Judgment, or in the Alternative, an Order Granting a Stay of Trial Until Pending Appeals in Other Cases Resolve Material Issues Likely to Arise in this Case." (Mot. for SJ or Stay, R. 1364). In that motion, Respondent asked the circuit court to grant partial summary judgment "*to preclude* ***the expected*** *statutory defense* under S.C. Code of Laws Section 15-32-230, representing a liability shield for negligently inflicted harm in the context of certain alleged obstetrical emergencies," and argued the statute did not apply to this case. (Id.) (emphasis added).

In the alternative, Respondent requested that the circuit court stay the trial of this case "until pending appeals in other cases resolve material issues ***likely to arise in this case***." (Id.) (emphasis added). Specifically, Respondent argued the trial of this case should be stayed until two appeals[1] "address[ing] various novel and complex legal and medical issues arising under S. C. Code of Laws Section 15-32-230" were resolved ***to ensure the circuit court would*** "***have guidance from the appellate courts about statutory definitions***, applicability to certain fact patterns, and related matters." (Id.). (emphasis added). The circuit court granted Respondent's request

for a stay for just these reasons. (Or. Granting Stay, R. 40). For months, this very case was stayed, and the circuit court met with the parties regarding continuing to stay the case, waiting for the parameters of the defense to be defined in the *Byrd* and *Flowers* appeals then pending in the Court of Appeals. All of this time and energy was for nothing under the Court of Appeals' current analysis.

Further, in *pre-trial* proceedings in this cause, Petitioner's November 15, 2021 motion to recuse shined a bright light on the substantive point that *gross negligence was going to be a litigated issue at trial*. (Def. Mtn to Recuse, R. 1401) The motion expressly alerted both Respondent, and the circuit court trying the case, that:

> Judge McKinnon should be recused from sitting as Trial Judge in this case ***which involves allegations of gross negligence by Dr. Miller*** that caused the serious and permanent injury to a child born to Angela Patton when he delivered her child during a vaginal delivery and a shoulder dystocia occurred.

Id. (emphasis added). The June 2, 2025 oral argument before the Court of Appeals confirms this critical notice point. Counsel for Respondent claimed at oral argument in response that "gross negligence, for one thing, never came up," and *if [Petitioner] had said anything about* ***gross negligence****. . . then you know, if we were smart enough,* ***that would have put us on notice***." *Patton v. Miller*, Oral Argument Archived Video, 2022-000288, June 3, 2025, media.sccourts.org/COA_Videos/2022-000288.mp4 at time stamp 19:20- 19:54. (emphasis added). But on reply, counsel for Petitioners indisputably confirms that gross negligence *did come up* as follows:

> . . . Mr. Graham discusses gross negligence and how he had no idea that was ever going to come up in the case, but if you look at the motion to recuse in the pre-trial in this case with Judge McKinnon, in the first paragraph of the motion, Defendant says

> this is a case where Plaintiff is going to assert gross negligence. . . . Mr. Graham responds to that motion and doesn't say a word about that, why? Because he knows that the statute is involved in this case.

Id. at time stamp 23:00-23:45; *see also Id.* at 24:30-24:50.

The trial proceedings also squarely lined up with the expected invocation of the statutory emergency defense. Petitioners' opening statement did much more than point to general facts and circumstances faced during delivery- it hit the bullseye of the statutory defense as follows:

> **Let me talk to you about an emergency, an obstetrical emergency**
> . . .
>
> Was this an obstetrical emergency. ***Was Alexia in immediate danger of serious bodily harm or death as a result of this shoulder dystocia.***

(*Id.* R. 283) (emphasis added). This statement of Petitioners' position on the issues to be tried substantively mirrors the emergency statute. *See* S.C. Code. Ann 15-32-230(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.") (emphasis added). It is difficult to imagine a scenario under which Petitioner's opening statement - *taken right from the statute and at the earliest stage of the trial* - was insufficient to alert opposing counsel that the affirmative defense, which Respondent admittedly expected, and the allegations of gross negligence which were forecast years prior, were at bar for disposition. And

Respondent did not object to Petitioners' opening statement, thus impliedly consenting to try the defense and waiving the right to challenge it later under settled South Carolina Supreme Court jurisprudence. *See e.g. 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");*see also State v. Lynn*, 277 S.C. 222, 284 S.E.2d 786 (1981) (finding that a failure to make the required contemporaneous objection may not be "bootstrapped" by a subsequent motion or request).

There was also ample evidence offered at trial whether the shoulder dystocia complicated delivery at bar, was or was not a genuine emergency. (R. 126-27, 283, 308-09, 415, 419, 770-776, 794-95) Dr. Miller, qualified as an expert in OB/GYN, testified, again right within the bullseye of the statutory emergency defense, ***that as soon as a shoulder dystocia is determined, the fetus is in immediate threat of serious bodily harm or death and that such a condition creates instability for the fetus and constitutes a genuine medical emergency.***[7] (R. 770-76, 794-95) (emphasis added).

Taken together, Respondent's earlier motion to stay and for partial summary judgment, Petitioners' motion for recusal, Petitioners' opening statement, and the parties' testimony at trial, confirm that the statutory emergency defense was front and center. Thus, under the first prong of the *Pool* test, Respondent far from lacked

[7] While the transcript does not reflect the particular nature of the objection, this testimony, elicited a prolonged two-part objection which required a bench conference. (R. 794-95) Consequently, the statutory emergency defense and gross negligence were far from "potential" issues at trial as the Court of Appeals' Opinion posits. (Slip Op. at p. 4)

notice that the statutory emergency defense would be tried. To the contrary, Respondent was ***well aware*** it would be tried and even attempted to remove the issue from trial through her pretrial motions practice. Respondent was on notice *for years* that this defense would be an issue at trial.

The record further establishes that Respondent not only had the opportunity to refute the emergency defense -which is all that is required- but further tried to refute the defense at trial, and actually did refute it. First, Respondent offered sufficient evidence that the shoulder dystocia complicated delivery was no *genuine* emergency at all. (R. 126-27, 283, 308-09, 415, 419, 770-776, 794-95) That evidence alone, if believed by the fact finder, is sufficient to avoid application of the statutory defense without even resorting to a heightened culpability standard. This is a fundamental factual difference between this case and *Dunbar*. In *Dunbar*, the plaintiff had concluded her case when a statute of limitation affirmative defense was raised by Rule 15(b) motion to amend, and directed verdict was immediately granted against plaintiff ***on that limitations defense***. *Dunbar*, 341 S.C. at 265, 533 SE.2d at 915. Not so here. No directed verdict could have been granted on the statutory emergency defense, since Respondent offered ample evidence tending to illustrate the shoulder dystocia complicated delivery was no *genuine emergency* at all.

And even after presentation of all evidence, Respondent's counsel stated his understanding -confirmed by the circuit court- that no final directed verdict ruling had been granted on gross negligence or recklessness and counsel sought to re-brief those issues, and he did. (R. 1135). Respondent's counsel argued that the evidence

he elicited from both Drs. Gureswich and Miller was sufficient to support the submission of recklessness to the jury. Specifically, Respondent's counsel contended that Dr. Miller "was aware of the danger, he consciously applied as much traction as he intended and that was a devastating amount of traction that caused a life changing injury to Alexia." (R. 1136) Respondent's counsel stated his own view of gross negligence and its distinctiveness from recklessness. (R. 1139)

But a showing of recklessness means that gross negligence has already 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."). Respondent thus had the opportunity to refute the emergency defense, did so, and further even attempted to prove a heightened culpability standard over simple negligence at trial and sought to submit the issue to the jury. (R. 1135-39).

Consequently, by denying the motion to amend and Petitioners' request to charge the jury on section 15-32-230, the trial court failed to instruct the jury with the controlling law, which is an abuse of discretion. *See Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000) ("Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error."). Petitioners were prejudiced by the failure to

properly charge the jury because if Petitioners' experts had been believed by the fact finder that there was temporally a genuine emergency during the delivery, the statutory requirements of section 15-32-230 would have been met, and the jury could have awarded Petitioners a defense verdict. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (providing an erroneous jury instruction is grounds for reversal if the Petitioner was prejudiced by the erroneous instruction). Had section 15-32-230 been charged, Respondent would have argued that the case should still be submitted to the jury despite the circuit court's finding that there had been a failure on her part to present sufficient evidence of gross negligence or recklessness (although she claimed to have presented evidence of recklessness). Such would have been based on her competing evidence that there was not yet a "genuine" emergency at the time of injury, and there was more time for the Doctor to use maneuvers to try to resolve the dystocia and deliver the child without the ultimate shoulder injuries suffered.

To that end, the opportunity to refute a defense is just that -an opportunity. An open chance to refute an expected defense does not -and cannot- guarantee the party opposing the Rule 15(b) amendment with the inviolable right that it must succeed in refuting the defense at every angle so as to ultimately prevail before amendment is allowed. Prejudice, then, cannot result under Rule 15(b) when, as here, a party has a plain and unmistakable opportunity to refute a defense -and further actually does so at trial- here with ample evidence that there was no genuine emergency and further by eliciting testimony of recklessness which subsumes gross

negligence. The apparent weakness of Respondent's recklessness showing, however, cannot fall on Petitioners' shoulders. Rule 15(b) prejudice cannot be used to handicap a movant if the non-movant doesn't knock its opportunity to refute the expected defense out of the park with its own evidentiary showing. Rule 15(b) principles only give the non-movant the opportunity to do so, but not the circuit court the prerogative to deny the motion to amend if the taken opportunity proves unsuccessful.

E. This Court Should Also Provide Instructions On Remand That The New Trial Should Be Presided Over By A Different Trial Judge

The Court of Appeals' Opinion failed to adhere to this Court's precedent in other ways connected to the trial court's Rule 15(b) ruling. The Opinion below mistakenly characterizes Petitioner's recusal argument as targeting, in general terms, the circuit court's Rule 15(b) ruling as demonstrating judicial bias. But that is not the case. As a preliminary matter, Petitioners moved to recuse the trial court as soon as he was assigned and well before any consideration of the 15(b) motion. Further, Petitioners articulated the reasons why circumstances could lead to the judge's impartiality being reasonably questioned, and Petitioners again cited this Court's precedent, which holds that a judge's impartiality might reasonably be questioned when ***his factual findings*** *are not supported by the record. Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) (emphasis added). Petitioners argued that the circuit court's *factual findings* – specifically those underpinning its Rule 15(b) ruling, was unsupported by the record. The circuit court expressly found that it was not until *the defense* called Dr. Miller in the *defense case-in-chief* that the statutory defense elements were ever raised. (R. 821). This

appeared as the critical *factual* basis for the trial court's Rule 15(b) ruling, but this finding is unsupported by the record, and thus this recusal issue is directly controlled by *Ellis*. *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). In fact, the statutory emergency defense came up much sooner in the trial. (Defendants' Opening Statement, R. 283; Testimony of Dr. Duboe, R. 308-09; Testimony of Dr. Miller, R. 415, 419, 770, 772, 774, 776); (Testimony of Dr. Gurewitsch, R. 637; June 26, 2013 Depo. of Dr. Gurewitsch, R. 1612-14 (read into evidence at trial); Testimony of Dr. Lupo, R. 706).

The circuit court judge agreed that he would ordinarily have recused himself based on the articulated grounds in the motion pre-trial, but stated that since there were only two circuit court judges available in the circuit, and due to his prior law firm's amount of litigation in the circuit, it would be unfair to the prior law firm for him to recuse himself, as it would set a precedent. This is respectfully not a basis for denying the recusal motion. Hence, *Ellis* controls and warrants certiorari review and reversal of the Court of Appeals ruling on the recusal issue as well.[8]

Conclusion

For these reasons, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari as delineated above.

[8] To be clear, this Court may still grant certiorari and reverse the Court of Appeals on the Rule 15(b) issue, even if it denies certiorari on the recusal issue. The wrong legal standards were applied to the Rule 15(b) decision, as outlined herein.

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