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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

Appellate Case No. 2015-001237

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

v. v.

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

PETITION FOR REHEARING

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QUESTIONS PRESENTED

I. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE OBSTETRIC EMERGENCY STATUTE WAS INAPPLICABLE TO THIS CASE?

II. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED IN FAILING TO CHARGE THE JURY ON THE CORRECT AND COMPLETE DEFINITION OF GROSS NEGLIGENCE?

STATEMENT OF THE CASE

This is a medical negligence case involving an injury sustained by minor Bryson F. at the time of his birth on August 20, 2009. Genesie Fulton brought this action in her individual capacity and as Next Friend of Bryson F., a Minor. Appellants allege that Dr. William L. Goldstein, and William Goldstein OB-GYN (hereinafter "Respondents") failed to properly manage and resolve a condition known as shoulder dystocia. Shoulder dystocia is a condition that sometimes arises in a head-first vaginal delivery where the infant's shoulder becomes lodged behind the mother's pubic bone. Instead of using only gentle traction (force or pulling) and properly performing one of the appropriate maneuvers available to safely relieve the stuck shoulder, Dr. Goldstein instead improperly used excessive force upon baby Bryson's head sufficient to cause the nerves in Bryson's neck to be stretched and torn apart. As a result, Bryson has permanent brachial plexus nerve damage and lifelong deformity and deficiency in movement in his right arm.

The Summons and Complaint were filed on February 28, 2013 and designated as Civil Action Number 2013-CP-21-00587. (R. pp. 11-21). On April 26, 2013, Defendants Dr. Goldstein and William Goldstein OB-GYN answered with general denials and assertions of numerous affirmative defenses, including the emergency obstetrical care statute found at S.C. Code Ann. § 15-32-230. (R. pp. 29-36). Two other defendants originally named in the suit were dismissed by stipulation on September 29, 2014, and the consent order granting dismissal was entered on September 30, 2014. (R. p. 1-6). Neither of these defendants were parties at the time of trial, nor are they parties to this appeal. An Amended Complaint was filed on April 30, 2015. (R. pp. 37-42).

The case went to trial against Respondents in the Florence County Court of Common Pleas beginning on May 4, 2015, with the Honorable Michael G. Nettles serving as presiding trial judge. Trial started on a Monday and concluded that Friday, May 8, 2015. Despite alleging the obstetric

emergency affirmative defense in their Answer, Respondents put forth no evidence at trial on several of the elements required for a defendant to avail itself of the statutorily created defense. For this reason, after the defense rested, Appellants requested the court find as a matter of law that the obstetric emergency affirmative defense did not apply to this case and must not be included in the jury charge or on the verdict form. (R. p. 838, line 8-p. 839, line 1; p. 839, line 20-p. 842, line 23). Ultimately, the Court determined it was a question of fact to go to the jury. (R. p. 845, lines 12-15). After understanding that the judge intended to include the obstetric emergency affirmative defense in the jury charge and on the verdict form, Appellants next inquired of the judge how he intended to define "gross negligence" for the jury. (R. p. 902, lines 1-3). After learning that the trial court intended to charge that "gross negligence is the failure to exercise even the slightest care," Appellants requested the trial court to charge the correct and complete definition of gross negligence that was necessary for the jury to correctly understand the concept of gross negligence under South Carolina law. (R. p. 902, lines 4-12). The trial court denied the request and stated that "there's just going to be a short definition on what gross negligence is." (R. p. 902, lines 13-16). Indeed, the jury was charged only that "[g]ross negligence is the failure to exercise even the slightest care . . . ." (R. p. 921, lines 14-15).

Deliberations began around 6:00 PM, and just after 10:00 PM that Friday, the jury reached a verdict in favor of the Defendant. (R. p. 937, line 11; p. 941, line 15-p. 942, line 13). Ultimately, the jury found that the obstetric emergency exception applied, thereby requiring gross negligence. The jury then found that the Plaintiff did not prove that the Defendants were grossly negligent. (R. p. 942, lines 6-10).

Appellants moved for a new trial absolute, and the judge agreed to hear the motions on a future date. (R. p. 946, line 11-p. 947, line 11). Appellants then filed a motion for new trial absolute

on May 15, 2015, (R. pp. 51-67). The trial judge heard oral argument on May 19, 2015. The Court entered its order denying the motion for new trial on the same date. (R. pp. 5-8). Appellants timely filed their notice of appeal with the trial court and court of appeals on June 8, 2015. The amount involved in this appeal is in excess of One Million Dollars. On June 28, 2017, this Court entered an Order affirming the trial court's decision.

ARGUMENT

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

Appellants respectfully submit that this Court either overlooked or misapprehended the arguments set forth in Appellants' Final Brief and Reply with respect to whether the trial court erred in failing to find as a matter of law that the obstetric emergency statute was inapplicable to this case. The Court concluded that the evidence presented was sufficient to charge the jury with the obstetric emergency statute. However, the Court did not indicate (1) by what definitions the statute is to be interpreted, particularly with regard to medical instability and "immediate threat;" (2) by what criteria those elements of the statute are to be evaluated; (3) whether the statutory requirements of medical instability and "immediate threat" can be proven by proof of a genuine emergency or whether such requirements have independent significance and mandate independent and additional proof; (4) whether such requirements demand expert testimony to make a prima facie showing of medical instability and "immediate threat" as those phrases should properly be defined and evaluated; and (5) what evidence Respondents put forth that was sufficient to create a question for the jury about medical instability and "immediate threat", necessary as a matter of law for the obstetrical emergency statute to be properly charged to and considered by the jury. Appellants respectfully submit that there was no evidence to support the second and third elements

of the affirmative defense, which required proof that the patient is not medically stable and that the patient is in immediate threat of death or serious bodily injury. Appellants respectfully submit that the evidence, summarized below, required a finding that the trial court erred in failing to find as a matter of law that the obstetric emergency affirmative defense did not apply to this case.

A. The Emergency Exception Must Be Interpreted as a Statute in Derogation of the Common Law.

As an initial matter, Appellants note that at common law, there is no "emergency medical and obstetrical care exceptions," as set forth in S.C. Code Ann. § 15-32-230.[1] The common law states that the plaintiff in a medical malpractice lawsuit must:

> (1) Present evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, AND
>
> (2) Present evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the plaintiff.
>
> *Cox v. Lund*, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985).

"[S]tatutes in derogation of the common law are to be strictly construed." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696, 2012 (2012) citing *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Additionally, "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Id.* citing *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Thus, Section 15-32-230 is to be strictly construed, in the least restrictive manner.

B. As an Affirmative Defense, the Defendant Has the Burden of Proving All Elements of the Obstetric Emergency Exception.

[1] The specific requirements of this affirmative defense are discussed *infra*.

S.C. Code Ann. § 15-32-230 is an affirmative defense and must be pleaded or is waived. In *Howard v. South Carolina Dep't of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) our Courts noted, "Affirmative defenses are waived if not pled." In accordance with this requirement, Respondents pled the obstetrical care exception as an affirmative defense.

However, mere pleading of an affirmative defense without supporting evidence is insufficient. It is incumbent upon the defense to present evidence on each and every element of its affirmative defense. South Carolina Courts have noted, "It is well established that a party pleading an affirmative defense has the burden of proving it. *Cole v. S.C. Elec. & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003), citing *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000). "When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence." *Id.* citing *Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 318, 150 S.E. 789, 792 (1929). Accordingly, a defendant cannot rest upon a factually unfounded, unsupported affirmative defense, nor should the same be presented to the jury for determination. *See Hoffman v. Greenville*, 242 S.C. 34, 40-41, 129 S.E.2d 757, 760-761 (1963) (holding that the trial judge properly refrained from charging an affirmative defense to the jury where there was no proof of such a defense).

In this case, Respondents asserted the affirmative defense based upon the statutorily created obstetric emergency care exception, but failed to present evidence of its necessary elements. S.C. Code Ann. § 15-32-230 (A) and (C) read:

> (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an

obstetrical or surgical suite, no physician[2] may be held liable unless it is proven that the physician was grossly negligent.

(C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

S.C. Code Ann. § 15-32-230 (A) and (C).[3]

In order for a physician to avoid liability by asserting this affirmative defense for negligent actions he would otherwise be liable for at common law, the physician must prove all the required elements of the statute. For a medical malpractice claim arising out of obstetrical care,[4] a defendant physician is required to present evidence that: (1) the claim arises out of care rendered in a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient is in immediate threat of either death or serious bodily injury.[5] If all these requirements have been met, then the physician is not responsible for his own negligent conduct unless it is proven that the physician was grossly negligent.

C. Respondents Failed to Present Any Evidence that Any Patient was Not Medically Stable at Any Point in Time, from Admission to Discharge.

Respondents wholly failed to present any evidence from anyone that any patient was not medically stable at any point in time from admission to discharge. Respondents failed to present any testimony on this issue for any period of time that Dr. Goldstein had assumed the care of Genesie and her unborn child. The statute unambiguously required this of Dr. Goldstein.

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[2] In this case, this lawsuit went to trial on claims against a "physician" only. No claims were asserted at trial against any "non-physician" such as a hospital, nurse, corporation (for profit or non-profit), governmental entity, or any other person or entity not otherwise properly defined as a "physician."

[3] Section (B) involves a claim where there is "no previous doctor/patient relationship" between the physician and the patient or the patient did not receive prenatal care. This section is not applicable to the facts of this litigation.

[4] Appellants concede that this case involves a claim for medical malpractice arising out of obstetrical care.

[5] Additionally, the statute explains this limitation on liability only applies to care rendered prior to the patient's discharge from the emergency department or the obstetrical or surgical suite.

Therefore, it was incumbent upon Dr. Goldstein, the party pleading the affirmative defense, to present evidence on this point. As the actor in the suit with regard to the affirmative defense, the burden of proof rested upon Dr. Goldstein to establish his affirmative defense. Dr. Goldstein failed to produce any evidence at all that his patient or patients were not medically stable. Because Respondents failed to offer even a modicum of evidence on medical stability, the trial judge should have determined as a matter of law that the obstetric emergency exception did not apply.

Respondents first offered the testimony of the Defendant Dr. Goldstein, both as a fact witness and as an obstetrical expert. He determined, in his expert opinion, that he did not breach the standard of care in terms of pulling too hard.[6] Using exhibits, Dr. Goldstein explained that during shoulder dystocia, "The baby should be getting oxygen . . . . 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." (R. p. 362, line 4-p. 363, line 16). Dr. Goldstein also noted that sometimes the umbilical cord is wrapped tightly around the baby's neck, but that "in this case, we were able to slip it over the head." (R. p. 409, lines 12-25).

Importantly, defense counsel did not even attempt to get Dr. Goldstein to allege under oath that his patients were not medically stable, either at admission or at any other point during the course of labor and delivery. He did not provide any such testimony regarding Genesie's state when she first entered the hospital for induction, nor did he provide any such testimony regarding her state throughout the course of her labor and delivery. Dr. Goldstein failed to provide the same

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[6] He made such a determination despite testifying under oath that he didn't think there was a standard of care for traction, (R. p. 455, lines 6-15), that he didn't know whether it would be inappropriate to apply more than gentle traction, (R. p. 456, lines 6-13), that an obstetrician simply uses "the traction that's necessary to get the baby delivered," (R. p. 471, lines 8-10), despite having no memory of being trained to avoid using more than gentle traction (R. p. 466, line 22-p. 467, line 2), that he had no memory of how much traction he used at any point during Bryson's delivery (R. p. 473, lines 4-7), that he had no memory of how much he pulled any time he'd encountered shoulder dystocia (R. p. 474, lines 8-12), and despite Dr. Goldstein admitting that he was not qualified to offer any opinion on what caused Bryson's injuries in this case. (R. p. 476, lines 14-20).

with regard to Bryson. Moreover, he made clear he did not believe there was risk of brain damage that would have justified using excessive traction in this case. (R. p. 489, lines 18-23).

Respondents called as their next obstetrical expert, Dr. Gower. Dr. Gower provided his opinion regarding why, generally, shoulder dystocia is considered an emergency. (R. p. 510, lines 21-p. 511, line 1). In support, he set forth the general risks associated with shoulder dystocia and the injuries which may occur.[7] However, despite going over what is generally known to be the risks of the condition, he made no effort to discuss which were present in this case at the time Bryson was about to be delivered. He made no assertion whatsoever that either mother or baby in this case were not medically stable, from the time of admission and throughout labor and delivery.

When asked if there was any indication that Dr. Goldstein feared for the baby's life, Dr. Gower had to concede, "No, I didn't have any indication of that." (R. p. 570, lines 16-19). When asked if he had any understanding that Dr. Goldstein was concerned that there was an imminent risk of brain damage, Dr. Gower responded, "No, I don't have any indication about what he was thinking about that." (R. p. 571, lines 20-25). Again, defense counsel did not even try to get Dr. Gower to contend under oath that either mother or child were not medically stable upon admission to the hospital, or even at any other point in time throughout labor and delivery.

Finally, defense counsel offered the expert opinions of yet another obstetrician, Dr. Salley. Dr. Salley said Dr. Goldstein did not breach the standard of care. He offered the opinion that shoulder dystocia is an obstetric emergency and set forth the potential risks associated with the encounter. (R. p. 723, lines 15-18). Again, however, Dr. Salley never opined that mother or child were not medically stable at admission, or at any other time throughout the course of labor and

[7] This discussion of potential risks and injuries did not seek to separate out which were caused by the condition and which were caused by mismanagement of the condition.

delivery. Again, defense counsel did not wish to ask Dr. Salley for his opinion under oath of whether or not mother or child was not medically stable.

The only evidence from any source presented on the subject came from Appellants' witness Dr. Michael Hall. Dr. Hall answered questions related to whether either the mother or her infant was medically stable. When asked, he stated unequivocally that neither child nor mother was not medically stable from admission to delivery. (R. p. 859, lines 2-16). Therefore, the only testimony ever presented by any party on whether or not a patient was not medically stable came from Appellants' expert witness, who emphatically stated that mother and child were medically stable throughout admission, labor, and delivery.

Defense counsel wholly failed to offer evidence in support of one of the required elements to prove the obstetrical emergency affirmative defense. Despite presenting testimony from three different obstetrical experts, it could not get a single one to assert on the record, under oath, that Genesie Fulton was not medically stable, either at the time of her admission, or at any point thereafter up to and through her delivery of Bryson. Defense counsel could not get a single witness to assert on the record that Bryson F. was not medically stable at any point from Genesie's admission to the hospital up through Bryson's birth. For this reason, Respondents' affirmative defense fails as a matter of law. For this reason, the obstetrical emergency exception should not have been charged to the jury and should not have been placed on the verdict form.

Despite the total lack of evidence on this point, the issue was presented to the jury and the jury found that the obstetric emergency exception applied. The jury then found that that the defendants had not breached the heightened gross negligence standard and found for the defense. (R. pp. 9-10). In light of the jury's determination, Appellants were clearly prejudiced by the court's erroneous decision to charge the jury the statutory defense.

D. Respondents Failed to Present Any Evidence that Any Patient was in Immediate Threat of Death or Serious Bodily Injury.

Similarly, Respondents did not present evidence that there was an immediate threat of death or serious bodily injury from the condition of shoulder dystocia. The suggestion that brain injury or death may follow shoulder dystocia merely states the reason why it is important for obstetricians to comply with standards of care for safe resolution of shoulder dystocia. Shoulder dystocia itself does not represent an immediate threat of death or serious bodily injury. It is only the failure to resolve the shoulder dystocia in accordance with the standards of obstetrical care that creates the potential risk of death or serious bodily injury. Moreover, since Dr. Goldstein had been present at bedside at the time the shoulder dystocia arose, there was no threat of death or serious bodily injury, immediate or otherwise, at the onset of his bedside care.

Dr. Goldstein confirmed that Bryson was delivered before there was any immediate risk or threat of brain damage. (R. p. 489, lines 18-23). Dr. Gower confirmed that Bryson was not at immediate risk or threat of death (R. p. 570, lines 16-19) or brain damage. (R. p. 571, lines 20-25). Dr. Hall confirmed the same. (R. p. 857, p. 17-p. 859, line 1).

Because the evidence consistently showed Bryson was delivered before there was any immediate threat of death or serious bodily injury, the obstetrical emergency affirmative defense, by its own terms, does not apply. Thus, it should not have been charged. Charging the statute prejudiced Appellants by requiring proof of gross negligence for them to recover, when the common law permits them to recover for all damages caused by ordinary medical negligence. For this reason, the trial court erred in charging the statute.

II. THE COURT OVERLOOKED OR MISAPPREHENDED THAT THE LOWER COURT ERRED IN FAILING TO CHARGE THE JURY ON THE CORRECT AND COMPLETE DEFINITION OF GROSS NEGLIGENCE

Appellants respectfully submit that this Court either overlooked or misapprehended the arguments set forth in Appellants' Final Brief and Reply with respect to whether the trial court erred in failing to find the lower court erred in failing to charge the jury the correct and complete definition of gross negligence. The Court concluded that the jury charge was substantially correct and covered the law. However, the Court did not explain how "the failure to exercise even the slightest care" is substantially correct if the uncharged portion of the law explained that gross negligence is "the absence of care that is necessary under the circumstances." The Court also did not discuss what effect, if any, the lower court's failure to include the language requested by Appellants had on the correctness and accuracy of the charge. Appellants respectfully submit that for the charge to be complete, correct, accurate, and free from error and prejudice, it had to include the language requested by Appellants. Specifically, the charge had to state that gross negligence also means "the absence of care that is necessary under the circumstances," as stated in *Hollins v. Richland County School Dist. 1*, 310 S.C. 486, 427 S.E.2d 654 (1993). Appellants respectfully submit that for the reasons summarized below, this court overlooked or misapprehended the law when it held the jury charge in this case was substantially correct and covered the law.

The trial court erred in failing to charge the jury the correct and complete definition of gross negligence. After learning that the trial court intended to charge the jury on the emergency exception statute, despite Appellants' argument that Respondents had not presented evidence on all elements of the affirmative defense, Appellants sought to ensure that an accurate and complete definition of gross negligence be charged to the jury. The trial judge indicted he only intended to charge the jury that gross negligence was defined as "the failure to exercise even the slightest care," Appellants requested the trial court charge the remaining relevant and appropriate language. (R. p. 902, line 4-p. 902, line 12). To this request, the trial court replied, "there's just going to be

a short definition on what gross negligence is." (R. p. 902, lines 13-16). Indeed, the jury was charged only that "[g]ross negligence is the failure to exercise even the slightest care . . . ." (R. p. 921, lines 14-15). Such an erroneous definition of gross negligence would establish a lower level of culpability for the recovery of punitive damages (i.e., "clear and convincing proof of recklessness") than for the recovery of actual damages under the statute.

The error was then compounded by this incorrect and incomplete definition of gross negligence being placed upon the verdict form. (R. p. 9-10). Doing so emphasized the incorrect law. Based on its erroneous information about the meaning of gross negligence, the jury concluded that the plaintiffs did not prove that the defendants failed to exercise a slight degree of care. (R. p. 9-10). The jury was never given the opportunity to answer a different question, i.e., whether Dr. Goldstein provided "the care that is necessary under the circumstances." The fact that those questions can elicit different answers signifies that the charge given was not "substantially correct."

"The circuit court must charge the current and correct law to the jury." *Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003) (citing *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995)). Additionally, "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." *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983) (citing *Eaddy v. Jackson Beauty Supply Co.*, 244 S.C. 256, 136 S.E.2d 297 (1964)).

[PLEASE MAKE THIS NEXT PARAGRAPH THE 2D IN THIS SECTION.]Appellants specifically requested the trial court charge the jury that gross negligence also means "the absence of care that is necessary under the circumstances." (R. p. 902, lines 9-10). In defining gross negligence, the Supreme Court has stated:

> Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. *Etheredge v. Richland County School Dist.* 1, 341 S.C. 307, 534 S.E.2d 275 (2000). It is the failure to exercise slight care. *Id.* Gross negligence has also been defined as a relative term and means the absence of care that is necessary under the circumstances. *Hollins v. Richland County School Dist.* 1, 310 S.C. 486, 427 S.E.2d 654 (1993).
>
> *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283, (2003)

The Court of Appeals has acknowledged the same, noting, "The Supreme Court has held that 'gross negligence is a relative term, and means the absence of care that is necessary under the circumstances.'" *Rakestraw v. South Carolina Dep't of Highways & Pub. Transp.*, 323 S.C. 227, 231, 473 S.E.2d 890, 892-893 (Ct. App. 1996) (quoting *Hollins v. Richland Co. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993)).

Appellants requested that the trial court give the correct and complete definition of gross negligence, one encompassing the full description of the term as given by the South Carolina Supreme Court. Limiting the charge to "failure to exercise even the slightest care," and then repeating this incorrect and incomplete definition on the verdict form prejudiced Appellants. The short-hand charge read to the jury did not fully explain the concept of gross negligence. Instead, it presented the jury with only the most constricting, defense oriented language that is found in the case law. With the concept only partially explained, the jury could not have correctly understood the term and could not have correctly applied it to this case. *See Berberich v. Jack,* 392 S.C. 278, 294, 709 S.E.2d 607, 615, (2011) (holding that the trial court's declining Berberich's request to define the concepts of ordinary negligence verses recklessness had "the potential to confuse the jury and skew the apportionment of fault in a manner that favored the defendant," and reversing and remanding for a new trial). The manner in which the jury was charged did not accurately reflect the concept of gross negligence in South Carolina and skewed the definition in a manner that favored the defendant. Therefore, Appellants were prejudiced by this error. Accordingly,

Appellants respectfully submit this court overlooked or misapprehended the law in failing to find the trial court erred in failing to charge the jury on the complete and correct definition of gross negligence.

CONCLUSION

For the reasons stated, Appellants respectfully prays this Court reconsider its prior unpublished opinion filed in this case, or in the alternative have re-argument of the questions presented in this Petition.

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July 6, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

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.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellants, certifies that I have this on this date, July 6, 2017, served copies of the **PETITION FOR REHEARING** upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

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GRAHAM LAW
Shining a Light on Safety, Guiding the Way to Justice.

Edward L. Graham
Diane M. Rodriguez

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July 6, 2017

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Genesie Fulton, individually and as Next Friend for Bryson F., a minor v. L. William Goldstein, M.D., individually and d/b/a L. William Goldstein OB-GYN
Appellate File No. 2015-001237

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of Petition for Rehearing of Appellants Genesie Fulton, individually and as Next Friend for Bryson F., a minor, in the above referenced matter along with my firm's check for $25.00 for filing fee. Once clocked-in, please return a copy with our courier. By copy of this letter, I am serving attorneys for Respondents, with a copy of the same.

With kindest personal regards, I am

Yours Very Truly,

Edward L. Graham

ELG/bh
Enclosures as cited above.

Enclosures
cc: Elloree A. Ganes, Esquire
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