STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Michael J. Baxley, Circuit Court Judge

71341

Case No. 2007-CP-10-1553

Jamesetta Washinton, as Guardian ad Litem
of Jayden W., a minor, ... Petitioner,

v.

Edmund Rhett, Jr., M.D., Low Country Obstetrics and
Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a
East Cooper Regional Medical Center and AMN
Services, Inc., f/k/a Nurses RX Inc., ... Defendants

OF WHOM Edmund Rhett, Jr., M.D. is ....Respondent.

RECEIVED
FEB 20 2014
SC Court of Appeals

PETITION FOR REHEARING

Edward L. Graham
J. Layton Ruffin
GRAHAM LAW FIRM, P.A.
383 W. Cheves St.
Florence, SC 29501

ATTORNEYS FOR PETITIONER

Robert H. Hood
Molly H. Craig
Chilton Grace Simmons
Deborah H. Sheffield, *of counsel*
Hood Law Firm, LLC
172 Meeting St.
Charleston, SC 29401

ATTORNEY FOR RESPONDENTS

QUESTIONS PRESENTED

I. **DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE, AND THAT SUCH TESTIMONY WAS PREJUDICIAL TO PETITIONER?**

II. **DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THEORETICAL GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE, AND THAT SUCH TESTIMONY WAS PREJUDICIAL TO PETITIONER?**

III. **DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING AN EMERGENCY EXCEPTION TO INFORMED CONSENT?**

STATEMENT OF THE CASE

This is a medical negligence case involving brain bleeds and consequent brain damage sustained by minor Petitioner, Jayden W., son of Petitioner Jamesetta Washington, at the time of his birth on July 16, 2002. Petitioner alleges that Respondent Dr. Edmund Rhett, Jr., lacked proper obstetrical knowledge to manage this delivery correctly; chose to expedite Jayden's vaginal delivery by use of a vacuum extractor, which was not indicated but was in fact contradicted by Jayden's relatively high station in the mid-pelvis portion of the birth canal; chose to use the vacuum without making any effort whatsoever to obtain informed consent or even to announce his intent to use vacuum extractor; and misused the vacuum extractor. (R. 29-35) That vacuum extraction traumatically burst several blood vessels within Jayden's brain, causing him significant bleeding and consequent brain damage. (R. 29-35)

The Summon and Complaint were filed on April 16, 2007 and designated as Civil Action Number 07-CP-10-1553. (R. 28-36) The Complaint alleges negligence and other wrongdoing not only on the part of Dr. Rhett, but also on the part of hospital employees. Petitioner named Low Country Obstetrics and Gynecology, P.A. (hereinafter, "Low Country") as a defendant because of its role as employer of Dr. Rhett, for whose torts it had *respondeat superior* liability. Petitioner also named Tenet South Carolina, Inc. d/b/a East Cooper Regional Medical Center (hereinafter, "Hospital"), due to its *respondeat superior* liability for its torts of employees. Respondent Dr. Rhett's Answer raised the alleged defenses of general denial, no deviation from the standard of care, informed consent, reasonableness and good faith, pre-existing medical condition, predisposition of medical condition and unconstitutionality of punitive damages. (R. 37-42) Defendant Low Country's Answer asserted a general denial. (R. 43-46) Hospital's Answer alleged defenses of general denial, compliance with standards of care, failure to allege

facts sufficient to constitute a cause of action, no proximate cause, natural disease process, intervening and superseding negligence, comparative negligence and unconstitutionality of punitive damages. (R. 55-61)

During discovery Petitioner learned that a labor and delivery nurse was actually employed by a nurse agency, AMN Services, Inc. f/k/a Nurses RX Inc. (hereinafter, "Nurse Agency"), and not by the Hospital. Petitioner obtained leave to amend the Summons and Complaint; and did so, adding the Nurse Agency as an additional Defendant. (R. 7-12; 47-54) Defendant Nurse Agency's answer denied liability and raised affirmative defenses. (R. 79-86)

Prior to trial Petitioner settled claims against both Defendant Nurse Agency and Defendant Hospital. (R. 258: 5-24) Those settlements were approved by the trial judge.

The case was scheduled for trial against Dr. Rhett and Low Country in the Charleston County Court of Common Pleas starting on July 26, 2010, with the Honorable Michael J. Baxley serving as presiding trial judge. Prior to testimony the court denied Petitioner's motion *in limine* to keep out evidence of alcohol usage by the mother the first month of pregnancy before she realized she was pregnant. (R. 246: 14-20) The Court withheld ruling on Petitioner's motion *in limine* to keep out testimony of Dr. Aubrey Milunsky, a geneticist, about prenatal maternal alcohol consumption as a possible contributing cause of the child's brain bleeds and brain damage (R.. 227: 19 –228: 13; 231: 10 –235: 3; 236: 23 –245: 13) and Dr. Milunksy's unreliable and theoretical testimony that genetic factors may also have been a possible contributing cause of Jayden's brain bleeds. (R. 221: 1 –224: 13; 224: 21 –231: 9) Respondent's counsel suggested that the court hold Petitioner's Motion *in Limine* in abeyance pending an opportunity for Petitioner's counsel to *voir dire* Dr. Milunsky. (R. 104: 9-13; 226: 11-13) The Court agreed to revisit the issue, leading Petitioner to believe *voir dire* of Dr. Milunsky would be allowed so the

court could properly discharge its gatekeeper function. (R. 230: 15 –231: 5; 231: 10 – 245: 15) During trial, however, the trial court precluded Petitioner from being heard on a *voir dire* challenge to the causation testimony of Dr. Milunsky (R. 1466: 12 –1468: 3), and allowed the jury to hear speculative, theoretical and unreliable opinion testimony which lacked probative value, was not helpful to the jury and was highly prejudicial to Petitioner. (R. 1464: 18 – 1539: 7)

The Respondent kept referring to a general consent form signed by Petitioner Jamesetta Washington as the "informed consent" document. At the end of Respondent's case, the trial judge granted Petitioner's Motion for a partial directed verdict, ruling that the general consent form did not represent informed consent as a matter of law. (R. 2034: 25 –2035: 5; 2035: 25 – 2046: 7)

In his charge on informed consent, the trial judge informed the jury that there was an emergency exception to the informed consent requirement, but he did not charge them on the major limitations to that emergency exception as requested by Petitioner. (R. 2202: 5 -. 2206:11; 2235: 25 –2237: 14; 2258: 12 – 2259: 9; 3522-3606)

At the outset of jury deliberations, Petitioner and Low Country announced to the court their settlement for policy limits of Low Country's insurance coverage, which settlement was entered by the Court. (R, 2256: 23 –2258: 9)

The jury deliberated from 3:40 P.M. through 6:23 P.M. on August 10, 2010, and from 9:00 A.M. through 3:22 P.M., August 11, 2010, when they announced they were hopelessly deadlocked. (R. 2250:19; 2262:15; 2263:1-11; 2264: 2 –2268: 2) The trial judge gave an Allen charge. (R. 2264: 3 – 2268:2) The jury went out again at 3:29 P.M.; and announced one hour and

seventeen minutes later that the jury had reached a verdict in favor of Respondent Rhett. (R. 2268:3-18; 2269: 22 – 2270:17)

Post-trial interviews of jurors revealed that one juror had been biased against Petitioner from the outset, and that she and the foreman both had undisclosed personal experiences with the medical profession that affected their deliberations. (R. 3717-3718) Such interviews also revealed confusion by the jury about the judge's partial directed verdict on informed consent, and his charge on an unlimited emergency exception to informed consent. (*Id.,* R. 3716-3717)

Petitioner made a timely Motion for New Trial Absolute. (R. 145) By Order dated September 1, 2010, Judge Baxley denied Petitioner's Motions and entered judgment for Respondent Rhett. (R. 17-18)

Thereafter, Petitioner timely served and filed Notice of Appeal from Judge Baxley's said Order. (R. 3719-3724) The amount involved in this appeal is indeterminate, for Petitioner seeks a new trial on the claim for compensation for traumatic brain damages negligently inflicted, with an opportunity for a multi-million dollar verdict commensurate with significant non-economic damages and present value economic damages in excess of Six Million Dollars.

This Court issued its Opinion filed February 5, 2014, by which it affirmed the trial court's denial of Petitioner's Motion for a New Trial Absolute. In doing so, the Court declined to address the substance of Petitioner's Arguments I and II, based on its belief that such errors related to causation and could not be prejudicial, since the jury had ruled against Petitioner on the breach of standard of care issue. The Court overlooked or misapprehended the distinction between those cases which have ruled that exclusion of causation testimony is not prejudicial when the jury verdict turns on a standard of care issue and those precedents which recognize that

the admission of prejudicial matter taints the entire trial proceedings and supports a presumption of prejudice irrespective of the specific jury verdict.

ARGUMENT

I. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE, AND THAT SUCH TESTIMONY WAS PREJUDICAL TO PETITIONER.

A. Standard of Review

Determinations of relevance are largely within the trial court's discretion, and its decision to either admit or exclude evidence will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law to the prejudice of the Petitioner's rights. *Merrill v. Barton*, 250 S.C. 193, 195, 156 S.E.2d 862, 863 (1967). To warrant reversal on appeal, a party must show both the error of the court's ruling and resulting prejudice. *Doe v. Doe,* 324 S.C. 492, 499, 478 S.E.2d 854, 858 (Ct. App.1996).

The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Gooding v. St. Francis Xavier Hops.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). "An abuse of discretion occurs when the trial court's decision is based upon error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.,* 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008). Here, the testimony of Dr. Milunsky about maternal alcohol use as a possible contributing cause of brain damage should have been precluded for several reasons. His testimony had no probative value, and any minimal relevance was outweighed by its prejudicial nature. Moreover, it was not helpful to the jury, was unreliable, and violated the "most probable"

requirement and its admission violated precedents.

Allowing this testimony prejudiced Petitioner because it invited the jury to speculate about misconduct by Petitioner Jamesetta Washington harmful to her baby when the record was completely devoid of evidence to that effect. The Court overlooked or misapprehended that allowing such prejudicial testimony tainted the entire trial. Disallowing testimony regarding causation cannot prejudice a plaintiff who loses on the standard of care issue; but allowing prejudicial causation testimony to be heard by the jury taints their deliberation regarding all issues, including the standard of care issue. The jury verdict finding no standard of care breach was the product of prejudice.

B. The Trial Court Failed to Meet its Responsibility to Keep Irrelevant Prejudicial Evidence Out of the Jury's Purview Under Rule 401, 402 and 403 S.C.R.E.

The trial court erred by failing to exclude speculative and highly prejudicial evidence concerning prenatal maternal alcohol consumption as a possible contributing cause of Jayden's brain damage. Such evidence had no probative value; and its admission was extremely prejudicial, depriving Petitioner of a fair trial. For evidence to be relevant it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, S.C.R.E.; *see Hoeffner,* 311 S.C. at 365, 429 S.E.2d at 192; *Davis,* 340 S.C. at 155, 530 S.E.2d at 387; *Gulledge v. McLaughlin,* 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, S.C.R.E.; *see Pike v. South Carolina Dep't of Transp.,*332 S.C. 605, 613,

506 S.E.2d 516, 520 (Ct. App. 1998), *aff'd as modified,*343 S.C. 224, 540 S.E.2d 87 (2000). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E.; *In re Robert R.,* 340 S.C. 242, 246-47, 531 S.E.2d 301, 303 (Ct. App. 2000); *Haselden,* 341 S.C. at 497 n.12, 534 S.E.2d at 301 n.12; *Hunter v. Staples,* 335 S.C. 93, 101-02, 515 S.E.2d 261, 266 (Ct. App. 1999); *see also Watson ex rel Watson v. Chapman,* 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000) ("The dictates of Rule 401 are subject to the balancing requirement of Rule 403, S.C.R.E., which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative.")

The facts in this case show that Jamesetta Washington, mother of Jayden, consumed alcohol in modest amounts at the outset of her pregnancy before she knew she was pregnant. (R. 975: 2-13) There is no evidence of any alcohol "abuse," excessive alcohol consumption, or any alcohol consumption later than the early prenatal period before Jamesetta realized she was pregnant. (R. 1494:20-24) No expert for either side opined that such maternal alcohol consumption in the early prenatal period most probably caused Jayden's brain bleeds and brain damage. However, two defense experts, the geneticist, Dr. Aubrey Milunsky, and Dr. Lynn Norton, an obstetrician, testified at deposition that if the mother consumed more alcohol than she admitted, that could be a contributing cause of brain damage, but to an indeterminable degree. Dr. Milunsky theorized in his deposition that Jayden's mother may have consumed more alcohol than she admitted, and he believed her prenatal alcohol consumption was a contributing factor, but he could not ascribe a mathematical probability of even a one in a million chance that maternal alcohol ingestion caused brain bleeds or brain damage. (R. 1502:19-24) Dr. Norton

similarly testified at deposition to her belief that maternal alcohol consumption possibly caused brain damage, but she could not testify that it most probably did so. (R. 2689: 6 –2690: 13). She could not testify that there was even a one in a million chance that alcohol caused brain damage in this case. *Id.* The defense was expected to offer such unreliable, speculative and theoretical causation testimony at trial, pursuant to a "multifactorial cause" theory.

Believing such testimony to be completely improper, because unreliable, based on speculation and in violation of the "most probable" cause requirement, Petitioner moved *in limine* to preclude such testimony. (R. 113-115; 231:10 –245:8) The trial judge denied the motion about excluding references to maternal alcohol consumption in the medical records, stating:

> I will tell you now that the court will not exclude the record about the alcohol abuse as a major component of the defense's case. It's known science and even among lay people it's known that you don't ingest alcohol when you may be pregnant. The court will not exclude that testimony.

(R. 246:14-20). That ruling was erroneous because (1) there was no evidence whatsoever of alcohol "abuse"; and (2) the purported capacity of maternal alcohol ingestion to cause brain bleeds and brain damage is not with the realm of lay knowledge, (3) is not scientifically reliable as applied to this case, and (4) it utterly fails the "most probable" requirement. The court withheld its ruling on the motion to preclude expert testimony on purported alcohol causation (R. 245: 9-15), and then refused to allow *voir dire* on the subject when defense expert Dr. Milunsky was called. (R. 1466:12 –1468:3). In fact, the trial court ruled that it would not decide until after Dr. Milunsky's testimony whether any of it was objectionable and then, if so, make a corrective charge:

> THE COURT: Counsel, the best way for me to do that and not delay these proceedings is to ask you to hold that objection and we will take

> it up at the end of the testimony as to whether or not there may be some objection to the science itself. If so, then the court will make a curative instruction. If not, we will remain where we find ourselves.

(R. 1467:21 –1468:3). Unfortunately, by that time the harm had been done. Nevertheless, the court persisted in its erroneous belief that the testimony was proper. (R. 1602:18 –1603:4; 1608: 3-13).

Dr. Milunsky was allowed to testify in the trial as follows:

> Q. And what of significance in the first trimester did you find in the mother's records?
>
> A. That there was a history of alcohol use in the first trimester, the first three months of pregnancy.
>
> Q. With regard to this child and his problems and developmental delays, how is that relevant?
>
> A. Well, it is potentially relevant in the sense that the prenatal record indicates alcohol use but does not indicate how much and precisely when. So it sits there as an undefinable concern that may or may not have to do with one or more of these items.
>
> Q. Are these the kind of delays that you see with alcohol ingestion?
>
> EDWARD GRAHAM: Objection. Leading, Your Honor.
>
> THE COURT: Overruled as to that question.
>
> THE WITNESS: There is something called fetal alcohol syndrome.
>
> DIRECT EXAMINATION CONTINUED BY ROBERT HOOD:
>
> Q. Say that word again, those words?
>
> A. Fetal alcohol syndrome, that is what it is called.

Q. Yes, sir.

A. I can say that Jayden does not have the fetal alcohol syndrome.

Q. Okay.

A. However, the medical literature is very clear about something called an incomplete fetal alcohol syndrome.

Q. Incomplete?

A. Incomplete, (affirmative nod). So just like anything else in life, there are gradations – slow, slight, not quite there yet – involvement of anything that you might care to think so. It is possible – that's all that I can say – that there was alcohol taken that wasn't so severe as to cause the entire syndrome, which by the way includes mental retardation, heart defects and other significant birth defects but was enough to cause troubles. But this is all speculation. We don't know. It sits there undefined. It's an item.

(R. 1491:18 –1493:16) (Emphasis added.)

Q. To a medical degree of certainty, most probably, has the alcohol had an impact in this case?

A. I think I've already stated that it is not possible to, uh, assign a risk to Jayden from the alcohol taken; since, to begin with, we don't know how much was taken and when precisely it was taken. So it remains an item of concern that it could be a contributing factor, yet one of the multiple factors that are operating in Jayden's case to cause the issues or some of the issues but we don't actually know for sure.

Q. All right. Is there any way to scientifically know for sure, a hundred percent?

A. No, actually not.

Q. What about fifty-one percent?

A. No, no. There is no way to assign a population (sic) or any other kind of risk with reference to the alcohol here. It is more probably than that that Jayden's problems occurred as a consequence

> of multiple factors that have nothing to do with the bleeding, but rather from either the alcohol and/or his vasculature problem, his connective tissue problems.
>
> Q. Is that your opinion to a medical degree of certainty, most probably, Doctor?
>
> A. Yes.

(R. 1494:17 –1495:22) (Emphasis added.)

Such testimony was admittedly speculative. It was also of no relevance and highly prejudicial. If there was any arguable relevance, it was miniscule and greatly outweighed by the prejudicial nature of such testimony. In effect, such testimony invited the jury to speculate that Jayden W.'s brain was possibly damaged in part by his mother's excessive drinking, of which there is no evidence, but which the jury nevertheless was invited to assume may have been present, based on nothing but surmise and conjecture. Allowing such testimony poisoned the jury's perceptions of Jamesetta's pregnancy and prevented Petitioner from receiving a fair trial.

When asked directly on cross-examination about the limited causal effect, if any, of maternal alcohol ingestion, Dr. Milunsky testified in pertinent part as follows:

> Q. Doctor, can you tell us today, do you believe that there is even a one in ten thousand chance that alcohol played any role in causing the damage to Jayden?
>
> A. I don't think that I can add to the statement, that it simply would reiterate it to the jury to hear it again.
>
> Q. Can you say that there is even a one in a million chance?
>
> A. That's absurd statement (sic) to talk about one in whatever number when there is no scientific basis to account for such a statement.
>
> Q. Sir, please answer yes or no. Can you tell these Ladies and

Gentlemen whether there is even a one in a million chance that alcohol had any significance in this brain damage?

A. No, the response –that is not "yes" or "no", the response is how do you come to one in a million? That supports that there is a statement, and there is no way for me to come up with a rational, never mind scientific, statement that could aid and abet a statement of one in any number that you might choose.

***

Q. Dr. Milunsky, please turn to Page 24 of your deposition.

A. Okay.

Q. Starting at Line 7, I asked the question, (reading):

Q. Would you be willing to testify at trial that there is at least – I mean, to a reasonable degree of medical certainty, there's at least a one-in-a-million chance that alcohol by the mom caused any birth defect of Jayden W.?

A. There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects.

Q. Is that a correct reading of your answer?

A. I even stated here again, multiple times already.

(R. 1502:12 – 1503:12; 1504:3-22) (Emphasis added)

Dr. Milunsky's admissions on cross, though evasive, were consistent with his deposition testimony, which was the basis for Petitioner's objection to his being allowed to express to the jury his wild speculation about excessive alcohol consumption as a possible cause of Jayden's brain damage. (R. 113-115) Eliciting an admission from Dr. Milunsky during his cross-examination that his testimony was speculative and without scientific reliability does not un-ring the bell that should never have been rung. The judge should not have let the jury hear Dr. Milunsky's irrelevant prejudicial speculation. Beyond Dr. Milunsky's expert opinion there was

no other evidence presented at trial that the maternal alcohol consumption played any role in causing Jayden W.'s injuries sustained during birth. The testimony of Dr. Milunsky is speculative, theoretical, and not probative of alcohol causing Jayden's brain damage. Its prejudicial nature is painfully obvious, greatly outweighing any presumed minimal probative value. Therefore, the trial court's decision to admit such testimony is in clear violation of Rule 401, 402, and 403, S.C.R.E. and was an abuse of discretion.

Allowing this testimony prejudiced Petitioner because it invited the jury to speculate about misconduct by Petitioner Jamesetta Washington harmful to her baby when the record was completely devoid of evidence to that effect. The Court overlooked or misapprehended that allowing such prejudicial testimony tainted the entire trial. Disallowing testimony regarding causation cannot prejudice a lower case plaintiff who loses on the standard of care issue; but allowing prejudicial causation testimony to be heard by the jury taints their deliberation regarding all issues, including the standard of care issue. The jury verdict finding no standard of care breach was the product of prejudice.

C. Allowing Testimony of Possible Damage From Prenatal Maternal Alcohol Use Violates Scientific Reliability Standards.

In *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), the South Carolina Supreme Court adopted a standard for admissibility of scientific evidence based on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." In considering reliability under the *Jones* standard, the Court looks at several factors, including (1) the publication and peer review of the technique; (2) prior application of the method to the type of

evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). Such evidence is also subject to disallowance for prejudice or lack of probative value. *Id.*

In 1993 the case of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113S.Ct. 2786, 125 L. Ed. 2d 469 (1993), altered the federal trial bench's gatekeeper role with respect to scientific evidence, requiring that such evidence must be relevant, reliable and helpful to the jury to be admitted. The Court suggested four factors to use for determining reliability; (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique. If such evidence is determined to be sufficiently relevant, reliable and helpful, the court must still consider whether its probative value is outweighed by its prejudicial effect. *Id.*

After *Daubert*, the South Carolina Supreme Court revisited the issue of admissibility of scientific evidence in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court ruled that for scientific evidence to be admissible the trial court must initially determine that the evidence will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable. The *Jones* factors should be used to determine reliability. *Id.* The Court noted that even if otherwise admissible, such evidence should still be precluded if its prejudicial effect outweighs its probative value. *Id.* The Court concluded the scientific evidence at issue in *Council* had been properly admitted.

The most recent state Supreme Court case to consider admissibility of scientific evidence is *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). In *Watson,* the judgment for Plaintiff was reversed because the purported expert testimony should have been disallowed,

because purported experts were not qualified, and the purported scientific evidence was not reliable. The Court confirmed that reliability is a prerequisite for both scientific and technical testimony. The Court confirmed that the trial judge serves a gatekeeper role and "should be cautious in conferring an expert label upon a witness" and in allowing purported scientific evidence through such witnesses. *Id.*, 389 S.C. at 449, 699 S.E.2d at 176.

The alcohol causation testimony of Dr. Milunsky should have been disallowed because it was not helpful to the jury, was not reliable, and its prejudicial effect outweighed any potential probative value. That it was neither helpful nor reliable can be proven through Dr. Milunksy's own words: "It is not possible to...assign a risk to Jayden from the alcohol...since...we don't know how much was taken and when precisely it was taken." (R. 1494, lines 22-24).

> Q. And you said that you believe that Jayden has incomplete fetal alcohol syndrome?
>
> A. I did not. I did not say that.
>
> Q. What ---
>
> A. I said that he does not have fetal alcohol syndrome, as point one. Point two, that the features that he does have are consistent with incomplete – or that some of the features are consistent with incomplete fetal alcohol syndrome; <u>for which there is no proof</u>.

(R. 1501: 1 –1502: 3) (Emphasis added.)

> Q. You can't express an opinion with any scientific reliability about any degree of probability or possibility, can you?
>
> A. About what?
>
> Q. That alcohol played any significant role in causing brain damage in this child?
>
> A. You're like a dog with a bone. I mean, the fact is that we made the statement here that we don't know about the contribution of alcohol taken, we don't know the volume, the amount, the timing, and its sits there as an item that cannot be resolved. It sits there

> nevertheless because some of the features are consistent with incomplete fetal alcohol syndrome.

(R. 1503:13 – 1504:2) (Emphasis added.)

Further, Dr. Milunsky acknowledged, "There's no scientific basis upon which to reach a statistical likelihood for the [alcohol's] role in Jayden's birth defects." (R. 1504:15-22). Testimony from this witness about possible alcohol causation is neither helpful nor reliable, but invites speculation and theorizing about possible excessive alcohol consumption as a possible cause that cannot be quantified. Any presumed minimal probative value is greatly outweighed by the obvious prejudicial effect of such testimony.

Although the admission of such testimony is plainly erroneous, it is noteworthy that the trial judge did not even recognize his role as gatekeeper of unreliable scientific testimony. He withheld his ruling on Petitioner's Motion in Limine (R. 245:9-15), then refused Petitioner's attempt to have him exercise his gatekeeper duty before Dr. Milunsky testified. (R. 1466:12 –. 1468:3). Startlingly, he announced his intention to consider questions of helpfulness, reliability and prejudice only after the jury heard the challenged testimony. (R. 1467:20 –1468:3) His attitude was that any purported scientific evidence that was in retrospect determined to be unhelpful, unreliable or prejudicial could be remedied by a corrective charge. Such a cavalier view by a trial judge of his gatekeeper role reflects a dangerous misunderstanding of *State v. Council, supra*; and *Watson v. Ford, supra*.

D. The Trial Court's Admission of Testimony Concerning Possible Damage From Prenatal Maternal Alcohol Use Violates the "Most Probable" Requirement.

"Before expert medical testimony is admissible on the question of causation between the

plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probable' rule." *Payton v. Kearse*, 329 S.C. 51, 495 S.E. 2d 205 (Ct. App. 1995) (quoting *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 410 S.E. 2d 537 (1991). *Payton* involved expert testimony of a Dr. Richards who was hired to testify for the Defendant Doctor, Dr. Kearse. He was a qualified pharmacist, who listed six possible reasons as to why Mr. Payton may have the injuries he claimed. However, much like the instant case, the expert could not testify that any one of those causes most probably caused the injuries. Therefore, the expert was properly precluded from testifying that any one or the combination of the causes caused the injury.

Dr. Milunsky's overall causation opinion expressed during direct examination was, "it is more probably that Jayden's problems occurred as a consequence of multiple factors...." (R. 1495:13-16). A multifactorial cause theory does not permit testimony of a myriad of minor possible causation factors that each fall short of most probable cause. That is precisely the significance of *Payton v. Kearse,* supra. Yet the trial judge allowed Dr. Milunsky to testify about his speculation that multiple possible factors preceding Jayden's vacuum delivery, including maternal alcohol consumption, had contributing causal significance. Dr. Milunsky's testimony about the significance of alcohol and other factors fell dramatically short of the most probable requirement. When asked about the alcohol factor during cross examination, Dr. Milunsky finally acknowledged, "There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects." (R. 1504:15-18).

The trial court allowed Dr. Milunsky to speculate about possible timing and amount of maternal alcohol ingestion that was not supported by actual evidence. The Court further allowed Dr. Milunsky to theorize that such assumed excessive alcohol consumption in pregnancy was a possible contributing cause of Jayden's brain damage. Allowing such speculative and theoretical

testimony is wrong on many levels, and certainly violates the "most probable" rule of *Payton v. Kearse*.

E. The Trial Court's Admission of Testimony Concerning Possible Damage From Prenatal Maternal Alcohol Use Violates Precedent.

In *Johnson v. Horry County Solid Waste Authority,* 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010) the decedent was in a single car accident after leaving a bar. After exiting her vehicle after that initial accident, she died in a second accident, as she was crushed between her car and a solid waste truck. At trial, Plaintiff made a motion *in limine* to exclude evidence of Decedent's blood alcohol level, which was .14, and evidence showing traces of marijuana and cocaine in Decedent's bloodstream. Plaintiff argued no evidence causally linked Decedent's intoxication to the second accident. At the trial court's request, the County attempted to establish such a causal connection. The County raised several arguments, but the trial court excluded the evidence under Rule 403. The Court of Appeals affirmed this ruling by recognizing that:

> ... otherwise relevant evidence may be excluded when its probative value is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....' Rule 403, S.C.R.E. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Owens,* 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001) *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005).

Id. at 838. The Court of Appeals agreed with the trial court that the "prejudice created by admitting decedent's blood alcohol level substantially outweighed the probative value." *Id.* at 839.

The case *sub judice* presents stronger reasons to exclude speculative and theoretical

alcohol causation testimony than in *Johnson*. Unlike *Johnson*, in which a toxicology report evidenced an alcohol blood level of .14, plus marijuana and cocaine in the bloodstream, there is no evidence whatsoever that Jamesetta Washington was ever even intoxicated while pregnant. *Id.* There is no evidence that she consumed more than a modest amount while pregnant. (R. 1494:20-24) There is no evidence that she consumed any alcohol later than early in the pregnancy before she realized she was pregnant. (R. 975:2-13) Tests after the delivery proved she had no drugs or alcohol in her system. (R. 3142) The speculation and theorizing about possible causal significance of alcohol usage in this case is far less probative than in *Johnson*; and its prejudicial effect is at least as great as that in *Johnson* because the testimony invites a decision on an improper basis. Dr. Milunsky's speculative and theoretical testimony regarding maternal alcohol use as a possible contributing cause of brain damage served no purpose other than to invite a jury verdict on an improper basis and should have been excluded.

Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003), also represents compelling authority that Dr. Milunsky's speculative testimony should have been excluded. In *Kennedy,* a tractor-trailer moved in front of a pick-up truck driven by Kennedy. Kennedy's pick-up truck then struck the rear of the 18-wheeler, and Kennedy alleged that he sustained injuries caused by negligence of the tractor-trailer driver in pulling too suddenly in front of him. After the accident Kennedy had a toxicology screening which showed the presence of marijuana in his bloodstream. *Id.* at 128-29, 595 S.E.2d at 251. Griffin sought to admit the toxicology evidence of Kennedy's marijuana as probative of the assertion that Kennedy could have stopped without hitting the tractor-trailer if he had not been adversely affected by the drug. The trial court allowed the testimony. Despite eyewitness testimony that Kennedy did have sufficient time to stop, the Court of Appeals concluded that the circumstances of the accident did not "necessarily

suggest that [Kennedy] was driving under impairment." *Id.* Under those circumstances, the Court reversed a defense judgment, concluding that the danger of unfair prejudice substantially outweighed the probative value of the toxicology report. *Id.* at 128-29, 595 S.E.2d at 251.

In the instant case, speculative theorizing of possible excessive alcohol ingestion possibly later than the first month of pregnancy, being a possible contributing causal factor for brain damage, is even less probative than the toxicology evidence of marijuana use in *Kennedy.* In *Kennedy* there was evidence of recent marijuana use and delayed motor responses immediately prior to the injurious impact, whereas in this case *sub judice* there is no evidence of any maternal alcohol use within approximately eight months before the birth, and no evidence of excessive consumption in the first month. (R. 975: 2-13) Tests performed immediately after Jayden's brain bleeds were noted as negative for alcohol and illicit drugs. (R. 3142) Allowing Dr. Milunsky to speculate about possible causal significance of possible additional alcohol use in pregnancy and possible excessive alcohol consumption during pregnancy is manifestly improper. As the probative value of such testimony is non-existent, its prejudicial nature obvious, its utter failure to meet the "most probable" requirement, and its lack of scientific reliability, the trial judge abused his discretion in admitting the testimony and thus denied Petitioner a fair trial.

F: Petitioner Suffered Prejudice When the Trial Court Admitted Testimony Regarding Maternal Use of Alcohol as a Possible Contributing Cause of Jayden W's Brain Damage.

It is prejudicial to erroneously admit expert testimony that a mother caused her baby's brain damage by abusing alcohol during pregnancy, if there is no evidence that the mother abused alcohol during pregnancy. The court of appeals declined to address this issue because it

found the issue related exclusively to the element of causation. However, Petitioner respectfully argues the Court did not consider case precedent which held, "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial." *S.C. State Hwy Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 485 (1965).

It is hard to imagine what could be more prejudicial that accusations that a mother caused her own child's brain damage by abusing alcohol, a well-known teratogen. There was no evidentiary basis for Dr. Milunsky to argue that Jamesetta consumed alcohol in more than a modest amount in the very first weeks of her pregnancy. Nevertheless defense counsel offered Dr. Milunsky multiple questions related to alcohol consumption, alcohol abuse, fetal alcohol syndrome, and the harm caused by drinking during pregnancy, which Dr. Milunsky was more than happy to answer. (R. p: 1482, II. 4-11; p.1490, II. 21-23; p. 1491, II 18-23; p. 1492, 1. 2; p. 1495, 1. 22). This is so even though Dr. Milunsky specifically stated he "has no idea, and the record doesn't indicate, how much alcohol" was consumed. (R. 1482: 8-9).

Defense counsel continued to ask Dr. Milunsky about the causal significance of "alcohol ***abuse.***" R. 1490:21 –1491:15) (emphasis added). Defense counsel elicited and emphasized evidence about the possibility of obtaining fetal alcohol syndrome from excessive alcohol consumption during pregnancy, despite the stark absence of evidence that Jamesetta had consumed more than a modest amount of alcohol and that modest consumption was limited to the first month of pregnancy before she missed her period and learned she was pregnant.

The erroneous admission of such highly prejudicial evidence denied Petitioner her right to a fair trial. Rule 103(A), SCRE. The rule that prejudice is presumed where "the admission of incompetent evidence having some probative value upon a material issue of fact in the case" is based upon "the possibility that the verdict of the jury may have been influenced, to the prejudice

of the complaining party, by the improperly admitted evidence." *S.C. State Hwy Dept. v. Graydon, supra.* Additionally, "Such evidence being incompetent and having some probative value upon a material issue of fact in the case, it is presumed to be prejudicial." *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 495, 61 S.E.2d 53 (1950). Finally, the Supreme Court of South Carolina has explained, "[T]here may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony" that even its "subsequent withdrawal will not remove the effect caused by its admission . . . ." *Templeton v. C. & W. C. RY. Co.,* 117 S.C. 44, 55, 108 S.E. 363, 367, (1921).

This case similarly presents an example of testimony of probative value to a material issue that is so improper and capable of creating such a strong impression upon juror's minds that its admission must be understood to have prejudiced the complaining party. Few things in our society are look upon with more contempt than a mother who chooses to harm her own child. For an expert to take the stand and accuse a mother of drinking alcohol in a sufficient quantity during her pregnancy to cause her child's brain damage creates the type of prejudice that the cases cited to sought to prevent.

Moreover, this is not a case where the court simply refused to admit evidence; as with the above-cited-cases, this is a case where prejudicial evidence was in fact admitted into the record. It would be difficult to argue that causation evidence excluded from the record would have affected the minds of jurors whose deliberations did not continue beyond the standard of care issue. In contrast, the jury in this case heard the prejudicial evidence, which tainted the entire decision-making process of the jury. When evidence as prejudicial as alcohol abuse during pregnancy is introduced to the jury, it is difficult to understand how this would not have created a

strong impression upon the juror's minds prejudicing the Petitioner on all aspects of their deliberation, including standard of care breaches.

Finally, this Court cited *Stephens v. CSX Transp., Inc.* 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) for the proposition that it need not address issues related to admissibility of maternal use of alcohol. Petitioner respectfully submits that this opinion is inapposite to the case at hand. The court in *Stephens* determined that a challenge to a jury charge on an issue that the jury never reached in its deliberations cannot be prejudicial. *Id.* at 503, 735 S.E.2d at 515. This is logical, but it is also an entirely different situation from a challenge to evidence that is improperly admitted, heard by the jury and which tainted the entire proceeding. Moreover, the cases discussed above regarding the presumption of prejudice related to the admission of material evidence; they did not consider prejudice arising from an incorrect jury instruction. Accordingly, the court in *Stephens* would not have considered the principles set forth in *Cooper*, *Graydon*, or *Templeton*.

II. THE COURT OVERLOOKED OR MISAPPRENDED THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THEORETICAL GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE, AND THAT SUCH TESTIMONY WAS PREJUDICIAL TO PETITIONER.

A. Standard of Review

The standard of review is set forth in Argument I A, s*upra* at page 6. Dr. Milunsky's testimony concerning theoretical genetic factors as a possible cause of brain bleeds and brain damage should have been excluded because it lacks probative value, any presumed minimal relevance is outweighed by its prejudicial effect, it is not helpful to the jury, it is not reliable, and it violates the "most probable" requirement.

B. The Trial Court Failed to Meet its Responsibility to Keep Irrelevant Prejudicial Evidence Out of the Jury's Purview Under Rule 401, 402 and 403 SCRE.

Dr. Milunsky's testimony concerning possible causal significance of theoretical genetics factors falls into three categories: (1) Jayden supposedly has multiple birth defects that cannot all be caused by traumatic brain damage at birth; (2) Jayden supposedly has a connective tissue disorder that made the blood vessels in his brain more vulnerable to injury from traumatic vacuum suction by Dr. Rhett; (3) despite negative results from currently available genetics testing, there will supposedly be in existence at some unknown future date tests which, if then taken by Jayden, would reveal that he has a genetic syndrome not yet recognized by current developments in genetics. (R. 1469:21- 1539:7) Each will be addressed in turn.

Dr. Milunsky contends that Jayden has or had numerous alleged birth defects, many of which can be caused by traumatic brain injury at birth, and others of which are not unusual in the newborn[1]. Dr. Milunksy had never examined Jayden W., but purported to make these diagnoses from two photographs and a partial review of the medical records.

Testimony of Dr. Barbara Burton, Petitioner's genetics expert, was based on her physical examination of Jayden as well as a review of all relevant medical records and the negative results of five genetics tests. (R.. 2490:12 –2505:10; 2512:2 – 2514:6) Dr. Burton explained that many of the conditions identified by Dr. Milunsky either never existed, were merely transient, or

[1] Those include coloboma, a developmental imperfection of the eye (R. 1471:15 – 1472:8); hyperextensibility, or loose joints (R. 1471:12); hypotonia, or reduced muscle tone (R. 1479: 3-4); narrow blood vessels to the lung (R. 1471:25); alleged narrow blood vessel in the brain (R. 1471:24 – 1472:9); undescended testis (R. 474:7-17); bilateral hydroceles, associated with undescended testis (R. 1472:18 –1476:19); reduced platelet count (R. 1388:9-13); delayed myelination (R. 1479:20 – 1480:10); strabismus, or a condition of being cross-eyed (R. 1481: 5-7); supposedly wide-spaced nipples (R. 1479:5); and supposedly prominent ears (R. 1480: 15-16).

represent individual variability rather than birth defects. (*Id.,* R. 2514:8 –2526:14) She further explained that many of the conditions which Dr. Milunsky addressed were to be expected when a child is born with traumatic brain bleeds, and the others are not very unusual. Id. Because the alleged birth defects identified by Dr. Milunsky are either to be expected when a baby's brain is traumatically injured at birth or are not very unusual, such testimony had minimal relevance that was outweighed by its prejudicial nature and tendency to confuse. It should have been disallowed by the trial court as part of its gatekeeper function.

Dr. Milunsky also testified that Jayden's mother had certain conditions associated with a connective tissue disorder including spina bifida, fused vertebrae, lordosis, and an extra pair of ribs. (R. 1482:24 –1484:10) Although there was no evidence that any such conditions were shared by Jayden, Dr. Milunsky nevertheless opined that Jayden had an inherited connective tissue disorder. Dr. Burton testified from her personal examination that Jayden did not have any connective tissue disorder; and that his mother's spine and rib issues are unrelated to connective tissue disorder. (R. 2515:20 –2519:22) Dr. Milunsky agreed that connective tissue disorders have never been associated with brain bleeds at birth, except with respect to an extremely rare genetic syndrome he admitted Jayden does not have. (R. 1518:25 –1519:10) Thus, there was no probative value to Milunsky's testimony about connective tissue disorder, which only served to prejudice and confuse the jury about theoretical genetics factors. Moreover, even assuming arguendo that Jayden had inherited a connective tissue disorder which made him more vulnerable to brain bleeds from vacuum suction, that assumed pre-existing condition would not break the causal connection between Dr. Rhett's use of the vacuum and Jayden's resulting brain bleeds. Even Dr. Milunsky admitted that Dr. Rhett's vacuum use caused the child's brain bleeds. (R. 1531:18-20)

Even more disturbing is Dr. Milunsky's proposition that there will be in the future tests for genetic syndromes which are not yet recognized; and his prediction Jayden would be theoretically proven to have such a syndrome, not yet recognized, if he ever took such tests, which do not yet exist. (R. 1504:23 –1508:7) Such testimony has no probative value; and any assumed minimal relevance is greatly outweighed by its tendency to prejudice and confuse the jury.

C. Allowing Testimony of Possible Damage From Theoretical Genetics Factors Use Violates Scientific Reliability Standards.

Dr. Milunsky's testimony regarding possible brain damage from theoretical genetic factors should have been denied admissibility under *State v. Council, supra.* The testimony was neither helpful to the jury nor scientifically reliable using the *Jones* factors for reliability. This evidence was not reliable because it involves speculation about what future developments in genetics may entail, rather than an application of current science to known facts. The record discloses no basis for a reliability determination under any *Jones* factor. The trial court disallowed an opportunity for *voir dire* out of the jury's presence by Petitioner's counsel to develop a more detailed record regarding lack of reliability. Yet Dr. Milunsky's testimony itself reveals the lack of scientific reliability.

Dr. Milunsky admitted during direct examination that his opinion was based on speculation and that he could not give a more probable than not causation opinion. (R. 1494:17 – 1495:13). His testimony expressed a collision of ideas of what could possibly be a contributing cause; it could be unknown alcohol consumption, it could be an undiagnosed inherited vasculature problem, it could be an unrecognized inherited connective tissue problem. All are theories devoid of factual support, and all lack scientific reliability.

Review of the transcript shows that Dr. Milunsky's opinions had not been published or peer reviewed on his beliefs in this case, and that his opinion was in fact contrary to accepted medical knowledge. Dr. Milunsky admits that out of the 2,000 known connective tissue disorders, the supposed birth defects he says Jayden exhibits are not parallel with a single one. He cannot match it, name it, test for it, or even validate its existence, but he claims to be sure that Jayden has it, based only on his say-so. (R. 1509:18 – 1510:21). Dr. Milunsky suggested during his deposition that five tests be run to explore the nature of the alleged connective tissue disorder. (R. 2766-2783). When those tests were later run, each of them returned negative, showing no genetic problem whatsoever. (R. 2494:8 – 2503:6; 2588-2595) Nevertheless, Dr. Milunsky persisted in his assertion that his word should be given credence over scientifically reliable test results.

The trial court also had before it substantial evidence that Dr. Milunsky's trial opinions were based on an incomplete work up of Jayden W., leading to a speculative genetics theory. Dr. Milunsky never conducted a physical examination, but reviewed only two pictures of Jayden W. and limited medical records. Not once did he examine the child. He merely surmised that this child must have some not yet recognized genetic disorder without appropriate scientific process. As stated by Dr. Rhett's counsel Robert Hood, "Most syndromes are identified by examination;" however one was not completed by Dr. Milunsky. (R. 228:21-23).

In analyzing the reliability of an expert's testimony, the "key question" is "whether it can be (and has been) tested." *Daubert, supra.* South Carolina cases are in accord. *See, e.g., Watson v. Ford Motor Co., supra.* Like the expert in *Watson,* Milunsky contends that there is a genetic syndrome for which there is no test. Such testimony is speculative, theoretical and unreliable.

"Simply put, an expert does not assist the trier of fact...if he starts his analysis based on

...assumption (of the very question he was called upon to resolve)....") *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999). As explained in pretrial hearings by Petitioner, Dr. Milunsky suggested that five tests be completed to prove the connective tissue disorder, but even if those tests came back negative (which they did) his opinion would not change. (R. 225:9-19). This is clearly an example of working improperly from an assumption. "When an expert proposes a theory that modifies otherwise well-established knowledge ...we would expect the importance of testing as a factor in determining reliability to be at its highest." *Bitler v. AO Smith Corp.*, 400 F.3d 1227, 1235 (10th Cir. 2004). With no indicia of reliability, the trial court improperly submitted the opinions of Dr. Milunsky to the jury.

Perhaps in evaluating the reliability of the theoretical genetics factors presented by Milunsky, the trial judge was understandably distracted by his own recent personal experiences. His brother had died earlier that year from a previously undiagnosed genetic neurodegenerative disease. (R.229, lines 16-21) He had just attended a genetics conference on that disease two weeks earlier. *Id.* From those experiences he was aware of "an entire array of genetic possibilities of things that we don't yet understand, that we know are out there." (R. 230:1-3) It is tragic that the judge lost his brother, but our awareness of an "entire array of genetic possibilities" does not mean that current speculation about possible future science should be admissible.

The testimony of Dr. Milunsky regarding proximate cause was neither helpful, reliable nor probative. It should have been precluded. The court failed to perform its role as gatekeeper to prevent the jury from hearing unreliable, speculative and theoretical testimony from Dr. Milunsky.

D. The Trial Court's Admission of Testimony Concerning Possible Damage From Theoretical Genetic Factors Violates the "Most Probable" Requirement.

"Before expert medical testimony is admissible on the question of causation between the plaintiffs injuries and the acts of the defendant, the testimony must satisfy the 'most probable' rule." *Payton v. Kearse, supra.* Dr. Milunsky's overall causation opinion expressed during direct examination was, "it is more probably that Jayden's problems occurred as a consequence of multiple factors...." (R. 1495:13-16) The trial judge allowed Dr. Milunsky to testify about this speculation that multiple possible contributing factors preceded Jayden's brain damage, including maternal alcohol consumption, vascular problems, and purported connective tissue disorder. Yet Dr. Milunsky's testimony about the causal significance of each alleged factor fell dramatically short of the most probable requirement. When asked about the genetic syndrome factor, Dr. Milunsky admitted that Jayden did not match any known genetic disorder. (R. 1506: 24 – 1508:7). The only factor that Dr. Milunsky can clearly identify as a cause of the bleeding on the brain is the use of the vacuum on the head of Jayden W.: "It's a factor. No question." (R. 1531:20). Dr. Milunsky's opinion testimony regarding possible contributing causes of the child's brain damage is essentially the same "multifactorial cause" testimony properly excluded by this Court in *Payton v. Kearse.* Allowance thereof permitted Dr. Milunsky to speculate about theoretical causal possibilities which do not come close to meeting the "most probable" requirement for causation. This is the same danger the Court was concerned with in *Jackson v. Bermuda Sands*, 383 S.C. 11, 17, 677 S.E. 2d 612, 615-616 (Ct. App. 2009) (where opinion testimony is not proved by scientific testing, opinions "amount to mere speculation and conjecture.") This type of testimony invites the jury to speculate about causation, and should have been precluded by its failure to meet the "most probable" requirement for admissibility.

E: Petitioner Suffered Prejudice When the Trial Court Admitted Testimony Regarding Theoretical Genetic Factors as a Possible Contributing Cause of Jayden W's Brain Damage.

It is prejudicial to erroneously admit expert testimony that future genetic science will allow the creation of tests which will prove in the future that Jayden W's brain damage was caused by theoretical genetic factors, if all recommend genetics test currently in existence were taken with negative results; and none of the alleged birth defects are scientifically known to cause brain bleeds. This Court declined to address this issue because it found the issue related exclusively to the element of causation. However, Petitioner respectfully argues the Court did not consider case precedent which held, "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial." *S.C. State Hwy Dep't v. Graydon, supra.*

The erroneous admission of such highly prejudicial evidence denied Petitioner her right to a fair trial. Rule 103(A), SCRE. The rule that prejudice is presumed where "the admission of incompetent evidence having some probative value upon a material issue of fact in the case" is based upon "the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence." *S.C. State Hwy Dept. v. Graydon, supra.* Additionally, "Such evidence being incompetent and having some probative value upon a material issue of fact in the case, it is presumed to be prejudicial." *Cooper Corp. v. Jeffcoat, supra.* Finally, the Supreme Court of South Carolina has explained, "[T]here may be instances where such a strong impression has been made upon the minds of the jury by illegal

and improper testimony" that even its "subsequent withdrawal will not remove the effect caused by its admission . . . ." *Templeton v. C. & W. C. RY. Co., supra.*

This case similarly presents an example of testimony of probative value to a material issue that is so scientifically unreliable yet capable of creating such a strong impression upon juror's minds that its admission must be understood to have prejudiced the complaining party. Moreover, this is not a case where the court simply refused to admit evidence; as with the above-cited-cases, this is a case where prejudicial evidence was in fact admitted into the record. It would be difficult to argue that causation evidence excluded from the record would have affected the minds of jurors whose deliberations did not continue beyond the standard of care issue. In contrast, the jury in this case heard the prejudicial evidence, which tainted the entire decision-making process of the jury.

Finally, this Court cited *Stephens v. CSX Transp., Inc., supra,* for the proposition that it need not address issues related to admissibility of maternal use of alcohol. Petitioner respectfully submits that this opinion is inapposite to the case at hand. The court in *Stephens* determined that a challenge to a jury charge on an issue that the jury never reached in its deliberations cannot be prejudicial. *Id.* at 503, 735 S.E.2d at 515. This is logical, but it is also an entirely different situation from a challenge to evidence that is improperly admitted, heard by the jury and which tainted the entire proceeding. Moreover, the cases discussed above regarding the presumption of prejudice related to the admission of material evidence; they did not consider prejudice arising from an incorrect jury instruction. Accordingly, the court in *Stephens* would not have considered the principles set forth in *Cooper*, *Graydon*, or *Templeton*.

III. THE TRIAL COURT OVERLOOKED OR MISAPPREHENDED THAT THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING AN EMERGENCY EXCEPTION TO INFORMED CONSENT.

The purpose of jury instructions is to enlighten the jury and aid it in arriving at a correct verdict. *State v. Leonard*, 292 S.C. 133, 355 S. E. 2d 273 (1987). Ordinarily, a trial court has the duty to give a requested instruction that correctly states the law applicable to the issues and the evidence. *Singletary v. South Carolina Dept. of Educ.*, 316 S.C. 153, 447 S. E. 2d 231, 93 Ed. Law Rep. 978 (Ct. App. 1994). See also, *State v. Cooney*, 320 S.C. 107, 463 S. E. 2d 597 (1995) (the law to be charged must be determined from the evidence presented at trial).

A trial court is required to charge the current and correct law. *Stokes v. Spartanburg Regional Medical Center,* 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006). 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. *Koutsogiannis v. BB&*T, 365 S.C. 145, 149, 616 S.E.2d 425, 427-28 (2005); *Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 244 (1997); *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983). Moreover, when general instructions to the jury are insufficient to enable to jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Stokes, supra.*

Informed consent is a key issue in this case. Although the defense continually tried to confuse the jury on this issue by referring to a general consent form as the "informed consent" document, the trial court properly ruled that the general consent document signed by Jamesetta Washington did **not** represent informed consent, as a matter of law. (R. 2045:13-17).

Nevertheless, Defendant still contended that he did not need to obtain informed consent to use the vacuum because of an alleged emergency. Petitioner did not agree that an emergency was present, but with the issue of Dr. Rhett's failure to obtain informed consent for the use of a

vacuum extractor still an issue in this case, Petitioner wanted the jury to know the limitations that the law places on the emergency exception to informed consent. Petitioner therefore submitted her Request to Charge #12:

> Informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. However, a physician must respect a competent patient's refusal of treatment, even in an emergency. If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency.
>
> Even under the emergency exception to the informed consent doctrine, a physician should seek the consent of the patient, or, if the patient is incapable of providing consent, the consent of a family member, before administering treatment. Impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception.

(R. 3666-3667) The said charge comes directly from Judge Ralph King Anderson, Jr.'s well known book on Requests to Charge. (Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, Chapter 27) It is a balanced charge, with the early part written from a strong pro-defense perspective, recognizing an emergency exception to the informed consent requirement; and the second paragraph expressing limitations on the emergency exception. In submitting the requested charge, Petitioner of course desired the second paragraph to be charged concerning limitations to the emergency exception to informed consent, but in fairness expected the entire charge to be read. The trial court shockingly read only a modified version of the pro-defense portion:

> Now, let's talk about emergency situations. However, informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. Therefore, under this ruling it is for you to decide whether a medical emergency existed at the time of the vacuum procedure requiring immediate treatment and overriding the need to obtain informed consent.

(R. 2205:13-22) The court declined to charge the portion which expressed limitations to the

emergency exception to the informed consent doctrine. (R. 2236:25 – 2237:14) Choosing not to charge such limitations, the judge misinformed the jury about the correct law. The omitted portions of the requested charge were absolutely necessary for the charge to be a correct, balanced and fair charge on South Carolina law. See *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 533 C.S. (2002); 61 Am. Jur. 2d "Physicians, Surgeons and Other Healers" §§ 157, 167 176 (2004).

Post–trial interviews revealed that the jury was in fact confused by the informed consent charge. The jury apparently agreed that improper use of a vacuum by Dr. Rhett was a cause of Jayden's brain damage, but mistakenly thought the presence of a supposed emergency situation eliminated the need for Dr. Rhett to comply with the standard of care. (R. 3716-3717) Further, the jury did not deliberate on informed consent as they believed that the trial court had already addressed that issue, and did not think they needed to address that issue if they found there was an emergency situation. *(Id.,* R. 3717) The jury obviously did not understand the charge regarding the standard of care, breaches thereof, or the effect of the lack of informed consent. They were confused by the incomplete charge on the emergency exception to informed consent. The jury did not understand that performing a vacuum extraction delivery without informed consent is a form of negligence. They had no way to know the limited circumstances in which an emergency exception to informed consent applies, as the trial judge chose not to let them know about that tremendously important part of the law on informed consent. As informed consent was a key issue in the case, that omission represented an abuse of discretion, was material and prejudicial.

"An informed consent action is no different from any other action for professional malpractice." *Hook v. Rothstein,* 281 S.C. 541, 551, 316 S.E.2d 690, 696 (Ct. App. 1984).

Because informed consent issues are subsumed under negligence under S.C. law, there was no separate issue regarding informed consent for the jury to consider, just one overall standard of care issue: Did Dr. Rhett breach the generally accepted standard of care for obstetricians under these facts and circumstances? This question could not properly be resolved under the facts of this case without a discussion by the jury on informed consent, and such a discussion could not properly occur without a correct charge on informed consent. As the jury was utterly confused by the charge which erroneously informed them of an unlimited emergency exception to informed consent, they were unable to properly deliberate the standard of care issue. Their confusion resulted from the erroneous pro-defense charge regarding the emergency exception to informed consent, without limitations thereto being revealed by the trial court.

Plaintiff's Request to Charge #12 was timely made. (R. 2202:5 – 2206:1; 2235:25 – 2237:14; 2258:12 –2259:9; pp. 3110-3214) It involved a controlling legal principle. The trial court's failure to charge the second part of Plaintiff's Request to Charge #12 was thus reversible error under *Koutsogiannis*, *supra*; *Brown, supra; Baker, supra;* and *Stokes, supra.* Petitioner timely objected to the charge as made. (R. 2236:7 – 14)

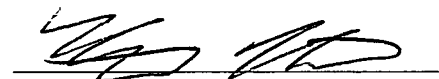
Petitioner respectfully disagrees with this Court's conclusion that Petitioner's appeal addressed the failure of the trial court to give a charge which contained statements that were inapplicable to the facts of this case. Petitioner did not object to the absence of the first statement enumerated by this court, "a physician must respect a competent patient's refusal of treatment, even in an emergency." This statement comes from the first paragraph of Judge Anderson's two paragraph charge. Petitioner sought inclusion of Judge Anderson's second paragraph. The same is true of the Court's second enumerated statement, "If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency."

Petitioner complains of the charge as given and the exclusion of the second paragraph in its entirety. The wording chosen by the Court created an impression that if an emergency existed at any time that fabricated the need to obtain informed consent prior to the emergency. That was improper and an incorrect statement of the law. The charge erroneously instructed the jury that there were no limitations to the emergency exception to the informed consent requirement. The jury was never informed that *even under the emergency exception* a physician should seek the consent of the patient and that impracticality of conferring with the patient is a *prerequisite* to dispensing with the emergency exception. Thus, the jury was left to believe that in an emergency situation, there is absolutely no informed consent requirement.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court reconsider its prior opinion filed in this case on February 5, 2014, or in the alternative, have re-argument of the questions raised in this Petition.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
J. Layton Ruffin
383 W. Cheves St.
Florence, SC 29501
843-662-3281-T
843-665-0254-F

Attorney for Petitioner

February 20, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Michael J. Baxley, Circuit Court Judge

Case No. 2007-CP-10-1553

Jamesetta Washinton, as Guardian ad Litem
of Jayden W., a minor, ... Petitioner,

v.

Edmund Rhett, Jr., M.D., Low Country Obstetrics and
Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a
East Cooper Regional Medical Center and AMN
Services, Inc., f/k/a Nurses RX Inc.,... Defendants

OF WHOM Edmund Rhett, Jr., M.D. is .... Respondent.

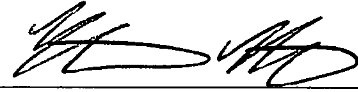
PROOF OF SERVICE

The undersigned, an attorney in this matter for the Petitioner certifies that I have this 20th day of February, 2014 served copies of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, first-class postage prepaid, to the following address(es):

Pleadings: **Petition for Rehearing**

Counsel served:
Robert H. Hood
Molly H. Craig
Chilton Grace Simmons
Deborah H. Sheffield, *of counsel*
Hood Law Firm, LLC
172 Meeting St
Charleston, SC 29401

RECEIVED
FEB 20 2014
SC Court of Appeals



Edward L. Graham
Graham Law Firm, P.A.
383 W. Cheves St.
Florence, SC 29501
(843) 662-3281- T
(843) 665-0254- F

February 20, 2014