THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-001237

Genesie Fulton, individually and as Next Friend for Bryson F., a minor — Appellants,

v

L. William Goldstein, M.D., individually and d/b/a L. William Goldstein OB-GYN, — Respondents.

REPLY BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants hereby adopt and incorporate by reference the Statement of the Case as set forth in Appellants prior Brief.

RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

Appellants object to Respondents' Statement of the Facts to the extent it includes factual inaccuracies, contested factual matter, and misstatements. This includes statements unsupported by citation, such as Respondents' contention that Dr. Goldstein "immediately took the appropriate measures to address this medical emergency." (Resp. Brief. p. 3).

Respondents acknowledge that Dr. Goldstein's first attempt at an episiotomy was inadequate, thereby requiring Dr. Goldstein to take time to cut a second. However, despite cutting the mother twice, Dr. Goldstein stated he still "was unsuccessful in being able to jam my hand into the vaginal canal . . . ." (Tr. p. 726:18-20, 726:14-24). Additionally, Respondents do not dispute that after Dr. Goldstein was unable to resolve the shoulder dystocia that he called to "get someone in here, get someone in here. It doesn't matter. Get a doctor, anybody. Get someone in here." (530:2-4). Indeed, Respondents' acknowledge that Dr. Coker came to the room and resolved the matter, ultimately in less than a minute. (Tr. p. 752:25 to 753:2, 922:3 – 13). In Dr. Goldstein's own words, "he came, he saw, he conquered, and he left." (Tr. p. 752:12-21). In Dr. Coker's words, he stated, "Well, I've done what I came to do." (Tr. p. 922:9-10).

Respondents highlight the APGAR scores, which are known only *after* delivery. Dr. Goldstein explained the APGAR scores showed that "the baby was improving." (Tr. p. 676:1). Respondents similarly draw attention to the cord blood gas, which is also not known until after delivery. The cord blood gas of 7.19 was one one-hundredth below what Dr. Goldstein explained he likes to see. (Tr. p. 676:14-16). Finally, Respondents note the presence of a nuchal cord, which Dr. Goldstein explained in some cases may be tight, but "in this case, we were able to slip it over

the head." (Tr. p. 674:17-25). Importantly, Respondents cite no testimony that any of the aforementioned, considered alone or together, caused either mother or child to not be medically stable. That is because no witness offered testimony the mother or child was not medically stable.

Respondents do not dispute that Genesie was a compliant patient. Respondents do not dispute that she was induced because of her distance from the hospital and not because of any perceived emergent circumstances. Additionally, Respondents do not dispute that there were no concerns for the mother or child's well-being at admission. Dr. Goldstein never asserted there was any great concern from admission to the time Genesie was ready to start pushing.

Finally, Appellants note that Respondents presented partial excerpts of testimony from Dr. Gomez-Carrion, Appellants' obstetric expert witness, that were elicited on cross. A more accurate presentation of her testimony reveals that Dr. Gomez-Carrion stated that, based on Dr. Goldstein's own sworn testimony, he did not exhibit the knowledge and experience needed to safely resolve shoulder dystocia. (Tr. p. 199:19 to 200:12). She noted that the standard of care required a physician to not go beyond using gentle traction when managing shoulder dystocia, and Dr. Goldstein's deposition testimony showed he was not even aware that this was the standard. (Tr. p. 201:16-22). She explained the standard of care requires the physician to instruct the mother to stop pushing after shoulder dystocia is diagnosed and that Dr. Goldstein failed to do so. (Tr. p. 203:5-13). Dr. Gomez-Carrion explained why B.F.'s permanent brachial plexus birth injury was caused by Dr. Goldstein's excessive pulling, (Tr. p. 203:11 – 22) through the use of illustrations and recitation of transcript testimony. (Tr. p. 207:16 to 211:1).[1] Dr. Michael K. Hall, Appellants'

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[1] In their statement of facts, Respondents include the opinion of a *neurologist*, Dr. Jacobson, under the subheading "Expert Opinions on the Standard of Care," that the amount of traction used by Dr. Goldstein, an *obstetrician*, during B.F.'s delivery was not "excessive." It is unclear why Respondents sought to elicit obstetric standard of care opinions from a neurologist at trial. It is also unclear why Respondents would highlight such incompetent expert witness testimony in an appellate brief. To be clear, Neurologists are not obstetricians, do not deliver babies, have little to no experience beyond a rotation in medical school delivering babies, and have no understanding of whether an amount of traction used by an obstetrician is excessive or not.

rebuttal obstetric expert witness, similarly highlighted deficiencies in the care provided by Dr. Goldstein but also went on to explain why both mother and infant were in fact medically stable throughout the delivery. (Tr. p. 1133:2 – 16). Dr. Hall's rebuttal testimony was the only testimony presented by any witness regarding whether a patient was or was not medically stable.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE OBSTETRIC EMERGENCY STATUTE WAS INAPPLICABLE TO THIS CASE.

A. Introduction

A statute that grants a physician immunity from the consequences of his negligent acts that disable and disfigure an infant is a statute in derogation of the common law. Respondents do not dispute this. Further, Respondents do not dispute that the negligence immunity statute must therefore be strictly construed, in a manner that disturbs established common law only to the extent necessary to affect the clear intent of the legislature.[2] Respondents acknowledge that the negligence immunity statute is an affirmative defense. They acknowledge that as such, the defendant physician bears the burden of proving *all* elements of the defense. Despite this admission, Respondents still fail to cite *any* testimony that either B.F. or his mother Genesie were not medically stable, under any definition[3] of medically stable, at any point in time from admission

[2] *See also Velazquez v. Jiminez,* 172 N.J. 240, 257, 798 A.2d 51, 62, (N.J. 2002) (noting courts give "'narrow range' to statutes granting immunity from tort liability because they leave 'unrepressed injury and loss resulting from wrongful conduct.'"

[3] The assertion by Respondents that Appellants did not request a jury charge defining medically stable misses the crux of Appellants' argument. The argument is that Respondents offered no evidence or testimony that a patient was not medically stable *under any definition*. Therefore, the issue should not have gone to the jury. It is not a matter of the element being left undefined or improperly defined. It is a matter of the element being wholly ignored. For this reason, Appellants have not sought to define "medically stable." Nevertheless, Respondents cite to two wholly irrelevant definitions of "medically stable" in their brief. The Am. Jur. 2d *Worker's Compensation* definition makes no sense outside the context of workers' compensation. Similarly, the EMTALA definition is irrelevant. In fact, despite acknowledging the EMTALA definition does not correspondent to a medical definition, Respondents nevertheless discuss how they would have satisfied this non-medical, statutorily-specific definition. But again, Respondents ignore that no witness presented testimony that a patient was not medically stable, even under these inapplicable definitions.

to discharge. Therefore, the trial court erred in failing to find as a matter of law that the obstetric emergency exception did not apply in this case. Additionally, Respondents have put forth no challenge to Appellants' argument that if the issue was improperly presented to the jury, then Appellants were prejudiced by this error.

B. Respondents Still Fail to Present Any Testimony that Any Patient was Not Medically Stable at Any Point in Time, From Admission to Discharge.

Respondents gloss over their failure to establish this required element by highlighting the strength and extent to which they satisfied *other* required elements of the affirmative defense. This is most obvious in Respondents Statement of Facts, where Respondents present facts under subheadings "Evidence of obstetrical emergency" and "evidence of imminent danger." Conspicuously absent from the statement of facts is a subheading under which evidence supporting the third element, "medically stable" is included. This is because no such evidence exists. Despite Respondents best efforts to argue otherwise, the purported strength of any two required elements do not spill over and satisfy the unsupported third.

Because Respondents failed to address this issue with any witness at trial, they now present scattered transcript excerpts collected and pieced together ad hoc in an attempt to show the patient was not medically stable. No amount of scouring the record, however, will reveal any testimony that either mother or child were not medically stable at any point during which Dr. Goldstein was responsible for Genesie's labor and delivery. Argument by attorney from evidence pieced together ad hoc does not supplant the need for competent testimony admitted in evidence that the patient was not medically stable.

Not only do Respondents ad hoc attempt fail to actually cite any testimony that a patient was not medically stable, it also conflates the elements "genuine emergency" and "immediate threat" with "medically stable." This is evidenced both by the failure to include a section presenting

evidence that the patient was not medically stable in their Statement of Facts and from their arguments. Respondents note that there "was ample testimony about the dire risks . . . ." (Resp. Brief p. 14). A risk or a threat is a *possibility*. Pointing to a threat does not demonstrate that something is actually affecting a patient, causing them to not be medically stable. Moreover, Respondents' argument of a purported paradox further highlights their conflation of the elements. To attempt to show a patient was not medically stable, Respondents cite the trial judge's testimony that "[i]f I was in a spot where eight minutes might get cerebral palsy or dead, I would consider that to be an *emergency*." (Tr. p. 1116:16-18). Respondents are exactly right. This evidence may indeed show that there was a genuine *emergency*. However, it says nothing about medical stability and merely conflates the elements of emergency or immediate threat with medical stability.

The statute as written provides three distinct elements which must be satisfied. Thus it follows that the criteria by which one must determine medical stability or instability is different from how one determines the presence of a genuine emergency and whether there is an immediate threat of death or serious injury. One element cannot be a mere restatement of the others, as this would render language from the statute superfluous and without purpose. *See In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463, (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplus age, or superfluous . . . ." 82 C.J.S. Statutes § 346.). Therefore, the statute as written recognizes that while there may be a genuine emergency with an immediate threat of serious harm, the patient may nevertheless be medically stable. If the patient is medically stable, then the physician is not shielded from responsibility for the harm caused by his negligent acts.[4]

[4] Unlike this case, in a situation where a patient is actually determined to have been not medically stable, an additional question may arise; should a physician be afforded immunity under the statute where it was his negligent mismanagement of the patient which led to the patient becoming not medically stable?

The defendant, Dr. Goldstein, was called to the stand and qualified as an expert witness. He never offered any testimony that in his opinion either of his patients were not medically stable, pursuant to any definition, at any point in time that Genesie and B.F. were under his care. Defendant obstetric expert Dr. Gower was called to the stand. Like Dr. Goldstein, Dr. Gower never offered any opinion that either patient was not medically stable. Defendant obstetric expert Dr. Salley then took the stand. Again, like the two preceding experts, he too failed to offer any opinion as to whether either patient was not medically stable. Defendant neurology expert Dr. Jacobson took the stand. He offered no opinion that either patient was not medically stable. No witness ever offered any testimony that either mother or child, throughout the course of labor and delivery under the care of Dr. Goldstein, were not medically stable. The issue simply went unaddressed.[5]

In response to Appellants' argument that Respondents presented no testimony that a patient was not medically stable, Respondents now appear to argue that it was within the jury's province to reach the conclusion that a patient was not medically stable by inferring as much from the sparsely scattered facts cited to in Respondents' brief. This argument, however, ignores the fact that determination of patient's medical condition is beyond the ambit of common knowledge and learning. Special training and learning is necessary to opine on a patient's medical condition. *See Botehlo v. Bycura,* 282 S.C. 578, 583, 320 S.E.2d 59, 62, (Ct. App. 1984) ("The reason for requiring expert testimony is that matters of *proper diagnosis* and treatment ordinarily involve technical knowledge beyond the ken of laymen." (emphasis added)). Our Court has noted, "Expert evidence is required where a factual issue must be resolved with scientific, technical, or any other

[5] Why defense counsel would not ask their experts to offer opinion on whether Genesie or J.B. was not medically stable is uncertain. However, it does not matter whether the question was not asked for fear of what answer would be received from an under oath witness, or whether it was simply an oversight due to defense counsel being accustomed to the role of defending and not proving elements of a case. In either scenario, the element went wholly undiscussed and therefore Respondents' affirmative defense failed as a matter of law.

specialized knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175, (2010). *Watson* explained that "expert testimony is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." *Id. See also Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 177, 758 S.E.2d 501, 504, (2014) (noting that because medical knowledge is generally outside of a juror's common knowledge, expert testimony is required); *Honea v. Prior*, 295 S.C. 526, 530, 369 S.E.2d 846, 849, (Ct. App. 1988) (noting that to be qualified, an expert must have knowledge sufficient to "enable the person to give guidance and assistance to the jury in solving a problem about which the jury's good judgment and average knowledge is inadequate").

The only competent opinion on the matter came from Dr. Hall, who stated unequivocally that the patients in this case were medically stable. Respondents offered no testimony from anyone that a patient was not medically stable. Given the absence of any testimony that a patient was not medically stable, the trial judge should have determined as a matter of law that the affirmative defense had not been established, and the issue should not have gone to the jury.

Even assuming a jury had the knowledge and training to analyze and diagnose a patient's medical condition, the evidence referenced by Respondents does not allow the inference of medical instability to be drawn. Respondents point to only one piece of information that Dr. Goldstein could have been aware of during his management of Genesie's labor and delivery; the presence of a nuchal cord. Unfortunately for Respondents, no witness offered any testimony that the nuchal cord in this case caused any issues, let alone that it was a basis from which a witness could opine that J.B. was not medically stable. The best Dr. Goldstein could do is describe the ways a nuchal cord sometimes might affect the baby and describe *other* situations where he had been faced with more complicated nuchal cord presentations. Thus, at best, he described how a nuchal cord in some situations poses a risk to the baby. Notably, he never stated that nuchal cord

in this case had any effect at all on the child; that the cord was tight, knotted, or wrapped multiple times around the infant's neck; or that this child was not medically stable. In fact, Dr. Goldstein stated on multiple occasions that in this case, all he had to do was just slip the cord over the infant's head.[6] He never stated that the presentation of the nuchal cord caused any issue and certainly did not state the infant was not medically stable as a result or in part because of the nuchal cord.

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[6] At trial, Dr. Goldstein explained:

> Q: Now, explain to us, in this situation [shoulder dystocia], is the baby getting oxygen.
>
> A: The baby should be getting oxygen. I mean, here's the placenta, but you can't see the cord here so, you know, the cord could be, you know, trapped between the back of the head, or the cord could be wrapped around the neck. I've seen as many as three wraps around the neck. I've seen true knots, double true knots in the cord, but, you know, we can't see the cord so, you know, the baby should be getting adequate oxygen.
>
> Q: When you say it's wrapped around the neck, what are you talking about?
>
> A: I mean some babies have long umbilical cords and during the process of growth and development the cord becomes looped around the neck and, you know, sometimes it can be real tight and that can -- you know, when the baby has a contraction, or when the mother has a contraction and pushes on the baby and pushes the baby down, the cord can constrict around the neck and it doesn't cut off the breathing of the baby, but it cuts off the blood supply to the baby which is where the baby gets the oxygen.
>
> (Tr. p. 628:7 to 629:3).

Dr. Goldstein continued:

> A: She had a nuchal cord and fortunately we were able to reduce the cord over the baby's head.
>
> Q: Okay. Now, I want you to stop right there and in your delivery note, I want you to explain the medical significance of where the nuchal cord was.
>
> A: The cord is looped around the baby's neck so, you know, sometimes these are tight nuchal cords and when they're tight then they, they compress the umbilical cord and that compresses the blood flow to the baby and reduces the baby's oxygenation during labor and during pushing.
>
> Q: Okay. And when you saw that the nuchal cord was wrapped around the baby's neck, what did you do?
>
> A: Well, fortunately, in this case, we were able to slip it over the head.
>
> Q: Okay. What I'm trying to find out is what does it mean when you say nuchal cord reduced.
>
> A: That means that we slipped the cord over the baby's head and reduced it from being around the baby's neck.
>
> (Tr. p. 674:12 to 675:4).

The remaining two pieces of information cited by Respondents are also of no assistance. Like the nuchal cord, these facts exist alone, without any discussion of how they support a finding a patient was not medically stable. Respondents first note the infant had a pH score of 7.19. The only testimony offered concerning the significance of cord blood gas at 7.19 came from Dr. Goldstein, who sated, "That shows that the pH was a little bit low. We like to see them above 7.2." (Tr. p. 676:12-16). Dr. Goldstein's comment that the cord blood gas was one one-hundredth below what he likes to see is a far cry from opining that the patient was not medically stable. Its significance and effect on a patient's medical condition went unexplained. It simply exists as a fact untied to the question of whether or not a patient was or was not medically stable. If it indeed showed the patient was not medically stable, certainly defense counsel would have asked one of the witnesses to offer such opinion. They did not, and we are left only with conjecture concerning why Respondents would not put the question to their witnesses.

Similarly, Respondents noted the APGAR scores were low, but again, there was no evidence or testimony regarding how this affected or related to a patient's medical stability. Respondents have simply noted that the APGAR scores were low but left this fact untied to any discussion or opinion regarding how this impacts or affects a patient's medical stability. In fact, Dr. Goldstein explained the APGAR scores were going up when rechecked and how that showed the baby was improving. (Tr. p. 675:21 to 676:6).

Respondents discuss Dr. Jacobson's testimony of the APGAR scores. Dr. Jacobson never stated the scores had anything to do with or related to a finding that a patient was not medically stable. The testimony cited by Respondents reveals as much. Dr. Jacobson offered comment on the APGAR scores only in terms of how they related to *causation* of the injury; he said nothing about medical stability. Dr. Jacobson stated it was his opinion that the low APGAR score meant

the baby's tone was low, and that this might make the infant more vulnerable to injury. (Tr. p. 943:11 to 944:13). Dr. Jacobson explained that while the APGAR score was low at birth "it perked up pretty quick after birth." (Tr. p. 944:23-25). Like Dr. Jacobson, defendant expert witness Dr. Salley discussed the low APGAR score only when providing his opinion as to the cause of B.F.'s brachial plexus birth injury. (Tr. p. 1020:1-3). He made no comment at all concerning whether it permitted a determination that a patient was not medically stable or how this affected the patient.

Finally, Respondents fail to explain how Dr. Goldstein could have possibly been aware of the cord blood gases or the APGAR score while he was managing Genesie's labor and delivery. By their nature, neither can be known until *after* the infant is born. Cord blood gases are taken from the umbilical cord after birth. The APGAR score is a score taken at one, five, and ten minutes after birth. Hypothetically, even if an expert had attempted to rely on this information to offer the opinion that a patient was not medically stable, (again, no such opinion was ever offered by any witness), such evidence would be entirely irrelevant to what Dr. Goldstein or anyone else could have known while he was delivering B.F. As this evidence could not have been known during the delivery, it is not competent evidence to find the patient was not medically stable.

South Carolina case law makes clear that our Courts abhor the evaluation of a medical malpractice case through the lens of hindsight. *See e.g. Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 574 (1999) (noting the purpose of a hindsight charge is to elucidate the meanings of "similar circumstances" and "like conditions" as they existed when treatment was provided, not what hindsight may reveal.) The language of Section 15-32-230 supports the same. The statute as written makes clear that one is to assess the patient's status based upon the conditions then existing, when the physician is caring for a patient in a purported emergency situation. The statute reads, "the limitation on physician liability . . . shall only apply if the patient ***is*** not medically

stable . . . ." S.C. Code. Ann. § 15-32-230(C). To receive the benefit of hindsight and facts unknown or unknowable to the physician, the statute would have to read, "if the patient ***was*** not medically stable." Deliberate use of the present tense *is* denotes the patient's condition is to be evaluated based upon the facts then existing and known by the physician, not under the lens of hindsight, with the benefit of facts now known that could not have been known by the physician during his treatment and management of the purported emergency. Accordingly, it is inappropriate to rely upon the APGAR score or cord blood gases as neither were known until after the shoulder dystocia had been resolved and B.F. was born.[7]

C. Appellants Argue Respondents Failed to Offer Opinion that a Patient was Not Medically Stable, Not that Respondents Failed to Use Magic Words.

Respondents did not ask their witnesses to discuss whether the mother or child were medically stable during the course of Genesie's labor. Due to this failure, Respondents must now mis-frame Appellants argument as Appellants' criticizing a failure to use "magic words." Respondents' argument is without merit.

The cases discussing "magic words" cited by Respondents explain how an expert may express his level of certainty regarding conclusions she reached. The cases do *not* discuss how to handle situations where the expert wholly fails to offer any opinion. They certainly do not stand for the proposition than an expert may fail to state an opinion altogether, and then allow counsel to argue what conclusions the expert might have reached.

Contrasting the facts of this case to the case cited by Respondents makes the distinction clear. In *Gamble v. Price,* 289 S.C. 538, 541, 347 S.E.2d 131, 132 (Ct. App. 1986), Respondent set forth evidence at trial through an expert witness that the plaintiff had sustained permanent

[7]Appellant reiterates that neither of these facts were even used by a witness to support an opinion that the patient was not medically stable at any point in time. Indeed, no opinion was ever offered by anyone that any patient was not medically stable under any definition, at any time, based upon any information, whether known or not known at the time the emergency was encountered.

disability. *Id.* at 541, 347 S.E.2d at 132. Appellant argued the plaintiff's witness did not offer his opinion that the plaintiff suffered a permanent disability, "most probably." *Id.* at 541, 347 S.E.2d at 132. The Court essentially concluded that any similar language such as "most definitely," "definitely" or "did" cause the injury is sufficient to show the expert holds his opinion with the requisite level of certainty. In the case at hand, the concern is not the level of certainty of opinions offered; it is the total failure of Respondents' witnesses to offer opinion at any level of certainty.

Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414, (Ct. App. 1987), also cited by Respondents, stated, "the critical issue was not a question involving medical knowledge and judgment, but simply a question of who was telling the truth about whether [Defendant doctor] disclosed the risk." *Id.* at 354, 356 S.E.2d at 417. The Court then noted that credibility of a witness is a question for the jury. In this case, the critical issue, whether a patient was not medically stable, clearly requires medical knowledge and judgment and is not a question of determining witness credibility. Efforts to characterize the relevant issue as one concerning whether or not "magic words" were used is meritless. In *Stallings*, the defendant himself established that there was a duty to disclose a particular risk and the only question was whether he disclosed the risk or not. *Id.*

D. Appellants Did Not Concede There was an Immediate Threat.

Respondents contend Appellants conceded the defense had satisfied the element that there be an "immediate threat of serious bodily injury or death." A review of what was actually discussed with the judge reveals this is false. The excerpt quoted by Respondents notes only acknowledgment by Appellants of the existence of a "threat" but at no point concedes the immediacy of the threat as required by the obstetric emergency exception. Issue of concession aside, even if Respondents had satisfied this element, Respondents still wholly failed to satisfy the required medical stability element in order to receive statutory protection from negligent acts. Stated differently, satisfaction

of the "immediate threat" element does nothing to satisfy the "medically stable" element, and all the elements had to be satisfied.

II. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY ON THE CORRECT AND COMPLETE DEFINITION OF GROSS NEGLIGENCE

Respondents appear to assert that Appellants waived objection to the jury charge. Respondents base this argument solely on the assertion that Appellants did not also cite to Appellants' objection to the footnote on the verdict form that restated the jury charge. However, in the initial brief, Appellants stated the error of incorrectly charging the jury "was compounded by this incorrect and incomplete definition being placed upon the verdict form." (App. Initial Br. p. 13). To be clear, the issue on Appeal is the error in the charge provided to the jury, in all manner by which the charge was presented to the jury. The verdict form merely restated the objected-to, incomplete definition of gross negligence. As Appellants dedicated pages of discussion concerning their issue with the charge, it is hard to understand how this issue was waived. Nevertheless, Appellants clarify that the issue appealed is the judge's failure to charge the jury on the correct and complete definition of gross negligence, both as it was read to the jury and to the extent the objected-to charge was restated on the verdict form.[8]

The error in allowing the obstetric immunity from negligence statute to go the jury is compounded by the error of omitting all definition of what constitutes gross negligence. The definition of gross negligence was incompletely, and therefore incorrectly charged to the jury. Appellants requested the full, accurate, and complete definition be charged. The court refused, stating it would only give the jury a "short definition on what gross negligence is." (Tr. p. 1176:13-

[8] As Respondents pointed out, Appellants did in fact object to the inclusion of the charge on the verdict form at trial. (Tr. p. 1216:5-14).

16). The short definition cut out the very parts Appellants requested be charged, thereby limiting what constitutes gross negligence under South Carolina law.

A trial judge must "declare the law" to the jury. *Baker v.* Weaver, 279 S.C. 479, 482 309 S.E.2d 770, 771 (Ct. App. 1983) (citing S.C. Const. art. V, § 17 (1985)). 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). Where a party requests additional instruction involving a substantial feature of the case, it is prejudicial for the trial judge to refuse to give the correct instruction. *See Baker v. Weaver* at 483, 309 S.E.2d at 772 (stating, "Because the requested additional instruction involved a substantial feature of the case . . . it was prejudicial to [Appellant'] position for the trial judge not to have given the jury an instruction concerning those principles.").

The trial judge failed to do exactly that; it failed to provide additional instruction to the jury necessary for the jury to understand the concept of "gross negligence" as defined in South Carolina. The omission of the additional instruction unfairly constrained the definition of gross negligence and what conduct may constitute gross negligence, thereby prejudicing Appellants.

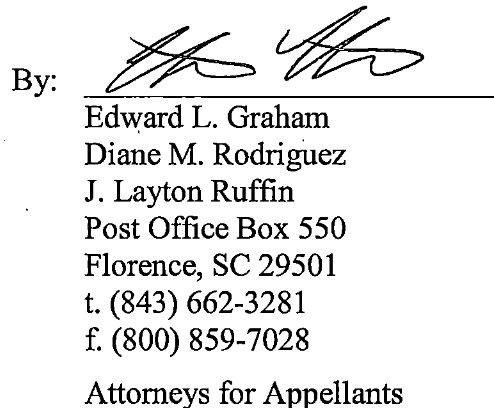
Respondents acknowledged in their brief, "This Court has defined gross negligence in a number of ways" and that "gross negligence is a relative term, and means the absence of care that is necessary under the circumstances." *Hollins v. Richland Cty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993) (citations omitted). However, Respondents then argue that because the Court charged part of the definition, the part most restrictive and favorable to the defense, that the court correctly charged the jury on gross negligence. Their argument ignores that gross negligence as charged to the jury narrowed what conduct was capable of being considered gross negligence beyond what the full and complete definition would require.

Finally, the requested language is not a mere repeat or restatement of the charged, "even slightest of care" language. A review of the jury charge in its entirety reveals that no substantial equivalent of the requested language was included in the general instructions. (Tr. p. 1257-1282). Therefore, it cannot be argued that the "substance of the request" was included elsewhere in the charge. If requested additional definition is an accurate reflection of the law that has not otherwise been stated, and the definition may alter a jury's understanding of a substantial feature of the case, then it is prejudicial error not to charge the additional language. The trial court should not charge only the definition most favorable to a single party, and omit other language necessary for the jury to accurately apply the law to the facts as presented. In this case, such language was refused, and Appellants suffered prejudice as a result.

CONCLUSION

For the reasons stated, Appellants respectfully submit that the trial court's denial of Appellants' Motion for New Trial Absolute should be reversed, with the case remanded for a new trial.

GRAHAM LAW FIRM, P.A.

By: 

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