STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael J. Baxley, Circuit Court Judge

Case No. 2007-CP-10-1553
Appellate Case No.: 2014-00831

Ct. App. Opinion NO. 2014-UP-55 – Filed February 5, 2014

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

REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner hereby adopts and incorporates by reference the Statement of the Case as set forth in the Petition for Writ of Certiorari.

PETITIONER'S RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Petitioner objects to Respondents' Statement of the Case to the extent it includes factual inaccuracies, contested factual matter, misstatements, and argument.

ARGUMENT

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?

A. There Exist Special and Important Reasons to Grant the Petition for Writ.

i. The Decision by the Court of Appeals Is in Conflict with Prior Decisions by the Supreme Court Related to the Reliability of Expert Testimony.

In recent years, this Court has emphasized the importance of the trial court's role as gatekeeper in the admission of evidence and the exclusion of unreliable or incompetent evidence. *See e.g., Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010); *Graves v. CAS Med. Sys.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012). This Court has not hesitated to affirm the exclusion or reverse the admission of unreliable expert testimony. Respondent contends certain expert testimony he presented to the jury escapes review because the evidence was purportedly introduced as relevant to the issue of causation and not standard of care. However, the admission of incompetent and unreliable testimony of purported alcohol abuse, in a case where there was no evidence to support that assertion, was prejudicial in that it tainted the entire proceedings and precluded the Petitioner from obtaining a fair jury deliberation of the standard of care issues. So too was the admission of testimony concerning genetic issues prejudicial, where there was no competent or reliable evidence to support Respondent's theory of an inherited genetic propensity for weakened blood vessels in the child's brain, only unreliable

speculation about what future developments in genetics may reveal and enable testing for. In failing to review on the merits the trial court's decision not to exercise its gatekeeper duty, the Court of Appeals allowed to stand trial court rulings in contravention to this Court's prior decisions regarding the admissibility of expert testimony. Accordingly, this Court should grant the Writ of Certiorari to review the decision on the merits.

Graves and *Watson* involved incompetent or unreliable testimony submitted by the plaintiff. Notwithstanding, the rules promulgated by this Court governing the admission of expert testimony were clearly intended to apply to both plaintiff and defendant. In this case, the defendant, with great creativity, sought to admit highly prejudicial and incompetent evidence which, if admitted, would be nearly impossible to later remove from the minds of the jurors. Through a world renowned geneticist, Respondent improperly painted the mother of a brain damaged child as one who may have consumed excessive amounts of alcohol during her pregnancy in sufficient quantities to cause her own child's brain damage, despite a dearth of evidence to that effect. Moreover, Respondent used the same expert to present to the jury the expert's belief that this child suffered from some yet-to-be-identified genetic abnormality, not yet recognized by science or capable of testing, which may have caused Jayden to be more susceptible to brain bleeds. In so doing, Respondent introduced evidence in violation of this Court's prior decisions. Appellant respectfully requests this Court grant the Petition for Writ of Certiorari, and reverse the decision reached by the Court of Appeals.

ii. The Decision by the Court of Appeals Is in Conflict with Prior Decisions by the Supreme Court Related to the Admission of Incompetent Evidence Having Some Probative Value upon a Material Issue of Fact.

Respondent's argument at trial was that Jayden's brain damage was caused by alcohol use or genetic abnormalities, not because of any malpractice committed by Dr. Rhett. Respondent argues his tactics escape review because purported alcohol abuse and purported genetic abnormalities relate to causation, not standard of care. Respondent contends that because the jury found Respondent did not breach the standard of care, improper expert testimony

couched in terms of causation is non-reviewable. Under this logic, expert testimony, no matter how inappropriate, would never be reviewed so long as the defense attorney was clever enough to prejudice a plaintiff on standard of care issues and claim the improperly introduced testimony related only to causation. To affirm the introduction of incompetent unreliable expert testimony under these circumstances creates an incentive for the tactic to be repeated in future cases.

Fortunately, the Supreme Court has a mechanism by which to prevent such abuses. Supreme Court precedent states, "[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). Such a presumption exists because of "the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence." *Id.* The Court of Appeals' decision not to review these issues is in conflict with the holding set forth in *Graydon*. This Court has a special interest in both assuring that decisions related to the admission of expert testimony are reviewable by appellate courts, and in assuring that any abuses by a party of the admission of expert testimony do not occur without consequence. To rule otherwise is to declare open season for incompetent evidence. Accordingly, Petitioner respectfully requests this Court grant her Petition for Writ of Certiorari and reverse the decision reached by the Court of Appeals.

B. The Presumption of Prejudice Has Not Been Rebutted

Defendant contends that even though *Graydon* establishes a presumption of prejudice where incompetent evidence is admitted and the incompetent evidence has some probative value upon a material issue of fact, this presumption may be rebutted. Defendant then argues this presumption was rebutted in this case. Petitioner disagrees.

In *Johnson v. Broome*, 175 S.C. 385, 393, 179 S.E. 315, 318, (1935) this Court held, "The testimony given by the plaintiff which we have found to have been incompetent was of probative value, was upon a material issue, and is, therefore, presumed to have been prejudicial

to the defendant." To overcome this legal presumption, the Court in *Templeton v. C. & W. C. Ry. Co.*, 117 S.C. 44, 51, 108 S.E. 363, 365 (1921) explained that the following question must be answered, "Has the error been cured by the effort of the Circuit Judge to correct it?"

In this case, no effort was made to cure or correct the admission of improper testimony. Indeed, the incompetent evidence in question was determined *admissible.* Therefore, there is no valid argument that the presumption of prejudice was rebutted. The jury was allowed to consider evidence that the mother of a brain damage child consumed alcohol in sufficient quantity during her pregnancy to cause harm to her unborn baby, and therefore the brain damage purportedly was not caused by malpractice. The jury was allowed to consider evidence that this child suffered from a yet-to-be-determined genetic abnormality which caused the child's brain damage, and not the result of any malpractice. No curative instruction was given to the jury, no limiting instruction was given to the jury, and no other effort of any kind was made to undo the harm caused by allowing the jury to hear such inflammatory and prejudicial testimony.

In support of his argument, Respondent cites to *Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988). *Mali* involved allegations of legal malpractice. *Id.* at 79, 367 S.E.2d at 168. The jury found for the plaintiff and awarded damages arising out of the defendant's legal malpractice. *Id.* The defendant appealed the trial court's admission of evidence related to anticipated income and expenses. *Id.* at 83, 367 S.E.2d at 170. Defendant argued the evidence was speculative and therefore inadmissible. *Id.* The Court of Appeals agreed. The Court then noted, "Since evidence as to lost profits has probative value on the issue of damages, prejudice must be presumed." *Id.* at 84, 367 S.E.2d at 170. Therefore, the burden then shifted to the opposing party "'to show affirmatively that no prejudice resulted' from the introduction of the questioned evidence." *Id.* citing 5A C.J.S. *Appeal & Error* § 1677 at 705 (1958).

The Court in *Mali* determined that the presumption of prejudice was not rebutted, and that the admission of speculative evidence of profits warranted a new trial on damages. *Id.* at 85, 367 S.E.2d at 171. The Court also held that the admission of evidence of speculative profits did

not affect the jury's finding that malpractice had been committed. This is a logical presumption. It would be hard to argue that a speculative representation of estimated lost profits would somehow prejudice the jury into its determination of whether the standard of care had been breached. However, this is vastly different from the argument that representing to the jury that a mother of a brain damaged child consumed alcohol in a sufficient quantity to cause her own child's brain damage would prejudice the jury against the plaintiff. The same is true for the admission of incompetent evidence that the child's brain damage was caused by some yet-to-be-identified genetic abnormality, and not because the physician committed malpractice.

C. Cases Involving a Challenge to a Jury Charge on an Issue Never Reached by the Jury are Different from Cases Involving Admission of Prejudicial Evidence Heard by the Jury Prior to Deliberations.

Respondent in his return notes that the Court of Appeals cited to *Stephens ex. Rel. Lillian C. v. CSX Transp., Inc.*, 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) for the proposition that "it is not necessary that we address any ruling . . . unless it relates to breach of [the defendants'] duty of reasonable care." The language behind the ellipsis is of critical importance. The full quote reads, "[I]t is not necessary that we address any ruling ***on the jury charge*** . . . ." This is a critical distinction. Petitioner agrees that it would be exceedingly difficult to argue the jury was so prejudiced by the language of a jury charge unrelated to the standard of care that it affected the jury's ability to fairly deliberate whether the defendant breached the standard of care. An improper *jury instruction* regarding a question never reached, as a matter of common sense, likely did not influence the deliberation of questions decided. Indeed, the court in *Stephens* acknowledged that the primary consideration is whether something has affected the jury's ability to fairly deliberate on those questions that were reached. The Court noted that it did not need to address alleged errors in certain jury charges "as those alleged errors could hardly have affected the jury's deliberations over whether CSX or DOT breached its duty of reasonable care, and could not possibly have prejudiced Stephens." *Id.* at 521, 735 S.E.2d at 514-15.

Respondent's citation to *Laurens Tel. Co. v. Enterprise Bank*, 90 S.C. 50, 72 S.E. 878 (1911) is inapposite for the same reason. It involved an error in *jury instruction* related to punitive damages where the jury did not reach this issue. *Id.* at 61, 72 S.E. at 882. The same is true for Respondent's citation to *Livingstone v. Greater Washington Anesthesiology & Pain Consultants. P.C.*, 978 A.2d 852, 864 (Md. App. 2009). This case involved the trial court's refusal to give a "substantial factor" *jury instruction* on causation. *Id.* The Court determined that because the jury found no breach in the standard of care, "appellants cannot show prejudice as a result of the trial court's refusal to give their requested *instruction . . . on causation.*" *Id.* These cases differ greatly from the current situation, where incompetent and unreliable evidence was admitted which improperly characterized the mother of a brain damaged child as an alcohol user who caused her own child's brain damage, or of the child as having some yet-to-be-determined genetic abnormality which might have made the child more susceptible to brain bleeds, and not because of any malpractice. Petitioner has not raised any issue regarding the instruction provided to the jury related to causation. Accordingly, those cases which considered whether the objecting party suffered prejudice by the trial court's failure to include or exclude certain jury charges pertaining to questions never reached by the jury are inapposite to the case at hand.

D. One Cannot "Open the Door" for Opposing Counsel to Introduce Incompetent, Unreliable, Speculative Expert Testimony, Which is Unsupported by the Record.

Respondent makes the argument that Petitioner "opened the door" to allow Dr. Milunsky to offer his unreliable and unscientific opinions regarding alcohol use as the cause of Jayden's impairments, or his unreliable and unscientific opinions regarding the yet-to-be identified genetic abnormality which Jayden might have suffered from, which might have made him more susceptible to brain bleeds. This argument has no merit. One cannot "open the door" to the admission of incompetent evidence. One cannot "open the door" for allowing a judge to abrogate his role as gatekeeper of competent evidence. It is true that an attorney can fail to object to the introduction of incompetent or unreliable expert testimony. Moreover, the failure to make a contemporaneous objection may result in its admission and the inability to subsequently

challenge its admission. In this case, Petitioner filed motions *in limine* and objected multiple times to the introduction of the testimony in question. Petitioner submitted evidence without challenge by Respondent that alcohol use in the very first trimester in a modest amount cannot cause the injuries Jayden suffered in this case. Petitioner did not "open the door" to unreliable evidence by the introduction of reliable evidence, which was introduced without challenge.

Petitioner timely objected to the introduction of the incompetent evidence. Respondent conceded as much by not challenging Petitioner on this question. Objections were raised both *in limine*, and prior to Dr. Milunksy's taking the stand. Petitioner's motion *in limine* concerning Dr. Milunsky was held in abeyance. Petitioner's attempt at expert *voir dire*, promised during the motion hearing, was disallowed. Petitioner's objections were overruled. Accordingly, there was nothing left that Petitioner could do to preclude the admission of the unreliable testimony.

More importantly, Petitioner did not "open the door" to the admission of this type of evidence. The last words from the judge on the issue of alcohol were, "I will tell you now that the court will not exclude the record about alcohol abuse . . ." (R. 246:14-20). Thus, it became clear to Petitioner that evidence of alcohol use or "alcohol abuse" as the judge referred to it, would come before the jury. Knowing this, Petitioner sought to address the lack of evidence of any such alcohol "abuse" or use in any quantity sufficient to cause brain damage at the outset. Doing so by no means "opened the door" to allow Respondent to submit incompetent, unreliable, and highly prejudicial expert testimony that this child's injuries were not the result of malpractice, but caused by the mother's intentional consumption of alcohol during pregnancy in a sufficient quantity to cause brain damage to her child.

Discussion of matters a judge already ruled come into evidence cannot "open the door" for the submission of evidence on this matter. It certainly does not open the door for the admission of incompetent and unreliable testimony. Any proffered expert testimony would still need to meet the standards for admissibility set forth in Rule 702, SCRE and explained in *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). The judge would still have to exercise his

role as gatekeeper as set forth in *Watson , supra.* Accordingly, even if Petitioner made this issue relevant (which she did not), Respondent would still need to meet this state's statutory and common law admissibility standards. These standards were not met, and the trial court erred in allowing the admission of this testimony.

The same is true for expert testimony related to genetic factors. Because the judge had already denied Petitioner's motion to exclude Dr. Milunsky's genetics related testimony (R. 224: 14-17; 230:11-25), Petitioner's discussion of genetics did not open any doors. Even if the Petitioner is considered to have opened the door to certain testimony regarding currently known genetics factors, the door cannot be opened to unreliable, speculative testimony from an expert about potential future knowledge, nor potential future tests.

E. Dr. Milunsky Offered Testimony that the Mother May Have Consumed Enough Alcohol during Pregnancy to Cause Her Unborn Child to Suffer Brain Damage.

Respondent contends that because Dr. Milunsky never explicitly stated that Jamesetta "abused alcohol," that no prejudice has been suffered. Petitioner disagrees.

Respondent correctly points out that "there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission." *Templeton*, 117 S.C. at 55, 108 S.E. at 367. Petitioner notes that this quotation explains that even in a situation where improper testimony was subsequently withdrawn, the effect caused by its admission may remain. This case presents a far more serious situation; one where no attempt was made to withdraw or correct the admission of improper testimony. As such, the prejudicial impact upon the jury of the improperly admitted evidence must be greater than the situation presented in *Templeton.*

Respondent defends the admission of unreliable and prejudicial evidence by arguing that Dr. Milunsky himself never uttered the phrase "alcohol abuse." This is a distinction without difference. One needs look no further than the trial judge's own characterization of the defense's evidence to understand how defense counsel presented the evidence of alcohol consumption and how it intended the evidence to be understood. In denying Petitioner's motion to exclude

reference to maternal alcohol consumption from the medical records, the trial judge stated:

> 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. (Emphasis added.) (R. 246: 14-20).

The trial judge understood from defense counsel's presentation and discussion of this evidence that it was evidence of "alcohol abuse" and *"a major component of the defense's case."* Yet Respondent defends himself by arguing the phrase "alcohol abuse" was never explicitly uttered by a witness. This quotation from the judge illustrates precisely how defense counsel wished the evidence to be understood. It illustrates the highly prejudicial nature of the evidence, in light of the fact that "lay people" might have a preconceived understanding of what impact alcohol has on a fetus. Finally, it illustrates the magnitude of the prejudicial impact this evidence had on the entirety of the trial. The trial judge presiding over this case characterized the evidence as evidence of "alcohol abuse" and as "a major component of the defense's case." How can it now be argued that this expert testimony did not impact the jury's deliberations, when the trial judge himself misconstrued the testimony as evidence of alcohol abuse?

Dr. Milunsky did not need to say "alcohol abuse" as defense counsel phrased it into his questions. Defense counsel asked Dr. Milunsky: "Q. Looking back at the first trimester of the pregnancy ***and alcohol abuse***, does this child have . . . (R. 1490:21-23). Dr. Milunsky never needed to use the phrase as defense counsel was happy to use the phrase for him.

Despite Respondent's mischaracterization of the evidence, it is important to note (1) there was no evidence whatsoever of alcohol "abuse"; (2) the purported capacity of maternal alcohol ingestion to cause brain bleeds and brain damage is not within the realm of lay knowledge, (3) the testimony proffered was not scientifically reliable as applied to this case, and (4) the expert testimony utterly failed the "most probable" requirement for admission.

Early in depositions it became clear Respondents intended to defend this case by alleging the child's brain damage was caused by the mother consuming alcohol in an excessive quantity sufficient to cause her child's brain damage, and not from any malpractice on the part of Dr.

Rhett. 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. Dr. Milunsky theorized in his deposition that Jayden's mother may have consumed more alcohol than she admitted and believed her prenatal alcohol consumption was a contributing factor, even though 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 also could not testify that there was even a one in a million chance that alcohol caused brain damage in this case. *Id.*

At trial, Dr. Milunsky continued to testify about the "potential relevance" of alcohol use which might have caused the child to suffer from incomplete fetal alcohol syndrome, which might be responsible for the Jayden's delayed development, even though by his own admission "this is all speculation." (R. 1491:18 –1493:16). Such testimony was speculative and highly prejudicial. It invited the jury to speculate that Jayden's brain damage was caused by his mother's excessive drinking, and not because of any malpractice committed by Dr. Rhett. There was no evidence to support this invitation. On cross, Dr. Milunsky stated that Jayden had some features "consistent with incomplete fetal alcohol syndrome; for which there is no proof." (R. 1501:1 –1502:3). However, eliciting these admissions does not un-ring the bell of allowing the jury to hear the evidence in the first place, especially where no curative instruction was given.

F. Dr. Milunsky Offered Testimony that Jayden Possibly Suffers from some Yet-To-Be-Discovered Genetic Abnormality Which May Become Recognized and Testable in the Future and Which Might Have Contributed to His Brain Bleeds

Respondent has not even attempted to argue Dr. Milunsky never testified at trial that Jayden possibly suffers from some yet-to-be-discovered genetically transmitted connective tissue disorder which may in the future become recognized and testable and which might have contributed to Jayden's brain bleeds. The evidence shows every genetic test recommended by

Dr. Milunsky came back negative, and every known connective tissue disorder was ruled out by Dr. Barbara Burton, who examined Jayden. (R. 2490:12-2505:10; 2512:2–2514:6). Nevertheless, Dr. Milunsky insisted his prediction of future genetics knowledge should be accepted.

Dr. Milunsky admitted that all deformities he purported that Jayden suffered from, which actually existed and were acknowledged by the scientific community, had nothing to do with Jayden's brain bleeds. (R. 1481:8-11). Dr. Milunsky simply presumed the existence of a disorder which may possibly be causally significant, even though this yet-to-be-discovered disorder is not currently recognized by the scientific community and cannot be tested for.

This unreliable and incompetent testimony was equally as prejudicial as the incompetent testimony heard by the jury regarding purported alcohol abuse by Jamesetta. The purpose for the admission of both the incompetent alcohol abuse testimony and the incompetent genetic abnormality testimony is clear: to prejudice the jury against Jayden and to inappropriately persuade the jury that Jayden's brain damage was caused by alcohol abuse and genetic predisposition, and not because of any malpractice on the part of Dr. Rhett. Ultimately, the incompetent evidence had probative value upon a material issue of fact and is therefore presumed to be prejudicial, was impressed upon the minds of the jury, and there has been no showing by Respondent to rebut this presumption. Even without any such presumption, common sense dictates that a juror would be prejudiced by the introduction of evidence that a mother may have consumed excessive amounts of alcohol during her pregnancy which caused her child to suffer brain damage. Moreover, a juror would similarly be prejudiced by the parade of genetic abnormalities presented and the statement by a world-renowned geneticist that this child's brain damage may have been caused by a yet-to-be-discovered genetic abnormality and that this genetic abnormality cannot currently be tested for.

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?

Respondent appears to challenge the trial court's decision granting partial directed verdict that the general consent form signed by Petitioner did not represent informed consent as a matter of law. (R. 2034:25-2035:5; 2035:25 – 2046:7). Respondent mentions the judge's ruling on this issue and then states three hired experts for the defense opined Dr. Rhett complied with the standard of care for informed consent. To the extent Respondent argues his experts agreed the general consent form constituted informed consent for vacuum use, this is a misrepresentation of Respondent's own expert witnesses' testimony. Of the general consent form, Dr. Hobbs stated, "well, I think this is a consent for service, for care. It is not specific to what he was faced with as far as what we would classify as informed consent . . . ." (R. 1893:20-23).

In actuality, the defense experts opined it was unnecessary to obtain informed consent under the circumstances. This is what gives rise to Petitioner's objection. Petitioner's experts contended that informed consent should have been obtained before the vacuum was applied. In light of this conflict, Petitioner requested that the trial judge provide the jury with a charge which explained when informed consent is necessary, when it may be dispensed with under the emergency exception, and what limitations are imposed upon the emergency exception.

Petitioner submitted the charge on informed consent that is found in Judge Ralph King Anderson, Jr.'s book on Requests to Charge. (Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, Chapter 27). The charge found Judge Anderson's book logically explained that informed consent is not required in an emergency situation, but that "even under the emergency exception . . . a physician should seek the consent of the patient . . ." and that "impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception." *Id.* (R. 3666-3667).

The trial judge never submitted the section of Plaintiff's submitted charge which explained the limitation upon the emergency exception to informed consent. The omitted paragraph was necessary for the charge to be a correct, balanced, and fair charge. *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529, 533 S.C. (2002); 61 Am. Jur. 2d "Physicians,

and Other Healers" §§ 157, 167 176 (2004). Because under South Carolina law informed consent issues are subsumed by the overall question of whether a physician breached the standard of care, a proper jury instruction on informed consent was necessary for the jury to properly resolve the question of whether Dr. Rhett breached the standard of care. As charged, the jury was left to consider only whether an emergency situation existed, and if so, then informed consent was not required. Thus, the jury never considered whether Dr. Rhett sought consent of the patient or whether it was impracticable to confer with the patient under the circumstances.

The Court of Appeals took issue with charge language submitted by Petitioner related to refusal of treatment, battery, and any duty of the physician to seek consent from a patient's family member. Petitioner does not object to the exclusion of any of these specific parts of the first paragraph of the submitted charge. Petitioner never asserted that Jamesetta refused treatment that Dr. Rhett committed battery, or that Dr. Rhett should have sought consent from a family member. Petitioner does contend that Dr. Rhett used the vacuum without her informed consent; that she had the right to be informed of the primary risks, benefits and alternatives before deciding whether she would submit to that procedure; that there was ample time for an informed consent discussion to take place; and that the purported emergency exception was concocted to insulate Dr. Rhett from liability, given the reality that he has never obtained a patient's informed consent for vacuum extraction and has never deemed it necessary to do so.

Petitioner's challenge is to the failure to charge the jury regarding limitations of the emergency exception to informed consent. On this question, the Court of Appeals provided no analysis. Instead, the Court simply stated, "As to all other statements in the requested jury charge, we find the trial court's charge correctly and adequately covered those points of law." Despite the lack of analysis, the holding remains in conflict with prior rulings by this Court regarding the exclusion of a proper jury charge which accurately reflects the law.

Respondent argues *Harvey, supra* addresses claims for battery where medical treatment was refused due to religious beliefs. Respondent contends that because Petitioner did not refuse

medical treatment, the language requested by Petitioner was not applicable. However, Respondent ignores the fact that although *Harvey v. Strickland* did involve a violation of informed consent involving a blood transfusion of a Jehovah's Witness, the case turned on issues of informed consent. Nowhere in *Harvey* does it limit itself to issues of informed consent in the context of religious beliefs. *Harvey* cited the well-established law that "South Carolina recognizes a medical malpractice cause of action stemming from a lack of informed consent." *Id.* (citing *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984)). *Hook* itself did not involve any issue of religious prohibition of medical treatment. The court in *Hook* determined whether an action for failure to obtain informed consent existed where a doctor failed to inform a patient of the risks associated with a particular medical procedure. *Hook, supra,* 281 S.C. at 547, 316 S.E.2d at 695. Accordingly, Respondent's argument is without merit.

Respondent highlights the fact that the charge requested by Petitioner was found in a section of Judge Anderson's book titled, "Medical Malpractice-Right to be Free of Unwanted Medical Treatment." However, this title merely suggests the rationale behind the informed consent doctrine. As the Court in *Hook* explained, "The basis of the doctrine is the patient's right to exercise control over his or her own body by deciding intelligently for himself or herself whether or not to submit to the particular procedure." *Hook, supra,* 281 S.C. at 547-48, 316 S.E.2d at 695. The historical development of the rule as summarized by the Court in *Harvey* explained it ensured the "right to be free of unwanted medical treatment," the "right to determine what shall be done to his own body," and that this right is "the very bedrock on which this country was founded." *Harvey* at 310, 566 S.E.2d at 533. Thus, the title of the section from which Petitioner cited her requested charge does not indicate that the charge is relevant only when treatment is refused or there is an action for battery. It is relevant in any case where informed consent was not sought, and the patient thereby experienced medical treatment without the opportunity to withhold consent after being informed of the significant risks, benefits, and alternatives.

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 constitutes reversible error. *Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 427-28 (2005). Since the jury was not provided with the requested charge, but with a charge that erroneously provided an unlimited emergency exception to informed consent, the jury was unable to properly deliberate on the standard of care, and Petitioner suffered prejudice as a result.

Moreover, even if the subject paragraph requested to be charged was technically deficient in any minor respect, which is denied, Petitioner also objected to the charge *as given*. The charge *as given* was erroneous and reversible because it was an incorrect statement of South Carolina law on a material issue. *See State v. Buckner,* 341 S.C. 241, 246-47, 534 S.E.2d 15, 18 (Ct. App. 2000) ("The trial judge is required to charge the current and correct law of South Carolina . . . . Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge.") (Citations omitted).

CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court grant a Writ of Certiorari.

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July 9, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESON COUNTY
Court of Common Pleas

Michael J. Baxley, Circuit Court Judge

Case No.: 2007-CP-10-1553
Appellate Case No. 2014-000831

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

v.

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OF WHOM Edmund Rhett, Jr., MD is .....Respondent

PROOF OF SERVICE

The undersigned attorney in this matter for the Appellant, certifies that she/he has this 9th day of July, 2014 served copies of a Reply to Respondent's Return to 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 Daniel E. Shearouse
South Carolina Supreme Court Clerk
1231 Gervais Street
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~and~

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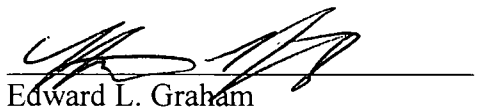

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