

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. 2014-000831

Ct. App. Opinion No. 2014-UP-055 – Filed February 5, 2014

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

Petitioner,

v.

Edmund Rhett, Jr., M.D., Low County 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.

BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

	Page
STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS .....	3
<i>Evidence of the Mother's Use of Alcohol during Pregnancy</i> .....	3
<i>Evidence of the Emergency that Developed during the Delivery</i> .....	3
<i>Evidence of the Child's Conditions after Delivery</i> .....	4
<i>Expert Testimony on Proximate Cause</i> .....	5
<i>Expert Testimony on Informed Consent</i> .....	6
SUMMARY OF ARGUMENT .....	8
I. The Evidentiary Issue: Does the Trial Court's discretionary ruling to allow certain expert opinion testimony from Dr. Milunsky regarding possible causes of the Child's conditions justify reversal of the jury's finding that Dr. Rhett did not deviate from the standard of care? .....	10
<i>The Applicable Law – Medical Expert Opinion Testimony on Proximate Cause</i> .....	10
<i>The Pertinent Facts -- Plaintiff's Motions &amp; The Expert Testimony</i> .....	11
A. The Court of Appeals properly declined to consider the Plaintiff's complaints about the Trial Court's admission of expert opinion testimony by Dr. Milunsky as to the Plaintiff's use of alcohol during her pregnancy and a genetic condition as contributing causal factors in the Child's conditions. ....	15
B. The Plaintiff opened the door to expert medical opinion on causal connection of alcohol and genetics. ....	18
C. The Trial Court did not abuse its discretion in allowing Dr. Milunsky's opinions on causation. ....	19
II. The Jury Charge Issue: The Trial Court charged the jury on the correct, applicable law of informed consent in emergencies .....	25
CONCLUSION .....	31

## TABLE OF AUTHORITIES

Cases	Page
<i>Austin v. Stokes-Craven Holding Corp.</i> , 387 S.C. 22, 691 S.E.2d 135 (2010) .....	9, 11
<i>Cent. of Georgia Ry. v. Walker Truck Contractors</i> , 270 S.C. 533, 243 S.E.2d 923 (1978) .....	9, 18
<i>Fields v. Reg'l Med. Ctr. Orangeburg</i> , 363 S.C. 19, 609 S.E.2d 506 (2005).....	11
<i>Floyd v. Floyd</i> , 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).....	18
<i>Harvey v. Strickland</i> , 350 S.C. 303, 566 S.E.2d 529 (2002).....	27, 28
<i>Hook v. Rothstein</i> , 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984).....	9, 26
<i>Johnson v. Horry County Solid Waste Auth.</i> , 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010).....	22
<i>Kennedy v. Griffin</i> , 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004) .....	22
<i>Laurens Tel. Co. v. Enter. Bank</i> , 90 S.C. 50, 72 S.E. 878 (1911).....	17
<i>Linog v. Yampolsky</i> , 376 S.C. 182, 656 S.E.2d 355 (2008) .....	27, 28
<i>Livingstone v. Greater Washington Anesthesiology &amp; Pain Consultants, P.C.</i> , 978 A.2d 852 (Md. App. 2009) .....	18
<i>Mali v. Odom</i> , 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988).....	16
<i>Martasin v. Hilton Head Health Sys.</i> , 364 S.C. 430, 613 S.E.2d 795 (Ct. App. 2005).....	10, 20
<i>Melton v. Medtronic, Inc.</i> , 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) .....	9, 26
<i>Miller v. Rhode Island Hosp.</i> , 625 A.2d 778 (R.I. 1993).....	29
<i>Payton v. Kearse</i> , 329 S.C. 51, 495 S.E.2d 205 (1998) .....	20, 21
<i>S.C. State Hwy Dep't v. Graydon</i> , 246 S.C. 509, 144 S.E.2d 485 (1965) .....	16
<i>Selh v. Moore-McCormack Lines, Inc.</i> , 362 F.2d 541 (2d Cir. 1966).....	17
<i>Shumpert v. State</i> , 378 S.C. 62, 661 S.E.2d 369 (2008).....	30

<i>Sims v. Hall</i> , 357 S.C. 288, 592 S.E.2d 315 (Ct.App.2003).....	21
<i>State v. Council</i> , 335 S.C. 1, 515 S.E.2d 508 (1999) .....	passim
<i>State v. Dinkins</i> , 319 S.C. 415, 462 S.E.2d 59 (1995).....	23
<i>State v. Dunlap</i> , 353 S.C. 539, 579 S.E.2d 318 (2003).....	18
<i>State v. Jones</i> , 273 S.C. 723, 259 S.E.2d 120 (1979).....	11, 20
<i>State v. Jones</i> , 343 S.C. 562, 541 S.E.2d 813 (2001), <i>on appeal after retrial</i> , 383 S.C. 535, 681 S.E.2d 580 (2009).....	23, 24
<i>State v. Price</i> , 368 S.C. 494, 629 S.E.2d 363 (2006) .....	11
<i>State v. White</i> , 382 S.C. 265, 676 S.E.2d 684 (2009).....	11, 24
<i>State v. Young</i> , 364 S.C. 476, 613 S.E.2d 386 (Ct.App.2005), .....	18
<i>Stephens ex rel. Lillian C. v. CSX Transp., Inc.</i> , 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012).....	8, 15
<i>Templeton v. C. &amp; W. Ry. Co.</i> , 117 S.C. 44, 108 S.E.2d 363 (1921).....	16
<i>United States v. Frazier</i> , 387 F.3d 1244 (11th Cir. 2004).....	19
<i>United States v. Lankford</i> , 955 F.2d 1545 (11th Cir. 1992).....	19
<i>Washington ex rel. Jayden W. v. Rhett</i> , No. 2014-UP-055, 2014 WL 2579703 (S.C. Ct. App. Feb. 5, 2014).....	3
<i>Williams v. Hedican</i> , 561 N.W.2d 817 (Iowa 1997).....	20

**Statutes**

S.C. Code Ann. §44-66-60 .....	28
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**Rules**

Rule 401, SCRE .....	10
Rule 402, SCRE .....	10

Rule 403, SCRE .....	10
Rule 606, SCRE .....	30
Rule 702, SCRE .....	passim

**Other Authorities**

Anderson, S.C. Requests to Charge - Civil, § 27-22 (2009) .....	28
Mueller & Kirkpatrick, <i>Evidence</i> § 1.4 (3d ed. 2003).....	19

## STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Respondent would restate the questions as:

### EVIDENTIARY RULING

- I. Can the jury's finding that Dr. Rhett did not deviate from the standard of care be reversed based on the Trial Court's evidentiary rulings allowing expert opinion testimony from Dr. Milunsky on causation?
  - A. Did the Court of Appeals properly decline to consider the Petitioner's challenge to the Trial Court's admission of expert opinion testimony by Dr. Milunsky on contributing causal factors in the Child's conditions because the jury determined Dr. Rhett did not breach his duty of due care without ever reaching any question related to causation?
  - B. Did the Petitioner open the door to testimony about the possible causal relation of maternal alcohol use and genetics in her opening statement and testimony from her own experts on those points?
  - C. Did the Trial Court properly exercise its discretion under Rule 702 and *State v. Council* in admitting expert opinion testimony from Dr. Milunsky regarding the Plaintiff's use of alcohol during her pregnancy and a genetic condition as contributing causal factors in the Child's conditions?

### JURY CHARGE

- II. Did the Court of Appeals properly affirm the Trial Court's charge to the jury on informed consent in emergencies because it set forth the correct, applicable law under the facts of this case?

## STATEMENT OF THE CASE

This case arises out of the birth of the Plaintiff Child, Jayden Washington, who was delivered by Defendant Obstetrician, Dr. Edmund Rhett, Jr. with the assistance of a vacuum extractor on July 17, 2002. The Child's mother, Jamesetta Washington, brought this action as his GAL, alleging that Dr. Rhett did not obtain informed consent to use the vacuum and he was negligent in using the vacuum extractor; and that as a result the Child suffered a brain injury. (ROA 28, 47.) Dr. Rhett answered denying that he was negligent in any manner that proximately caused any injury to the Child. (ROA 72.)

After years of discovery and motions, the case finally came to trial before Judge Baxley for jury selection on July 26, 2010, and concluded after thirteen days of trial on August 11, 2010. The Trial Court granted a partial directed verdict to Plaintiff and instructed the jury that the General Consent Form that the Plaintiff had signed upon admission to the hospital was not, as a matter of law, informed consent to the use of the vacuum extractor. (ROA 2072, ll. 17-18; 2205, l. 23-2206, l.3.) Ultimately, however, the jury returned a verdict for the Defendant with the answer of NO to the question: "Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?" (ROA 3714.)

The Plaintiff appealed, and raised seven issues which included attacks on the Trial Court's evidentiary rulings and challenges to the Trial Court's refusal to give certain requests to charge. The Court of Appeals affirmed, finding, in pertinent part, that the Trial Court did not err in charging the jury on informed consent, and otherwise declined to address the evidentiary issues relating to causation because the jury found that Dr.

Rhett did not breach his duty of due care. *Washington ex rel. Jayden W. v. Rhett*, No. 2014-UP-055, 2014 WL 2579703 (S.C. Ct. App. Feb. 5, 2014).

## **STATEMENT OF THE FACTS**

As in virtually all medical malpractice cases, the details of the medical care provided to the Plaintiff are found in the medical records. However, in this case, the actual delivery was videotaped and the jury was provided with a unique visual record of the events as they had transpired.

### ***Evidence of the Mother's Use of Alcohol during Pregnancy***

According to the medical records, when the Plaintiff attended her first prenatal visit in January 2002, she provided a history that included the fact that she had last used alcohol and marijuana on November 1, 2001. (ROA 3227, 3237.) When she transferred to another medical practice, she gave a history that she had used alcohol (2x week) between the ages of 18 and 20, and she had stopped October 20, 2001. (ROA 3033.)

### ***Evidence of the Emergency that Developed during the Delivery***

After the Plaintiff was admitted to East Cooper Hospital on July 15, 2002, a fetal monitor was attached to monitor the Child's heart rate and the contractions. (ROA 1248, ll. 23-25; 1249, ll. 13-23.) The fetal monitoring strips are another important piece of the documentary evidence. (ROA 3342-3498.) The Plaintiff's labor was slow and she had been in labor for almost 18 hours when Dr. Rhett came on call at noon on July 16<sup>th</sup>. After the fetal monitor showed a dip in the Child's heart rate mid-day, Dr. Rhett examined the Plaintiff and found that she was dilated only 4-5 cm, so he stopped the Pitocin, gave her oxygen, and repositioned her. The heart rate went back up and they restarted the Pitocin and continued to monitor her labor. (See ROA 3342-3498.)

Then, at approximately 7:00 pm, the heart rate had gone down again and the monitoring strips showed that the Child's heartbeat had slowed down for a prolonged period. (ROA 1254; Tr. 1342.) Upon examination, Dr. Rhett determined that the Plaintiff was fully dilated and he was ready for her to push. (ROA 1244; Tr. 1332.) However, as the videotape shows, she was exhausted from being in labor for 24 hours and she could not push. By 7:30pm, the Child's heart rate had not gone back up. At that point, and it was critically necessary to deliver that baby as quickly as possible. (See ROA 1621.) Dr. Rhett had three options to deliver that baby: perform a caesarian section or proceed with a vaginal delivery with the assistance of either forceps or a vacuum extractor. (ROA 1256-57, 1259.) Dr. Rhett determined that a c-section was not a viable option because the baby was already inside the vagina (i.e. would have had to have been literally pushed back up the birth canal to deliver by c-section), and it would have taken at least 20 minutes to prepare the operating room and the Plaintiff for surgery. (ROA 1259, 1264, 1272, 1427.) Therefore, Dr. Rhett opted to use the vacuum extractor and the Child was delivered three minutes later at 7:37 pm. The timing can be detected on the video. The cause of the Child's heart rate decelerations and the urgent need to deliver him was apparent when he was delivered with the umbilical cord wrapped around his neck. (ROA 1281, l. 17 - 1282, l. 14)(See also ROA 3342.)

***Evidence of the Child's Conditions after Delivery***

Fortunately, the Child's APGAR scores were normal when he was born. (ROA 720, ll, 22-24.) However, he was transferred to MUSC when he developed problems, and there it was determined that he had a brain bleed/hemorrhage which required surgery. (ROA 469-70.) The Plaintiff's expert in pediatric neurology testified that the Child

suffers from a combination of mild to moderate problems with developmental delays consistent with neurologic injuries associated with the brain hemorrhage. (ROA 673-75.) However, the Defendant's expert testified that the Child also was born with a connective tissue disorder and a number of other genetic problems, including a colomaba, hyperextensibility, pulmonary artery branch stenosis, hyperplastic transverse sinus in his skull, a heart murmur, bilateral hydroceles, scoliosis – none of which were caused by the brain hemorrhage. (ROA 1470-82, 1489-90.)

***Expert Testimony on Proximate Cause***

The pivotal causation question at trial was whether the use of the vacuum extractor was a proximate cause of the Child's brain bleed and neurologic injuries. On the causation issue, the Plaintiff presented testimony from her experts in a preemptive attempt to rebut the anticipated defense argument that genetics and her alcohol use might have caused her Child's problems. Plaintiff's board-certified expert in pediatric neurology, Dr. Katz, testified that her use of alcohol in the first trimester was not related to the brain bleeds or any of the Child's problems. (ROA 697, l.14 – 698, l. 9.) Dr. Adler, another board-certified pediatric neurologist called by the Plaintiff, also testified to his opinion that the Plaintiff's alcohol use had no effect on the Child's brain bleeds or any of his problems. (ROA 826, ll. 9-16; 827, ll. 4-11) Dr. Zimmerman, a board-certified pediatric neuro-radiologist, testified that there was no imaging evidence of fetal alcohol syndrome. (ROA 900, ll. 14-15.) Dr. Burton, a board-certified pediatrician and clinical geneticist, testified that, in her opinion, Plaintiff's alcohol use had no impact on the Child's motor, cognitive or neurologic problems. (ROA 2485.) Dr. Burton also testified

that in her opinion, the Child's brain damage was not caused by any genetic conditions. (ROA 2503, l. 13 – 2505, l. 10.)

The Defendant presented testimony from Dr. Milunsky, board-certified in internal medicine, pediatrics, and clinical genetics, who testified that the Plaintiff's use of alcohol in the first trimester, as evidenced in the medical records, was potentially relevant to the child's inflammatory problems and developmental delays. (ROA 1491, l. 18 – 1492, l. 7.) More specifically, Dr. Milunsky testified that while the Child did not have fetal alcohol syndrome, (ROA 1492, ll. 22-23.), his features were consistent with incomplete fetal alcohol syndrome, and that it was most probable that his problems occurred as a consequence of multiple factors that had nothing to do with the bleed, but rather from alcohol use and/or his genetic connective tissue problems. (ROA 1495, ll. 11-22.)

#### ***Expert Testimony on Informed Consent***

The Plaintiff Mother signed a General Consent Form when she was admitted to the hospital; it does not mention use of a vacuum. (ROA 3499). Dr. Rhett did not obtain any separate consent to use of the vacuum. He explained that he considered that the consent form covered the use of the vacuum when necessitated by an obstetrical emergency. (ROA 1315). And, in fact, emergency and the urgency were confirmed when the Child was delivered with the umbilical cord wrapped around his neck.

Plaintiff's expert, Dr. Oakes testified that the signed "blanket" form was not informed consent to use of the vacuum. He further testified that even in an emergency situation, the obstetrician would have a duty to obtain informed consent before using a vacuum, even if time limitations required that it be abbreviated, unless the baby was going to die within minutes. Notwithstanding that the Child was, in fact, born with the

cord wrapped around his neck, Dr. Oakes was of the opinion that there was no such an emergency when Dr. Rhett used the vacuum because the baby was not in jeopardy.

(ROA 433-35.)

In contrast, Defense experts testified that there was an emergency, the baby was in distress, and Dr. Rhett did not have time to stop to her and talk about risks, complication, and alternatives:

- “That’s not the time to talk about vacuum, risks, complications, Caesarean sections, or what could happen with that. By the time that happens, this baby would be in worse trouble. \*\*\*\* In this situation there was no time for that. ... Maybe we had three seconds. That’s not appropriate. The appropriate thing to do is get this baby out of trouble as soon as you can.”(ROA 1599, ll. 13-17; ROA 1600, ll. 6-11 – Dr. Weinstein.)
- “Meantime the clock is running which may mean that the baby is developing acidosis, and I think it would be losing precious seconds in medicine. \*\*\*\* [I]n the heat of the battle when fetal outcome is at-risk often we have to dispense with that and go with our gut.” (ROA 1741, ll 19-22; ROA 1819, ll.17-19 – Dr. Van Dorsten.)
- “I didn’t see any informed consent because the basic things is that there was not time to do so. \*\*\*\* You’ve got to get the baby out.” (ROA 1890, ll. 22 – 1891, l. 3. – Dr. Hobbs.)

## Summary of Argument

The Court of Appeals affirmed the judgment entered on the jury's verdict, finding that the Trial Court did not err in charging the jury on informed consent, and declining to address the evidentiary issues relating to causation because the jury found that Dr. Rhett did not deviate from the standard of care. The Court has granted review on the issues of the Trial Court's admission of opinion testimony from Defendant's expert, Dr. Milunsky, regarding possible contributing causes of the Child's brain damage, and the charge to the jury on informed consent in emergencies.

On the evidentiary issues, the Plaintiff Petitioner poses the question presented as whether the Court of Appeals erred 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 in the future? The Respondent Dr. Rhett submits that the Trial Court's discretionary ruling to allow certain expert opinion testimony from Dr. Milunsky regarding possible causes of the Child's conditions does not justify reversal of the jury's finding that Dr. Rhett was not negligent for several reasons.

First, the Respondent Dr. Rhett would clarify that the Court of Appeals did not rule on the correctness of the Trial Court's evidentiary rulings. Rather, the Court of Appeals declined to reach the merits of the Trial Court's evidentiary rulings allowing Dr. Milunsky's opinion testimony because the jury never reached the issue of causation, citing to *Stephens ex rel. Lillian C. v. CSX Transp., Inc.*, 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012). The Respondent maintains that decision was proper because,

as it is well settled, a jury's verdict will not be reversed on an evidentiary ruling unless the appellant proves that the ruling was an abuse of discretion and demonstrates prejudice. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 142-43 (2010). Here, the jury's finding that Dr. Rhett did not deviate from the standard of care negates any possible prejudice from the opinion testimony about proximate cause. Accordingly, the Court of Appeals properly declined to reach the Petitioner's evidentiary issues.

The Respondent also submits that the Appellate Court should not address the merits of the Petitioner's evidentiary issues on these points because she opened the door on the issue of her alcohol use and genetics in her opening statement, and she proceeded to elicit opinions from her own experts about the causal relationships. *Cent. of Georgia Ry. v. Walker Truck Contractors*, 270 S.C. 533, 243 S.E.2d 923, 925 (1978). Ultimately, however, the Respondent maintains that the Trial Court acted within its discretion under Rule 702 and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), in admitting the expert opinion testimony from Dr. Milunsky regarding the Plaintiff's use of alcohol during her pregnancy and the Child's genetic conditions as contributing causal factors in the child's conditions.

As to the alleged error in the charge to the jury, the Trial Court virtually quoted from the correct law on informed consent as set forth in *Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010), and *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984), and neither the law nor the facts supported the charge requested by the Plaintiff.

## I. The Evidentiary Issue

### **Does the Trial Court's discretionary ruling to allow certain expert opinion testimony from Dr. Milunsky regarding possible causes of the Child's conditions justify reversal of the jury's finding that Dr. Rhett did not deviate from the standard of care?**

#### *The Applicable Law – Medical Expert Opinion Testimony on Proximate Cause*

It is well settled that the plaintiff in every medical practice action must prove that the defendant's negligence was a proximate cause of the plaintiff's injury. Medical experts "must, with reasonable certainty, state that in their professional opinion, the injuries complained of *most probably* resulted from the defendant's negligence."

*Martasin v. Hilton Head Health Sys.*, 364 S.C. 430, 438, 613 S.E.2d 795, 799-800 (Ct.

App. 2005). The relevant evidentiary rules include:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible. Rule 402, SCRE.

'Relevant evidence' means evidence having any 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.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Rule 702, SCRE.

Key decisions on admissibility of expert testimony under Rule 702, include *State v. Council*, 335 S.C. 1, 515 S.E.2d 508, 518 (1999), and *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). The trial court must first determine if the expert witness is qualified, then it must find that the opinion evidence will assist the trier of fact and that the underlying science is reliable. To determine reliability, the trial court should apply these factors, to the extent applicable: (1) the publications 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.

The trial court's decision to admit expert testimony will not be reversed on appeal absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006); see also *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 142-43 (2010). To prove prejudice, the Plaintiff must show a reasonable probability that the jury's verdict was influenced by the challenged evidence. *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009); see also *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

#### ***The Pertinent Facts – Plaintiff's Motions & The Expert Testimony***

Plaintiff filed several pretrial motions seeking to exclude expert testimony as to the cause of the Child's birth injuries, motor impairments and developmental delays on the grounds that the experts' opinions did not reach the required level of reliability or probability and that such evidence would be irrelevant and prejudicial. One motion asked the Trial Court to strike expert testimony and evidence that the Plaintiff's use of alcohol during her pregnancy is related to the Child's birth injuries or developmental delays

(ROA 116.) The other motion was directed to Defendant’s expert, Dr. Milunsky, a board-certified pediatrician and geneticist, and sought exclusion of his opinions that the Child’s “birth injuries were not caused by the improper utilization of the vacuum extractor, but are the result of some unnamed, unidentified genetic disorder, undiagnosed connective tissue disorder, or maternal alcohol ingestion....” (ROA 129.)

The Trial Court heard the motions at the beginning of trial, and denied the motion to exclude Dr. Milunsky’s testimony about genetics as the cause of the Child’s problems subject to the right to revisit the issue when he testified. (ROA 224, ll. 14-20; 230, l. 17 – 231, l. 9.) As to the issue of Dr. Milunsky’s opinion on the causal effect of the Plaintiff’s alcohol use, the Trial Court asked to see the deposition and withheld ruling, (ROA 245, ll. 9-15), and Defense Counsel agreed not to mention alcohol during opening statements. (ROA 244, ll. 10-13.) However, the Plaintiff’s Counsel opened the door to that very issue during his opening statement and elicited testimony from her own experts during Plaintiff’s case-in-chief.

Inexplicably, Plaintiff’s Counsel introduced the subject of Plaintiff’s use of alcohol during his opening statement by anticipating the question: “Could consumption of alcohol in the first few weeks cause these kinds of problems? (ROA 343, ll. 9-11.) He told the jury that he had investigated that question and his experts would testify that the Plaintiff’s ingestion of alcohol during the first trimester did not explain the brain bleed. (ROA 343, l. 4 – 344, l. 9.) In his opening, the Plaintiff’s Counsel also forecast that the defense would present expert testimony about alcohol:

Even the defense’s experts, who are going to come in and try to convince you that alcohol somehow was a problem, let’s see if they can even say that there was a one in a million chance that alcohol caused harm to this child, caused any brain damage to this child. (ROA 344, ll. 12-17.)

Then in her case-in-chief, the Plaintiff proceeded to elicit testimony from her own experts as to the causal relation of her alcohol use to her Child's problems. Plaintiff's board-certified expert in pediatric neurology, Dr. Katz, testified that her use of alcohol in the first trimester was not related to the brain bleeds or any of the Child's problems. (ROA 697, l.14 – 698, l. 9.) Dr. Adler, another board-certified pediatric neurologist called by the Plaintiff, also testified to his opinion that the Plaintiff's alcohol use had no effect on the Child's brain bleeds or any of his problems. (ROA 826, ll. 9-16; 827, ll. 4-11) Dr. Zimmerman, a board-certified pediatric neuro-radiologist, testified that there was no imaging evidence of fetal alcohol syndrome. (ROA 900, ll. 14-15.) Dr. Burton, a board-certified pediatrician and clinical geneticist, testified that, in her opinion, Plaintiff's alcohol use had no impact on the Child's motor, cognitive or neurologic problems. (ROA 2485.)

The issue of genetics also was raised in the Plaintiff's opening statement. Plaintiff's counsel spoke of gene and chromosome problems and told the jury that the Child had some "oddities"<sup>1</sup> and the Plaintiff had some problems that were of concern so he also had conducted an investigation on that topic.<sup>2</sup> Plaintiff's Counsel told the jury that they would present testimony from one of the top geneticists in the country [Dr. Burton] who determined that "there is no gene problem here." (ROA 345, l. 1 - 347, l. 16. See Burton testimony at ROA 2503-05, 2610, 2616-17.)

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<sup>1</sup>"This child has a couple of oddities, like we all do; you know, some are a little more unusual than others." (ROA 346, ll. 6-8.)

<sup>2</sup>"We were concerned enough to check into the genetics for a couple of reasons." (ROA 346, ll. 12-13.) "So we wanted to address might there be some type of gene issue here." (ROA 347, ll. 9-10.)

Defense expert Dr. Milunsky is board-certified in internal medicine, pediatrics, and clinical genetics. He is a Fellow of the Royal College of Physicians. He published 25 books and teaches at Boston University School of Medicine. (ROA 1464, l. 18 – 1465, l. 11; 1469, ll. 1-20.) The Plaintiff did not object to Dr. Milunsky's qualifications as an expert in the field of genetics and pediatrics. (ROA 1466-67.) Instead, Plaintiff's counsel attempted to question him about the scientific basis for his opinion. The Trial Court asked him to hold such objection about the science until the end of his testimony, to which Plaintiff's counsel agreed. (ROA 1467, l. 14 – 1468, l. 10.)

Thereafter, Dr. Milunsky testified that the Plaintiff's use of alcohol in the first trimester, as evidenced in the medical records, was potentially relevant to the child's inflammatory problems and developmental delays. (ROA 1491, l. 18 – 1492, l. 7.) More specifically, Dr. Milunsky testified that while the Child did not have fetal alcohol syndrome, (ROA 1492, ll. 22-23), his features were consistent with incomplete fetal alcohol syndrome, and that it was most probable that his problems occurred as a consequence of multiple factors that had nothing to do with the head bleed, but rather from alcohol use and/or his vascular problem, i.e. his connective tissue problems. (ROA 1495, ll. 11-22. See also ROA 1501-03.)

On cross-examination, Plaintiff attempted to make Dr. Milunsky quantify the statistical probability of whether the maternal alcohol use had any significance in the brain damage, but Dr. Milunsky replied that there was no scientific basis to reach any statistical likelihood. (ROA 1502, l. 12 – 1504, l.2.) Plaintiff, who had referred to the Child's unspecified "oddities" in opening statement, also asked Dr. Milunsky to identify precisely what connective tissue disorder he thought the Child had; however, Dr.

Milunsky explained that “he has a connective tissue disorder. We don’t have a definitive syndrome name to attach, and that’s not unusual, at all, especially for connective tissue conditions.” (ROA 1504, l. 22 – 1510, l. 1.)

After Dr. Milunsky had testified, Plaintiff pursued her challenge to his opinion testimony on the grounds of the reliability of the science and the “most probable” standard. (ROA 1602, l. 18 – 1603, l. 22.) The Trial Court found that Dr. Milunsky’s testimony met the most probable standard and that his testimony was sufficient to pass the test required by Rule 702. (ROA 1608, ll, 3-17.) Ultimately, the jury did not even reach any questions of proximate cause, because they found that Dr. Rhett did not deviate from the standard of care.

**A. The Court of Appeals properly declined to consider the Plaintiff’s complaints about the Trial Court’s admission of expert opinion testimony by Dr. Milunsky as to the Plaintiff’s use of alcohol during her pregnancy and a genetic condition as contributing causal factors in the Child’s conditions.**

The Court of Appeals declined to reach the merits of the Trial Court’s evidentiary rulings allowing Dr. Milunsky’s opinion testimony because the jury never reached the issue of causation, citing to *Stephens ex rel. Lillian C. v. CSX Transp., Inc.*, supra, stating:

Because the jury determined Dr. Rhett did not breach his duty of due care, and thus, did not reach subsequent questions related to causation, this court need not address any issue raised by Jamesetta that relates to causation. *See Stephens ex rel. Lillian C. v. CSX Transp., Inc.*, 400 S.C. 503, 520, 735 S.E.2d 505, 514 (Ct. App. 2012) (“Because the jury’s verdict [that neither defendant breached its duty of reasonable care] made it unnecessary for the jury to reach the other issues in the case, it is not necessary that we address any ruling . . . unless it relates to breach of [the defendants’] duty of reasonable care.”). On this basis, we decline to address issues related to the admissibility of testimony showing that maternal use of alcohol or genetics may have caused the child’s problems because we find these issues relate exclusively to the causation element.

[Ct. App. Opinion, p. 3.]

Plaintiff argues that the Court of Appeals erred in failing to consider *S.C. State Hwy Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 485 (1965), which holds: "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial." To the extent that *Graydon* discusses such a presumption – it is not conclusive, and can be rebutted. *Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170-01 (Ct. App. 1988). And here, the jury's answer to the special interrogatory clearly rebuts any possible presumption of prejudice and demonstrates that the jury never reached the causation question. Notably, in *Mali v. Odom*, the Court found that the erroneous admission of incompetent evidence on damages, could not have affected the jury's findings as to liability, and ordered a new trial on damages only. *Id.*

Plaintiff also argues the evidence of her alcohol use prejudiced the jury against her and influenced their finding that Dr. Rhett did not deviate from the standard of care, citing to *Templeton v. C. & W. Ry. Co.*, 117 S.C. 44, 55, 108 S.E.2d 363, 367 (1921), for the proposition 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." [Petitioner's Brief, p. 23.] However, the Plaintiff's argument has no merit in view of the facts that (1) as discussed further below, the Plaintiff's own counsel opened the door on the issue of her prenatal alcohol use, and (2) Dr. Milunsky never testified at trial that the Plaintiff Mother *abused* alcohol.

The medical records irrefutably show that the Plaintiff gave a medical history of using alcohol in the first trimester, and Dr. Milunsky gave his opinion based on that

medical history without characterizing her alcohol use as abuse. (ROA 1491-92.)

Moreover, the Plaintiff herself raised the issue of alcohol use during her opening statement and by eliciting expert medical opinions on the causal connection of alcohol use from her own experts. [ROA 343-44 (opening statement); ROA 697-98 (Dr. Katz); ROA 826-27 (Dr. Adler); (ROA 900 (Dr. Zimmerman); (ROA 2605 (Dr. Burton).]

In *Stephens*, as here, the jury answered special interrogatories finding that the defendant did not breach the duty of reasonable care, and thus, the Court held that it was not necessary to address issues related to jury charges on any issue other than the duty of care. Accordingly, by the same analysis, the Court of Appeals properly held in this case that it was not necessary to address any issues related to evidentiary rulings that relate only to proximate cause.

The Court of Appeals' holding is also supported by *Laurens Tel. Co. v. Enter. Bank*, 90 S.C. 50, 72 S.E. 878, 882 (1911) (error in jury instruction immaterial, where jury found that the defendants had not violated the law), and *Selh v. Moore-McCormack Lines, Inc.*, 362 F.2d 541, 542 (2d Cir. 1966) ("In light of the jury verdict, it is unnecessary for this Court, in passing on the appeal with respect to the claims of negligence and unseaworthiness, to consider the propriety of the district court's rulings concerning the admission and exclusion of testimony by medical experts and others relating to whether plaintiff's exposure to the hot fuel oil could have aggravated a dormant cancer in his larynx. Since the jury found that there was no negligence and no unseaworthiness, they did not answer the questions relating to proximate cause and, hence, these evidentiary rulings, whether erroneous or not, afford no basis for reversal."). See also *Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*,

978 A.2d 852, 864 (Md. App. 2009) (“The jury ...found that neither Dr. Margolis nor Dr. Martin committed a breach in the standard of care when providing care to Dr. Orr. Thus, the jury did not proceed to determine the question of causation. Accordingly, ... appellants cannot show prejudice as a result of the trial court's refusal to give their requested “substantial factor” instruction when giving its instructions on causation.”).

**B. The Plaintiff opened the door to expert medical opinion on causal connection of alcohol and genetics.**

Defendant submits that the Plaintiff should not be allowed to challenge the opinion testimony by Dr. Milunsky because she opened the door in her opening statement and by presentation of opinions from her own experts on the same points. *Cent. of Georgia Ry. v. Walker Truck Contractors*, 270 S.C. 533, 243 S.E.2d 923, 925 (1978) (“Where the defendant's counsel opens the door to a certain line of inquiry, he cannot object if the inquiry when pursued by the plaintiff's counsel.”); see *State v. Young*, 364 S.C. 476, 613 S.E.2d 386 (Ct.App.2005), *aff'd as modified*, 378 S.C. 101, 661 S.E.2d 387 (2008) (a comprehensive review of door-opening doctrine); *State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003)(door opened in opening statement).

In *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465, 484 (Ct. App. 2005)<sup>3</sup>, the Court of Appeals noted that:

The primary purpose for the rule is that of fairness and completeness of the information for making the decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder. Danny R. Collins, *South Carolina Evidence* 2.9 (2d ed.2000).

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<sup>3</sup> *Overtaken on other grounds* by 2008 S.C. Acts 211, § 1 (regarding attorney-client privilege).

See also Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 1.4 at 12 (3d ed. 2003) (discusses that a party has to accept the consequences of her/his strategic choices in broaching a subject).

The Plaintiff opened the door on the issue of her alcohol use and genetics in her opening statement, and she proceeded to elicit opinions from her experts about the causal relationship. In all fairness, she cannot object that the Defendant posed the same question to his experts. See *United States v. Lankford*, 955 F.2d 1545, 1553 (11th Cir. 1992) (“fairness demands that if experts are presented, the jury must receive a full presentation on both sides of an issue”). Rather, it would have been unfair to allow the Plaintiff to present her experts’ opinions that there was no causal connection and exclude defense expert Dr. Milunsky’s opinion on the same issue.

**C. The Trial Court did not abuse its discretion in allowing Dr. Milunsky’s opinions on causation.**

The Plaintiff complains that defense expert Dr. Milunsky’s opinions were irrelevant, speculative, and prejudicial and should have been excluded under Rules 401, 402 and 403, SCRCF. As discussed above, the very fact that the Plaintiff peremptorily raised the issue of her alcohol use as well as the issue of her and the Child’s congenital problems establishes that the subject was relevant. Since her experts gave opinions on the causal relationship of alcohol and genetics, the Defendant’s expert should certainly be allowed to offer an opinion. See *United States v. Frazier*, 387 F.3d 1244, 1270 (11th Cir. 2004) (if the testimony for one party is relevant, testimony for the other party on the same would also be relevant). Similarly, as discussed above, the fact that the Plaintiff opened the door on these subjects should preclude her from complaining about any prejudice.

In addition, it is important to note that while the Plaintiff argues that she was highly prejudiced by unfounded accusations of excessive alcohol use and she refers to her issue in terms of alcohol “abuse,” the Record will show that Dr. Milunsky NEVER used the term alcohol *abuse* during his trial testimony, nor did he ever suggest that her consumption was excessive. To the contrary, he was very clear that “we don’t know about, the contribution of alcohol taken, we don’t know the volume.” (ROA 1503, ll. 21-23.) The Plaintiff argues that alleged prejudice was revealed by the Trial Judge’s reference to alcohol abuse. However, that one reference was during colloquy concerning motions outside the presence of the jury. (ROA 246, ll. 15-16.)

The Plaintiff also complains that Dr. Milunsky’s opinions were unreliable under *State v. Council* and *State v. Jones*, supra. More specifically, the Plaintiff’s complaint appears to center on the fact that Dr. Milunsky could not assign a statistical number to the likelihood that the alcohol use affected the Child. However, our appellate courts have never set any such requirement that an expert be able to reduce his opinion to a statistical number to establish reliability under Rule 702 or *State v. Council*. See *Williams v. Hedican*, 561 N.W.2d 817, 830 (Iowa 1997). (refusing to accept argument that statistical proof has to be presented before a medical expert can testify on causation).

An expert is not required to give a statistical number to a question of “how sure are you?” Rather, the benchmark is “most probably.” See *Martasin*, 613 S.E.2d at 799-800. Dr. Milunsky stated his opinion in the requisite standard of “to a medical degree of certainty, most probably.” (ROA 1495, ll. 20-22.)

Further, contrary to the Plaintiff’s contention, nothing in the Court’s decision in *Payton v. Kearsse*, 329 S.C. 51, 495 S.E.2d 205 (1998), precludes an expert from offering

an opinion of a “multifactorial cause theory.” In *Payton*, the plaintiff claimed that the automobile accident caused tinnitus, and the defendant had a pharmacy expert review the medications taken by the plaintiff to determine if any of them had the potential to produce tinnitus as a side effect. The pharmacist identified six drugs which were documented in medical literature as having an incident or adverse reaction of tinnitus. However, he could not state to a reasonable degree of certainty whether any of medications caused the tinnitus, only that they had the “potential” to produce the reaction. The Court held that the trial court properly excluded his testimony because it did not meet the “most probably” standard. *Payton v. Kearsse*, 495 S.E.2d at 211. There is no mention in the opinion that the expert offered any inadmissible opinion about a combined effect of the drugs.

As the Trial Court charged the jury, the law clearly recognizes that causation may be “multifactorial”:

The law does not require that a defendant’s negligence be the only cause or the sole cause of an injury. A defendant must compensate a plaintiff if one or more of his negligent acts or omissions was an efficient cause of the injury and, combined with other efficient causes in such a way that had there been no negligent act or omissions the injury would not have resulted or would not have been as severe. Proximate cause does not mean the only cause or the sole cause of a condition. The defendant’s act can be a proximate cause of the plaintiff’s injury if it was at least one of the direct, concurring causes of the injury. (ROA 2200, l. 14 – 2202, l. 4.)

See *Sims v. Hall*, 357 S.C. 288, 299, 592 S.E.2d 315, 319 (Ct.App.2003)(“Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury.”). Accordingly, the Trial Court properly exercised its discretion in allowing Dr. Milunsky’s opinion that the

alcohol and connective tissue disorder “most probably” contributed to the Children’s problems.

Plaintiff argues that the Trial Court’s decision to allow Dr. Milunsky to testify about the causal connection of her alcohol use violated precedent found in the appellate opinions of two automobile negligence cases: *Johnson v. Horry County Solid Waste Auth.*, 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010); and *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004). However, upon review, the opinions do not support the Plaintiff’s claim of error by the Trial Court in this case. In *Kennedy*, the Court held that the trial court erred in allowing admission of evidence of the mere presence of marijuana, because there was no evidence of any causal connection between the marijuana and the accident. Similarly, in *Johnson*, the Court held that the trial court had wisely excluded evidence of the defendant’s blood alcohol level because any relevant substantially outweighed the probative value; however, in so holding, the Court noted that no expert testimony was proffered as to how the alcohol would have impaired the driver’s judgment. Here, in contrast, there was evidence offered by both parties on the causal question. While the Plaintiff’s experts opined that there was no causal relation, Dr. Milunsky’s opined that the Plaintiff’s maternal alcohol use was a contributing cause to the Child’s problems.

As to Dr. Milunsky’s opinion that the Child has a genetic, connective tissue disorder that most probably contributed to his problems, the Plaintiff complains that his opinion is unreliable and speculative because he cannot identify the disorder by a specific name<sup>4</sup> and because he testified about future advances in genetic research. However,

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<sup>4</sup>ROA 1506, l. 24 – 1507, l. 1.

Plaintiff's own expert, Dr. Burton, opined that connective tissue disorder is a recognized condition:

The term connective tissue disorder within the field of medical genetics is used to refer to a group of conditions in which there's an inherited difference in one of the chemicals that makes up the connective tissue, which is the tissue that kinds of holds everything together in the body. (ROA 2515, l. 21 – 2516, l. 3.)

While Dr. Burton was of the opinion that the Child does not have any connective tissue disorder, her opinion does not foreclose the admissibility of Dr. Milunsky's opinion that he does, even if he cannot identify it by name; for as Dr. Milunsky testified, it is not unusual to not have a definitive syndrome name to attach to connective tissue conditions. (R. 1509, l. 22 – 1510, l. 1.) In addition, to the extent that Dr. Milunsky did testify about the future of genetics in a theoretical perspective, the Plaintiff's own counsel posed the questions on cross-examination,<sup>5</sup> and Dr. Milunsky's causation opinion was not predicated on any future discoveries.

Plaintiff misperceives the scope of the reliability component of Rule 702 and the factors articulated by the Court in *State v. Council*, and related precedent. The pertinent focus should not be on the credibility of Dr. Milunsky's opinion, but on the reliability of the science that underlies it. For example, in *State v. Dinkins*, 319 S.C. 415, 462 S.E.2d 59 (1995), the Court held that population frequency statistics for DNA test results were admissible. Then, in *State v. Council*, the Court held that mtDNA analysis is admissible, but the Court also reaffirmed prior decisions that the reliability of polygraph examinations had not improved sufficiently to allow their admission. In *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001), the Court held that "barefoot insole impression"

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<sup>5</sup> Example: "Q. And I realize that you can predict that in the future geneticists will know more about genetics than they currently know. Correct?" (ROA 1507, ll. 4-7.)

evidence was not scientifically reliable and was not admissible to identify defendant as the wearer of boot, and on subsequent appeal after a remand, the Court found that the evolution of the methodology had not deemed it scientifically reliable. *Jones II*, 383 S.C. 535, 681 S.E.2d 580, 588 (2009). While, in *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), the Court held that expert testimony related to dog tracking evidence was reliable.

As the Plaintiff argued in opening statement, it is commonly known from reliable medical science that maternal alcohol use can injure the baby, and Plaintiff's own expert testified that connective tissue disorders are medically recognized. Thus, as the Court explained in *State v. Council*, once the foundation of the science has been determined to be reliable, the opponent of the evidence still has a full arsenal available to rebut the evidence such as cross-examination on flaws in the analysis or testing and presentation from other experts. 515 S.E.2d at 519. The Plaintiff did just that in this case by presenting her own experts who offered their opinions on the same question and by piercing cross-examination of Dr. Milunsky which gave the jury more than ample testimony on which to decide whether to rely on his opinion.

Ultimately, it was the Plaintiff's burden to prove that some negligence by Dr. Rhett proximately caused the Child's injuries. Plaintiff's experts offered the opinion that neither the maternal alcohol use nor any connective tissue disorder caused the Child's problems; instead, she was of the opinion that the only possible cause was the brain bleed. On the other hand, the Defendant's expert offered his opinion that the brain hemorrhage was not the cause of the Child's problems and that instead, it was most probable that the maternal alcohol use and a connective tissue disorder were contributing

causes. Nothing in Rule 702 or the associated precedents forecloses this classic battle of the experts.

## **II. The Jury Charge Issue**

### **The Trial Court charged the jury on the correct, applicable law of informed consent in emergencies.**

One of the Plaintiff's allegations of negligence was lack of informed consent to the use of the vacuum. Despite the fact that the Plaintiff signed a General Consent Form when she was admitted to the hospital, (ROA 3499), Plaintiff claimed that the form did not specifically mention or authorize the obstetrician to use a vacuum to assist in delivering the baby, and Dr. Rhett did not tell her he was going to use a vacuum or advise of her the associated risks. (ROA 990-01.) Dr. Rhett testified that he did not discuss use of the vacuum with the Plaintiff because there was an emergency with the baby in distress and he thought the general consent covered it.

Plaintiff's OB/GYN expert (Dr. Oates) testified that there was no emergency that demanded dispensing with informed consent, but he did acknowledge that an emergency situation could arise where a baby was going to die in a matter of minutes; yet he still insisted that the OB/GYN would still have to get an "abbreviated" informed consent. (ROA 434, ll. 5-23.) In contrast, Defendant's OB/GYN experts testified that Dr. Rhett complied with the standard of care as to informed consent under the circumstances that presented during the delivery. (ROA 1893, l. 12 – 1894, l. 6 – Dr. Hobbs; ROA 1574, ll. 13-23 - Dr. Weinstein; ROA 1739, l. 22 – 1741, l. 11 – Dr. Van Dorsten.)

Plaintiff moved for a partial directed verdict on informed consent, asking that the Trial Court instruct the jury as a matter of law that the General Consent Form does not represent informed consent. (ROA 2036, ll. 6-9.) Despite the expert testimony that the

General Consent Form met the standard of care, the Trial Court granted the motion.

(ROA 2073, ll. 16-18.) In the charge to the jury, the Trial Court virtually quoted from the correct law on informed consent as set forth in *Melton v. Medtronic, Inc.*, 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010), and *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984):

Now, let's talk about informed consent. A doctor has the duty to inform a patient of the known risk or dangers of the treatment or procedure that the doctor proposes so that the patient will be able to make an intelligent decision as to whether to follow the doctor's proposed treatment. The basis of the doctrine of informed consent is the patient's right to exercise control over his or her own body by deciding intelligently for herself whether or not to submit to the particular procedure. ***In the absence of an emergency that requires immediately treatment***, the doctor must tell the patient of One, the diagnosis. Two, the general nature of any proposed procedure and the course of treatment. Three, the material risks involved in the course of treatment. Four, the probability of success associated with the course of treatment. Five, the prognosis if a particular procedure is not done or course of treatment not followed. Six, the existence of any alternatives to the procedure or course of treatment.

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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. At the close of the evidence in this case, the Court ruled that the document entitled Consent for Admission and Treatment, entered into evidence as Exhibit 2-004, does not provide informed consent for a vacuum extraction delivery. This does not mean that the issue of informed consent in this case must be decided in favor of the plaintiff, but simply means that Exhibit 2-004, alone and by itself, does not meet the requirements of South Carolina law with regard to informed consent and the vacuum extraction delivery in this case. (ROA 2202, l. 5 – 2206, l. 11 (emphasis added)).

The Plaintiff objected to the jury charge on emergency situations because the Trial Court had not given her Request to Charge #12, which was literally photocopied from Judge

Anderson's charge book:

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.

(ROA 3666-67; see objection and ruling at ROA 2236, l. 7 – 2237, l. 14.)

The Court of Appeals found that the Plaintiff's requested charge contained statements that were "inapplicable to the facts of this case, and incorrect statements of the law:"

Specifically, (1) the statement, "a physician must respect a competent patient's refusal of treatment, even in an emergency," is inapplicable because there is no evidence Jamesetta refused any treatment; (2) the statement, "If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency," is legally incorrect, *see Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008) ("[N]o independent cause of action for medical battery exists in South Carolina."); and (3) the statement, "if the patient is incapable of providing consent, the consent of a family member [should be sought], before administering treatment" is legally inaccurate, *see Harvey v. Strickland*, 350 S.C. 303, 311, 566 S.E.2d 529, 534 (2002) (rejecting doctor's argument he was under a duty to obtain patient's mother's consent for blood transfusion when patient was unconscious), as well as inapplicable to the facts of this case because there is no evidence Jamesetta was incapable of providing consent. 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 fact that she proffered the entire charge, the Plaintiff maintains that she does not object to Trial Court's failure to charge the first paragraph of her request, but complains that the jury was not charged the second paragraph in its entirety as a limitation on the emergency exception. Notwithstanding, that the request comes from Judge Anderson's charge book, the authorities cited with the proposed charge do not support the language about any requirement that a physician seek consent from family members or "impracticability of conferring with the patient" as a prerequisite to the emergency exception as presented.

The request to charge cites to South Carolina authority of *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002), and the Adult Health Care Consent Act, S.C. Code Ann. §44-66-60. However, *Harvey*<sup>6</sup> and §44-66-60 address claims for battery in situations of where a patient has refused medical treatment due to religious beliefs. In fact, the Request to Charge is found in Judge Anderson's charge book under Section 27-22, entitled "Medical Malpractice – Right to be Free of Unwanted Medical Treatment." Anderson, S.C. Requests to Charge - Civil, § 27-22 (2009). Here, the Plaintiff did not refuse treatment and no action for battery was made out<sup>7</sup>; thus, as the Court of Appeals held, such language was not applicable and there was no error in declining to give the requested charge.

Further, there is nothing in *Harvey* or §44-66-60 that supports the language in the second paragraph about any requirement that a physician seek consent from family

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<sup>6</sup>In that case, the patient was a Jehovah's Witness and he had expressly indicated he did not want any treatment involving the use of blood or blood products during elective surgery.

<sup>7</sup>See *Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008).

members or “impracticability of conferring with the patient” as prerequisite to the emergency exception as presented. That language in Judge Anderson’s charge does not appear to be from any appellate court opinion in this State, although such language can be found in a Rhode Island opinion:

Under the emergency exception a medical-care provider 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. The impracticality of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception. A physician must respect the refusal of treatment by a patient who is capable of providing consent, even in an emergency.

*Miller v. Rhode Island Hosp.*, 625 A.2d 778, 784 (R.I. 1993) (citations omitted).

In *Miller*, the patient, who was inebriated, entered the hospital ER for treatment of severe injuries sustained in an automobile accident, and the physician performed a diagnostic peritoneal lavage – not only without consent -- but over the patient’s strident objections, such that he had to be physically restrained and sedated. Notably, in that case, the Court stated that: “Under the emergency exception to informed consent it is within the domain of the jury to engage in factfinding concerning the existence of an emergency and a patient’s competence to consent.” *Id.* at 787.

Here, there was no question of the patient’s competence. Rather, the key question was the existence of an emergency. Plaintiff’s expert testified that there was no emergency to justify dispensing with informed consent, but the Defense experts all testified that there was an emergency that placed the baby as serious risk and required Dr. Rhett to deliver that baby immediately without stopping to explain to her what was happening and the alternatives with the associated risks. It was for the jury to judge the credibility of the witnesses and to weigh the conflicting expert opinions to determine if

there was an emergency. The charge, as given, properly stated the applicable law upon which the jury was to make its factual finding, and there is no ground to reverse its finding that Dr. Rhett did not deviate from the standard of care.

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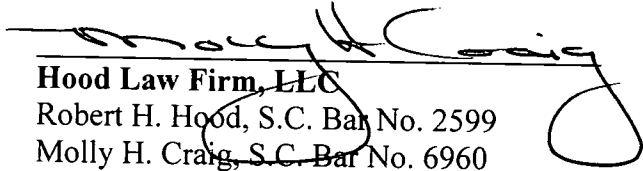
Plaintiff tries to prove that the jury was confused by the informed consent charge based on the Affidavit of Plaintiff's Counsel, Mary Watters, who interviewed three of the jurors after the trial. (ROA 3716.) As a threshold matter, the Defendant submits that Ms. Watters' hearsay about what the jurors discussed with her is an improper basis to challenge the jury charge under Rule 606, SCRE, because it does not prove any improper external influence on the jury's deliberations. *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008) ("Rule 606 thus draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter.") Furthermore, as to the substance of Ms. Watters' averments, they do not support any ground to grant a new trial based on the Trial Court's refusal to charge the exact language of Plaintiff's Request #12.

There was conflicting testimony from experts for both parties about informed consent and whether an emergency was presented. Based on the evidence presented, the Trial Court's charge to the jury, as a whole, was a correct statement of the law, and the Court of Appeals properly affirmed the judgment on that verdict.

## CONCLUSION

Wherefore, based on the foregoing, the Respondent Dr. Rhett respectfully submits that the Court of Appeals properly considered the correct legal standards that apply to the challenges to the evidentiary rulings and the jury charge, and properly affirmed the judgment entered on the jury's verdict that Dr. Rhett did not deviate from the standard of care in delivering the Child. Accordingly, the decision of the Court of Appeals and the judgment entered on the jury's verdict should be affirmed.

Respectfully submitted,



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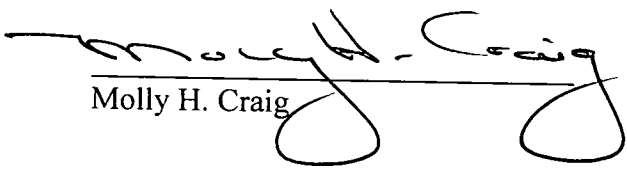
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### Certificate of Service

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I certify that on this 3rd day of November 2014, a copy of the foregoing BRIEF OF RESPONDENT was served on Petitioner by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to her Counsel of Record as listed below:

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



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Molly H. Craig

**RECEIVED**

NOV 04 2014

MOLLY H. CRAIG  
Partner  
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**S.C. SUPREME COURT**

November 3, 2014

Daniel E. Shearouse, Clerk of Court  
Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, SC 29201

Re: Jamesetta Washington, as Guardian ad Litem for Jayden Washington, a minor v.  
Edmund Rhett, Jr., M.D., Low Country Obstetrics & Gynecology, P.A.  
C/A No. 07-CP-10-1553, Charleston CP  
Appellate Case No. 2014-000831  
HLF File No. 2.100

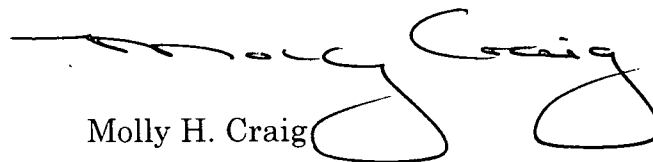
Dear Mr. Shearouse:

Enclosed for filing please find the original and fifteen (15) copies of the Final Brief of Respondent, Edmund Rhett, Jr., M.D., in the above-referenced case. Please file the original and return a clocked-in copy in the enclosed self-addressed stamped envelope.

By copy of this letter I am serving Petitioner with a copy of the same.

Kind regards,

Yours truly,

  
Molly H. Craig

MHC/jad

Enclosure(s)

cc: Edward L. Graham, Esquire  
J. Layton Ruffin, Esquire