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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Michael J. Baxley, Circuit Court Judge

Case No. 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
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., MD is ....Respondent

PETITION FOR A WRIT OF CERTIORARI

Edward L. Graham
J. Layton Ruffin
GRAHAM LAW FIRM, P.A.
383 W. Cheves St. (29501)
Florence, South Carolina 29503
Phone: (843) 662-3281
Facsimile: (843) 665-0254
ATTORNEY FOR PETITIONERS

Other Counsel of Record:
Robert H. Hood
Molly H. Craig
Deborah H. Sheffield, *Of* Counsel
HOOD LAW FIRM, LLC
172 Meeting St.
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
ATTORNEYS FOR RESPONDENT
Edmund Rhett, Jr., M.D.

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals in its order filed March 21, 2014.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S ADMISSION OF SPECULATIVE EXPERT OPINION TESTIMONY REGARDING POSSIBLE CAUSAL SIGNIFICANCE OF EITHER (A) POSSIBLE MATERNAL ALCOHOL ABUSE NOT IN EVIDENCE AND/OR (B) A THEORETICAL GENETICALLY TRANSMITTED CONNECTIVE TISSUE DISORDER WHICH MAY BECOME RECOGNIZED AND TESTABLE IN THE FUTURE?

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S JURY CHARGE REGARDING AN EMERGENCY EXCEPTION TO INFORMED CONSENT, WITHOUT ALSO INCLUDING A CHARGE ABOUT THE MATERIAL LIMITATIONS ON THAT EXCEPTION?

STATEMENT OF THE CASE

This is a medical negligence case involving brain bleeds and brain damage sustained by minor 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 sufficient 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 to obtain informed consent or even to announce his intent to use a vacuum; selected a vacuum cup contraindicated for this delivery; and misused the vacuum extractor. (R. 29-35). The vacuum extraction traumatically burst several blood vessels within Jayden's brain, causing significant bleeding and consequent brain damage. (R. 29-35).

The Summons and Complaint were filed on April 16, 2007 and designated as Civil Action Number 07-CP-10-1553. (R. 28-36). The Complaint alleges liability for negligence and other wrongdoing by Dr. Rhett, his employer, Low Country Obstetrics and Gynecology, P.A. (hereinafter, "Low Country"), and nurses and others employed by Tenet South Carolina, Inc. d/b/a East Cooper Regional Medical Center (hereinafter, "Hospital"). AMN Service, Inc. f/k/a Nurses RX Inc. (hereinafter, "Nurse Agency") was added as a defendant upon learning that it

had employed a nurse involved with the delivery of Jayden. The Defendants answered, asserting a general denial and various affirmative defenses immaterial to this appeal. (R. 7-12; 47-54).

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 went to 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 modest alcohol usage by the mother the first month of pregnancy before she realized she was pregnant, and in so ruling the court erroneously referred to such evidence as evidence of "alcohol abuse." (R. 246: 14-20). The Court withheld ruling on Petitioner's motion *in limine* to keep out speculative testimony of Dr. Aubrey Milunsky, a geneticist, about possible causal significance of (1) possible prenatal maternal alcohol consumption in excess of that shown by the evidence[1]; and (2) a theoretical genetically transmitted connective tissue disorder which may in the future be recognized and subject to testing. (R. 221: 1–224: 13; 224: 21–231: 9). Respondent's counsel suggested that the court hold Petitioner's Motion *in Limine* about Dr. Milunsky 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.[2] 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 unhelpful, speculative, unreliable opinion testimony which was highly prejudicial and violated prior orders of this Court. (R. 1464: 18 – 1539: 7).

The Respondent referred during trial 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

[1] (R.. 227: 19 –228: 13; 231: 10 –235: 3; 236: 23 –245: 13)
[2] (R. 230: 15 –231: 5; 231: 10 – 245: 15).

consent form did not represent informed consent as a matter of law.[3] In his informed consent charge, the trial judge informed the jury that there was an emergency exception to informed consent, but he did not charge them about the material limitations on that emergency exception.[4]

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).

After commencing deliberations at 3:40 P.M. on August 10, 2010, the jury announced at 3:22 P.M., on August 11, 2010, that they were hopelessly deadlocked.[5] 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 they had reached a verdict in favor of Respondent Rhett.[6]

Petitioner made a timely Motion for New Trial Absolute. (R. 145). By Order dated September 1, 2010, Judge Baxley denied Petitioner's Motions. (R. 17-18). Thereafter, Petitioner timely served and filed her Notice of Appeal. (R. 3719-3724). The Court of Appeals issued its decision filed February 5, 2014, by which it affirmed the trial court's denial of Petitioner's Motion for a New Trial Absolute. Petitioner timely filed a Petition for Rehearing on February 20, 2014. On March 21, 2014, the Court of Appeals denied Petitioner's Petition.

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 uncapped non-economic damages and present value economic damages in excess of Six Million Dollars.

STATEMENT OF FACTS

Jamesetta was a student at the University of South Carolina when she became pregnant with her first child. (R.974: 3-4). After initial pre-natal care in Columbia, Jamesetta returned

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[3] (R. 2034: 25 –2035: 5; 2035: 25 –2046: 7)

[4] (R. 2202: 5 -. 2206:11; 2235: 25 –2237: 14; 2258: 12 – 2259: 9; 3522-3606).

[5] (R. 2250:19; 2262:15; 2263:1-11; 2264: 2 –2268: 2).

[6] (R. 2268:3-18; 2269: 22 – 2270:17).

home to Charleston to live with her parents for the rest of her pregnancy. [7] She obtained further pre-natal care from Low Country.[8] The pregnancy was uneventful, with no serious complications until Jayden was injured being born at the Hospital. He was born on July 16, 2002, by vacuum extraction delivery performed by Dr. Rhett soon after the second stage of labor began. (R. 987: 4-5; 3110-3214)

Plaintiff presented evidence that Dr. Rhett was negligent in his delivery of Jayden by vacuum extraction, thereby causing injury to the minor child's brain, resulting in brain bleeds in multiple areas and severe permanent harm.[9] Dr. Rhett's negligence includes use of a vacuum without informed consent, and without even telling the patient he intended to use a vacuum; use of a vacuum without an indication, very early in the second stage of labor; use of a vacuum when Jayden was located at a relatively high portion of the birth canal, in the mid-pelvis; use of an extra-long vacuum cup, contraindicated for use in the mid-pelvis; and improper use of the vacuum in a rocking motion which applied asymmetrical forces to Jayden's brain.[10] Dr. Rhett revealed in his deposition a shockingly low level of obstetrical and anatomical knowledge.[11] Yet the defense obstetrical experts were willing to defend Dr. Rhett on the theory that his conduct was within two standard deviations of average quality, i.e., that it was not in the <u>bottom 4%</u> of obstetrical care.[12] Dr. Rhett described the delivery inaccurately, at his deposition, as proven by a birth video of the labor and delivery[13]. Dr. Rhett admitted using a vacuum in 50% of his vaginal deliveries, far more than other obstetricians, and that he has never obtained a patient's informed consent for doing so.[14]

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[7] (R. 978: 2-9; 983: 1-16; 3215-3278).
[8] (R. 983: 17-25; 3024-3109).
[9] (R. 403: 9 – 588: 18; 645:25 – 647:5; 655: 21- 656: 4; 658: 3-23; 692: 14 – 693: 8, 873: 14 –826: 1; 874: 12 – 901:18; 1052: 23 – 1067:6; 1096: 4 –1097: 14; 1143: 4 – 1166:21; 1190:10 – 1202:12; 2298:5 – 2401:3;2454:3 – 2471:9).
[10] (R. 403:19 – 588:18; 645:25 – 647:5; 655:21 – 656:4; 658:3-23; 2298:5 – 2401:3; 2454:3 – 2471:9)
[11] (R. 470:15 – 471:22; 477:16 –574:20)
[12] (R. 1759:3 – 1760:3; 1816:25 –1817:3)
[13] (R. 403:19 – 588:18; 645:25 – 647:5; 655:21 – 656:4; 658:3-23). Dr. Rhett changed his testimony at trial in numerous respects after studying the fundamentals of obstetrical anatomy, vacuum extraction principles and the birth video, and after practicing testifying in front of a video camera in preparation for his appearance at trial. (R. 1321: 22 – 1324:23; 1328:25 – 1329:2; 1329: 8-11; 1330: 9-16; 1331: 1-19)
[14] (R. 426:14-19; 429:19 – 430: 9; p. 541:12-15.

Jayden was transferred to MUSC on the morning of July 17, 2002. (R. 955:1-24). Doctors at MUSC diagnosed brain bleeds, and performed brain surgery to remove a large clot from the posterior fossa portion of his cerebellum. [15] Jayden has received extensive follow-up care, treatment and therapy. (R.998: 19 –1008:22). Because of his brain damage, Jayden suffers developmental, motor and cognitive delays and deficits. He requires life-long care and treatment for his brain damage.[16] His vocational opportunities will be limited to possible sheltered employment.[17] Jayden's economic damages valued by Plaintiff's economist Dr. Oliver Wood are in excess of six million dollars present value.[18]

ARGUMENTS

I. Dr. Milunsky's Expert Opinion Testimony that Jayden's Brain Injury Was Possibly Caused by Either (A) Possible Maternal Alcohol Abuse Not Shown by the Evidence and/or (B) a Genetic Disorder That May in the Future Become Recognized and Testable Should Never Have Been Heard by the Jury.

A. Introduction

This case presents a conflict between the decision of the Court of Appeals and prior decisions reached by this Court regarding admission of expert testimony. The trial court admitted testimony of a geneticist, Dr. Milunsky, without exercising its role as gatekeeper. Dr. Milunsky testified that the amount of maternal alcohol ingestion was possibly greater than the evidence showed; if so, that possibly caused some symptoms consistent with incomplete fetal alcohol syndrome; and was a possible cause of Jayden's brain damage. The trial court failed to exclude this prejudicial opinion testimony which implied that Jayden's mother harmed her child by abusing alcohol during her pregnancy, even though Dr. Milunsky had no factual basis to presume alcohol consumption in sufficient quantity to cause harm to a fetus, and even though Dr. Milunsky could not state that there was even a one-in-a-million chance that alcohol consumption caused Jayden's brain damage. Dr. Milunsky was also allowed to testify, without even having examined the child, that Jayden possibly suffers from some yet-to-be-discovered genetically

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[15] (R. 998:1-15; 3294 - 3307).
[16] (R. 692:14 – 693: 8; 813:14 – 826:1; 874: 12 – 901: 8; 1052: 12 – 1067: 6; 1143:4 – 1166:21)
[17] (R.1096:4 – 1097:14)
[18] (R. 1199:4-7).

transmitted connective tissue disorder which may in the future become recognized and testable and which might have contributed to his brain bleeds. Despite negative test results from the five genetics tests recommended by Dr. Milunksy, and despite the fact that any form of connective tissue disorder was ruled out by Dr. Barbara Burton, who did examine the child,[19] Dr. Milunsky insisted that his prediction of future genetics knowledge should be accepted because he is an expert and he says so. This speculative testimony was not helpful to the jury, was unreliable, violated the "most probable" requirement for medical causation testimony, and violated South Carolina Supreme Court case precedent.

B. The Trial Court Admitted Prejudicial Evidence that Should Have Been Excluded Under Rule 401, 402 and 403 SCRE

Petitioner was deprived of a fair trial by the admission of irrelevant, speculative, and highly prejudicial opinion testimony that was premised upon evidentiary assumptions not present in this case. 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, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. Moreover, relevant evidence may be excluded where its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE.

i. Purported Alcohol Abuse

As to purported alcohol abuse and incomplete fetal alcohol syndrome, the facts in this case show that Jamesetta Washington, mother of Jayden, consumed alcohol in modest amounts only at the very beginning 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 opined that Jamesetta's actual alcohol consumption in the early prenatal period most probably caused Jayden's brain bleeds, brain damage, or any other problem.

[19] (R. 2490:12 – 2505:10; 2512:2 – 2514:6).

Notwithstanding, it became clear that the Respondents intended to defend this case by alleging the mother harmed her own child through alcohol abuse. During depositions, two defense experts, a geneticist, Dr. Aubrey Milunsky, and Dr. Lynn Norton, an obstetrician, testified that if the mother consumed more alcohol than shown by the evidence that could possibly be a contributing cause of brain damage, to an indeterminable degree. Dr. Milunsky theorized in his deposition that if Jayden's mother abused alcohol, he believed that may have possibly been a contributing factor, but he could not ascribe any mathematical probability, not even a one in a million chance, that maternal alcohol ingestion caused brain bleeds or brain damage. (R. 1502:19-24). Similarly, Dr. Norton stated she believed maternal alcohol consumption possibly caused brain damage, but she could not state it most probably did so, or that there was a one-in-a-million chance that it did. (R. 2689: 6 –2690: 13).

The trial judge denied Petitioner's motion *in limine* to preclude the introduction of medical records showing modest alcohol consumption by Jamesetta before she found out she was pregnant, stating:

> I will tell you now that the court will not exclude the record about the alcohol abuse[20] 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). (R. 113-115; 231:10 –245:8, 246:14-20)

The court withheld its ruling on the motion to preclude expert testimony on purported alcohol abuse as a possible cause (R. 245: 9-15), in favor of allowing voir dire on the subject when Dr. Milunsky was called. Yet the court denied *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:

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[20] That an unfounded accusation of excessive alcohol consumption while pregnant is highly prejudicial is starkly revealed by the trial judge's reference to alcohol "abuse." The subject Motion in Limine addressed a medical record of modest maternal alcohol consumption before Jamesetta realized she was pregnant. That record did not suggest excessive alcohol consumption or alcohol abuse. Excessive alcohol ingestion or alcohol abuse by the mother during pregnancy existed not in the evidentiary record but only in the imagination of defense counsel, Dr. Milunsky and Dr. Norton.

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 then 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 "all speculation." It was of no relevance, highly prejudicial and calculated to confuse and mislead the jury. If there was any arguable relevance, it was greatly outweighed by the prejudicial nature of such testimony. Such testimony invited the jury to speculate that Jayden W.'s brain was damaged by his mother's excessive drinking, of which there is no evidence, but based purely on 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).

Eliciting an admission from Dr. Milunsky during his cross-examination that his testimony was "all speculation" and without "scientific basis" does not remedy the problem created by allowing the jury to hear this testimony in the first place. This testimony was not cumulative, for beyond Dr. Milunsky's opinion, there was no other evidence that the maternal alcohol consumption played any role in causing Jayden W.'s injuries sustained during birth.[21] The trial court's decision to admit such testimony is in clear violation of Rule 401, 402, and 403, SCRE and was an abuse of discretion.

ii. Purported Genetic Disorder

Dr. Milunsky paraded a list of deformities he purported that Jayden suffered from, even though he admitted none of these had anything to do with the cause of bleeding in the back of the brain. (R. 1481:8-11). Most of these alleged "deformities" were caused by Jayden's brain damage, though some were individual variations not associated with the brain damage. He then listed abnormalities Jayden's mother suffered from, including spina bifida, fused vertebrae, and lordosis, though none of these were shared by Jayden. (R. 1482:24 –1484:10). Dr. Milunsky then opined that Jayden had inherited some unspecified and unknown connective tissue disorder

[21] Defendant elected not to elicit that testimony from Dr. Norton.

which may possibly have caused Jayden to be vulnerable to brain bleeds, even though no such connective tissue disorder is currently known or testable, and even though Dr. Burton ruled out any form of connective tissue disorder upon her physical examination of the child. Dr. Milunsky did not examine Jayden, but based his causation opinion on two photographs of the child and a partial review of the medical records. Dr. Milunsky's speculative opinion that Jayden has some yet-to-be-discovered genetically transmitted connective tissue disorder, which he reached in the face of negative tests results on all five of the genetics tests he recommended, was unreliable and should never have been presented to the jury.

Dr. Milunsky presumed the existence of a disorder which may possibly be causally significant, which is not currently recognized and cannot be tested for. He opined that in the future, there would be a test for the yet-to-be-discovered genetic syndrome Jayden purportedly suffers from, which would prove Jayden did in fact have such syndrome, which possibly made him more susceptible to brain bleeds. (R. 1504:23 –1508:7). Dr. Milunsky could not identify any known disorder from which Jayden suffers. (R. 1510:18-21).

Even assuming arguendo that Jayden had inherited some unspecified yet-to-be-discovered connective tissue disorder, there was no scientific basis that this purported disorder could have caused brain bleeds. When asked by defense counsel whether there is a genetic basis for the brain bleeds, Dr. Milunsky simply plugged his book and made the unremarkable observation that "everything is genetic." (R. 1489:20-24). This is a far cry from establishing Jayden's brain bleeds were proximately caused by Jayden's yet-to-be-discovered condition. Dr. Milunsky agreed that known 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). Dr. Milunsky admitted he did not know of any brain bleeds being caused by a connective tissue disorder, other than brittle bone disease, which he admitted Jayden does not have. (R. 1521:8 – 1522:10). Such testimony about theoretical future genetics knowledge has no current scientific basis, lacks probative value and any assumed,

minimal relevance is greatly outweighed by its tendency to prejudice and confuse the jury. Accordingly, Dr. Milunsky's testimony about theoretical genetics factors should have been excluded under Rules 401, 402, and 403, SCRE.

C. Admitted Testimony Violated Scientific Reliability Standards.

The trial judge has the distinct role and responsibility to serve "as gatekeeper and must decide whether the evidence submitted by a party is admissible . . . ." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010). In exercising its gatekeeping duties, the trial court must determine that the evidence will assist the trier of fact, that the expert is qualified, and that the underlying science is reliable. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge." *Watson* at 449, 699 S.E.2d 1at 177. The court looks to the *Jones* factors to determine reliability.[22] The evidence is also excluded for prejudice or lack of probative value. *Id.*

i. Purported Alcohol Abuse

The trial judge as gatekeeper should have excluded the alcohol causation testimony of Dr. Milunsky 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. 1494:22-24).

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>.

[22] These include: (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. *Id.* citing *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

(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 not in evidence as a possible cause that cannot be quantified. Any presumed minimal probative value is greatly outweighed by the obvious prejudicial effect of such testimony.

The trial judge did not recognize his role as gatekeeper of unreliable scientific testimony. He withheld his ruling on Petitioner's motion *in limine* (R. 245:9-15), denied Petitioner's request that he exercise this duty before Dr. Milunsky testified, (R. 1466:12 –. 1468:3), and announced he would consider questions of helpfulness, reliability and prejudice only after the jury heard the challenged testimony. (R. 1467:20 –1468:3). This determination must be made prior to being heard by the jury in order to keep jurors from hearing unhelpful, unreliable, prejudicial, or otherwise inadmissible evidence from an expert witness. As explained, the standard for admissibility of scientific evidence "is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods." *State v. Douglas*, 367 S.C. 498, 509, 626 S.E.2d 59, 65 (Ct. App. 2006). It is insufficient to attempt to correct any mistake by a curative instruction after the jury has heard the evidence. *See also State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The familiar tenet of evidence law that a continuing

challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability.").

In any event, the judge never asked the jury to disregard any of the evidence related to alcohol abuse, incomplete fetal alcohol syndrome, or alcohol's possible causal significance. Accordingly, Petitioner respectfully submits the court erred by not exercising its role as evidentiary gatekeeper and thereby allowed the jury to hear scientifically unreliable and highly prejudicial testimony concerning the possible causal significance of excessive alcohol ingestion not of record.

ii. Purported Genetic Disorder

Dr. Milunsky's testimony regarding possible brain damage from theoretical genetic factors, based upon purported diagnosis of an unspecified, yet-to-be-discovered connective tissue disorder should have been excluded by the trial court under *Council, supra.* The diagnosis required Dr. Milunsky to speculate about what future developments in genetics may entail, rather than apply current science to known facts. The trial judge 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. The court did not rule as to the reliability factors under *Jones*, or make any other attempt to exercise his role as gatekeeper. Nevertheless, 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 collage of ideas of what could possibly be a contributing cause; it could be from either presumed excessive alcohol consumption; and/or some not yet recognized connective tissue problem; or other unexpressed factor(s). All are possible causation theories devoid of factual support, and all lack scientific reliability.

Review of the transcript shows no evidence that Dr. Milunsky's opinions had been

published or peer reviewed on his assertions in this case, and his causation opinion regarding connective tissue disorder as a possible cause was in fact contrary to current medical knowledge. Dr. Milunsky suggested during his deposition that five tests be run to explore the nature of the alleged connective tissue disorder. (R. 2766-2783). Petitioner arranged for all of these tests to be done. Each test returned negative, showing no genetic problem whatsoever.[23] Petitioner also arranged for Dr. Burton to examine Jayden for possible connective tissue disorder, and she ruled out any such condition.[24] Nevertheless, Dr. Milunsky persisted in his assertion that his word should be given credence over scientifically reliable test results. 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 identify a specific genetic disorder or syndrome he asserts Jayden has. He cannot test for it, or even validate its existence; but he claims to be sure that Jayden has it, based only on his say-so about what future genetics knowledge will entail. (R. 1509:18 – 1510:21). Dr. Milunsky's trial opinions were also based on a cursory, incomplete work up. Dr. Milunsky never conducted a physical examination of the child, but reviewed only two pictures of Jayden W. and limited medical records. He surmised Jayden must have some not yet recognized genetic disorder without any semblance of 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). The examination completed by Petitioner's geneticist ruled out connective tissue disorder.

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, 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.

[23] (R. 2494:8 – 2503:6; 2588-2595).
[24] (R. 2490: 12 – 2505:10; 2512:2 -2526:14)

1999). 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). A court must assess the science known at present, and determine if it is used in a reliable manner based on current knowledge and not the expert's *ipse dixit* conclusions or predictions of future knowledge. This was not done in this case.

D. Admitted Testimony Violated 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). In *Kearse*, this Court held a defense expert could not offer testimony of six possible causes of the plaintiff's injuries.

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 *Kearse,* supra. Nevertheless, the court allowed Respondent's expert witness, who could not state that there was even a one-in-a-million chance that alcohol consumption caused brain bleeds in this case, to testify that multiple possible factors preceding delivery had possible contributing causal significance, including purported alcohol abuse not supported by the factual record and a connective tissue disorder not currently recognized in the scientific community. Indeed, 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). 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 more than a possible cause of brain bleeding is the use of the vacuum: "It's a factor. No question." (R. 1531:20)

A Defendant, or any party for that matter, should not be permitted to group together several alternate causation theories which individually fail the most probable standard and state the sum satisfies the most probable standard, especially where some of those theories are both highly improbable and highly prejudicial. For a party to be able to argue that individually improbable causation theories somehow combined and interacted to create a greater aggregate probability than each individually, the party should present reliable evidence of cumulative effect or synergistic propensity. Without such evidence, there is no reason to believe that purported possible causes, when taken as a whole, would constitute the most probable cause. There was no such evidence in this case. In fact, though Dr. Milunsky could not express a most probable causation opinion regarding purported alcohol abuse or yet-to-be-determined connective tissue disorder, the multiple factor causation theory he was allowed to express included alcohol "and/or" connective tissue disorder, (R. 1495:11-19) which word choice undermines any purported cumulative effect or synergistic propensity. Accordingly, under *Payton v. Kearse,* it was error to allow the jury to hear improbable causation theories, which could not be stated to have even a one-in-a-million chance of causing the injury.

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 the initial accident, she was struck by a second vehicle and died. At trial, Plaintiff sought to exclude evidence of Decedent's .14 blood alcohol level and evidence of traces of marijuana and cocaine in her bloodstream. Plaintiff argued no evidence causally linked Decedent's intoxication to the second accident. The County attempted to establish such a causal connection. Ultimately, the trial court excluded the evidence under Rule 403. The Court of Appeals affirmed, stating:

> . . . 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.

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. *Kennedy* involved injuries sustained by another's alleged negligence driving an 18-wheeler. After the accident, Kennedy tested positive for marijuana. *Id.* at 128-29, 595 S.E.2d at 251. 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.

This case presents stronger reasons to exclude speculative and theoretical alcohol causation testimony than in *Johnson* and *Kennedy.* There is no evidence that Jamesetta Washington was ever intoxicated. *Id.* There is no evidence that she consumed more than a modest amount while pregnant. (R. 1494:20-24). There is no evidence 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 *Kennedy.* Its prejudicial effect is at least as great as that in those cases because Dr. Milunsky's testimony about possible alcohol abuse, not of record, as a possible cause of brain damage invites a decision on an improper basis and should have been excluded.

F. Petitioner Suffered Prejudice

It is prejudicial to admit expert testimony that a mother caused her baby's brain damage by abusing alcohol during pregnancy where there is no evidence that the mother abused alcohol during pregnancy. Moreover, it is prejudicial to admit expert testimony that Jayden suffers from some yet-to-be-discovered genetically transmitted connective tissue disorder for which future genetic science will allow the creation of a test which will show Jayden W. has such a disorder and that such was a possible cause of his brain damage. This is especially so where Jayden underwent all recommended currently available tests and the results of all those tests came back negative.

The Court of Appeals found any improperly admitted expert testimony related only to causation, and therefore declined to address the issue. Petitioner submits that the Court of Appeals 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). The incompetent, unreliable, and highly prejudicial testimony offered by Dr. Milunsky on issues of alcohol abuse and future genetics knowledge impressed upon a material issue of fact in this case, and therefore is presumed to be prejudicial.

The admission of such highly prejudicial evidence denied Petitioner her right to a fair trial. Rule 103(A), SCRE. The presumption of prejudice 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." *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). This Court 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). In this case the judge made no effort to cure the prejudicial effect of improperly admitted evidence.

This case presents testimony that is so improper and capable of creating such a strong impression upon juror's minds that its admission must be understood to have likely prejudiced Petitioner. Few things in our society are looked upon with more contempt than a mother who chooses to abuse alcohol during pregnancy thereby harming her own child. Respondent's counsel presented several questions to his expert intended to elicit testimony about the mother's alcohol abuse and how this may have caused features of incomplete fetal alcohol syndrome.[25] 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). For an expert to take the stand and accuse a mother of abusing alcohol during her pregnancy to cause her child's brain damage, without any factual predicate, creates the type of prejudice the cases cited to sought to prevent.

The same can be said for testimony regarding the yet-to-be-discovered genetically transmitted connective tissue disorder that purportedly might have caused Jayden's brain bleeds. This is simply more unreliable scientific testimony that is capable of creating such a strong impression upon juror's minds that its admission must be understood to have prejudiced the complaining party. Petitioner notes the trial judge placed on the record how he had been personally influenced by genetics from a conference he had attended two weeks prior to this trial. The judge stated, "humans have just been able to match the geno[me] and . . . its opened an entire array of genetic possibilities of things we don't yet understand, that we know are out there. So I cannot tell you that this is hocus-pocus that you're claiming that the defendants are putting up." (R. 229:19 – 230:13). Indeed, the field itself might not be hocus-pocus, but one geneticist's predictions of what the future might hold is not far from it.

Moreover, this is not a case where the court simply refused to admit evidence. This is a case where prejudicial evidence was in fact admitted into the record. It would be difficult to

[25] (R. 1482: 4-11; 1490:21-23; 1491:18-23; 1492:2; 1495:22).

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 or the mysticism associated with predictions in genetics 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. Thus, although disallowing testimony on causation could not cause prejudice on the standard of care, allowing exceptionally prejudicial causation testimony about alcohol abuse and future genetics knowledge does.

The Court of Appeal 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 improper admission of evidence; they did not consider prejudice arising from an incorrect jury instruction. Accordingly, the court in *Stephens* would have had no reason to consider the principles set forth in *Cooper*, *Graydon*, or *Templeton.*

In light of this court's noted concerns that fact finders should not be misled by the "aura of infallibility surrounding unproven scientific methods," this Court should take this opportunity to once again remind litigants that there are consequences to seeking admission of highly prejudicial and unreliable testimony, especially where the testimony accuses a mother of abusing alcohol to cause her own child's brain damage, and there is no evidence to support such a contention. *State v. Dougals*, *supra*. This Court brought greater light to the effect expert

testimony has upon the jury in *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013), where the Court stated, "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." In light of this Court's own acknowledgements of the impact expert testimony has upon the jury, Petitioner respectfully submits that she was prejudiced by the unreliable, prejudicial, and inflammatory testimony.

II. THE JURY SHOULD HAVE NOT BEEN CHARGED REGARDING AN EMERGENCY EXCEPTION TO THE INFORMED CONSENT DOCTRINE, WITHOUT ALSO BEING CHARGED ABOUT MATERIAL LIMITATIONS ON THAT EXCEPTION.

This case presents a conflict between the Court of Appeals and prior decisions of this court regarding jury charges. 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). Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request is 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). When general instructions are insufficient to enable a jury to understand the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Stokes, supra.*

Defendant contended that he did not need to obtain informed consent to use the vacuum because of an alleged emergency. Petitioner denied the existence of an emergency, especially in light of Dr. Rhett's contention that he does not need to obtain informed consent for vacuum use and his admission that he never has done so, despite the fact that he uses a vacuum in 50% of his vaginal deliveries, far more than other obstetricians. Nevertheless, Petitioner wanted the jury to understand the limitations 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 charge comes directly from Judge Ralph King Anderson, Jr.'s well known book on Requests to Charge. (Ralph King Anderson, Jr., S.C. Requests to Charge – Civil, 2002, Chapter 27). The first sentence expresses a strong pro-defense perspective and the second paragraph expresses limitations on the emergency exception. Petitioner desired the second paragraph to be charged. Surprisingly, the court gave an unqualified, pro-defense charge:

> 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 limitations on the emergency exception to informed consent. (R. 2236:25 – 2237:14) (61 Am. Jur, 2d "Physicians, Surgeons and Other Healers" § 157, 167, 176 (2004)). Choosing not to charge such limitations, the judge misinformed the jury. The omitted portions of the requested charge were necessary for a correct and fair charge on the law.

As "[a]n 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), informed consent issues are subsumed under negligence, and there was no separate issue regarding informed consent for the jury to consider. The verdict form posed 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, which could not properly occur without a correct charge on informed consent. As the jury was confused by the erroneous charge which informed them of an unlimited emergency exception to informed consent, they were unable to properly deliberate the standard of care issue.

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 caused 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 did not think they needed to address that issue if they found there was an emergency situation, and believed that the trial court had already addressed that issue in its partial directed verdict ruling. *(Id.,* R. 3717) The jury obviously did not understand the charge regarding standard of care, breaches thereof, lack of informed consent, and a qualified emergency exception thereto. They had no way to know the limitations upon the emergency exception, as the court failed to charge them that law. As informed consent was a key issue in the case, that omission represented an abuse of discretion, was material and prejudicial.

Petitioner respectfully disagrees with the Court of Appeal's conclusion that Petitioner objected to the trial court's failure to give a charge which contained statements that were inapplicable to the facts of this case. Petitioner did not object to the failure to charge, "a physician must respect a competent patient's refusal of treatment, even in an emergency." 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." Those statements come from the first paragraph of Judge Anderson's two paragraph charge. Petitioner sought inclusion of Judge Anderson's second paragraph.

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 eliminated the need to obtain informed consent, even a shorter informed consent

discussion, and even prior to the alleged emergency. That was improper and an incorrect statement of the law, as the charge erroneously instructed the jury that the emergency exception to informed consent was unlimited. 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, incorrectly, that in an emergency situation, there is absolutely no informed consent requirement.

CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court grant a writ of certiorari.

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

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Circuit Court

The Honorable Michael J. Baxley, Circuit Court Judge

Case No.: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
Jayden W., a minor ....Petitioner,

vs.

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., MD is ....Respondent.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 21st day of April 2014 served copies of a Petition for Writ of Certiorari upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter St.
Columbia, SC 29201

Counsel served:

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

Edward L. Graham
J. Layton Ruffin
Graham Law Firm, P.A.
P.O. Box 550
Florence, SC 29503
(843) 662-3281

Attorney for Petitioner