

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS**

Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

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

v.

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

Of Whom Edmund Rhett, Jr. MD is.....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE?
- II. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THEORETICAL GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE?
- III. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT?
- IV. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING EXPERT WITNESS FEES?
- V. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN NOT PERMITTING REPLY TESTIMONY OF DR. OAKES CONCERNING MISLEADING USE BY DEFENSE OF STATISTICS IN A MEDICAL JOURNAL ARTICLE?
- VI. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE IN VIOLATION OF THE CASE MANAGEMENT ORDER?
- VII. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN FAILING TO ALLOW MORE EXTENSIVE VOIR DIRE CONCERNING POTENTIAL JUROR BIAS AGAINST A MEDICAL NEGLIGENCE PLAINTIFF?

STATEMENT OF THE CASE

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

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

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

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

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

As trial against Dr. Rhett and Low Country approached, Appellant proffered demonstrative evidence for defense counsel to review and examine, in accordance with the Multi-Week Docket Case Management Order. Defense counsel proffered no demonstrative evidence for Appellant to review in accordance with the Case Management Order. (R. pp. 1-6; p. 1291, line 24 – p. 1294, line 15) Defense showed Appellant's counsel several demonstrative exhibits at the outset of trial but did not disclose any intent to use a pelvic model or a vacuum pump until they were actually used, without notice or warning of any kind, in the defense's direct examination of Dr. Rhett and one of his obstetrical witnesses. (*Id.*, R. p. 1262, line 9 – p. 1264, line 25; p. 1649, line 22 – p. 1651, line 3)

The case was scheduled for trial against Dr. Rhett and Low Country in the Charleston County Court of Common Pleas starting on July 26, 2010, with the Honorable Michael J. Baxley serving as presiding trial judge. *Voir dire* was limited, even though numerous prospective jurors

had personal or professional connections with the Defendants. (R. p. 174, line 22 – p. 211, line 12)

Prior to testimony the court denied Appellant's motion *in limine* to keep out evidence of alcohol usage by the mother the first month of pregnancy before she realized she was pregnant. (R. p. 246, lines 14-20) The Court withheld ruling on Appellant's motion *in limine* to keep out testimony of Dr. Aubrey Milunsky, a geneticist, about prenatal maternal alcohol consumption as a possible contributing cause of the child's brain bleeds and brain damage (R. p. 227, line 19 – p. 228, line 13; p. 231, line 10 – P. 235, line 3; p. 236, line 23 – p. 245, line 13) and Dr. Milunsky's unreliable and theoretical testimony that genetic factors may also have been a possible contributing cause of Jayden's brain bleeds. (R. p. 221, line 1 – p. 224, line 13; p. 224, line 21 – p. 231, line 9) Respondent's counsel suggested that the court hold Appellant's Motion *in Limine* in abeyance pending an opportunity for Appellants' counsel to *voir dire* Dr. Milunsky. (R. p. 104, lines 9-13; p. 226, lines 11-13) The Court agreed to revisit the issue, leading Appellants' to believe *voir dire* of Dr. Milunsky would be allowed so the court could properly discharge its gatekeeper function. (R. p. 230, lines 15 – p. 231, line 5; p. 231, line 10 – p. 245, line 15) During trial, however, the trial court precluded Appellant from being heard on a *voir dire* challenge to the causation testimony of Dr. Milunsky (R. p. 1466, line 12 – p. 1468, line 3), and allowed the jury to hear speculative, theoretical and unreliable opinion testimony which lacked probative value, was not helpful to the jury and was highly prejudicial to Appellant. (R. p. 1464, line 18 – p. 1539, line 7)

The Defendants kept referring to a general consent form signed by Appellant Jamesetta Washington as the "informed consent" document. At the end of Defendant's case, the trial judge granted Appellants' Motion for a partial directed verdict, ruling that the general consent form did

not represent informed consent as a matter of law. (R. p. 2034, line 25 – p. 2035, line 5; p. 2035, line 25 – p. 2046, line 7)

In his charge on informed consent, the trial judge informed the jury that there was an emergency exception to the informed consent requirement, but he did not charge them on the major limitations to that emergency exception as requested by Appellants. (R. p. 2202, line 5 – p. 2206, line 11; p. 2235, line 25 – p. 2237, line 14; p. 2258, line 12 - p. 2259, line 9; R. pp. 3522-3606) The court also declined to charge the jury about the normalcy of expert witnesses being paid, despite repeated attacks by the defense on Appellant's experts on that basis. (R. p. 2237, line 15 – p. 2238, line 6; p. 2258, line 12 – p. 2259, line 9)

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

The jury deliberated from 3:40 P.M. through 6:23 P.M. on August 10, 2010, and from 9:00 A.M. through 3:22 P.M., August 11, 2010, when they announced they were hopelessly deadlocked. (R. p. 2250, line 19; p. 2262, line 15; p. 2263, lines 1-11; p. 2264, line 2 – p. 2268, line 2) The trial judge gave an Allen charge. (R. p. 2264, line 3 – p. 2268, line 2) The jury went out again at 3:29 P.M.; and announced one hour and seventeen minutes later that the jury had reached a verdict in favor of Respondent Rhett. (R. p. 2268, lines 3-18; p. 2269, line 22 – p. 2270, line 17)

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

and his charge on an unlimited emergency exception to informed consent. (*Id.*, R, pp. 3716-3717)

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

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

STATEMENT OF THE FACTS

This is an obstetrical negligence claim. Jamesetta Washington brought this case as Guardian ad Litem on behalf of her son, Jayden W., alleging that negligence committed by her obstetrician, Dr. Edmund Rhett, Jr., during Jayden's birth and perinatal period caused him to sustain severe and permanent brain damage.

Jamesetta was a student at the University of South Carolina when she became pregnant with her first child. (R. p. 974, lines 3-4) After initial pre-natal care in Columbia, Jamesetta left school and returned home to Charleston to live with her parents during the rest of her pregnancy. (R. p. 978, line 2-9; p. 983, lines 1-16; pp. 3215-3278) There she obtained further pre-natal care from Low Country Obstetrics and Gynecology, P.A. (R. p. 983, lines 17-25; pp. 3024-3109) The pregnancy was uneventful, with no serious complications until Jayden was injured being born at

East Cooper Regional Medical Center. He was born on July 16, 2002, after induction with the drug Pitocin, by vacuum extraction delivery performed by Dr. Rhett. (R. p. 987, lines 4-5; pp. 3110-3214)

Plaintiff presented evidence that Dr. Rhett was negligent in his delivery of Jayden by vacuum extraction, thereby causing injury to the minor child's brain, resulting in brain bleeds in multiple areas and severe permanent harm. (R. p. 403, line 19 – p. 588, line 18; p. 645, line 25 – p. 647, line 5; p. 655, line 21- p. 656, line 4; p. 658, lines 3-23; p. 692, line 14 – p. 693, line 8, p. 873, line 14 – p. 826, line 1; p. 874, line 12 – p. 901, line 18; p. 1052, line 23 – p. 1067, line 6; p. 1096, line 4 – p. 1097, line 14; p. 1143, line 4 – p. 1166, line 21; p. 1190, line 10 – p. 1202, line 12; p. 2298, line 5 – p. 2401, line 3; p. 2454, line 3 – p. 2471, line 9.) Dr. Rhett's negligence includes use of a vacuum without informed consent, and without even telling the patient he intended to use a vacuum; use of a vacuum without an indication, very early in the second stage of labor; use of a vacuum when Jayden was located at a relatively high portion of the birth canal, in the mid-pelvis; use of an extra long vacuum cup, contraindicated for use in the mid-pelvis; and improper use of the vacuum in a rocking motion which applied asymmetrical forces to Jayden's brain. (R. p. 403, lines 19 – p. 588, line 18; p. 645, line 25 – p. 647, line 5; p. 655, line 21 – p. 656, line 4; p. 658, lines 3-23; p. 2298, line 5 – p. 2401, line 3; p. 2454, line 3 – p. 2471, line 9) Dr. Rhett revealed in his deposition a shockingly low level of obstetrical and anatomical knowledge. (R. p. 470, line 15 – p. 471, line 22; p. 477, line 16 – p. 574, line 20) Yet the defense obstetrical experts were willing to defend Dr. Rhett on the theory that his conduct was within two standard deviations of average quality, i.e., that he was not in the bottom 4% of obstetricians. (R. p. 1759, line 3 – p. 1760, line 3; p. 1816, line 25 – p. 1817, line 3) Dr. Rhett described the delivery inaccurately, at his deposition, as proven by a birth video of the labor and

delivery¹. (R. p. 403, line 19 – p. 588, line 18; p. 645, line 25 – p. 647, line 5; p. 655, line 21 – p. 656, line 4; p. 658, lines 3-23)

Jayden was transferred to MUSC on the morning of July 17, 2002. (R. p. 955, lines 1-24) Brain bleeds were diagnosed at MUSC, and brain surgery was performed to remove a large clot from the posterior fossa portion of his cerebellum. (R. p. 998, lines 1-15; pp. 3294 - 3307) He has received extensive follow-up care, treatment and therapy. (R. p. 998, line 19 – p. 1008, line 22)

Most of Jayden's treatment costs have been paid to date by Medicaid. As of March, 2010, the last date as of which figures are currently available, the retail value of causally related Medicaid payments totaled \$223,403.59. (R. p. 1201, line 15 – p. 1202, line 16) Because of Jayden's brain damage, he suffers developmental, motor and cognitive delays and deficits. Additional procedures and therapy will be necessary for Jayden in the future, and Jayden will need vast future care and treatment. (R. p. 692, line 14 – p. 693, line 8; p. 813, line 14 – p. 826, line 1; p. 874, line 12 – p. 901, line 8; p. 1052, line 12 – p. 1067, line 6; p. 1143, line 4 – p. 1166, line 21) His vocational opportunities will be limited to possible sheltered employment. (R. p. 1096, line 4 – p. 1097, line 14) His economic damages valued by Plaintiff's economist, Oliver Wood, based on testimony of Plaintiff's life care planner, Robert Voogt, and vocational expert, Jean Hutchinson, are in excess of six million dollars at present value. (R. p. 1199, lines 4-7).

¹ Dr. Rhett changed his testimony at trial in numerous respects after studying the fundamentals of obstetrical anatomy, vacuum extraction principles and the birth video, and after practicing testifying in front of a video camera in preparation for his appearance at trial. (R. p. 1321, line 22 – p. 1324, line 23; p. 1328, line 25 – p. 1329, line 2; p. 1329, lines 8-11; p. 1330, lines 9-16; p. 1331, lines 1-19)

ARGUMENT

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W.'S BRAIN DAMAGE.

A. Standard of Review

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

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

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

The trial court erred by failing to exclude speculative and highly prejudicial evidence concerning prenatal maternal alcohol consumption as a possible contributing cause of Jayden's brain damage. Such evidence had no probative value; and its admission was extremely prejudicial, depriving Appellant of a fair trial. For evidence to be relevant it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, S.C.R.E.; *Hoeffer v. The Citadel*, 311 S.C. at 365, 429 S.E.2d 190,(1993); *Davis v. Traylor*, 340 S.C. at 155, 530 S.E.2d 385 (Ct. App. 2000) ; *Gulledge v. McLaughlin*, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, S.C.R.E.; see *Pike v. South Carolina Dep't of Transp.*, 332 S.C. 605, 613, 506 S.E.2d 516, 520 (Ct. App. 1998), *aff'd as modified*, 343 S.C. 224, 540 S.E.2d 87 (2000). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E.; *In re Robert R.*, 340 S.C. 242, 246-47, 531 S.E.2d 301, 303 (Ct. App. 2000); *Haselden*, 341 S.C. at 497 n.12, 534 S.E.2d at 301 n.12; *Hunter v. Staples*, 335 S.C. 93, 101-02, 515 S.E.2d 261, 266 (Ct. App. 1999); see also *Watson ex rel Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000) ("The dictates of Rule 401 are subject to the balancing requirement of Rule 403, S.C.R.E., which requires a court

to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative.")

The facts in this case show that Jamesetta Washington, mother of Jayden, consumed alcohol in modest amounts at the outset of her pregnancy before she knew she was pregnant. (R. p. 975, lines 2-13) There is no evidence of any excessive alcohol consumption, and no evidence of any alcohol consumption later than the early prenatal period before Jamesetta realized she was pregnant. (R. p. 1494, lines 20-24) No expert for either side opined that such maternal alcohol consumption in the early prenatal period most probably caused Jayden's brain bleeds and brain damage. However, two defense experts, the geneticist, Dr. Aubrey Milunsky, and Dr. Lynn Norton, an obstetrician, testified at deposition that if the mother consumed more alcohol than she admitted, that could be a contributing cause of brain damage, but to an indeterminable degree. Dr. Milunsky theorized in his deposition that Jayden's mother may have consumed more alcohol than she admitted, and he believed her prenatal alcohol consumption was a contributing factor, but he could not ascribe a mathematical probability of even a one in a million chance that maternal alcohol ingestion caused brain bleeds or brain damage. (R. p. 1502, lines 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. p. 2689, line 6 – p. 2690, line 13). She could not testify that there was even a one in a million chance that alcohol caused brain damage in this case. *Id.* The defense was expected to offer such unreliable, speculative and theoretical causation testimony at trial, pursuant to a "multifactorial cause" theory.

Believing such testimony to be completely improper, because unreliable, based on speculation and in violation of the "most probable" cause requirement, Appellant moved *in*

limine to preclude such testimony. (R. pp. 113-115; p. 231, line 10 – p. 245, line 8) The trial judge denied the motion about excluding references to maternal alcohol consumption in the medical records, stating:

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

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

THE COURT: Counsel, the best way for me to do that and not delay these proceedings is to ask you to hold that objection and we will take it up at the end of the testimony as to whether or not there may be some objection to the science itself. If so, then the court will make a curative instruction. If not, we will remain where we find ourselves.

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

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

Q. And what of significance in the first trimester did you find in

the mother's records?

A. That there was a history of alcohol use in the first trimester, the first three months of pregnancy.

Q. With regard to this child and his problems and developmental delays, how is that relevant?

A. Well, it is potentially relevant in the sense that the prenatal record indicates alcohol use but does not indicate how much and precisely when. So it sits there as an undefinable concern that may or may not have to do with one or more of these items.

Q. Are these the kind of delays that you see with alcohol ingestion?

EDWARD GRAHAM: Objection. Leading, Your Honor.

THE COURT: Overruled as to that question.

THE WITNESS: There is something called fetal alcohol syndrome.

DIRECT EXAMINATION CONTINUED BY ROBERT HOOD:

Q. Say that word again, those words?

A. Fetal alcohol syndrome, that is what it is called.

Q. Yes, sir.

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

Q. Okay.

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

Q. Incomplete?

A. Incomplete, (affirmative nod). So just like anything else in

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

(R. p. 1491, line 18 – p. 1493, line 16) (Emphasis added.)

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

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

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

A. No, actually not.

Q. What about fifty-one percent?

A. No, no. There is no way to assign a population (sic) or any other kind of risk with reference to the alcohol here. It is more probably than that that Jayden's problems occurred as a consequence of multiple factors that have nothing to do with the bleeding, but rather from either the alcohol and/or his vasculature problem, his connective tissue problems.

Q. Is that your opinion to a medical degree of certainty, most probably, Doctor?

A. Yes.

(R. p. 1494, line 17 – p. 1495, line 22) (Emphasis added.)

Such testimony was admittedly speculative. It was also of no relevance and highly prejudicial. If

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

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

Q. Doctor, can you tell us today, do you believe that there is even a one in ten thousand chance that alcohol played any role in causing the damage to Jayden?

A. I don't think that I can add to the statement, that it simply would reiterate it to the jury to hear it again.

Q. Can you say that there is even a one in a million chance?

A. That's absurd statement (sic) to talk about one in whatever number when there is no scientific basis to account for such a statement.

Q. Sir, please answer yes or no. Can you tell these Ladies and Gentlemen whether there is even a one in a million chance that alcohol had any significance in this brain damage?

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

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

A. Okay.

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

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

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

Q. Is that a correct reading of your answer?

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

(R. p. 1502, line 12 – p. 1503, line 12; p. 1504, lines 3-22) (Emphasis added)

Dr. Milunsky's admissions on cross, though evasive, were consistent with his deposition testimony, which was the basis for Appellant's objection to his being allowed to express to the jury his wild speculation about excessive alcohol consumption as a possible cause of Jayden's brain damage. (R. pp. 113-115) Eliciting an admission from Dr. Milunsky during his cross-examination that his testimony was speculative and without scientific reliability does not un-ring the bell that should never have been rung. The judge should not have let the jury hear Dr. Milunsky's irrelevant prejudicial speculation. Beyond Dr. Milunsky's expert opinion there was no other evidence presented at trial that the maternal alcohol consumption played any role in causing Jayden W.'s injuries sustained during birth. The testimony of Dr. Milunsky is speculative, theoretical, and not probative of alcohol causing Jayden's brain damage. Its prejudicial nature is painfully obvious, greatly outweighing any presumed minimal probative value. Therefore, the trial court's decision to admit such testimony is in clear violation of Rule 401, 402, and 403, S.C.R.E. and was an abuse of discretion.

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

In *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), the South Carolina Supreme Court adopted a standard for admissibility of scientific evidence based on “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.” In considering reliability under the *Jones* standard, the Court looks at several factors, including (1) the publication and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). Such evidence is also subject to disallowance for prejudice or lack of probative value. *Id.*

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

After *Daubert*, the South Carolina Supreme Court revisited the issue of admissibility of scientific evidence in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court ruled that for scientific evidence to be admissible the trial court must initially determine that the evidence

will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable. The *Jones* factors should be used to determine reliability. *Id.* The Court noted that even if otherwise admissible, such evidence should still be precluded if its prejudicial effect outweighs its probative value. *Id.* The Court concluded the scientific evidence at issue in *Council* had been properly admitted.

The most recent state Supreme Court case to consider admissibility of scientific evidence is *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). In *Watson*, the judgment for Plaintiff was reversed because the purported expert testimony should have been disallowed, because purported experts were not qualified, and the purported scientific evidence was not reliable. The Court confirmed that reliability is a prerequisite for both scientific and technical testimony. The Court confirmed that the trial judge serves a gatekeeper role and “should be cautious in conferring an expert label upon a witness” and in allowing purported scientific evidence through such witnesses. *Id.*, 389 S.C. at 449, 699 S.E.2d at 176.

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

Q. And you said that you believe that Jayden has incomplete fetal alcohol syndrome?

A. I did not. I did not say that.

Q. What ---

A. I said that he does not have fetal alcohol syndrome, as point one. Point two, that the features that he does have are consistent with

incomplete – or that some of the features are consistent with incomplete fetal alcohol syndrome; for which there is no proof.

(R. p. 1501, line 1 – p. 1502, line 3) (Emphasis added.)

Q. You can't express an opinion with any scientific reliability about any degree of probability or possibility, can you?

A. About what?

Q. That alcohol played any significant role in causing brain damage in this child?

A. You're like a dog with a bone. I mean, the fact is that we made the statement here that we don't know about the contribution of alcohol taken, we don't know the volume, the amount, the timing, and it sits there as an item that cannot be resolved. It sits there nevertheless because some of the features are consistent with incomplete fetal alcohol syndrome.

(R. p. 1503, line 13 – p. 1504, line 2) (Emphasis added.)

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

Although the admission of such testimony is plainly erroneous, it is noteworthy that the trial judge did not even recognize his role as gatekeeper of unreliable scientific testimony. He withheld his ruling on Appellant's Motion in Limine (R. p. 245, lines 9-15), then refused Appellant's attempt to have him exercise his gatekeeper duty before Dr. Milunsky testified. (R. p. 1466, line 12 – p. 1468, line 3). Startlingly, he announced his intention to consider questions of helpfulness, reliability and prejudice only after the jury heard the challenged testimony. (R. p.

1467, line 20 – p. 1468, line 3) His attitude was that any purported scientific evidence that was in retrospect determined to be unhelpful, unreliable or prejudicial could be remedied by a corrective charge. Such a cavalier view by a trial judge of his gatekeeper role reflects a dangerous misunderstanding of *State v. Council, supra*; and *Watson v. Ford, supra*. That serious error needs to be corrected in terms strong enough for the trial bench to appreciate.

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

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

Dr. Milunsky's overall causation opinion expressed during direct examination was, "it is more probably that Jayden's problems occurred as a consequence of multiple factors...." (R. p. 1495, lines 13-16). A multifactorial cause theory does not permit testimony of a myriad of minor possible causation factors that each fall short of most probable cause. That is precisely the significance of *Payton v. Kearse, supra*. Yet the trial judge allowed Dr. Milunsky to testify about his speculation that multiple possible factors preceding Jayden's vacuum delivery, including maternal alcohol consumption, had contributing causal significance. Dr. Milunsky's testimony

about the significance of alcohol and other factors fell dramatically short of the most probable requirement. When asked about the alcohol factor during cross examination, Dr. Milunsky finally acknowledged, "There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects." (R. p. 1504, lines 15-18).

The trial court allowed Dr. Milunsky to speculate about possible timing and amount of maternal alcohol ingestion that was not supported by actual evidence. The Court further allowed Dr. Milunsky to theorize that such assumed excessive alcohol consumption in pregnancy was a possible contributing cause of Jayden's brain damage. Allowing such speculative and theoretical testimony is wrong on many levels, and certainly violates the "most probable" rule of *Payton v. Kearsse*.

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

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

... otherwise relevant evidence may be excluded when its probative value is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....' Rule 403, S.C.R.E. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Owens*, 346 S.C. 637, 666, 552 S.E.2d

745, 760 (2001) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

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

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

Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003), also represents compelling authority that Dr. Milunsky's speculative testimony should have been excluded. In *Kennedy*, a tractor-trailer moved in front of a pick-up truck driven by Kennedy. Kennedy's pick-up truck then struck the rear of the 18-wheeler, and Kennedy alleged that he sustained injuries caused by negligence of the tractor-trailer driver in pulling too suddenly in front of him. After

the accident Kennedy had a toxicology screening which showed the presence of marijuana in his bloodstream. *Id.* at 128-29, 595 S.E.2d at 251. Griffin sought to admit the toxicology evidence of Kennedy's marijuana as probative of the assertion that Kennedy could have stopped without hitting the tractor-trailer if he had not been adversely affected by the drug. The trial court allowed the testimony. Despite eyewitness testimony that Kennedy did have sufficient time to stop, the Court of Appeals concluded that the circumstances of the accident did not "necessarily suggest that [Kennedy] was driving under impairment." *Id.* Under those circumstances, the Court reversed a defense judgment, concluding that the danger of unfair prejudice substantially outweighed the probative value of the toxicology report. *Id.* at 128-29, 595 S.E.2d at 251.

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

F. Allowing Evidence of Alcohol Use the First Month of Pregnancy Under These Circumstances Endangers Public Policy.

This court has long recognized a public policy to protect the welfare of children. *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). In this case Jayden W.'s mother so loved her unborn child that she wrote down every substance she consumed during early pregnancy, before she realized she was pregnant, that may be important to the physician treating her and caring for her unborn child. (R. p. 984, lines 11-19) Those disclosures included drinking alcohol while in college, before she realized she was pregnant. *Id.* Every obstetrician would want a patient like Jamesetta to be honest and detail all drug or alcohol ingestion during pregnancy, for the health of the baby. Not one physician told Jamesetta that alcohol consumption in the first month or so of pregnancy, before learning she was pregnant, could be harmful to Jayden. At trial no one testified alcohol consumption most probably caused brain damage.

The rules of evidence should preclude this irrelevant, prejudicial evidence. If such evidence is nevertheless allowed, future parents may be discouraged from disclosing potentially important health information. This disincentive to disclose information is not in the best interest of future children and is thus a danger to public policy. Full disclosure to an obstetrician should be encouraged by public policy. When a patient fears that truthful information they reveal to a physician may harm them in court, by being used as a springboard for wild speculation and theorizing, such policy is jeopardized. The rules of evidence in this case failed to protect a brain-damaged baby and a loving mother, who trusted her doctor to use her truthful disclosures for her new baby's benefit. The Court's ruling was very wrong on many levels, and if not reversed sets a dangerous policy precedent.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY IMPROPERLY ADMITTING TESTIMONY REGARDING GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE.

A. Standard of Review

The standard of review is set forth in Argument I A, *supra* at page 7. Dr. Milunsky's testimony concerning theoretical genetic factors as a possible cause of brain bleeds and brain damage should have been excluded because it lacks probative value, any presumed minimal relevance is outweighed by its prejudicial effect, it is not helpful to the jury, it is not reliable, and it violates the "most probable" requirement.

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

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

Dr. Milunsky contends that Jayden has or had numerous alleged birth defects, many of which can be caused by traumatic brain injury at birth, and others of which are not unusual in the newborn². Dr. Milunsky had never examined Jayden W., but purported to make these diagnoses

² Those include coloboma, a developmental imperfection of the eye (R. p. 1471, line 15 – p. 1472, line 8); hyperextensibility, or loose joints (R. p. 1471, line 12); hypotonia, or reduced muscle tone (R. p. 1479, lines 3-4); narrow blood vessels to the lung (R. p. 1471, line 25); alleged narrow blood vessel in the brain (R. p. 1471, line 24 – p. 1472, line 9); undescended testis (R. p. 1474,

from two photographs and a partial review of the medical records.

Testimony of Dr. Barbara Burton, Appellant's genetics expert, was based on her physical examination of Jayden as well as a review of all relevant medical records and the negative results of five genetics tests. (R. p. 2490, line 12 – p. 2505, line 10; p. 2512, line 2 – p. 2514, line 6) Dr. Burton explained that many of the conditions identified by Dr. Milunsky either never existed, were merely transient, or represent individual variability rather than birth defects. (*Id.*, R. p. 2514, line 8 – p. 2526, line 14) She further explained that many of the conditions which Dr. Milunsky addressed were to be expected when a child is born with traumatic brain bleeds, and the others are not very unusual. *Id.* Because the alleged birth defects identified by Dr. Milunsky are either to be expected when a baby's brain is traumatically injured at birth or are not very unusual, such testimony had minimal relevance that was outweighed by its prejudicial nature and tendency to confuse. It should have been disallowed by the trial court as part of its gatekeeper function.

Dr. Milunsky also testified that Jayden's mother had certain conditions associated with a connective tissue disorder including spina bifida, fused vertebrae, lordosis, and an extra pair of ribs. (R. p. 1482, line 24 – p. 1484, line 10) Although there was no evidence that any such conditions were shared by Jayden, Dr. Milunsky nevertheless opined that Jayden had an inherited connective tissue disorder. Dr. Burton testified from her personal examination that Jayden did not have any connective tissue disorder; and that his mother's spine and rib issues are unrelated to connective tissue disorder. (R. p. 2515, l. 20 – p. 2519, line 22) Dr. Milunsky agreed that connective tissue disorders have never been associated with brain bleeds at birth, except

lines 7-17); bilateral hydroceles, associated with undescended testis (R. p. 1472, line 18 – p. 1476, line 19); reduced platelet count (R. p. 1388, lines 9-13); delayed myelination (R. p. 1479, line 20 – p. 1480, line 10); strabismus, or a condition of being cross-eyed (R. p. 1481, lines 5-7); supposedly wide-spaced nipples (R. p. 1479, line 5); and supposedly prominent ears (R. p. 1480, lines 15-16).

with respect to an extremely rare genetic syndrome he admitted Jayden does not have. (R. p. 1518, line 25 – p. 1519, line 10) Thus, there was no probative value to Milunsky's testimony about connective tissue disorder, which only served to prejudice and confuse the jury about theoretical genetics factors. Moreover, even assuming *arguendo* that Jayden had inherited a connective tissue disorder which made him more vulnerable to brain bleeds from vacuum suction, that assumed pre-existing condition would not break the causal connection between Dr. Rhett's use of the vacuum and Jayden's resulting brain bleeds. Even Dr. Milunsky admitted that Dr. Rhett's vacuum use caused the child's brain bleeds. (R. p. 1531, lines 18-20)

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

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

Dr. Milunsky's testimony regarding possible brain damage from theoretical genetic factors should have been denied admissibility under *State v. Council, supra*. The testimony was neither helpful to the jury nor scientifically reliable using the *Jones* factors for reliability. This evidence was not reliable because it involves speculation about what future developments in genetics may entail, rather than an application of current science to known facts. The record discloses no basis for a reliability determination under any *Jones* factor.

Dr. Milunsky admitted during direct examination that his opinion was based on

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

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

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

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

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

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

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

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

"Before expert medical testimony is admissible on the question of causation between the plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probable' rule." *Payton v. Kears*, *supra*. Dr. Milunsky's overall causation opinion expressed during direct examination was, "it is more probably that Jayden's problems occurred as a consequence of multiple factors...." (R. p. 1495, lines 13-16) The trial judge allowed Dr. Milunsky to testify about this speculation that multiple possible contributing factors preceded Jayden's brain damage, including maternal alcohol consumption, vascular problems, and purported connective tissue disorder. Yet Dr. Milunsky's testimony about the causal significance of each alleged factor fell dramatically short of the most probable requirement. When asked about the genetic syndrome factor, Dr. Milunsky admitted that Jayden did not match any known genetic disorder. (R. p. 1506, lines 24 – p. 1508, line 7). The only factor that Dr. Milunsky can clearly identify as a cause of the bleeding on the brain is the use of the vacuum on the head of Jayden W.: "It's a factor. No question." (R. p. 1531, line 20). Dr. Milunsky's opinion testimony regarding possible contributing causes of the child's brain damage is essentially the same "multifactorial cause" testimony properly excluded by this Court in *Payton v. Kears*. Allowance thereof permitted Dr. Milunsky to speculate about theoretical causal possibilities which do not come close to meeting the "most probable" requirement for causation. This is the same danger the Court was concerned

with in *Jackson v. Bermuda Sands*, 383 S.C. 11, 17, 677 S.E. 2d 612, 615-616 (Ct. App. 2009) (where opinion testimony is not proved by scientific testing, opinions "amount to mere speculation and conjecture.") This type of testimony invites the jury to speculate about causation, and should have been precluded by its failure to meet the "most probable" requirement for admissibility.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT.

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

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

Informed consent is a key issue in this case. Although the defense continually tried to confuse the jury on this issue by referring to a general consent form as the "informed consent"

document, the trial court properly ruled that the general consent document signed by Jamesetta Washington did **not** represent informed consent, as a matter of law. (R. p. 2045, lines 13-17).

Nevertheless, Defendant still contended that he did not need to obtain informed consent to use the vacuum because of an alleged emergency. Appellant did not agree that an emergency was present, but with the issue of Dr. Rhett's failure to obtain informed consent for the use of a vacuum extractor still an issue in this case, Appellant wanted the jury to know the limitations that the law places on the emergency exception to informed consent. Appellant therefore submitted her Request to Charge #12:

Informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. However, a physician must respect a competent patient's refusal of treatment, even in an emergency. If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency.

Even under the emergency exception to the informed consent doctrine, a physician should seek the consent of the patient, or, if the patient is incapable of providing consent, the consent of a family member, before administering treatment. Impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception.

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

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

(R. p. 2205, lines 13-22) The court declined to charge the portion which expressed limitations to the emergency exception to the informed consent doctrine. (R. p. 2236, line 25 – p. 2237, line 14) Choosing not to charge such limitations, the judge misinformed the jury about the correct law. The omitted portions of the requested charge were absolutely necessary for the charge to be a correct, balanced and fair charge on South Carolina law. See *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 533 C.S. (2002); 61 Am. Jur. 2d “Physicians, Surgeons and Other Healers” §§ 157, 167 176 (2004).

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

consent was a key issue in the case, that omission represented an abuse of discretion, was material and prejudicial.

"An informed consent action is no different from any other action for professional malpractice." *Hook v. Rothstein*, 281 S.C. 541, 551, 316 S.E.2d 690, 696 (Ct. App. 1984). Because informed consent issues are subsumed under negligence under S.C. law, there was no separate issue regarding informed consent for the jury to consider, just one overall standard of care issue: Did Dr. Rhett breach the generally accepted standard of care for obstetricians under these facts and circumstances? This question could not properly be resolved under the facts of this case without a discussion by the jury on informed consent, and such a discussion could not properly occur without a correct charge on informed consent. As the jury was utterly confused by the charge which erroneously informed them of an unlimited emergency exception to informed consent, they were unable to properly deliberate the standard of care issue. Their confusion resulted from the erroneous pro-defense charge regarding the emergency exception to informed consent, without limitations thereto being revealed by the trial court.

Plaintiff's Request to Charge #12 was timely made. (R. p. 2202, line 5 – p. 2206, line 11; p. 2235, line 25 – p. 2237, line 14; p. 2258, line 12 – p. 2259, line 9; pp. 3110-3214) It involved a controlling legal principle. The trial court's failure to charge the second part of Plaintiff's Request to Charge #12 was thus reversible error under *Koutsogiannis, supra*; *Brown, supra*; *Baker, supra*; and *Stokes, supra*.

IV. THE TRIAL COURT ALSO ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING EXPERT WITNESS FEES.

As noted in Argument III, *supra*, a trial court has the duty to give a requested instruction that correctly states the law applicable to the issues and the evidence. *Singletary, supra*; *Cooney,*

supra. When general instructions to the jury are insufficient to enable the jury to understand fully the law or the issues involved, a refusal to give a requested charge is reversible error. *Stokes, supra*.

Plaintiff's Request to Charge #3 addressed expert fees. It provides as follows:

When an expert witness is called by either a plaintiff or defendant, he expects to be paid and he should be paid. You should not take into consideration the fact that the witness is paid unless there is some evidence or circumstances appearing from the evidence which would fully and reasonably convince you that the testimony of the witness has been influenced because of the sum which he has been paid as a witness.

This charge is taken directly from Judge Ralph King Anderson's book on jury instructions, and is a correct statement of South Carolina law. See *Anderson v. Campbell Tile Co.*, 24 S.E.2d 104, 108 (1943). It should have been charged because Defendants elicited testimony regarding fees from every liability expert presented by Plaintiff and also from certain damages expert(s). (R. p. 590; pp. 619-620; p. 661; p. 714-715; p. 717; p. 833, lines 6-16; p. 906, line 20 – p. 907, line 1; p. 1168, lines 21-25; p. 1169, lines 4-12) Defendant repeatedly sought to prejudice the jurors against Plaintiff by persistently arguing directly and through innuendo that Plaintiff's experts were unworthy of belief because of the fact and amount of their payment for time and work as experts in this case. *Id*. The failure to give the requested charge was prejudicial to Plaintiff, as in evident from the defense verdict.

V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT PERMITTING REPLY TESTIMONY OF DR. OAKES CONCERNING MISLEADING USE BY DEFENSE OF STATISTICS IN A MEDICAL JOURNAL ARTICLE.

The Plaintiff in a civil action must first produce and disclose the entire evidence in

support of his case; after the defendant has offered all of his evidence, the plaintiff may reply. *Clinton v. McKenzie*, 36 S.C.L. (5 Strob.) 36 (1850). Reply testimony should be limited to rebuttal of matters raised in defense. *The State v. Brian Garris*, 394 S.C. 336, 714 S.E.2d 888, 896 (Ct. App. 2011). Admission of reply testimony is within the discretion of the trial judge, and his decision will not be disturbed on appeal absent a showing of abuse of discretion. *Vernon v. Provident Life & Accident Ins. Co.* 266 S.C. 208, 222 S.E.2d 501 (1976); *Ford v. A.A.A. Highway Express*, 204 S.C. 433, 29 S.E.2d 760 (1944).

The trial court abused its discretion in this case by denying Jayden W. the ability to perform an effective rebuttal concerning the defense's misleading use of statistics from a medical journal article. The article was first addressed when Dr. Rhett took the stand at the request of his own counsel. Dr. Rhett repeatedly referred to unspecified literature regarding the risk of brain bleeds to infants born vaginally without vacuum extraction being nearly as high as such risk to babies suctioned out with a vacuum. (R. p. 1237, line 12 – p. 1238, line 18; p. 1348, line 21 – p. 1349, line 5) In so testifying, Dr. Rhett was misusing statistics from a New England Journal of Medicine article,³ without revealing the source. Appellant's counsel knew that, and inquired about the subject article on cross-examination of Dr. Rhett in trying to verify the literary source of defendant's misleading statistics. (R. p. 1349, lines 6-20; p. 1353, line 2 – p. 1357, line 25) Counsel asked about any controls placed on the study's subjects. (R. p. 1354, lines 8-9; p. 1356, lines 15-20) Unfortunately, Dr. Rhett did not have the willingness or ability to answer questions truthfully and accurately about the specific controls used in the study. (R. p. 1353, line 2 – p. 1357, line 25) Defense expert Dr. Lynn Norton also used statistics from the article in a misleading way. (R. p. 1660, line 5 – p. 1661, line 25).

³ Dena Towner, et al., "Effect of Mode of Delivery in Nulliparous Women on Neonatal Intracranial Injury," New England Journal of Medicine, 1999; 341, R. pp. 3608-3613

Importantly, the subject article did not control for (1) gestational age; or (2) station at which vacuum was applied in the vacuum deliveries. The article did use certain weight parameters as a control for babies in its study, but the weight cutoff chosen was low enough to include many preterm babies. (R. p. 1671, line 23 – p. 1673, line 14; pp. 3608-3613)

To compare risk of brain bleeds in a population that includes preterm babies with brain bleeds in vacuum deliveries is an unfair and misleading comparison. That is because the risk of brain bleeds in preterm babies is high, because of early gestational age; and vacuums are not used on preterm babies, but are used only at or near term. To compare the risk of brain bleeds from early gestational age with the risk of brain bleeds from traumatic vacuum extraction at or near term is very misleading. Different processes are involved in causing brain damage to babies of different gestational ages. Term babies delivered by vacuum extraction with brain bleeds involve damage most probably caused by traumatic suction, while brain bleeds in preterm babies are ordinarily caused by insufficient maturation of tissues.

Moreover, the risk of brain bleeds in low or outlet vacuum extractions is relatively low, as contrasted with the much greater risk of traumatic brain bleeds when a baby is being suctioned out from higher up in the birth canal, in the mid-pelvis, from where Jayden W. was extracted. (R. p. 426, line 2 – p. 428, line 14) The defense thus misused the article's statistics in two ways: (1) by concealing that the weight limits used in the study included pre-term babies having a greatly increased risk of brain damage; and (2) by obscuring the statistical risk of brain bleeds from mid-pelvic vacuum extractions by lumping together the risk of brain damage from all vacuum deliveries, including the relatively low risk from low and outlet extractions.

Because of misleading testimony about statistics included in the article from Dr. Rhett (R. p. 1237, line 12 – p. 1238, line 18; p. 1348, line 21 – p. 1349, line 5) and Dr. Norton (R. pp.

1660-1661; pp. 1666-1667), Appellant needed to present reply testimony to explain the true and fair conclusions to be reached from the article. Through Dr. Oakes on reply, Appellant intended to show that the subject article had been misused by the defense in a tricky and deceptive way. The article itself places limitations showing that it should not be used as Defendants used it at trial:

The limitations of our study are those inherent in a retrospective analysis. Without a systematic study of all infants, injuries may have been missed.... A major limitation is that risk factors for injury cannot be further identified because the data base does not contain information about the indications for operative delivery, such as the duration of labor and the position of the fetal head. In the absence of this information and in view of clinicians' individual preferences in choosing the mode of delivery, the study groups may not be comparable and the differences in morbidity therefore cannot necessarily be attributed to the mode of delivery.

(R. p. 2015, line 2 – p. 2018, line 17; pp. 3608-3613) Dr. Oakes should have been allowed to explain why the article is not reliable support for an argument the defense was trying to make in the case, i.e., that vacuum intervention earlier in the second stage of delivery does not materially increase the risk of brain bleeds in babies. Appellant should also have been allowed to publish through Dr. Oakes the acknowledgement in this article that it should not be interpreted as the defense did in this case. (pp. 3608-3613; p. 2015, line 2 – p. 2018, line 17) Denying Appellant the right to explain to the jury the unscientific, deceptive spin the defense was applying to this article was an error of law, an abuse of discretion, and highly prejudicial to Appellant.

The Court's refusal to allow such reply testimony was especially odd since the court originally ruled it would be allowed. In addressing the scope of reply it would allow, the trial court expressly ruled, "I will give you follow-up on the New England Journal" (R. p.1982, lines 12-13), overruling defense objections. Appellant called Dr. Oakes as a reply witness, in

part to address the misleading use of statistics from that article by the defense. Despite the Court's prior ruling, counsel for Dr. Rhett continued to object. (R. p. 2015, line 2 – p. 2018, line 17) Ultimately, the court changed its mind and disallowed the testimony, on the asserted basis that contents of a learned treatise used by a party cannot be explained or challenged by the adverse party in reply. (R. p. 2015, line 2 – p. 2018, line 17) As that ruling is plainly erroneous, Appellant surmises that the court must have been confused about the issue. Nevertheless, that erroneous ruling by the trial court forced Appellant's counsel to return to his seat dumbfounded and severely prejudiced by his inability to explain to the jury how the defense had tried to trick them into thinking that vaginal delivery is what causes most brain bleeds in newborns, rather than early vacuum intervention. (R. p. 2017, line 15 – p. 2018, line 17) Appellant was prejudiced not only by being disallowed to proceed with rebuttal he was entitled to present, but also by the court's erroneous ruling making it appear at the very end of Appellant's reply that Appellant's counsel was disobeying the trial court by improperly challenging a "learned treatise," when in fact Appellant was trying to show the Defendants' misuse of a "learned treatise." The Court's ruling placed greater emphasis on the article, as it had been misinterpreted by the defense. By disallowing Appellant's rebuttal in this fashion, the Court made the defense's erroneous and deceptive interpretation seem both correct and unimpeachable. Such error rewarded the defense's unfair and manipulative use of statistics from the article and denied Appellant a fair trial.

VI. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE IN VIOLATION OF THE CASE MANAGEMENT ORDER.

Once this case was transferred to the multi-week docket, the Court issued a Case Management Order. The Court instructed counsel they must comply with this Order more strictly

than a typical scheduling order in circuit court. With respect to exchange of demonstrative evidence, Appellant complied while Dr. Rhett did not. (R. p. 1292, line 2 – p. 1293, line 22) Not until used in Dr. Rhett's direct examination did Appellant learn of the defense's intent to use a pelvic model. (R. p. 1259, lines 14-15) In rehearsed direct examination, Dr. Rhett used a tape measure to measure seven centimeters between the ischial spines and the pelvic or vaginal outlet on his pelvic model⁴. (R. p. 1264, lines 5-15) In fact there are five centimeters between those points in a typical normal human female pelvis. (R. p. 1991, lines 21-25) The defense had not shown Appellant its pelvic model prior to its courtroom appearance during the direct examination of Dr. Rhett by attorney Hood. (R. p. 1292, lines 2-22) Not until the end of the defense case, as Appellant called Dr. Oakes in reply, was Appellant able to have an expert examine the pelvis. Dr. Oakes determined that the defense had used a pelvic model with dimensions significantly different from a pelvis in a normal human adult female (R. p. 1990, line 16 – p. 1992, line 24). Dr. Rhett's measurements were misleading for other reasons as well. (R. p. 1990, line 16 – p. 1993, line 5) Dr. Rhett's tape measurements of its dimensions in the courtroom, without admitting his pelvic model was not to scale, and without allowing Appellant a chance to see it ahead of time as required by the Case Management Order, was completely unfair and prejudicial. If the model had been submitted for Appellant's review before trial, as ordered, Appellant would have had a timely opportunity to learn the truth about the model not being to scale, object and prevent the use of a non-conforming model for misleading measurement purposes. Use of the not-to-scale pelvic model represents, under these

⁴ The only possible purpose of this exercise was an attempt by the defense to fool the jury about the length of the birth canal and the station of Jayden within the birth canal when the vacuum was applied to his head. Such efforts continued with speculative testimony from defense expert Dr. Weinstein that the mother's birth canal may have been abnormally large (R.p. 1601, lines 17-25; p. 1602, lines 1-17; p. 1605, lines 17-25; p. 1606, line 1 – p. 1608, line 2), testimony the defense told the court they would not present, in response to Appellant's Motion in Limine on the issue. (R. p. 269, line 19 – p. 271, line 19)

circumstances, a knowing and willful violation of the Case Management Order which prevented a fair trial.

Not until during the defense's direct examination of its own obstetrical expert was Appellant aware that the defense would also use as demonstrative evidence a vacuum pump operated with a vacuum cup on a flat countertop railing in the front of the jury box. One of the issues in the case was Dr. Rhett's improper use of a vacuum by rocking back and forth, side to side, or up and down, which increases the risk to a baby of having blood vessels in the brain ruptured by the vacuum forces. (R. p. 458, line 23 – p. 460, line 22) When a vacuum is applied to a round object, like a baby's skull, such rocking sideways movements place dangerous asymmetric forces on the baby's blood vessels under the baby's soft pliable scalp. *Id.* The defense expert used the vacuum pump and cup on a flat surface rather than a round surface. When sideways rocking movements are applied to a vacuum cup on a flat surface, the suction breaks and the cup dislodges. The defense used its witness to make such a misleading demonstration, contending that Dr. Rhett's sideways motions could not have harmed Jayden W. because the cup would have dislodged before trauma was done to the blood vessels in the baby's brain. That represents another willful effort to deceive the jury and another knowing and willful violation of the Case Management Order. The defense should not be rewarded for its willful violations of Court Orders, which enabled the deceptive use of demonstrative evidence in trial.

Evidence presented must be sufficient to enable the fact finder to make a determination with reasonable certainty or accuracy. *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971). Demonstrative evidence should not be allowed when it is sprung upon opposing counsel in the middle of trial, in violation of a Case Management Order. That is particularly objectionable when its use is for the purpose of deceiving the jury. Just as junk

science from purported experts should be excluded, so too should deceptive misuse of demonstrative evidence be excluded. That its misuse is facilitated by knowing willful violation of a Court Order makes the misuse even more offensive. Defense's use of the pelvic model and vacuum pump were neither helpful to a truth-seeker nor based on reliable science. Their use was orchestrated through willful disregard of the Case Management Order, and was prejudicial to Appellant.

VII. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO ALLOW MORE EXTENSIVE VOIR DIRE CONCERNING POTENTIAL JUROR BIAS AGAINST A MEDICAL NEGLIGENCE PLAINTIFF.

A trial judge has a duty to assure that every juror is unbiased, fair and impartial. *State vs. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982). It is fundamental that every litigant entitled to a trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. *Haley vs. Blue Ridge Transfer Co. Inc.*, 802 F.2d 1532 (4th Cir. 1986), "A litigant's right to an impartial jury is a fundamental principle of our legal system." *Burke v. AnMed Health*, 393 S.C. 48, 710 S.E. 2d 84, 86 (Ct. App. 2011) quoting S.C. Code Ann. Section 14-7-1050 (2008). Although trial judges are accorded much discretion in matters of voir dire, that discretion is not unlimited; and it is the appellate court's function to correct an abuse of discretion or error of law. *Southern Bell Tel. Co. v. Shepard*, 262 S.C. 217, 204 S.E. 2d 11 (1974); *Wall v. Keels*, 331 S.C. 210, 501 S.E.2d 754 (Ct. App. 1998). A judge has the duty to assure that every juror is unbiased, fair and impartial. See, e.g., Rule 47(a), S.C.R.C.P.; *State v. Gulledge*, 277 S.C. 368, 287 S.E. 2d 488 (1982). That was not done here. As a result, Jayden W. was denied a fair trial and received a jury verdict which represents the product of bias and prejudice.

Obtaining an unbiased, fair and impartial jury is always a daunting challenge with the

current pro-business media campaigns, pro-insurance media campaigns, political messaging and media coverage of tort reform, “lawsuit abuse” and “frivolous lawsuit” issues. As recently as 2010 during congressional and senate races for both state and federal government, insurance companies spent millions of dollars on campaigns, claiming that premiums are going up because of lawsuits and advocating for defense verdicts. These campaigns are motivated in part by a desire to prejudice jurors against personal injury plaintiffs and enlist their support for tort reform. These campaigns were published and broadcast in newspapers, radio and television stations across South Carolina.

Given the mass media attempts to prejudice the public against personal injury plaintiffs, the trial judge should have conducted *voir dire* in a much more thorough and comprehensive manner than just the basics, in order to minimize the risk to Jayden W. of a biased juror being seated. Although the trial court did ask general questions about contact with the parties, the court allowed each member that was connected with the Defendants to stay on the panel after they answered leading questions about their ability to be fair and impartial in a “politically correct” way. (R. p. 178, line 9 – p. 185, line 10) That included ten prospective jurors, five current patients, three former patients, and two with professional or personal friendships. *Id.* The trial court asked about contact with witnesses (R. p. 189, line 14 – p. 191, line 17), and allowed three prospective jurors who knew defense witnesses personally or professionally to stay on the panel, after they answered leading questions “correctly” about their ability to be fair and impartial. *Id.*

Appellant acknowledges that qualifying or rehabilitating prospective jurors with leading questions about their ability to be fair and impartial is a time-honored tradition in this state. However, that does not make it right. *Bradbury v. Commonwealth*, 40 Va. App. 176, 578 S.E.2d

93 (Va. App. 2003). As the Virginia appellate court noted in Bradbury:

“... when a trial court itself becomes involved in the rehabilitation of a potential juror, we must review the court’s decision to retain the person on the panel more carefully. As this Court explained in *McGill v. Commonwealth*:

Using or permitting the use of leading questions, those which suggest a desired answer, in the *voir dire* of a prospective juror may taint the reliability of the juror's responses. Merely giving "expected answers to leading questions" does not rehabilitate a prospective juror. *Martin v. Commonwealth*, 221 Va. 436, 444, 271 S.E.2d 123, 129 (1980). Proof of a prospective juror's impartiality "should come from him and not be based on his mere assent to persuasive suggestions." *Breeden v. Commonwealth*, 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976) (quoting *Parsons v. Commonwealth*, 138 Va. 764, 773, 121 S.E. 68, 70 (1924)). When asked by the court, a suggestive question produces an even more unreliable response. See *Foley v. Commonwealth*, 8 Va.App. 149, 160, 379 S.E.2d 915, 921, [*aff'd*, 9 Va.App. 175, 384 S.E.2d 813] (1989) [(*en banc*)]. A juror's desire to "say the right thing" or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses.

A trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the *voir dire* examination to assure the selection of fair and impartial jurors. *Id.* at 154-55, 379 S.E.2d at 918. The proper role for a trial judge is to remain detached from the issue of the juror's impartiality. The trial judge should rule on the propriety of counsel's questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation.”

10 Va.App. 237, 242-43, 391 S.E.2d 597, 600 (Va. App. 1990).

Qualifying or rehabilitating jurors with leading questions is harmful for two very important reasons. First, it unfairly allows biased jurors to decide cases. That is because the use of leading questions by a judge in *voir dire* is at least as poor a device for truth-seeking as is asking leading questions of one’s own witness on direct examination, which is generally forbidden. Rule 611 (c) S.C.R.E. Second, it demonstrates to everyone in the courtroom that *voir*

dire in South Carolina does not promote the seating of only fair impartial jurors, and to that extent is a sham. When an obviously biased juror admits to a close personal or professional relationship with a defendant physician, but says in response to the judge's leading question that she can nevertheless be fair and impartial, everyone but the judge sees through that false assurance. When the judge accepts that assurance at face value, prospective jurors may reasonably conclude that dishonesty is tolerated in the courtroom, that the civil justice system is bogus, or that the judge is tremendously naïve. Any of those inferences can lead directly to juror disrespect of the civil justice system and/or the judge himself. The jurors may well pretend to respect the judge's power and authority to seat what he deems to be a fair and impartial jury. However, human nature tells us that it is foolish to think a juror can fairly and impartially judge a personal or professional friend, just because she says so in response to a judge's leading question. If a judge has a relationship with a party or witness such that the judge should offer to recuse himself or herself, why allow jurors with the same relationship to serve? Why have a lower standard in this state for jury service?

If prospective jurors with personal connections to a defendant are nevertheless deemed to be fair and impartial, if they say they can be in response to a leading question, then surely the plaintiff should be allowed greater freedom in *voir dire* to probe prospective jurors' life experiences, attitudes and biases. Yet the Court refused to ask numerous *voir dire* questions suggested by the Appellant, including questions concerning whether anyone worked or had family working in the medical field (R. p. 3615); whether jurors believed there were too many lawsuits or too many frivolous lawsuits (R. p. 3616); whether jurors were active in political causes or parties (R. p. 3617); whether jurors had religious beliefs that would be relevant to their service as a juror (*Id.*) and whether jurors had formed beliefs about the appropriateness or

inappropriateness of a victim who had sustained an injury bringing a claim in court for damages against the person considered to be responsible for the injury. *Id.* The trial court abused its discretion in this case by not allowing such inquiries.

As the affidavit of Mary Watters indicates, juror number 12 held a strong bias against the Appellant. According to other jurors, juror number 12 at the beginning of deliberations "stated her support of the Defendant's position and made it known that nothing would change her mind." (R. p. 3717) Her body language throughout trial made it obvious she was anti-plaintiff from the very beginning. *Id.* Thereafter, juror number 12 refused to engage in deliberations as instructed by the court.

The jurors interviewed, including the foreman, relate that the foreman and juror number 12 each had some memorable personal experience with medical professionals that affected their role in deliberations, but which was withheld during *voir dire*. No mention of those events was made in *voir dire*, because of the limitations placed by the Court. Had Jayden W. been allowed to ask his requested *voir dire*, these individuals and their preconceived bias and partiality could have more likely been identified and then excluded from the jury either for cause or with peremptory strikes⁵.

Given the pecuniary interest of the jurors who may likely have heard the insurance industry argument or had personal beliefs that medical negligence verdicts make health insurance customers' own premiums rise, it was especially important for the Court to permit extensive examination of the prospective jurors about exposure to advertisements promoting the agenda of tort reform, low plaintiff's verdicts, and defense verdicts. An appeal to the economic self-interest of jurors is a prejudicial argument which warrants reversal. *City of Columbia vs. Myers*, 278 S.C.

⁵ That the *voir dire* limitation was prejudicial is established not only by the defense verdict and the result of juror interviews (R. pp. 3716-3717), but also by the limited strikes Plaintiff had available to use with respect to multiple jurors with defense connections. (R. pp. 3626-3642)

288, 294 S.E.2d 787 (S.C. 1982). In closing argument to the jury, an attorney may not make such remarks which are unfairly calculated to arouse passion or prejudice. *Gathers vs. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984). An argument by counsel which invites the jury to base its verdict on considerations not relevant to the merits of the case is improper. *Hoeffner vs. The Citadel*, 311 S.C. 361, 429 S.E.2d 190, rehearing den. (1993). The risk of harm is not qualitatively different if the appeal to economic self-interest comes from outside the courtroom prior to the trial. How can jurors motivated by economic self-interest be excluded from South Carolina juries without more extensive opportunity for *voir dire*?

Appellant recognizes that S.C. has a long history of limited *voir dire*. Yet new problems merit new solutions. Rarely has there been so much over-the-top propaganda and distortions about the civil justice system in media publications and broadcasts throughout our country and state as there is currently. Such propaganda and distortions increase the risk of unfair, biased jurors being allowed to serve. Such developments warrant expanded *voir dire* to negate or minimize that increased risk.

It is noteworthy that modern jurisprudence has recognized one's right to participate in the civil justice system as a juror; and has limited the constitutionally permissible use of peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, L.Ed. 2d 54 (1986); *McCrea v. Gheraibeh*, 380 S.C. 183, 669 S.E.2d 333 (2008) *State v. Edwards*, 384 S.C. 504, 682 S.E. 2d 820 (2009), *Robinson v. Bon Secours St. Francis Health System, Inc.*, 382 S.C. 224, 675 S.E.2d 744 (2009) Those developments are right, fair and just. But in reality, limited *voir dire* increases the likelihood of attorneys basing decisions about peremptory strikes on broad stereotypes, generalizations and prejudices. How are preemptory strikes to be used efficiently and constitutionally if attorneys are denied an effective opportunity to explore the life experiences,

attitudes and biases of prospective jurors?

The trial court failed in its responsibility to assure a fair and impartial jury in this case. As a result, the Appellant was denied a fair trial and received a jury verdict which represents the product of bias and prejudice. The Appellant respectfully submits that the Court erred and abused its discretion in failing to permit more extensive *voir dire* examination of the jury panel, resulting in reversible error.

CONCLUSION

For the reasons stated, the Appellant respectfully submits that the trial Court's denial of the Appellant's Motion for a New Trial Absolute should be reversed; with the case remanded for a new trial.

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April 9, 2013

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS**

Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
Jayden Washington, a minor Appellants,

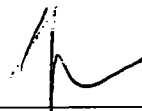
v.

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

Of Whom Edmund Rhett, Jr. MD is.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that this Final Brief of Appellant
complies with Rule 208(a)(3), SCACR.



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**STATE OF SOUTH CAROLINA
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**Appeal from Charleston County
Court of Common Pleas**

Michael J. Baxley, Circuit Court Judge

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RECEIVED

MAR 12 2013

SC Court of Appeals

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

Appellant,

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.

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

- I. Did the trial court act within its discretion in admitting the expert opinion testimony from Dr. Milunsky regarding the Plaintiff's use of alcohol during her pregnancy as a contributing causal factor in the Child's conditions?
- II. Did the trial court act within its discretion in admitting the expert opinion testimony from Dr. Milunsky regarding a genetic condition as a contributing causal factor in the Child's conditions?
- III. Did the trial court charge the jury on the correct, applicable law of informed consent in emergencies?
- IV. Did the trial court properly refuse to charge the jury on how to consider the fact that some of the expert witnesses received payment for their testimony?
- V. Did the trial court act within its discretion in limiting the Plaintiff on reply from asking questions of her expert, Dr. Oakes, about the New England Journal of Medicine article because it was not new matter?
- VI. Did the trial court act within its discretion in permitting the Defense to use a pelvic model and vacuum extractor as demonstrative evidence?
- VII. Did the Trial Court act within its discretion in conducting jury voir dire?

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, by filing a summons and complaint on April 16, 2007, which was subsequently amended.¹ (ROA 28, 47; Complaint; Amended Complaint, filed November

¹ The complaint originally named multiple defendants, including Dr. Rhett's practice, Low Country Obstetrics & Gynecology, and East Cooper Community Hospital; and the Plaintiff also later added AMN Services, Inc., a nurse staffing company that supplied one of the nurses on duty during the labor and delivery. However, all the other defendants have settled and the procedural history related to those parties is not material to this appeal.

4, 2009.) The Plaintiff alleged that Dr. Rhett was negligent in using the vacuum extractor and that as a result the Child suffered a brain injury.

Dr. Rhett answered denying that he was negligent in manner that proximately caused any injury to the Child. (ROA 72; Answer to Amended Complaint, filed December 1, 2009.)

The Chief Administrative Judge entered Case Management Orders setting deadlines, which included dates for the exchange of exhibit lists and an exhibit conference. Pursuant to the last amended order, the deadline for exchanging exhibit lists was February 18, 2010. (ROA 3; Order, filed 10/20/09).

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 Form² 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.) 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; Verdict.)

The Plaintiff filed a Motion for New Trial Absolute on August 23, 2010. (ROA 145.) The trial court denied the new trial motion by order filed September 1, 2010. (ROA 17.)

The Plaintiff filed and served a notice of appeal on September 29, 2010.

²“Consent for Admission and Treatment” - Exhibit 2-004. (ROA 3499.)

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 videotaped³ and the jury was provided with a unique visual record of the events as they had transpired.

According to the medical records, the Plaintiff was a 20-year-old student, living in Columbia, when she discovered that she was pregnant. She went to the Richland County Health Department in November 2001, to confirm that she was pregnant. (ROA 3283; Exhibit 5.) In January 2002, she attended her first prenatal visit at Palmetto Health in Columbia. During that visit, she provided a history that included the fact that she had last used alcohol and marijuana on November 1, 2001. (ROA 3227, 3237; Exhibit 4.)

She moved to back home to Charleston and became a patient of Defendant Dr. Rhett's partner, Dr. Osborne, at Low Country OB in March 2002. She told them that she had used alcohol (2x week) between the ages of 18 and 20, and she had stopped October 20, 2001. (ROA 3033; Exhibit 1 – Low Country records.) When she went past her due date, Dr. Osborne had her admitted to East Cooper Hospital on July 15, 2002. (ROA 3499-3500; Exhibit 107 – East Cooper Records.) Dr. Joseph, another obstetrician with Low Country, was on call and admitted the Plaintiff on the evening of July 15th, at approximately 7:00 pm and 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.⁴

³Exhibit 75 – Videotape.

⁴ ROA 3342-3498; Exhibit 102.

Dr. Joseph inserted Cervidil to induce labor, (ROA 1248, ll. 23-25); however, the Plaintiff's labor was slow. On the early morning of July 16th when Dr. Osborne came on call, he broke her water and prescribed Pictocin to start contractions (7:20am), and he also called in an anesthesiologist to administer an epidural for her pain. (ROA 1249, ll. 6-12.) When Dr. Rhett came on call at noon on July 16th, Plaintiff had been in labor for almost 18 hours. 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, repositioned her. The heart rate went back up and they restarted the Pitocin and continued to monitor her labor. (See ROA 3342-3498; Exhibit 107 – East Cooper Records)

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 and it was critically necessary to deliver that baby as quickly as possible. (ROA 1635-38.) At that point, 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; Exhibit 107 – East Cooper Records.)

Fortunately, the Child's APGAR scores were normal when he was born.(ROA 720, ll. 22-24 – Katz.) However, he developed problems, and he was transferred to MUSC where 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.)

INTRODUCTION TO ARGUMENT

The trial was a classic battle of the experts with the addition of the videotape that recorded Dr. Rhett's care and treatment culminating in the delivery of the Child with the use of the vacuum extractor. The Plaintiff presented a parade of experts to try and prove that Dr. Rhett was generally incompetent and "stupid,"⁵ despite the facts that Dr. Rhett is

⁵ ROA 471, ll. 18-20; 488, ll. 8-14; 516, ll. 15-24. See also ROA 800, l. 20 – 801, l. 4

a board-certified obstetrician and that the Plaintiff did not object to his qualifications as an expert in his field.⁶ As to this delivery specifically, the Plaintiff's experts offered their opinions that Dr. Rhett deviated from the standard of care in delivering the Child in that: he should not have used a vacuum extractor;⁷ he used the wrong type of vacuum⁸; he used the vacuum improperly;⁹ and he failed to get informed consent for use of the vacuum extractor.¹⁰ The Plaintiff's experts also opined that the use of the vacuum caused the brain hemorrhage¹¹ that resulted in all the Child's current developmental, neuromotor, and cognitive problems.¹²

Through cross-examination of Plaintiff's experts, the Defense proved that a vacuum extractor is a generally accepted device used by obstetricians to help deliver babies¹³ and that hemorrhaging is a known and accepted risk which can occur when the obstetrician does nothing to deviate from the standard of care.¹⁴ The Defense presented experts that proved to the jury that it was appropriate for Dr. Rhett to use the vacuum under the circumstances as they presented;¹⁵ that the baby was at a low station or even "crowning" when the vacuum was applied (as seen on the video) which is the safest time

⁶ROA 1283, ll. 8-25.

⁷ROA 458, 502, 570.

⁸ROA 2361, ll. 15-22.

⁹ROA 460.

¹⁰ROA 429 - 434, 570.

¹¹ROA 585-587, 896.

¹²ROA 692, 821-22.

¹³ROA 639.

¹⁴ROA 903-04.

¹⁵ROA 1544-45, 1569.

to use it;¹⁶ that he used an appropriate method in using the vacuum;¹⁷ and the general consent form was sufficient informed consent given the emergency situation he was facing with the baby in fetal distress.¹⁸ Defense experts also testified that the brain hemorrhage the Child suffered after the delivery was not the cause of his current problems.¹⁹ Ultimately, the jury found that Dr. Rhett had not deviated from the standard of care and never reached the issue of proximate cause.

On appeal, the Plaintiff seeks a new trial on various grounds including challenges to the trial court's voir dire of the jury panel, admission of Defense expert geneticist's testimony on causation, the Defendant's use of demonstrative evidence, limits on her Reply, and jury instructions. Defendant submits that the evidence of record and the applicable law do not support any preserved claim of prejudicial error to justify giving the Plaintiff a new trial.

Starting with the beginning of the trial, the record will show that the Plaintiff did not make any objection to the trial court's voir dire or the failure to ask certain of her proposed voir dire questions. However, the record also will show that the trial court conducted extensive *voir dire* that covered all the points required by S.C. Code Ann. §14-7-1020, and more, to assure the parties a fair and impartial jury.

By pretrial motions in limine and various challenges during the course of the trial, the Plaintiff did object to the opinion testimony from the Defendant's expert geneticist,

¹⁶ROA 1554.

¹⁷ROA 1552-54, 1653-54, 1743.

¹⁸ROA 1574, 1571, 1819.

¹⁹ROA 1490.

Dr. Milunsky that maternal use of alcohol and the Child's connective tissue disorder most probably were contributing causes of his problems. However, the record will also show that the Plaintiff opened the door to such expert medical opinion on those subjects by raising the issue during her opening statement and the presentation of opinions from her own experts on the same points. Beyond the preservation issue, the trial court did not abuse its discretion in admitting Dr. Milunsky's opinion testimony because it was relevant under Rules 401 and 402, SCRE, and outweighed any prejudice under Rule 403, SCRE; and because it was reliable under Rule 702, SCRE. Finally, but perhaps foremost, the Plaintiff was not prejudiced by Dr. Milunsky's testimony on causation because the jury specifically found that Dr. Rhett did not deviate from the standard of care. The jury never reached the question of proximate cause.

Plaintiff also seeks a new trial on the ground that the trial court erred in permitting the Defense to use certain demonstrative evidence. More specifically, during his testimony, Defendant Dr Rhett used a pelvic model for demonstrative purposes only to demonstrate to the jury the location of the baby's head when he used the vacuum extractor, and Dr. Norton, an OB expert, demonstrated how a vacuum extractor worked. Plaintiff asserts error because the Defendant had not produced the model or the vacuum for inspection prior to the deadline set in the Case Management Order. However, the Plaintiff did not timely make any such objection to either the model or the vacuum and she did not demonstrate any prejudice. Further, Plaintiff's and Defendant's counsel agreed at trial to show exhibits to each other prior to the witness's testimony, which both parties did, and Plaintiff's counsel did not object to the demonstrative evidence shown to them before hand at that time.

Plaintiff also maintains that the trial court did not err in limiting the scope of the examination of her OB expert, Dr. Oakes, on reply after the Defendant rested his case. Dr. Oakes had testified at length during the Plaintiff's case-in-chief about the risks of using a vacuum extractor and based his opinion on an ACOG Practice Bulletin that covered the topic of vaginal deliveries using forceps and vacuums and relied upon data from an article published in the New England Journal of Medicine. In her reply, Plaintiff sought to challenge the methodology and accuracy of the study, but the trial court acted within its discretion in limiting her from doing so because it was not new matter.

Finally, as to jury instructions, the trial court's charge to the jury, as a whole, covered the applicable law as supported by the evidence. As to Plaintiff's Request to Charge # 12, the trial court properly charged the jury on the correct law of informed consent in emergencies and the specific language requested by the Plaintiff regarding a patient's right to refuse treatment was not applicable under these facts. And as to Request to Charge # 3, the trial court did not err in refusing to charge the jury on how to consider the fact that an expert witness had been paid.

The trial court properly conducted *voir dire* to assure the parties a fair and impartial jury. The trial court also acted within its discretion in ruling on the evidentiary objections and correctly charged the jury on the applicable law. Accordingly, there is no preserved ground of prejudicial error to justify giving the Plaintiff a new trial.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING THE EXPERT OPINION TESTIMONY FROM DR. MILUNSKY REGARDING THE PLAINTIFF'S USE OF ALCOHOL DURING HER PREGNANCY AS A CONTRIBUTING CAUSAL FACTOR IN THE CHILD'S CONDITIONS.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING THE EXPERT OPINION TESTIMONY FROM DR. MILUNSKY REGARDING A GENETIC CONDITION AS A CONTRIBUTING CAUSAL FACTOR IN THE CHILD’S CONDITIONS.²⁰

A. The Law – Medical Expert Opinion Testimony on Proximate Cause

The plaintiff in every medical practice action must prove that the defendant's negligence was a proximate cause of the plaintiff's injury. Carver v. Med. Society of S.C., 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct.App.1985); Martasin v. Hilton Head Health Sys., 364 S.C. 430, 438, 613 S.E.2d 795, 799 (Ct. App. 2005). 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, 613 S.E.2d at 799-800; Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

“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.

²⁰ To the extent that these two issues arise from the testimony of the same witness, Dr. Milunsky, and they involve the same legal principals in many aspects, the Respondent is combining his arguments.

“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.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that under Federal Rule 702, before scientific evidence is admitted, the trial judge must determine that the evidence is relevant, reliable and helpful to the jury, and suggested four factors to consider in deciding reliability in scientific evidence cases: (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique. See discussion in State v. Council, 335 S.C. 1, 515 S.E.2d 508, 518 (1999).

Our appellate court did not adopt Daubert; instead, the Court has held that Rule 702, SCRE applies and provides the proper analysis for the admission of scientific evidence. State v. Council, *id.* In addition to determining that the expert witness is qualified, the trial court must find the evidence will assist the trier of fact and that the underlying science is reliable. *Id.* To determine reliability, the trial court should apply those factors as set forth in State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), 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. *See also* State v. Ford, 301 S.C. 485, 392 S.E.2d 781, 783 (1990).

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). 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).

The Plaintiff argues that the trial court erred in allowing Dr. Milunsky, the Defendant's genetics expert, to testify about maternal alcohol use and genetic factors as contributing causes to the Child's brain injury at birth and his current cognitive, motor and neurological problems.²¹ The Defendant maintains that the Plaintiff is not entitled to a new trial for each and all of several reasons: (1) the Plaintiff opened the door to Dr. Milunsky's testimony by raising the issues during her opening statement and by eliciting expert medical opinions on the causal connection of alcohol and genetics from her own experts; (2) Dr. Milunsky's opinions on causation were properly admitted under Rule 702, SCRE, and State v. Council; and (3) the Plaintiff was not prejudiced by Dr. Milunsky's testimony on causation because the jury found that Dr. Rhett did not deviate from the standard of care thereby never reaching the question of proximate cause.

B. The Procedural Facts -- Plaintiff's Motions & The Expert Testimony

Plaintiff filed several motions in limine 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

²¹ In her Appellant's brief, the Plaintiff discusses that Dr. Norton, one of the Defendant's expert obstetricians, testified *at deposition* about alcohol as a potential contributing cause. [Brief, p. 10.] However, Dr. Norton did not testify on that topic at trial.

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; Motion and supporting memorandum, dated 7/25/10.) The other motion was directed to Defendant's expert, Dr. Milunsky, a board-certified pediatrician and geneticist, and sought exclusion of his opinions as to the causation of 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; Motion and supporting memorandum, dated 7/25/10.)

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.) 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.) 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.)

Plaintiff then proceeded to elicit testimony from her 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" and the Plaintiff had some problems that were of concern so he also had conducted an investigation on that topic. 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.) Dr. Burton testified that in her opinion, the Child's brain damage was not caused by any genetic conditions. (ROA 2503, l. 13 – 2505, l. 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.). While Plaintiff did not object to Dr. Milunsky’s qualifications as an expert in the field of genetics and pediatrics, 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.)²²

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.) On cross-examination, Plaintiff attempted to have Dr. Milunsky quantify the statistical probability of whether the maternal alcohol use had any

²² Plaintiff complains, with rather strong rhetoric, that the trial judge failed to act as “a gatekeeper” because he did not rule prior to Dr. Milunsky’s testimony. However, the transcript shows that the trial judge asked Plaintiff’s counsel to hold his objection to which he voiced his agreement with the reply – “very good.” (ROA1468, l. 4.) The transcript does not evidence that the trial judge was “cavalier” or that he had a “dangerous misunderstanding” of his role under State v. Council. Defendant would submit that there is no error in the trial judge’s handling of the matter and that Plaintiff’s oversteps the proper tenor of appellate argument by suggestion that there was a “serious error that needs to be corrected in terms strong enough for the trial bench to appreciate.” [See Appellant’s brief, p.18.]

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 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.)

C. 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 presentation of opinions from her own experts on the same point. 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), 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).

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.

D. 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 and prejudicial under Rules 401, 402 and 403, SCRC. 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.

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 precludes her from complaining about any prejudice.

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 about the reliability of Dr. Milunsky's opinion on the causal connection between her alcohol use and the Child's problems 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).

We do not ask the expert 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(Medical experts "must, with reasonable certainty, state that in their professional opinion, the injuries complained of *most probably* resulted from the defendant's negligence."). And, contrary to the Plaintiff's contention, Dr. Milunsky stated his opinion in the requisite standard of "to a medical degree of certainty, most probably." (ROA 1495, ll. 20-22.) Further, the Court did not, as Plaintiff claims, hold in Payton v. Kears, that an expert is precluded from offering an opinion of a "multifactorial cause theory." [Appellant's Brief, p. 19.]

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. Kearse, 495 S.E.2d 211. There is no mention in the opinion that the expert offered any 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.”); see also Welch v. Whitaker, 282 S.C. 251, 260, 317 S.E.2d 758, 764 (Ct. App. 1984) (“most probably caused or contributed to the cause 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, Dr. Milunsky's testimony was evidence of a causal connection between the Plaintiff's maternal alcohol use, as 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 name²³ and because he testified about future advances in genetic research. However,

²³ROA 1506, l. 24 – 1507, l. 1.

Plaintiff's own expert, Dr. Burton, testified 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,²⁴ and Dr. Milunsky's 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"

²⁴ 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. 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.

E. The Plaintiff was not prejudiced by Dr. Milunsky's testimony on causation because the jury found that Dr. Rhett did not deviate from the standard of care.

Finally, even if, for the sake of argument, this Court were to find that the trial court abused its discretion in allowing Dr. Milunsky's testimony on causation, Plaintiff is not entitled to a new trial because there was no prejudice. State v. Price, supra. Here, the jury's verdict and answer to the special interrogatory clearly demonstrate that there is no probability that the jury's verdict was influenced by his opinions on causation. State v. White, supra.

The first question posed to the jury on the verdict form was: "Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?" The jury answered NO. (ROA 3714; Verdict.) The jury never reached the next question about proximate cause. Thus, the Plaintiff's claim of error in the admission evidence on the element of proximate cause is immaterial. See 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); see also 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.”); 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.”).

JURY INSTRUCTIONS

The purpose of jury instructions is to allow the jury to comprehend and render a fair verdict in the case. Builders' Lumber & Supply Co. v. Cheek, 139 S.C. 299, 137 S.E. 734 (1927). It is the trial court’s responsibility to charge the jury on the applicable law as raised by the pleadings and supported by the evidence. S.C. Const. art. V, §21; Dalon v. Golden Lanes, Inc., 320 S.C. 534, 540, 466 S.E.2d 368, 372 (Ct. App. 1996) (citations omitted). “When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial.” Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). “The substance of the law is what must be charged, not any particular verbiage.” Daves v. Cleary, 355 S.C. 216, 584 S.E.2d 423, 427 (Ct. App. 2003) (citing Keaton, supra.). If it is found that there was any error by the trial court in refusing to give a requested charge that was not otherwise covered by the charge in its entirety, the judgment entered on the

jury's verdict should be reversed only upon demonstration of prejudice. *Id.*; see also generally 15 S.C. Jur. *Appeal and Error* § 81.

III. THE TRIAL COURT CHARGED THE JURY ON THE CORRECT, APPLICABLE LAW OF INFORMED CONSENT IN EMERGENCIES.

A. Law on Informed Consent

The law on informed consent is clearly stated 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):

Under the doctrine of informed consent, a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose to a patient of sound mind, *in the absence of an emergency that warrants immediate medical treatment*, (1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure. *Hook v. Rothstein*, 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct.App.1984). 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. *Id.* at 547-48, 316 S.E.2d at 695. "[T]he scope of a physician's duty to disclose is measured by those communications a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances." *Id.* at 553, 316 S.E.2d at 698.

Melton, 698 S.E.2d at 894 (emphasis added). Ultimately, a claim for lack of informed consent is the same as any other allegation of malpractice; and the plaintiff must present expert medical evidence to establish the professional standard governing the scope of a physician's duty to inform a patient of the material risks inherent in a proposed treatment or procedure. *Id.*; Hook, 316 S.E.2d at 696-97.

B. Evidence as to Standard of Care on Informed Consent

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's Ex. # 103), Plaintiff claimed that the form did not specifically mention or authorize the obstetrician to use a vacuum to assist in delivering the baby, and the Defendant did not tell her he was going to use a vacuum or advise of her the risks. (ROA 990-01.) Dr. Rhett testified that he did not discuss the vacuum with the Plaintiff because there was an emergency and he did not have time, and he also thought the general consent covered it:

Q. Did you discuss the use of the vacuum with the mother?

A. No, sir, I did not.

Q. Did you have time to discuss it with the mother?

A. I thought that I had an obstetrical emergency that needed to be handled right away.

Q. Was that covered in the informed consent that she signed?

A. I think it is. It's the informed consent that we use for all of our deliveries.

Q. And is that the custom and practice, to your knowledge, of other obstetricians?

A. Yes, sir, that's what is done with all the vaginal deliveries that I know of, whether they are spontaneous, they have forceps or they use the vacuum.

Q. Is there any requirement that you know of that the hospitals where you have staff privileges, particularly East Cooper where this baby was born, to get a separate form when a vacuum is used?

A. None of the three hospitals where I have privileges require a separate form for vacuum or forceps. (ROA 1315, l. 5 – 1316, l. 6.)

Three 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.) As Dr. Van Dorsten explained, there simply was no time to give any informed consent for use of the vacuum because Dr. Rhett had to get the baby out:

A. I didn't see any informed consent because the basic things is that there was not time to do so.

Q. I would like for you to explain that in more detail.

A. Well, it's common sense. You've got to get the baby out. You don't have time for a long extended discussion. If you're going to do an informed consent, you have to do it based on what an informed consent entails. So not only do you have to explain the vacuum but you also have to explain a C-section, you also have to explain forceps. So the discussion one has -- if the patient is going to make the decision, she has to have all the information in order to make that decision.

Q. If you had been confronted with this clinical picture, what informed consent, if any additional informed consent, if any, would you have done in this situation?

A. I probably would not have done a whole lot of informed consent because I needed to get this baby out. (ROA 1890, l. 22 – 1891, l. 21.)

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 (see ROA 1574, ll. 13-23- Weinstein), the trial court granted the motion. (ROA 2073, ll. 16-18.)

C. The Charge to the Jury on Informed Consent in Emergencies

In the charge to the jury, the trial court virtually quoted from the correct law on informed consent as set forth in Hook v. Rothstein and Melton v. Medtronic, supra.:

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.

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 did not charge her Request to Charge # 12 in full, which read:

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; Plaintiff's Request #12; see objection and ruling at ROA 2236, l. 7 – 2237, l. 14.)

The request to charge, literally photocopied from Judge Anderson's charge book, 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, Harvey²⁵ 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; thus, 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 about any requirement that a physician seek consent from family members or "impracticability of conferring with the patient" as prerequisite to the emergency exception as presented. There was much 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 correct and their verdict should be affirmed.

Plaintiff tries to prove that the jury was confused by the informed consent charge based on the Affidavit of Plaintiff's Counsel, Mary Watters, Esquire, who interviewed three of the jurors after the trial. (ROA 3716; Affidavit.) As a threshold matter, the

²⁵In 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.

Defendant submits that Ms. Watters' hearsay about what the jurors discussed with her is 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.") [See further detailed discussion of improper use of Affidavit under Argument VII concerning Plaintiff's challenge to the jury *voir dire*.] 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.

Ms. Watters avers that the jurors believed that the presence of a purported emergency essentially abrogated Dr. Rhett's duty to comply with the standard of care. However, that is exactly what the law provides – informed consent is not required when an emergency is presented. Thus, to the extent the jury found that there was an emergency, then they correctly concluded Dr. Rhett did not violate the standard of care in not obtaining a separate informed consent to use the vacuum.

Ms. Watters also avers that the jury misunderstood the verdict form and the trial court's ruling on her directed verdict motion about the General Consent Form. However, the Plaintiff did not raise any challenge to the verdict form.²⁶ Nor did the Plaintiff object to the trial court's instruction to the jury that the consent form does not provide informed consent for a vacuum extraction delivery.

²⁶ The Plaintiff's only "challenge" to the verdict form at trial was grammatical. (ROA 2056-57.)

IV. THE TRIAL COURT PROPERLY REFUSED TO CHARGE THE JURY ON HOW TO CONSIDER THE FACT THAT SOME OF THE EXPERT WITNESSES RECEIVED PAYMENT FOR THEIR TESTIMONY.

As in any medical malpractice action, there were expert witnesses. The trial court charged the jury as to the weight and credibility of those experts:

Now, you also heard the testimony of several witnesses who have special knowledge or skill, experience, training or education in a particular field and they came in and gave their opinion as an expert witness about matters in which they are skilled. In determining the weight to be given any expert opinion, you should consider the qualifications and the credibility of the experts and the reasons they give, the basis that they give for their opinions. You are not bound by those opinions. You should give them what weight, if any, you deem that they are entitled to. In this case, if you find that there has been a conflict in the testimony of expert witnesses, then you must weigh one opinion against the other. You must consider the reasons given by one as compared with those given by the other. You should consider the relative credibility and knowledge of the particular expert who testified and therefore find in favor of that expert testimony that, in your opinion, is entitled to the greater weight. (ROA 2181, l. 5 – 2182, l. 6)

While the Plaintiff does not object to the charge as given, she seeks a new trial because the trial court did not give her Request to Charge # 3 regarding “Payment of Expert Witnesses:”

When an expert witness is called by either a plaintiff or a defendant, he expects to be paid and he should be paid. You should not take into consideration the fact that the witness is paid unless there is some evidence or circumstances appearing from the evidence which would fully and reasonably convince you that the testimony of the witness has been influenced because of the sum which he has been paid as a witness.

- See *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943).

(ROA 3647-48; Request #3. As to objection and ruling see ROA 2237, l. 15 – 2238, l.1.)

However, Defendant submits that there is no prejudicial error.

First, while the charge comes from Judge Anderson's charge book,²⁷ the cited opinion in Anderson v. Campbell Tile does not contain the requested language. In fact, the reference to payment of expert witnesses is found in the Court's quotation from American Jurisprudence, which states that "the fact that he is a paid witness" is one of the factors that a jury may consider in weighing the expert's opinion:

'Notwithstanding the critical comments upon the value and credibility of expert opinion testimony to be found in many opinions, it is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, *the fact that he is a paid witness*, the relative opportunities for study or observation of the matters about which he testifies, and any other matters which serve to illuminate his statements. In other words, the same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony. The opinion of the expert may not be arbitrarily rejected; it is to be considered by the jury in view of all the facts and circumstances in the case and of the common knowledge and experience of mankind; and when such common knowledge utterly fails, the expert opinion may be given controlling effect. 24 S.E.2d at 108 (quoting 20 Am. Jur. ¶1206) (emphasis added).

To the extent that the Defense did cross-examine Plaintiff's experts about whether they were being paid and how much, it is a proper subject of cross-examination. See 98 C.J.S. *Witnesses* § 644 ("A physician who testifies in a personal injury action may be asked by whom the physician was paid or from whom the physician expects payment, as well as how much he or she expects to be paid ...") (footnotes omitted). The transcript will show that the Plaintiff's own counsel took the opportunity to redirect her experts with questions that sought to confirm that the payments had no influence on their

²⁷Anderson, S.C. Requests to Charge - Civil, § 1-6 (2009).

opinions. (ROA657, l. 13 – 658, l. 12 – Oakes. ROA 849, ll. 7-17 – Adler. ROA 925, ll. 4-12 – Zimmerman.) Thus, ultimately, even if any error could be found in the refusal to give the Plaintiff's requested charge, the general charge on witness credibility, quoted above, together with the Plaintiff's redirect questions adequately covered the point and there is no prejudice to warrant a reversal.

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN LIMITING THE PLAINTIFF ON REPLY FROM ASKING QUESTIONS OF HER EXPERT, DR. OAKES, ABOUT THE NEW ENGLAND JOURNAL OF MEDICINE ARTICLE BECAUSE IT WAS NOT NEW MATTER.

The Court of Appeals addressed the scope of reply testimony and the standard of review in McGaha v. Mosley, 283 S.C. 268, 322 S.E.2d 461, 466(Ct. App. 1984):

The plaintiff in a civil action must first produce and disclose the entire evidence in support of his case; after the defendant has offered all of his evidence, the plaintiff may reply. *Clinton v. McKenzie*, 36 S.C.L. (5 Strob.) 36 (1850). Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff's case in chief. *Daniel v. Tower Trucking Co.*, 205 S.C. 333, 32 S.E.2d 5 (1944). Admission of reply testimony is within the discretion of the trial judge, and his decision will not be disturbed on appeal absent a showing of abuse of discretion. *Vernon v. Provident Life & Accident Ins. Co.*, 266 S.C. 208, 222 S.E.2d 501 (1976); *Ford v. A.A.A. Highway Express*, 204 S.C. 433, 29 S.E.2d 760 (1944).

See also Trial Handbook for South Carolina Lawyers § 8:3 (citing McGaha v. Mosley --

"This generally means that the judge should restrict rebuttal to the issues identified and pursued by the other party's own witnesses.").

Plaintiff seeks a new trial on the stated ground that: "The trial court erred and abused its discretion in not permitting reply testimony of Dr. Oakes concerning misleading use by defense of statistics in a medical journal article," and argues that: "Denying Appellant the right to explain to the jury the unscientific, deceptive spin the defense was applying to this article was an error of law, an abuse of discretion, and

highly prejudicial to Appellant.” [Appellant’s brief, p. 34, 36-37.] Defendant Dr. Rhett respectfully submits that the Plaintiff had the opportunity to explore the topics of the article in direct examination of her own expert and in cross-examination of Defendant and his expert, and the trial court properly exercised its discretion in sustaining his objections to questions posed to Plaintiff’s expert that were not the proper subject of reply.

First, contrary to the Plaintiff’s assertion²⁸, the Medical Journal article was introduced by the Plaintiff when she presented Dr. Oakes, her OB/GYN expert, as the first witness called at trial. During Dr. Oakes’ direct examination, the Plaintiff introduced Practice Bulletin (No. 17) from the American College of Obstetrics and Gynecology (ACOG), which is titled “Operative Vaginal Delivery”. The ACOG Bulletin, which was issued in June 2000, covers the topic of vaginal deliveries using forceps and vacuums. (ROA 3312, Plaintiff Ex. 31; ROA 519, l. 10 – 521, l. 5.) The Bulletin contains tables of statistics on risks of intracranial hemorrhage from various types of deliveries (spontaneous vaginal, caesarian section, use of forceps, use of vacuum) that are based on data from an article published in the New England Journal of Medicine.²⁹

In his direct testimony, Dr. Oakes read from the Bulletin about how ACOG had redefined the classification of stations and the types of forceps deliveries (ROA521, ll. 15-24), potential newborn complications of vacuum assisted deliveries (ROA 522, ll. 5-

²⁸ Plaintiff asserts in her brief that the article was first addressed when Dr. Rhett took the stand at the request of his own counsel. [Appellant’s brief, p. 34.]

²⁹ Towner, Deena, “Effect of Mode of Delivery in Nulliparous Woman on Neonatal IntraCranial Injury,”(December 2, 1999); (ROA 1352, ll. 17-22; 3608.)

17); and the overall risk (5%) of serious complications with vacuum extraction. (ROA 523, ll. 7-10). On redirect, Dr. Oakes testified further about that 5% risk, and specifically introduced the subject of the Journal article. (ROA 648, l. 19 – 649, l. 1)³⁰. Dr. Oakes’s testimony on redirect contained an extensive discussion of the Journal article, (ROA 648, l. 19 – 653, l. 4), in which he explained what he believed to be the difficulties with the analysis, and opined that the information is not “completely applicable in this case,” (ROA 653, ll. 3-4), because the table did not contain data for risks of a mid forceps vacuum. (ROA 653, l. 24 – 654, l. 2).

Plaintiff raised the issue of the Journal again in cross-examination of Dr. Rhett about the foundation for his knowledge of the risk of brain bleeds with use of a vacuum. (ROA 1349, ll. 6-11).³¹ However, Dr. Rhett could not recall if that particular article was the source of his knowledge of the risks (ROA 1353, ll. 2-23), and on further cross, he testified that he had not read the complete article. (ROA 1356, l. 15 – 1357, l. 5.) The transcript shows that Plaintiff was allowed to cross-examine Dr. Rhett fully about the Journal article, and there is absolutely no justification for the Plaintiff’s accusations that “Dr. Rhett did not have the willingness or ability to answer questions truthfully and accurately about the specific controls used in the study.” [Appellant’s brief, p. 35.]

³⁰“As I showed you, the overall risk is approximately five percent. If we just look at intracranial hemorrhage, that’s how they end up here in this table and that’s based upon an article that was published in the New England Journal of Medicine of a review of a large number of deliveries from the state of California.”

³¹ Defendant initially objected to the question based on the ground that the Plaintiff failed to follow Rule 803(17), SCRE, on the proper use of a learned treatise, to which Plaintiff’s counsel replied that he would follow the rule. (ROA 1351, l. 18 – 1352, l. 14.)

Defendant questioned Dr. Norton, a defense OB/GYN expert,³² about the Table in the ACOG Bulletin, and Dr. Norton referred to the Journal article as the source of the data on the risks which evidenced a lower risk of intracranial hemorrhage with vacuum assisted delivery compared to use of forceps, and clinically similar risks of bleeding with vacuum compared to c-section (ROA 1659, l. 24 – 1661, l. 25.) On cross-examination, Plaintiff questioned Dr. Norton about the data and risks and whether the Journal took into account low v. mid station use of a vacuum and also questioned him about the weight of the babies in the data and the relative risk to preemies. (ROA 1671, l. 13 – 1673, l. 14). Dr. Norton also testified, on cross-examination, specifically referencing the Journal article:

[T]his article from The New England Journal that we share, we see that babies can bleed no matter how they are delivered. This was a situation where this baby needed to be delivered regardless and there's -- there's going to be some babies that are going to have brain bleeds regardless of how they are delivered. There is increased association with brain bleeds with operative deliveries, vaginal or Caesarean section and that can be an association and not a cause. (ROA 1696, l. 19 – 1697, l. 5.)

Again, Plaintiff was allowed full cross-examination of Dr. Norton about the Journal and there is not justification for the accusation that Dr. Norton used the statistics from the article in a misleading way. [Appellant's brief, pp. 35-36.]

Eleven days into the trial, at the close of the Defendant's case, the trial court inquired as to the Plaintiff's plans for reply. Plaintiff voiced the intention to question her expert, Dr. Oakes about the Journal article. (ROA 1975, ll. 11-15.) The Defendant objected (ROA 1977, ll. 1-20) on the ground that this was not a new topic. To the trial court's inquiry as to what was new, the Plaintiff's counsel replied:

³² ROA 1612, ll. 5-13.

EDWARD GRAHAM: If Your Honor please, the New England Journal studies all vacuum deliveries and all certain other types of deliveries of babies that are twenty-five hundred grams or larger. Then it purports to draw conclusions about the relative degree of risk from brain bleeds from different modes of delivery. The last paragraph in there says that it should not be used for the purpose that they are trying to use it for. I also -- I would like to bring out that it doesn't make any distinction between outlet, low and mid-pelvic vacuums, which makes all the difference in the world to the relative degree of risk of vacuum deliveries. In terms of C-section and that sort of thing, it includes babies who were just very small -- twenty-five hundred grams is very small, many pre-term babies would fall into that category with increased risk of brain bleeds. (ROA 1981, ll. 1-22.)

Even though the distinction between outlet (also called "crowning"), low, and mid-pelvic vacuums and the weight of the babies had already been explored during the cross-examination of Dr. Norton, the trial court agreed to allow the Plaintiff to go into the Journal. (ROA 1985, ll. 11-21.)

The question posed to Dr. Oakes on reply, however, did not address the proposed topic of the distinction between low compared to mid-pelvic use of a vacuum. Rather, Plaintiff sought to challenge the methodology and accuracy of the study in comparing vaginal deliveries to c-sections:

Q. Doctor, do you have an opinion to reasonable degree of medical certainty as to whether or not the methodology used in that study accurately reflects the relative risk of a vacuum delivery and a normal spontaneous vaginal delivery and a C- section after labor? (ROA 2015, l. 20 – 2016, l. 1)

The trial court sustained the Defendant's objection:

THE COURT: Counsel, I am going to sustain that. Earlier the New England Journal was put forth as a learned treatise and now being attacked, and that would not be an appropriate follow-up in reply. The Court sustains the objection. Are there any other areas which you believe are new for this witness. (ROA 2016, ll. 5-12.)

However, the trial court allowed plaintiff's counsel to rephrase the question:

Q. Dr. Oakes, reference has been made to a table that appears, Table 1, in Practice Bulletin Number 17, that reflects certain degrees of risk of intracranial hemorrhage from different modes of delivery. Could you please tell us -- do you have an opinion to a reasonable degree of medical certainty as to whether or not the approach used in the article had an influence on the relative degrees of risk set forth in this table. If so, please explain. (ROA 2016, l. 22 – 2017, l. 7.)

Defense counsel again objected that it was not new, to which the Plaintiff's counsel argued that it was new because: "Dr. Van Dorsten³³ talked about it and he said, based on the New England study, these statistics are applicable to all deliveries. I would just like to explain the parameters of the study, just to explain what it really shows." (ROA 2017, ll. 18-24) The trial court sustained the Defendant's objection that it was beyond the scope of rebuttal. (ROA 2018, ll. 12-14.)

In her appellate brief, the Plaintiff rants about the controls in the study and the unfair and misleading comparisons of risks because the study included preterm babies. However, the Plaintiff proposed the ACOG Bulletin as the standard and opened the door on the article in her case through Dr. Oakes. Further, the Defendants did not, as the Plaintiff accuses, misuse the article in a "tricky and deceptive way: by concealing the weight limits used in the study or by obscuring the statistical risks of brain bleeds." [Appellant's Brief, p. 36-37.]

The Plaintiff quotes from the article about the limitation of the study based on data that may have been missed in the retrospective analysis, and argues that Dr. Oakes should have been allowed to explain that the article was not reliable to support the Defense's position about the relative risks in using the vacuum. [Appellant's brief, p.37.] First, the Defendant objects to the quotation from the article because, while the article

³³The transcript does not show that Dr. Van Dorsten testified about the Journal. It would appear that Counsel was referring to Dr. Norton's testimony.

was discussed and shown to the witness, it was never admitted into evidence or presented to the Court or the jury, and should not be included in the Record on Appeal, (Rule 210, SCACR), or referenced to the Court in this appeal. In any event, the Plaintiff had ample opportunity to question the witnesses (plaintiff expert Dr. Oakes, defendant Dr. Rhett, and defense expert Dr. Norton) about the article and never attempted to ask them about that limitation.

Despite the Plaintiff's invective against the Defendant with accusations of concealment, deception, manipulation, and trickery, the transcript will show that during this 2½ week trial, the Plaintiff had more than sufficient opportunity to question the witnesses about the article. On this record, the trial court did not abuse his discretion in limiting the questioning of Plaintiff's expert, Dr. Oakes on reply, and, certainly, if any abuse might possibly be found, it was not prejudicial so as to warrant a new trial.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE.

Since it was anticipated that the trial of this case would take several weeks and there were a large number of witnesses and substantial amounts of documentary evidence, the Chief Administrative Judge entered a Case Management Order setting deadlines, which included dates for the exchange of exhibit lists and a counsels' exhibit conference (February 18, 2010). (ROA 1; Order, filed 10/20/09). Much was accomplished at the exhibit conference in reviewing and premarking trial exhibits, but the task was arduous and the parties agreed to exchange demonstrative exhibits at a separate time. However, the parties never reconvened to exchange the demonstrative exhibits. Instead, Plaintiff's and Defendant's counsel agreed to show each other the demonstrative exhibits prior to the witnesses taking the stand. (ROA 1294, ll. 6-15.)

Plaintiff seeks a new trial because the Defendant did not present two pieces of demonstrative evidence for review/inspection prior to the trial beginning, namely a pelvic model and a vacuum pump.³⁴ However, the record will show that the Plaintiff did not make any timely objection to the use of either the pelvic model or the vacuum pump to preserve her complaints. Lastly, Plaintiff was not prejudiced in any way to justify a new trial.

A. Plaintiff did not timely object to the use of the pelvic model.

During his direct examination, Defendant Dr. Rhett used a pelvic model to point out parts of the anatomy to explain the station of the baby. (ROA 1259, l. 14 – 1260, l. 8). Plaintiff did not make any objection when Dr. Rhett first presented and used the model. However, when Dr. Rhett indicated that he was going to use the model to measure the ischeial spine to the bony part, Plaintiff did object on the ground of relevance:

EDWARD GRAHAM: Your Honor, we object to what I anticipate is going to be the use of a measuring instrument to measure a dimension that has absolutely no relevance. (ROA 1263, ll. 1-4.)

The trial court overruled the objection, subject to Plaintiff's right to cross-examine. It was only later, during a break in testimony that Plaintiff brought up the issue of the case management order; yet the Plaintiff did not make any motion. Rather the Plaintiff asked the trial court to consider award of sanctions or to instruct the jury that the Defendant has violated the case management order:

³⁴Plaintiff asserts that she complied with the case management order, but throughout trial, Plaintiff's counsel did not share some of his demonstrative exhibits until the day of or the night before the witness was to testify. (ROA 1294, ll. 6-25.)

Your Honor, today, during the direct examination of the Defendant Dr. Rhett, we were introduced, for the first time, during his examination to five demonstrative exhibits that had never been listed, never shown to us, never hinted about in any way, consisting of an electrode, the forceps, the pelvic model and two awards. They used two blowups that they hadn't told us about but at least those blowups of the strips were from strips that we had discussed as coming into evidence. Now I understand that they are getting ready to try to use the animation that they first showed to us on the day of closing (sic). If Your Honor please, I wanted to call this to your attention. To me, I think that it shows a willful violation of the court rules and I would just ask Your Honor, in your discretion, to consider whether these circumstances are appropriate for an imposition of an Order for sanctions and also whether Your Honor believes that it would be appropriate to give an instruction to the jury that the defense has violated the court orders by springing exhibits in trial that they did not exchange with us, as we had done with them in accordance with the spirit and the letter of discovery. (ROA 1292, l. 15 – 1293, l. 19.)

The trial court correctly found that there was no harm and, in a wise exercise of its discretion, declined to impose sanctions or give any curative instruction.³⁵ (ROA 1295, ll. 3-11.) Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (The imposition of sanctions is generally entrusted to the sound discretion of the trial court.)

B. The Plaintiff did not timely object to the demonstrative use of the vacuum pump.

Dr. Norton, one of the Defendant's OB/GYN experts, brought a vacuum pump with her to trial and demonstrated how it works. (ROA 1649, l. 22 – 1651, l. 7). Plaintiff complains that the use of the pump was a willful violation of the Case Management Order, and that the demonstration was misleading and a willful effort to deceive the jury. First, defense counsel showed the pump to plaintiff's counsel prior to Dr. Norton taking the stand, and again, Plaintiff did not object prior to or during Dr. Norton's testimony.

³⁵ Defendant submits that an instruction to the jury that the a party has violated a discovery/scheduling order is not within the range of authorized or appropriate sanctions. See Rule 37, SCRCP; Karppi, supra.

There was no objection from the Plaintiff at the time that Dr. Norton conducted her demonstration. Plaintiff did not take the opportunity to question Dr. Norton about the pump and her demonstration during his cross-examination. However, Plaintiff's Counsel asked that the pump be made a court's exhibit (#36) because he intended to use it in Plaintiff's case on reply. (ROA 1679, l. 20 – 1681, l. 20.) The transcript further shows that the trial court allowed the Plaintiff to raise the issue of the pump demonstration on reply (ROA1982, ll. 2-4, ll. 15-17), and Plaintiff's expert, Dr. Oakes testified that:

Q. While you were out of the courtroom, there was a demonstration through one of the defendant's witnesses using the vacuum cup and the pump to apply on this surface right here (wooden jury rail) and movements were made to the left and the right, resulting in a pop-off. Let me ask you, sir, what if anything does that demonstration, that type of demonstration, have to do with the delivery of a baby with a vacuum?

A. It has no relationship because what one is doing is applying the vacuum to a flat surface. That -- the whole purpose of this instrument is to have the scalp in this, it's not to be flat. So it is going to much more easily pop off of a flat surface than it is than a concave one or a convex one.
(ROA 2013, l. 11 – 2014, l. 4.)

Accordingly, not only did the Plaintiff not preserve any timely objection to the Defendant's use of the pump, she was not prejudiced because she used it to her own advantage in reply.

VII. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN CONDUCTING JURY VOIR DIRE.

A. Purpose and Scope of Voir Dire ~ Standard of Review

"It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial." State v. Holland, 261 S.C. 488, 201 S.E.2d 118,

122 (1973). Concomitantly, S.C. Code Ann. § 14-7-1020 provides that the court must question jurors to determine if they can be indifferent:

Jurors may be examined by court; if juror is not indifferent, he shall be set aside. The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

It is the responsibility of the trial court is to focus the scope of *voir dire* examination as described in § 14-7-1020.³⁶ Wilson v. Childs, 315 S.C. 431, 438, 434 S.E.2d 286, 291 (Ct. App. 1993). However, “the manner in which these questions are pursued and the scope of any additional *voir dire* is within the sound discretion of the trial court.” Id.; see also Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 109, 512 S.E.2d 510, 517 (Ct. App. 1998) (citations omitted); Norris v. Ferre, 315 S.C. 179, 181, 432 S.E.2d 491, 492 (Ct. App. 1993). “On appeal, this court will rely on the judgment of the trial judge who is able to observe the character and demeanor of the jurors, unless the record firmly establishes an abuse of discretion.” Creighton, *id.*

B. The Trial Court's Voir Dire

The transcript will show that the trial court conducted extensive *voir dire* that covered all the points required by §14-7-1020 and more to assure the parties a fair and impartial jury. The trial court questioned the jurors about connections to the attorneys

³⁶ Rule 47(a), SCRPC, provides that the examination of jurors may be conducted by the trial judge or the attorneys; however, it is considered the better practice for the trial judge to conduct the examination. State v. Britt, 237 S.C. 293, 311, 117 S.E.2d 379, 388 (1960) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

and law firms, connections to the parties, connection to the witnesses, knowledge about the facts of the case, whether the jurors had ever filed a lawsuit or been sued, whether the jurors or a member of their immediate family had ever had a claim or dispute with a physician or medical care entity regarding care or treatment, whether the juror had ever been a witness in a medical malpractice case, whether any family member was employed by Low Country OB, East Cooper, or Nurses Rx, whether any juror had ever had complications from a vacuum assisted delivery, whether any juror was a member of Greater St. Luke AME Church or Triangle Church, whether any juror ever had an unsatisfactory experience with medical personnel, and whether juror or any family member ever had a vacuum assisted delivery. (See ROA 174 - 216.)

The Plaintiff had submitted (30) proposed voir dire questions five months prior to trial (Plaintiff's Request for Voir Dire, dated 2/26/11). The questions asked by the trial court covered many of those requests; however, the transcript does not show that the Plaintiff made any objection to any of the questions asked or the trial court's failure to ask any other of his Requests.

Thirty-two jurors stood in response to one or more of the questions and the trial court asked each one whether the connection/experience would prevent them from being fair and impartial. The Plaintiff did not voice any objection to the trial court's questioning to determine whether the jurors could be fair and impartial.³⁷

³⁷ The transcript will show that once the jury was impaneled, the trial court did ask the Plaintiff "is there any objection to the jury draw procedure that the court employed or the strikes imposed by the other side? EDWARD GRAHAM: No, Your Honor." (ROA 217, ll. 21-25; see also 219, ll. 2-25).

C. The Plaintiff did not preserve any challenge to the trial court's voir dire.

The basis of the Plaintiff's challenge to the juror *voir dire* is difficult to discern. Plaintiff's issue is stated as: "Did the trial court err and abuse its discretion in failing to allow more extensive voir dire concerning potential juror bias against a medical malpractice plaintiff?" [Appellant's brief, p. 1] Plaintiff begins his argument with a diatribe about media coverage and political debate on tort reform,³⁸ and argues that the trial court should have conducted *voir dire* "in a more thorough and comprehensive manner than just the basics." The Plaintiff complains that the trial court did not ask questions concerning whether anyone worked or had family working in the medical field; whether jurors believed there were too many lawsuits or too many frivolous lawsuits; whether jurors were active in political causes or parties; whether jurors had religious beliefs that would be relevant to their services as a juror; whether jurors had formed beliefs about victims bringing lawsuits. [Appellant's brief, p. 44.]

Although the Plaintiff submitted proposed voir dire questions prior to trial, the transcript does not reveal that the Plaintiff timely expressed any such argument to the trial court at trial when he was conducting voir dire. Accordingly, the Plaintiff did not preserve any issue that might be based on the fact that the trial court did not ask all or any specific questions in the Requests for *Voir Dire* that Plaintiff submitted prior to trial. "Absent a timely objection to the examination of a juror, the issue is not properly preserved for appeal." Creighton, 512 S.E.2d at 517 (citing State v. Ivey, 331 S.C. 118, 122, 502 S.E.2d 92, 94 (1998); Hollins v. Wal-Mart Stores, Inc., 381 S.C. 245, 672

³⁸ Consistent with the vitriolic tone of his brief, Plaintiff's counsel contends that: "These campaigns are motivated in part by a desire to prejudice jurors against personal injury plaintiffs and enlist their support for tort reform." [Appellant's Brief, p. 42.]

S.E.2d 805 (Ct. App. 2008) (challenge to trial court's purported limitation of plaintiff's *voir dire* of juror waived where plaintiff failed to object to denial of further *voir dire* or ask trial court to conduct further *voir dire*); 15 S.C. Jur. *Appeal and Error* § 81; see also Watson v. Chapman, 343 S.C. 471, 540 S.E.2d 484, 489 (Ct. App. 2000) (“Making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination.”)

While the Plaintiff concedes that the trial court did ask “general questions” to determine contact with the parties, he complains that when jurors stood in response, the trial court asked “leading” questions about whether they could be fair and impartial in a “politically correct” way. [Appellant’s Brief, p. 42.] Plaintiff also acknowledges that the trial court followed the “time-honored tradition” questioning the jurors about their ability to be fair and impartial, Plaintiff simply claims that it is not right and expounds upon a strident challenge to our jury *voir dire* practices. Again, the Plaintiff did not preserve any issue for appeal because he never objected to the trial court’s questions – not once.

The Plaintiff attempts to show that she was prejudiced through the affidavit of her trial counsel, Mary Watters, who interviewed three jurors after the trial.³⁹ Ms. Watters avers her beliefs as to how the jury misinterpreted the charges, misperceived the evidence, misunderstood the trial court’s rulings, and misunderstood the verdict form. (ROA 3716-17; Watters Affidavit, ¶ 2a-e.) In her Affidavit, Ms. Watters further avers that one juror (#12) “held a bias against the Plaintiff and/or counsel from the outset of

³⁹ It is notable that one of the jurors, Heather Benton, had identified herself as a patient of Low Country OB/GYN and affirmed to the trial court that she could still be fair and impartial. (ROA 181, ll. 5-13.)

trial as evidenced by her behavior during trial, her negative and dismissive body language and looks toward Plaintiff and Plaintiff's counsel as well as her overtly positive and friendly behavior and looks toward Defendant, Defendant's family and defense counsel;" and that juror (#12) made it known to the jury at the beginning of deliberations that she supported the Defendants and that nothing would lead her to change her mind. (ROA 3717; Affidavit ¶2f-g.) Finally, Ms. Watters avers that Juror #12 and one of the jurors who spoke with her (Mr. Sewell) had not disclosed certain personal experiences with medical personnel or facilities that may have affected their ability to be fair and impartial. (ROA 3718; Affidavit ¶2h.)

Again, as a threshold matter, the Defendant submits that the Affidavit is improper under Rule 606, SCRE, to challenge the jury's verdict because it does not prove any improper external influence on the jury's deliberations. Traditionally, a juror's testimony was not admissible in order to prove either his own misconduct or that of fellow jurors. Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008); State v. Thomas, 268 S.C. 343, 234 S.E.2d 16 (1977); Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974). Rule 606, SCRE, as effective since 1990, however, alters the common law to allow jurors to offer testimony, albeit on a very limited basis, to challenge the validity of a verdict:

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

As the Court noted in Shumpert v. State, “ 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.” 661 S.E.2d at 371.

Notwithstanding, the prohibition and specific limitations in Rule 606, the Court has judicially recognized an exception to allow juror testimony involving internal misconduct when necessary to ensure fundamental fairness. Shumpert v. State, supra (citing State v. Hunter, 320 S.C. 85, 463 S.E.2d 314, 316 (1995) (juror alleged that verdict was tainted by racial prejudice); and State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)(juror alleged that jury began deliberations prematurely)). In Shumpert, the Court found that the juror’s “affidavit [did] not measure up to the high bar that precedent sets for the seriousness of allegations that juror testimony must raise before it may be admitted.” Id. at 372. There, the Court found that the juror’s averments about confusion and internal influences was pure speculation without any specific factual support:

We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror’s testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer’s remorse from a guilty verdict to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror’s ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

Here, Ms. Watters’ averments, as in Shumpert, about confusion and internal influences are speculation without any specific factual support; moreover, they are, in large part, totally irrelevant to her challenge to the *voir dire*. In addition, Ms. Watters’ complaint

about Juror #12's trial demeanor is not preserved because Plaintiff never raised the issue to the trial court during the proceedings. See S.C. Code Ann. §14-7-1030 (objections to jurors waived if not made before juror is impaneled or charged).

Finally, as to the complaint about the jurors (#12 and Sewell) alleged failure to respond to *voir dire* about personal experiences with medical personnel, it does not tend to show any prejudicial error in the *voir dire*. To the extent that it might present a separate issue which Plaintiff has not raised,⁴⁰ the averment simply is too vague to substantiate any ground to reverse the trial court's exercise of discretion in denying the new trial motion. In Thompson v. O'Rourke, 288 S.C. 13, 339 S.E.2d 505, 506 (1986), the Court enunciated the standard for granting a new trial when it is discovered that a seated juror fails to fully respond to *voir dire* questioning:

[R]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the parties' peremptory challenges. The inquiry must focus on the character of the concealed information, not the mere fact that a concealment occurred.

As quoted in Gray v. Bryant, 298 S.C. 285, 379 S.E.2d 894, 896 (1989).

"The granting of a new trial based on a juror's failure to honestly respond to the court's *voir dire* remains within the sound discretion of the trial court. Morris v. Jensen, 309 S.C. 153, 420 S.E.2d 710 (Ct.App.1992). A circuit judge's decision to issue such an order will not be reversed absent an abuse of discretion. *Id.*" Long v. Norris & Associates, Ltd., 342 S.C. 561, 538 S.E.2d 5, 9-10 (Ct. App. 2000). Beyond the fact that the Plaintiff has not presented any preserved issue on appeal as to the jury *voir dire*, there is nothing in this record to show that the trial court abused his discretion in denying the

⁴⁰ Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Plaintiff's motion for a new trial. A fair and impartial jury heard eleven days of testimony and after deliberating for almost 10 hours, they rendered a fair and just verdict which should be affirmed.

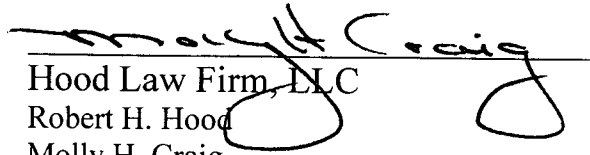
CONCLUSION

Based on the foregoing, the trial court properly conducted *voir dire* to assure the parties a fair and impartial jury. The trial court also acted within its discretion in ruling on the evidentiary objections and correctly charged the jury on the applicable law. The jury returned a verdict for the Defendant based on the specific finding that Defendant Dr. Rhett did not deviate from the standard of care in delivering the Plaintiff's Child. Accordingly, there is no preserved ground of prejudicial error to justify giving the Plaintiff a new trial.

Wherefore, the Defendant Dr. Edmund Rhett, Jr. respectfully requests that the Court summarily⁴¹ affirm the judgment entered on the jury's verdict.

⁴¹ Defendant submits that the law and record are so clear on what issues are preserved for appellate review that oral argument will not aid the Court. Rule 215, SCACR.

Respectfully submitted,



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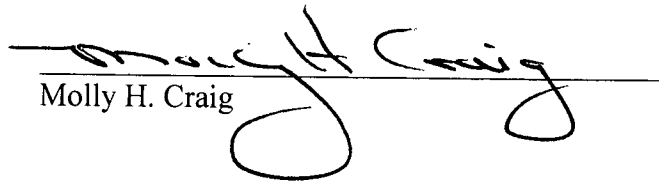
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Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

March 11, 2013



Molly H. Craig

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Charleston County
Court of Common Pleas**

Michael J. Baxley, Circuit Court Judge

Case No. 2007-CP-10-1553

RECEIVED

MAR 12 2013

SC Court of Appeals

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

Appellant,

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,

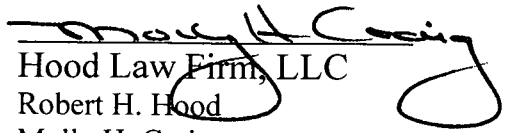
OF WHOM Edmund Rhett, Jr., MD is

Respondent.

Certificate of Service

I certify that on this 11th day of March, 2013, a copy of the Final Brief of Respondent (Edmund Rhett, Jr., MD) was served on Appellant and all other Counsel for Record by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed as listed below:

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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS**

Michael J. Baxley, Circuit Court Judge

CASE NO. : 2007-CP-10-1553

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

vs.

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

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE?
- II. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY IMPROPERLY ADMITTING TESTIMONY REGARDING GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE?
- III. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT?
- IV. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING EXPERT WITNESS FEES?
- V. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN NOT PERMITTING REPLY TESTIMONY OF DR. OAKES CONCERNING MISLEADING USE BY DEFENSE OF STATISTICS IN A MEDICAL JOURNAL ARTICLE?
- VI. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE IN VIOLATION OF THE CASE MANAGEMENT ORDER?
- VII. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN FAILING TO ALLOW MORE EXTENSIVE VOIR DIRE CONCERNING POTENTIAL JUROR BIAS AGAINST A MEDICAL NEGLIGENCE APPELLANT?

STATEMENT OF THE CASE

Appellant hereby adopts and incorporates by reference the Statement of the Case as set forth in Appellant's prior Brief.

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

Appellant objects to Respondent's Statement of the Case to the extent it includes factual inaccuracies, contested factual matter, misstatements, and argument.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W.'S BRAIN DAMAGE

A. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Testimony Under 401 and 403, S.C.R.E.

Respondent belittles Appellant's argument by claiming it centers around Dr. Milunsky's inability to "assign a statistical number to the likelihood that alcohol use affected the Child." (Respondent's Brief at 18).¹ In fact, Appellant complains that Dr. Milunsky's opinions were based upon evidentiary assumptions not present in this case, of exceptionally prejudicial subject matter, without assigning any degree of likelihood that alcohol consumption caused the injuries sustained by Jayden. These issues came out in cross-examination. Dr. Milunsky was asked, "To a reasonable degree of certainty, most probably, has the alcohol had an impact in this case?" (R. p. 1494, ll. 17-19). Dr. Milunsky responded:

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

(R. p. 1494, l. 20 - p. 1495, l. 5).

¹ Apparently after a thorough combing of all cases nationally, in an effort to support its misperceived understanding of Appellant's argument, Respondent found a 1997 case from Iowa. *Williams v. Hedican*, 561 N.W.2d 817, 830 (Iowa 1997). This case, however, explained that simply because a theory or technique has not been widely peer-reviewed, does not mean it is scientifically invalid. *Id.* Thus, the court held that lack of *statistically significant studies* goes to weight and not admissibility. *Id.* This is vastly different from holding that expert testimony does not need to satisfy Rules 401, 403 and 702, S.C.R.E. nor a "most probable" standard.

Appellant's first complaint is that if a party is going to introduce testimony that a mother's choices harmed her child, there had better be a sufficient basis for it. What could be more prejudicial to a plaintiff in a birth injury lawsuit? Rule 403, S.C.R.E. requires that evidence be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or of misleading the jury. The evidence presented by the defense was undeniably prejudicial, and it shifted the juror's focus to issues for which there was no evidentiary support. On direct examination, Jamesetta said, "When I realized that I was late on my period, I stopped, uh, going out and using alcohol at the time." (R. p. 975, ll. 2-4). Jamesetta was asked if at any time between early November and late November, she consumed any alcohol. She replied that she did not. (R. p. 977, ll. 18-21). On cross examination, the defense asked Jamesetta if she denied using alcohol before she learned she was pregnant. She responded, "No. I used in October but once I thought I was pregnant, I went to the Health Department and I didn't drink anything after I knew I was pregnant." (R. p. 1013, ll. 18-24).

There was no evidentiary basis for Dr. Milunsky to argue that Jamesetta consumed alcohol in more than a modest amount, nor in any amount beyond the first few weeks of her pregnancy. Yet Dr. Milunsky continued to give opinions which required him to assume greater alcohol consumption than the record reflected. Defense counsel asked and Dr. Milunsky answered multiple questions related to alcohol consumption, alcohol abuse, fetal alcohol syndrome, and the harm caused by drinking during pregnancy. (R. p. 1482, ll. 4-11; p. 1490, ll. 21-23; p. 1491, ll. 18-23; p. 1492, l. 2- p. 1495, l. 22). Dr. Milunsky specifically stated that he "has no idea, and the record doesn't indicate, how much alcohol" was consumed. (R. p. 1482, ll. 8-9). Nevertheless, defense counsel asked Dr. Milunsky about the causal significance of "alcohol abuse,"² to which Appellant's counsel objected. The court asked if this was leading, and

² This is just one example of the many highly inappropriate attempts by the defendant to prejudice the jury into believing: 1) that Jayden consumed more alcohol than the evidence reflected and 2) that there is evidence Jayden's injuries can be linked to alcohol consumption.

Appellant's counsel explained yes, but more importantly, it was prejudicial and assumed facts not in evidence. (R. p. 1490, l. 21 – p. 1491, l. 15).

When asked how this is relevant, Dr. Milunsky stated that “it is potentially relevant in the sense that the prenatal records indicate alcohol use but does (sic) not indicate how much and precisely when. So it sits there as an undefinable (sic) concern that may or may not have to do with one or more of these items.” (R. p. 1492, ll. 2-7). Defense counsel asked, “Are these the kind of delays that you see (sic) alcohol ingestion?” (R. p. 1492, ll. 8-9). Dr. Milunsky replied:

A. There is something called fetal alcohol syndrome.

Q. Say that word again, those words?

A. Fetal alcohol syndrome, that is what it is called.³

Q. Yes, sir.

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

Q. Okay.

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

Q. Incomplete?

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

(R. p. 1492, l. 14 – p. 1493, l.16).

Dr. Milunsky has no basis to argue that Jamesetta drank alcohol in a sufficient quantity and for a sufficient period of time to cause alcohol related fetal injuries. No expert testified that modest alcohol consumption in the early prenatal period most probably caused or even could possibly have caused Jayden's brain injuries. In expressing his opinions, Dr. Milunsky simply assumed that Jamesetta consumed more alcohol than the evidence showed and for a longer

³ What other purpose is there for twice repeating “fetal alcohol syndrome” (FAS) only to acknowledge Jayden does not suffer from FAS, but to attempt to prejudice the jury? This is just further evidence of the defense's attempt to poison the well with inappropriate alcohol-related testimony that even Dr. Milunsky has to admit is only speculative.

period of time than the evidence showed. Expert opinion based upon assumed facts that differ materially from the actual evidence cannot be probative.

Moreover, even if there were facts to support his assertions, Dr. Milunsky's own opinion is only that "It is possible – that's all I can say But this is all speculation . . . We don't know . . . It sits there undefined." (R. p. 1493, ll. 8-16) So while Appellant takes issue with Dr. Milunsky inappropriately basing opinions on highly prejudicial assumptions completely contradictory to the evidence, Appellant also takes issue with Dr. Milunsky's inability to assign any degree of likelihood that alcohol consumption caused or contributed to Jayden's brain injury. Accordingly, no matter what level of alcohol consumption Dr. Milunsky imagined Jamesetta to have consumed during her pregnancy, his conclusions are couched in phrases like, "it is possible," "this is all speculation," "we don't know," and "it sits there undefined." At trial, he could not even say there was a one in a million chance that maternal alcohol ingestion caused brain damage. (R. p. 1502, ll. 19-24). At least at deposition when Dr. Milunsky was asked the same question, he responded, "I don't know where you get one in a million but there's – there's no basis for one in a million. It's probably more like one in ten thousand or one in a hundred thousand or something on that order of magnitude." (R. p. 232, ll. 6-13). The probative value of Dr. Milunsky's testimony on this issue was minimal to nonexistent, and the prejudicial impact was irreparable. For these reasons, his testimony should have been excluded.

B. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Expert Testimony under 702, S.C.R.E.

Concerning the admissibility of testimony pursuant to Rule 702, SCRE, and Respondent erroneously contends Appellant confuses lack of "credibility" with lack of "reliability." To the contrary, Appellant recognizes that the trial judge must determine reliability of proffered expert testimony as an evidentiary gatekeeper, before the jury is allowed to hear the proffered expert testimony and judge its credibility. The judge in this case abdicated his responsibility to

determine lack of reliability before allowing the jury to hear unreliable causation testimony from Dr. Milunsky, tainted by assumption, speculation and the vaguest possibility.

Respondent erroneously contends Appellant misperceives the scope of reliability under the rule, and then boldly asserts that “it is commonly known from reliable medical science that maternal alcohol use can injure the baby” (Respondent’s Brief at 22).⁴ It is immaterial whether there is common knowledge that excessive alcohol consumption can cause injury to a baby.⁵ There is no common knowledge regarding “reliable medical science” nor whether the amount of alcohol ingested by Jamesetta Washington caused brain damage to her son.

Respondent’s attempt to oversimplify common knowledge regarding alcohol dangers evades the problems with Dr. Milunsky’s testimony. Expert testimony must “rest on a reliable foundation.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 598 (1993). Additionally, the standard for admissibility of scientific evidence “is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods.” *State v. Douglas*, 367 S.C. 498, 509, 626 S.E.2d 59, 65 (Ct. App. 2006).

As previously explained, Dr. Milunsky assumes greater alcohol consumption than the record reflects. He cited no test, medical literature, or other proposed scientific basis to support the proposition that modest alcohol consumption in the first few weeks of pregnancy can cause brain bleeds or brain damage, either directly or indirectly. Dr. Milunsky did not even attempt to make that proposition or assert that his method was consistent with recognized procedures. He

⁴ To be clear, despite Respondent’s misrepresentation, Appellant’s counsel never argued in opening statement that “it is commonly known from reliable medical science that maternal alcohol use can injure the baby.” This is the immensely prejudicial presumption Appellant sought to have removed from the jury’s purview. This statement, void of any medical or scientific authority, pays no attention to the quantity of alcohol consumed or the type of injury sustained in this case. What Appellant’s counsel instead told the jury was his expectation that Dr. Rhett may misrepresent how Jamesetta’s minimal alcohol conception during the first few weeks of pregnancy affected her child, before she realized she may be pregnant. Appellant’s counsel asked the jury to look for whether the defense could say there was even a one in a million chance that alcohol conception caused any harm to Jamesetta’s child. (R. p. 342, l. 22 – p. 344, l. 25)

⁵ Again, there is a vast difference between what a jury knows generally about the harm alcohol consumption can cause to a baby and the specific timing and mechanism of injury in this case. The fact that a jury has heard that some amount of alcohol consumption, at some time during pregnancy, can cause some unidentified harm to some unidentified baby does not remove the need for specific expert testimony. There were specific facts that had to be analyzed in light of the injuries sustained to determine whether the amount of alcohol Jamesetta consumed, at the time she consumed it, could have caused the specific harm through the specific manner, namely brain bleeds, suffered by Jayden.

acknowledged, “There’s no scientific basis upon which to reach a statistical likelihood for the [alcohol’s] role in Jayden’s birth defects.” (R. p. 1504, ll. 15-22).

Claiming generally that it is commonly known that maternal alcohol use can injure a baby does not establish the reliability of Dr. Milunsky’s testimony. It does not serve as a foundation for testimony that Jayden’s brain bleeds and brain injury were caused or contributed to by her mother’s alcohol consumption during pregnancy. Respondent has provided no explanation as to how this could occur, would occur, or did occur in this case, given the modest amounts of alcohol ingestion in evidence. If this were merely “common knowledge,” no expert testimony on the subject would have been needed. Accordingly, the trial court committed error in admitting testimony on this issue.

C. Trial Judge Disregarded his Role as Gatekeeper

Appellant moved in limine to preclude expert testimony that alcohol ingestion caused Jayden’s brain injuries. The trial judge initially stated that he would withhold ruling until later. (R. p. 245, ll. 9-15). However, the judge also said he would “not exclude the record about . . . the alcohol abuse as a major component of the defense’s case” because “it’s known science and even among lay people it’s known that you don’t ingest alcohol when you may be pregnant,” even though there is not even a hint of alcohol abuse in this case. (R. p. 246, ll. 14-19). The trial judge said he would withhold from ruling on the causation question at the pre-trial phase because he wanted to see the supporting evidence. (R. p. 245, ll. 9-15). When Appellant sought to voir dire the expert on his causation testimony, however, the trial judge refused Appellant’s request. (R. p. 1466, line 12 – p. 1468, ll. 3). Instead, the trial judge stated he would not decide until after Dr. Milunsky testified if his testimony was helpful, reliable, or prejudicial, and then make any needed corrective charges. (R. p. 1467, l. 20 – p. 1468, l. 3).⁶ By refusing to address issues

⁶ Respondent makes the strained argument that Appellant counsel’s response of “very good” to a trial court’s ruling that objections would not be heard until the end of the testimony shows counsel’s acceptance of the ruling. This is inconsistent with the record as a whole. Appellant’s counsel sought at the outset of trial, and throughout the trial, to first keep out and second

brought before the court, related to the reliability and admissibility of expert testimony, before the tainted evidence was heard by the jury, the trial court impermissibly eschewed its responsibilities as evidentiary gatekeeper and allowed the jury to hear scientifically unreliable, speculative testimony.

As part of the trial court's duty to determine issues of law, it "serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Importantly, the jury decides how much weight to attribute to the evidence only after the trial court makes a ruling that the particular evidence is sufficiently reliable to be admissible. *Id.* The trial judge's role is especially important when determining the admissibility of expert testimony. This evidence is beyond the realm of ordinary lay knowledge, and expert witnesses may express opinions based on facts not within their firsthand knowledge. *Id.* Accordingly, the trial court "is required to make certain preliminary findings regarding admissibility requirements, such as . . . reliability of the substance of the testimony . . . before a jury may hear the evidence." *Id.* at 389, 699 S.E.2d 169. *See also State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability.")

Permitting unreliable expert testimony to be heard by the jury, and offering to correct any deficiencies later through a curative charge, is incompatible with the judge's duties. The damage is done when the improper testimony is heard by the jury. It betrays common sense to assert the jury will disregard unreliable expert testimony simply because the judge issues a curative

mitigate Milunsky's abuse of the facts of this case and the unreliability of his concocted theories. Appellant's expression of civility to the tribunal does not alter Appellant's position.

instruction after the testimony is heard, which was not even done in this case. Expert testimony can have a substantial influence upon the jury. For this reason, it is imperative that trial judges execute the duties which they have been assigned. In this case, the record is clear that the trial court did not fulfill its role as gatekeeper, and evidence in violation of Rules 403, 702, S.C.R.E. was presented to the jury.

D. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Expert Testimony on Causation

Respondent argues its multifactorial causation theory is admissible because *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998) did not discuss whether an expert may opine to the combined effect of several causation theories. Respondent's argument, while inventive, would eviscerate the very principle *Kearse* sought to establish. *Kearse* acknowledged that expert medical testimony must satisfy the "most probably rule." *Id.* at 329, 495 S.E.2d 205. The court then noted the defendant's expert witness could not state any of the medications most probably caused respondent's tinnitus. *Id.* Therefore, the court held the trial judge properly excluded the defendant expert witness's testimony on causation. *Id.*

The Court in *Kearse* recognized that a party may not circumvent the well-established "most probably" standard in South Carolina by citing multiple "possible" causes. This is precisely what Respondent sought to accomplish in this case. Respondent's expert witness could not state that there was even a one-in-a-million chance that alcohol consumption caused Jayden's brain bleeds. Nevertheless, Dr. Milunsky concluded that, when alcohol consumption was considered with the alleged connective tissue disorder, these two factors "most probably" caused Jayden's injuries. Such tactics cannot be permitted. This runs in contravention to South Carolina case law. Allowing testimony on either or both of these subjects was in error.

Respondent points to South Carolina case law discussing concurrent proximate causes and contends this state recognizes a multifactorial causation theory. This is incorrect. Concurrent causation is not the same as a multifactorial theory. Concurring causes have been described as:

“[C]oncurring causes operate contemporaneously to produce the injury, so that it would not have happened in the absence of either.” In other words, “[i]f the actor’s conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability.”

Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97 (2006). (citations omitted).

Concurrent causation recognizes that if one or more negligent acts by a party caused an injury to another then that party is liable, even if a third party’s concurring negligence is also present. *Shepard v. S.C. Dep’t of Corr.*, 299 S.C. 370, 375, 385 S.E.2d 35 (Ct. App. 1989). The multifactorial theory presented by the defense, however, is an attempt to overcome the “most probably” hurdle to admission of expert testimony by grouping together unrelated theories and claiming that the aggregate “most probably” caused injury to the Appellant. Thus, a theory of concurrent causes of injury is vastly different from a theory that a string of insubstantial unrelated, improbable possibilities, when taken in the aggregate, satisfies the evidentiary requirement for admission of medical expert testimony.

Appellant’s issues with the multifactorial theory are threefold. First, a party should not be permitted to group together several alternate theories, no matter how insubstantial and improbable, and state that the combined sum satisfies this State’s “most probable” standard. There must be some indicia as to the likelihood of the individual parts of a multifactorial causation theory for the sum to constitute “most probable” to “a reasonable degree of medical certainty.” Second, a party should not be able to “piggyback” a substantially prejudicial “cause” of highly remote possibility to another “cause” somewhat greater possibility, and claim the aggregate satisfies “most probable” causation. This is fraught with potential abuse. Third, a party

should not be permitted to argue that its individually improbable causation theories somehow combined and interacted so as to create a greater aggregate probability than the sum of each individually. Without reliable scientific evidence of synergistic propensity, a party cannot argue that the sum is greater than the parts.

Irrespective of a multifactorial causation theory's viability in South Carolina,⁷ Respondent's specific theory in this case should not have been submitted to the jury. In order to state there was even a remote possibility that alcohol consumption caused the injury, Dr. Milunsky had to presume alcohol consumption beyond what is reflected in the evidence. Even then, at trial he was incapable of stating there was a one-in-a-million chance alcohol caused the injuries. At deposition, he said the likelihood of alcohol causing injury was something around the magnitude of one in a hundred thousand.⁸ Appellant therefore submits that the trial judge should have never allowed the jury to hear Dr. Milunsky's theory that Jayden's brain injuries were most probably caused by the mother's consuming more alcohol than the evidence reflects, which in turn created, at best, a one-in-a-hundred-thousand chance of causing Jayden's brain injuries.

E. Appellant's Efforts to "Remove the Sting" from the Trial Judge's Erroneous Denial of Appellant's Motions to Exclude Testimony Related to Alcohol Did Not "Open the Door" to Junk Science with No Indicia of Reliability or Probability

Respondent contends Appellant's counsel inexplicably introduced use of alcohol during Appellant's opening statement. The last words from the judge on this issue were:

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

(R. p. 246, ll. 14-20).⁹

⁷ Appellant believes that the prudent course to follow is the one already set by this Court in *Kearse*. The temptation for abuse with a multifactorial causation theory is too great to allow.

⁸ As to the genetic disorder, Dr. Milunsky could not identify any currently known connective tissue disorder which Jayden suffers from. Moreover, he could not identify any known connective tissue disorder, other than brittle bone disease (which he admits Jayden did not have), that has been associated with brain bleeds.

⁹ The perception and belief of alcohol's impact on a fetus during pregnancy reinforces Appellant's position that it was prejudicial and inappropriate to admit testimony on this issue.

However, the court withheld its ruling on the motion to preclude expert testimony on purported alcohol causation. (R. p. 245, ll. 9-15). So while the judge had initially said he would “withhold decision because I’d like to see the supporting evidence that you have in the deposition,” the judge’s ruling to admit medical record references to maternal alcohol consumption caused Appellant’s counsel to take preemptive maneuvers. Appellant’s counsel sought to “take the sting” out of the impending admission by addressing the issue first.¹⁰

Appellant counsel’s discussion of matters a judge has already ruled he will permit into evidence cannot “open the door.” Appellant sought to keep this testimony out, and Appellant’s efforts failed. Therefore, there was no door to open. Any assumed ambiguity based on the judge’s initial statement was removed by the judge’s later statement he would not exclude alcohol or “alcohol abuse”¹¹ because it is known that “you don’t ingest alcohol during pregnancy. (R. p. 246, ll. 17-19). The judge’s last words on this issue were an express, unambiguous statement that “the court will not exclude that testimony.” (R. p. 246, ll. 14-17). Therefore, Appellant did not open the door to Respondent’s trial testimony on either issue.

Even if this Court were to determine Appellant’s preemptive efforts opened the door, it cannot be said that the door was opened to allow any and all testimony, no matter the plausibility or reliability. Proffered evidence of causal significance of alcohol would still need to be assessed pursuant to rules of evidence governing relevance, prejudice, and reliability. Scientific evidence would still need to meet the standard for admissibility set forth in Rule 702, S.C.R.E. and explained in *State v. Jones*. The judge would still have to exercise his role as gatekeeper set forth in *Watson v. Ford Motor Co.* Accordingly, even if this Court were to determine Appellant’s counsel made this issue relevant, the defense must still meet this state’s statutory and common

¹⁰ While defense counsel did not introduce alcohol consumption in its opening, it belabored the issue throughout Dr. Milunsky’s testimony during their case-in-chief.

¹¹ The trial judge’s mention of letting in evidence of alcohol “abuse” evidences the prejudicial impact and misunderstanding that this evidence would cause with the jury. There is no evidence of alcohol abuse. Therefore, if the judge has been prejudiced by the defendant’s misrepresentation, then it is difficult to believe a jury would not make the same incorrect inference that there was evidence of alcohol abuse.

law admissibility standards. They did not, and the trial court erred in allowing the tainted testimony.

F. It is Prejudicial to Erroneously Admit Expert Testimony that a Mother Caused Her Baby's Brain Damage by Abusing Alcohol during Pregnancy Where there is No Evidence the Mother Abused Alcohol During Pregnancy

Respondents contend Appellant was not prejudiced at trial when the judge admitted testimony premised upon statements that the mother consumed alcohol in quantities sufficient to cause brain damage in her unborn child. It is difficult to imagine how implying at trial, without evidentiary basis, that a mother herself harmed her child, by drinking or abusing alcohol during pregnancy, would not be prejudicial to her case. Because of the erroneously admitted evidence, Appellant was denied her right to a fair trial. Rule 103(A), S.C.R.E. states, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Moreover, "[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 Highway Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 485 (1965). This rule "is based upon the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence." *Id.* Moreover, "Such evidence being incompetent and having some probative value upon a material issue of fact in the case, it is presumed to be prejudicial." *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 495, 61 S.E.2d 53 (1950).

Additionally, it is noted that "[n]o definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. White*, 372 S.C. 364, 385, 642 S.E.2d 607, 617 (Ct. App. 2007) (citing *State v. Gillian*, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004)). Finally, "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Douglas*, 367 S.C. at 523, 626 S.E.2d at 72.

Few things in our society are looked upon with more contempt than a mother who chooses to harm her child. This is why it is so condemning to Appellant for an expert to take the stand and testify at length that while we do not know just how much or for how long Jayden's mother continued to drink during her pregnancy, we do know her child suffers from brain damage that somewhat resembles brain damage caused by alcohol consumption during pregnancy. To state several times the phrase "fetal alcohol syndrome" only to explain she does not suffer from "fetal alcohol syndrome" but possibly may suffer symptoms similar to "incomplete fetal alcohol syndrome" is unquestionably prejudicial. It is difficult to comprehend how this would not impact the juror's entire perception of the trial.

Respondent erroneously contends Appellant was not prejudiced because the jury never reached the question of causation. That argument overlooks that this is not a case where a court refused to allow evidence on the issue of causation, which refusal could not have prejudiced that party, since the jury ultimately decided the case on the basis of no breach of the standard of care. To the contrary, this case involves not refusal of proffered evidence but the court's decision to allow the jury to hear demonstrably prejudicial evidence concerning alcohol intake by a pregnant woman. That evidence is demonstrably prejudicial because the judge himself, after hearing Respondent's counsel misleading description of the proffered evidence,¹² decided to allow evidence of the "alcohol and alcohol abuse." (R. p. 246, ll. 14-20). This existed only in the mind of Respondent's counsel and the speculation of Dr. Milunsky.

This is also not a case where a slip of the tongue caused prejudicial evidence to come before the jury briefly, with little notice. To the contrary, Respondent's counsel went out of his way to construct a direct examination of Dr. Milunsky about fetal alcohol syndrome, knowing it was not present in this case. He then asked Dr. Milunsky to repeat the phrase for emphasis. (R.

¹² Counsel for the defense contended the Appellant misstated when she stopped drinking, and that Jayden's delays were "more likely caused by teratogens or alcohol." (R. p. 235, l. 8-25). Neither statement is supported by the evidence.

p. 1492, ll. 14-23). That colloquy was followed by counsel's segue into a discussion of incomplete fetal alcohol syndrome, which neither Dr. Milunsky nor any other physician had diagnosed, but which Dr. Milunsky theorized might possibly be consistent with some of Jayden's symptoms. None of that was accidental. Respondent desired for the jury to be prejudiced by his repeated improper references to the speculative possibility that alcohol consumption played a causative role for Jayden's birth injuries and brain damage. To make sure the jury did not miss the Respondent's attempt to prejudice them with speculative assumptions about excessive alcohol intake, Mr. Hood asked Dr. Milunsky a leading question about Appellant's "alcohol abuse." (R. p. 1490, ll. 21-23). That was hardly an accident, but an obvious attempt to prejudice the jury through wild speculation into believing, falsely, that Jamesetta was guilty of alcohol abuse. Tellingly, when Appellant's counsel objected to the leading question about alleged "alcohol abuse" and the assumption of prejudicial facts not in evidence, the judge focused on the leading aspect, and did not appreciate that there was no evidence in the record of alcohol abuse. (R. p. 1491, l. 1). Presumably the judge had already decided, erroneously, there was alcohol abuse, based on nothing more than wild speculation, erroneous implications and misleading descriptions by Respondent's counsel. (R. p. 246, ll. 14-20).

Respondent's harmless error argument also ignores the court's error in the jury instruction on standard of care relating to the informed consent issue. *See* Argument III, *infra*. The extremely prejudicial speculation of excessive alcohol consumption and the unreliable testimony regarding its possible causal significance caused the jury to look upon Appellant with disfavor. Such prejudicial testimony clouded the jury's view of Appellant's entire case, not just causation issues, but also standard of care issues, including informed consent.

For these reasons, Appellant was deprived of a fair trial. The improper rulings and failures by the trial judge to keep out irrelevant or minimally relevant musings about the possible

causal significance of alcohol consumption, based on pure speculation, without any reliable scientific basis, on matters that were extremely prejudicial, was prejudicial and harmful error.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPROPERLY ADMITTING TESTIMONY REGARDING GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CASE OF JAYDEN W.'S BRAIN DAMAGE

A. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Testimony Under 401 and 403, S.C.R.E.

Dr. Milunsky paraded a list of deformities Jayden allegedly suffers from for the jury, but he admits they have nothing to do with causing bleeding in the back of the brain. (R. p. 1481, ll. 8-11). He then listed all the abnormalities Jayden's mother suffered from, including spina bifida, fused vertebrae, and lordosis. While none of these traits were shared by Jayden, Dr. Milunsky nevertheless opined that Jayden had inherited a connective tissue disorder based on his review of two photographs of the child and a partial review of the medical records. This cursory basis for diagnosis of a connective tissue disorder hardly qualifies as science.

Dr. Milunsky also could not substantiate from a scientific basis that Jayden's alleged connective tissue disorder could have caused brain bleeds directly or indirectly. When asked by defense counsel whether there is a genetic basis for the brain bleeds, Dr. Milunsky simply plugged his book and made the unremarkable observation that "everything is genetic." (R. p. 1489, ll. 20-24). Dr. Milunsky argued Jayden supposedly has a connective tissue disorder, but he could not identify any known disorder from which he suffers. (R. p. 1510, lines 18-21). Dr. Milunsky acknowledged that Jayden doesn't match any known genetic syndrome. (R. p. 1506, l. 24 – p. 1507, l. 3). Finally, Milunsky admitted he did not know of any reported incidents of brain bleeds being caused by any connective tissue disorder, other than brittle bone disease, which Jayden does not have. (R. p. 1521, l. 8 – p. 1522, l. 10).

Telling the jury that a child suffers from around a dozen genetic abnormalities is highly prejudicial, particularly when virtually all bodily characteristics in question can be caused by brain damage or are not unusual. Telling the jury that the child suffers from a connective tissue

disorder that caused the child's brain damage is also extremely prejudicial. The fact Dr. Milunsky could not cite any scientific basis to support the supposition that Jayden has a connective tissue disorder precludes his testimony on the subject from having any probative value. The fact Dr. Milunsky could not cite any scientific basis to support the supposition that connective tissue disorder or any other alleged birth defect caused Jayden's brain bleeds also precludes any potential probative value. Moreover, any probative value of Dr. Milunsky's opinions regarding alleged causal significance of Jayden's alleged connective tissue disorder is near nonexistent because Dr. Milunsky could not identify any known connective tissue disorder from which he suffers, and he could not identify any connective tissue disorder, other than one which he acknowledged Jayden did not have, that caused brain bleeds. Therefore, the near nonexistent probative value of Dr. Milunsky's testimony is outweighed by the prejudice created by presenting to the jury a list of alleged genetic abnormalities unassociated with brain bleeds.

B. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Expert Testimony on Causation

The court below should have also precluded Dr. Milunsky's testimony regarding genetic factors as a possible cause because the testimony fails the most probable test of *Payton v. Kearse*, supra. Allowing Respondent to circumvent the ruling in that case, by arguing a multifactorial causation theory, creates the very problem *Payton v. Kearse* sought to avoid, i.e., permitting the jury to be confused by testimony of speculative and remote causal possibilities. Where an expert like Dr. Milunsky cannot opine that either of two theoretical causes suggested by the defense is the most probable cause of brain damage, and cannot even opine there is a one in a million or a one-in-a-hundred-thousand chance alcohol caused the brain damage, it would make a mockery of our evidentiary jurisprudence to allow expert testimony that two improbable theories when considered together transform into the most probable cause. Appellant therefore takes issue with Dr. Milunsky's theory that Jayden's brain injuries were most probably caused by

either an unidentified connective tissue disorder with no medically established association with brain bleeds; and/or the mother consuming more alcohol than the evidence reflects, which in turn created, at best, a one-in-a-hundred-thousand chance of causing Jayden's brain injuries. That the court below allowed such testimony deprived Appellant of a fair trial.

C. The Trial Judge Disregarded his Role as Gatekeeper

Appellant sought to preclude unreliable expert testimony related to genetic factors. After hearing argument on the motion in limine, the judge noted the loss of his brother who suffered from a genetic disease. (R. p. 229, ll. 13-19). In preparing to rule on the motion in limine, he stated the following:

And I just came, two weeks ago, from a conference on genetics with regard to his particular disease. I can tell you that one thing that geneticists are saying is that the state of the science at this time, because we have just – humans have just been able to match the geno and the – from that just the – it's opened an entire array of genetic possibilities of things that we don't yet understand, that we know are out there. So I cannot tell you that this is hocus-pocus that you're claiming that the defendants are putting up. I've got to further listen to the basis of what the geneticists say and make a determination of whether or not there is a reliable basis for it. I can tell you that from what I am hearing, not only does it not defy believability but to me it's what my understanding of the state of the science is. At this point, I deny your motion.

(R. p. 229, l. 19 – p. 230, l. 13).

However, the trial court noted that the issue could be revisited, including the important determination of reliability. Paradoxically, the judge refused to allow *voir dire* or a proffer of testimony prior to admission of the evidence, which is the only way a judge can perform his duty as an evidentiary gatekeeper to determine reliability. (R. p. 230, ll. 17-24). Unfortunately, the trial court did not look at the particulars of Dr. Milunsky's testimony to determine its unreliability and thus failed to discharge its gatekeeper function. Instead, the court discussed the current state of the science as a whole, without looking at how Dr. Milunsky intended to use (or abuse) genetics. No one doubts that genetics is a budding field with seemingly endless possibilities, of which scientists have currently only scratched the surface. But this is precisely

why it is fraught with potential abuse in the courtroom. While genetics may not be “hocus-pocus,” the mysticism inherent to the field gives it a false aura of infallibility. As such, a court must assess the science known at present, and determine whether it is being used in a reliable manner, based on current knowledge and not simply the expert’s *ipse dixit* conclusions. This was not done in this case, and the Appellant was prejudiced as a result.

D. Appellant’s Efforts to “Remove the Sting” from the Trial Judge’s Erroneous Denial of Appellant’s Motions to Exclude Testimony Related to Genetic Factors Did Not “Open the Door” to Junk Science with No Indicia of Reliability or Probability

Because the judge had already denied Appellant’s motion to exclude Dr. Milunsky’s testimony of genetics as a cause of Jayden W.’s brain damage (R. p. 224, ll. 14-17; p. 230, ll. 11-25), Appellant’s comments and questions regarding that subject did not open any door, any more than comments regarding alcohol consumption. By addressing that topic early in the trial, Appellant sought to take the sting out of this subject of testimony as well.

Additionally, Appellant did not misrepresent the evidence regarding the effect of genetic factors on Jayden’s brain damage. Therefore, Appellant did not open the door to the admission of evidence on these issues. With respect to comments regarding genetics, the judge unequivocally ruled, over Appellant’s objection, that the defendant could introduce evidence related to Jayden’s alleged connective tissue disorder.

Even if the Appellant is considered to have opened the door to certain testimony regarding genetics factors, the door cannot be opened to unreliable, speculative testimony from an expert about prejudicial matters, which amounts to junk science. That is what the trial judge allowed the Respondent to present for jury consideration in this case.

E. It is Prejudicial to Erroneously Admit Expert Testimony that Unknown Genetic Abnormalities Not Yet Identified or Known to Modern Medicine Were Responsible for the Harm.

Admitting testimony under the guise of established and sound genetic science that the child’s injuries were caused by currently unknown, untestable, theoretical genetic abnormalities

clearly prejudiced the Appellant. That the jury found against Appellant on the standard of care issue does not render wrongful admission of this testimony harmless, any more than it renders the wrongful admission of alcohol consumption testimony harmless. The Respondent intended to prejudice the jury against Appellant by harping on genetics factors as a possible cause of brain damage in opening (R. p. 373, ll. 13-20), in Dr. Milunsky's testimony (R. p. 1470, l. 15 – p. 1490, l. 20), and in closing (R. p. 2134, ll. 7-10). Prejudice can be presumed from the Respondent's efforts to improperly influence the jury with speculative, unreliable and inappropriate causation evidence and from the jury's defense verdict.

III. FAILING TO PROPERLY CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT PREJUDICED APPELLANT

Lack of informed consent was a key issue in this case. Although the defense sought to confuse the issue by arguing a general consent form established informed consent, the trial court properly ruled as a matter of law the form did not represent informed consent. (R. p. 2045, ll. 13-17).

To avoid a directed verdict on lack of informed consent, Respondent argued an alleged emergency absolved him of any informed consent responsibility. Appellant disputed the existence of an emergency situation because it was feigned by Respondent and his litigation team and because Respondent has *never* obtained a patient's informed consent to use a vacuum extractor. (R. 426, ll. 14-19; p. 429, l. 19 - p. 430, l. 9). In fact, Respondent routinely used a vacuum to deliver babies, in fifty percent of his vaginal deliveries (R. p. 541, ll. 12-15), whereas a typical vacuum rate is only around fifteen percent. (R. p. 541, ll. 12-13).

Nevertheless, because the Respondent claimed an emergency made informed consent unnecessary, Appellant submitted a request to charge that acknowledged an emergency exception to the informed consent requirement, but made clear the standard of care to obtain informed consent persists even in most emergency situations. The trial judge elected to keep the

first portion of the requested charge, which favored the Respondent by expressing an emergency exception to informed consent, but refused to charge the second portion, which limited the emergency exception and explained how the standard for informed consent continues to apply in most emergency situations.

The failure to read the second part of the charge prejudiced the Appellant because it falsely informed the jury that “informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied.” (R. p. 2205, ll. 13-22). That is an incorrect statement of the law. Thus, the jury was left to consider only whether an emergency situation existed, and if so, then informed consent is not required. As evidenced by the post-trial interviews, the jurors applied the law as charged, believing the alleged emergency eliminated the need to comply with the standard of care.

This contravenes the charge set forth in Judge Ralph King Anderson’s charge book. As the charge states, even in an emergency situation, “a physician should seek the consent of the patient,” and “impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception.” (Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, Ch. 27).

Respondent argues, incorrectly, that the portion of the charge the trial judge refused to charge applies only to refusal to receive treatment for religious reasons. Although *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002), 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 religion prohibition of medical treatment. The court in *Hook* had to determine 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 v. Rothstein*, at *Hook v. Rothstein*, 281 S.C. 541, 547, 316 S.E.2d 690, 695 (Ct. App. 1984). Accordingly, Respondent's argument that the limitations to the emergency exception to informed consent apply only to cases involving religious beliefs is without merit.

Respondent also makes the bizarre argument that there is great significance that the requested charge was found in a section of Judge Anderson's charge book entitled, "Medical Malpractice-Right to be Free of Unwanted Medical Treatment." Anderson, S.C. Requests to Charge-Civil § 27-22 (2009). That is a perfectly reasonable place for the requested charge to be located, for it suggests the rationale for the informed consent doctrine. 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." *Id.* § 27-22, at 547-48, 695. The historical development and purpose of the rule was summarized by the court in *Harvey*:

The right to be free of unwanted medical treatment has long been recognized in this country. More than one-hundred years ago, in *Union Pac. R.R. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891), the United States Supreme Court perceived that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." In *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914), Justice Cardozo stated, "every human being of adult years and sound mind has a right to determine what shall be done with his own body...." More recently, it has been noted that "the individual's right to make decisions vitally affecting his private life according to his own conscience ... is difficult to overstate ... because it is, without exaggeration, the very bedrock on which this country was founded." *Wons v. Pub. Health Trust*, 500 So. 2d 679, 687 (Fla. Dist. Ct. App. 1987), *aff'd*, 541 So. 2d 96 (Fla. 1989). The right to control the integrity of one's own body spawned the doctrine of informed consent. *In re Duran*, 769 A.2d 497 (Pa. Super. Ct. 2001). Accordingly, the United States Supreme Court has held that a competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

Harvey at 310, 533

To fault Appellant for requesting use of a charge found in an aptly titled section makes no sense.

Finally, Respondent contends that the requested charge applies only to causes of action for battery because the Judge Anderson's charge cited to S.C. Code Ann. § 44-66-60. However, the South Carolina Supreme Court has made clear that South Carolina does not recognize an independent tort for medical battery. *Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008). Medical intervention without the patient's informed consent gives rise not to a claim of medical battery, but of medical negligence for breach of the standard of care related to informed consent. Nothing in the charge makes it appropriate only for causes of action for battery and inappropriate for causes of action for informed consent. Accordingly, the judge committed reversible error by failing to charge the jury with the correct law regarding informed consent in emergency situations, and the strict limitations on the emergency exception to the informed consent requirement. Appellant was prejudiced because the jury received an incorrect, incomplete charge on informed consent, a material issue in the case.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING EXPERT WITNESS FEES

Appellant does not disagree with Respondent's contention that a party may try to impeach an expert by showing his testimony is improperly influenced by the monetary payment he received. However, a party is also permitted to rehabilitate that witness on redirect. The fact that Appellant sought to rehabilitate a witness with questions related to whether payment influenced the witness's testimony does not remove the judge's responsibility to properly charge the jury. Appellant's redirect sought only to establish the lack of monetary influence upon the witness's testimony. Only if the evidence fully and reasonably convinces a juror that a witness has been influenced by the payment she received should the juror consider the fact that the witness was paid. The requested charge was fairly raised by the way Respondent tried the case,

and Appellant was entitled to the charge as requested, which correctly cites South Carolina law on the point. Ultimately, Appellant was prejudiced by the judge's failure to properly charge the jury on this subject.

V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT PERMITTING REPLY TESTIMONY OF DR. OAKES ON MISLEADING USE BY DEFENSE OF STATISTICS IN A MEDICAL JOURNAL ARTICLE

Respondent contends Appellant had already introduced the subject medical journal article during direct examination of Dr. Oakes. First, this assertion is not accurate. Dr. Oakes did not introduce the article. Dr. Oakes referenced an American College of Obstetric Gynecology ("ACOG") Practice Bulletin, which included a table from the medical journal article. This is a far cry from introduction of the article. Second, even if Dr. Oakes had introduced the article, Appellant could not have reasonably anticipated the perverse manner in which Dr. Rhett intended to present the article's findings. Appellant should not be precluded from calling Dr. Rhett on the carpet for his blatant abuse of medical literature.

Cross examination is not the equivalent of reply testimony. To clear up the confusion caused by either Dr. Rhett's ignorance or deception, Appellant needed to call a rebuttal witness, Dr. Oakes, to show that the subject article had been misused by the defense.

This error in the court's ruling at the end of the Appellant's reply and so close to the end of trial prejudiced Appellant. Appellant was denied the ability to clarify deceptive testimony presented by the defense. The jury was left to believe that vaginal delivery is what causes most brain bleeds in newborns, even though this belief contradicts the findings of modern medicine. That belief was incited by the abusive use of the medical journal article by Respondent. Accordingly, instead of giving Appellant an opportunity to provide the jury with truthful information about the article in reply to Respondent's abuse of medical literature, the judge conveyed to the jury that Appellant's counsel disobeyed the rules of court by improperly

challenging a “learned treatise.” Accordingly, Appellant was denied a fair trial and was prejudiced by the court’s erroneous ruling.

VI. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE IN VIOLATION OF THE CASE MANAGEMENT ORDER

Respondent argues that Appellant did not make a timely objection to the introduction of its pelvic model as demonstrative evidence. However, this argument ignores the fact that Respondent had not presented the model for review by Appellant prior to its use in court. Appellant objected once it became clear Respondent intended to misrepresent the human anatomy with its demonstrative model. The model used by Respondent was smaller than a biofidelic model, and Respondent mis-measured the distance to provide a 40% greater distance between the ischial spines and the pelvic or vaginal outlet. Without prior opportunity to inspect before trial, Appellant did not anticipate the defense’s use of a smaller-than-life model, or that Respondent would purport to measure distances between landmarks on the model. The difference allowed the defense to mislead the jury about the height of a birth canal and the level of Jayden’s station within the birth canal when the vacuum was applied to his head. Only when Dr. Rhett purported to measure the distance from the ischial spine to the pelvic outlet at a larger than lifelike dimension did Appellant’s counsel recognize the defense’s intention to mislead the jury. At that time, Appellant’s counsel made a contemporaneous objection. (R. p. 1351, lines 1-6). Neither the trial court nor this Court should condone Respondent’s violation of the Case Management Order and his misleading use of demonstrative evidence.

Just as shocking was the defense’s demonstrative use of the vacuum pump on a flat countertop. Unlike the case where the vacuum is used on the spherical shape of a newborn’s head, the vacuum suction to the table easily broke its seal when asymmetric force was applied. Again, the sole purpose was to confuse and mislead the jury, accomplished in part by violation of

the Case Management Order. Accordingly, the admission of both demonstrative devices was in error, and Appellant suffered prejudice as a result.

VII. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION ON FAILING TO ALLOW MORE EXTENSIVE VOIR DIRE CONCERNING POTENTIAL JUROR BIAS AGAINST A MEDICAL NEGLIGENCE APPELLANT

Respondent contends Appellant did not preserve objections to the trial court's refusal to make certain of her voir dire requests. Weeks before trial, Appellant submitted her *voir dire* requests. (R. pp. 3614-3619) The judge read only a few of the requests to the jury venire. The trial judge asked, "[a]re there any . . . further issues that the plaintiff wishes for me to take up at this time, on jury qualification?" (R. p. 214, lines 8-12). There was a side bar and a discussion about the judge's decision not to read Appellant's other *voir dire* requests, Appellant's objection thereto, and the judge's request that Appellant's objection be put on the record at a later time. Appellant's counsel thought he had put the *voir dire* objection on the record more expressly, but acknowledges that he has not yet located evidence of record in support.

CONCLUSION

For the reasons stated, the Appellant respectfully submits that the trial Court's denial of the Appellant's Motion for a New Trial Absolute should be reversed; with the case remanded for a new trial.

Respectfully submitted,



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April 10, 2013

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS**

Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
Jayden Washington, a minor Appellants,

v.

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

Of Whom Edmund Rhett, Jr. MD is.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that this Final Reply Brief of Appellant
complies with Rule 208(a)(3), SCACR.



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