(b)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2016-001551

Christy Byrd, as Next Friend of Julia B., a minor, ... Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

GRAHAM LAW FIRM, P.A.

Edward L. Graham (SC Bar: 2483)

Diane M. Rodriguez (SC Bar: 11274)
GRAHAM LAW FIRM, P.A.
Post Office Box 550
Florence, SC 29503
t. (843) 662-3281
f. (800) 859-7028

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2016-001551

Christy Byrd, as Next Friend of Julia B., a minor, ... Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

GRAHAM LAW FIRM, P.A.

Edward L. Graham (SC Bar: 2483)
J. Layton Ruffin (SC Bar: 78267)
Diane M. Rodriguez (SC Bar: 11274)
GRAHAM LAW FIRM, P.A.
Post Office Box 550
Florence, SC 29503
t. (843) 662-3281
f. (800) 859-7028

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REFERENCE MATERIAL

RULES AND STATUTES

STATEMENT OF THE CASE

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

RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

Appellant objects to Respondents' Statement of Facts to the extent it includes factual inaccuracies, contested factual matter, and misstatements. This includes any statements unsupported by citation, such as Respondents' contention that this delivery involved "two emergencies." (Resp. Brief, p. 4). The transcript as cited says nothing about a nuchal cord being a medical emergency.[1] This unsupported statement should be disregarded.

Whether "Dr. Browning and the hospital nurses immediately took appropriate measures . . . ." is clearly in contention. (Resp. Brief, p. 5). As discussed in the initial brief, Appellant's experts concluded that Dr. Browning (1) failed to instruct the mother to stop pushing, as evidenced by the video; (2) failed to correct inappropriately performed suprapubic pressure, as evidenced both by the video and by nurse Misty's sworn testimony describing how she performs "suprapubic pressure," which even Dr. Browning had to admit was wrong; and (3) use of excessive downward traction to deliver Julia, which is also seen on the video.

Finally, Appellants object to Respondents' summary of the defendants' expert's testimony to the extent Respondents did not support it with citations. Respondents argued their experts opined that "the Infant was not medically stable and that the risk was real and immediate even during those 45 seconds . . . ." Appellants respectfully submit that this is a factually inaccurate summary of what was stated by defense experts as well as Dr. Browning, as shown in Appellant's Brief and in this Reply, *infra*.

---

[1] Appellants conceded that shoulder dystocia is a medical emergency.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT RULING THE OBSTETRIC EMERGENCY AFFIRMATIVE DEFENSE FAILED AS A MATTER OF LAW.

A. Introduction

The issues in this case are clear. There are three elements a defendant physician must prove to avoid the consequences of his negligent actions under the obstetric emergency affirmative defense. Appellant concedes the first, which is that the defendants must prove that care was rendered in a genuine emergency situation. As for the remaining two, Respondents contend there is evidence, even if conflicting, that both infant and mother were not medically stable and that they were in immediate threat of death or serious bodily injury. Appellant argues there is no competent evidence of record to establish these elements and that the defendant doctor himself conceded the patient was medically stable and that there was not an immediate threat of death or serious injury. Appellant now respectfully asks this Court to resolve this issue and, in so doing, give definition and clarity to a statute that has yet to be interpreted by a South Carolina appellate court.

As conceded by Respondents, S.C. Code Ann. § 15-32-230 is an affirmative defense. Therefore, the defendant must prove *all* elements of the defense. Highlighting Appellant's concession of one element, medical emergency, does nothing to prove the remaining two. Moreover, a statute that grants a physician immunity from consequence of negligent acts that disable an infant is clearly a statute in derogation of the common law. As such, it must be strictly construed, in a manner that disturbs common law only to the extent necessary to carry out the clear intent of the legislature.[2] Respondents failed to prove, and indeed conceded, two required elements of the obstetric emergency affirmative defense. Therefore, the trial court erred in failing to find as

[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 unredressed injury and loss resulting from wrongful conduct.").

a matter of law that Respondents failed to prove the obstetric emergency affirmative defense. Finally, Respondents do not contend that if error occurred, their error was harmless.

B. Appellant preserved justiciable issues that are properly before this Court

The issue of whether the trial court erred in failing to grant directed verdict on the obstetric emergency affirmative defense is not merely an academic question, presented in the abstract to this Court. *See e.g. Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992). Appellant clearly raised this issue at trial, and the trial court ruled upon the issue. Appellant argued Respondents failed to prove a patient is not medically stable and a patient is in immediate threat of death or serious injury, two required elements of the obstetric emergency affirmative defense. The trial court ruled against Appellant and denied Appellant's motion for directed verdict. (R. p. 876 lines 10-21). The trial court then denied Appellants' motion for a new trial, which was based upon the same. Moreover, Appellants have not requested an advisory opinion because there is clearly a justiciable issue between the parties that was raised and preserved.

The issues before this Court concern only those aspects of the obstetric emergency affirmative defense that are implicated by the facts of this case. This includes Subsections (A) and (C) of S.C. Code Ann. § 15-32-230. These sections set forth the elements of the affirmative defense that a defendant must satisfy to be shielded from liability for his negligent actions. Appellant clearly argued these elements were not proven and moved for a directed verdict. (R. p. 876 lines 10-19). The same arguments were made in Appellant's motion for a new trial. (R. p. 40-47). The trial court denied Appellant's motion for directed verdict and denied the motion for new trial (R. p. 876 lines 20-21; R. p. 1-4). Therefore, this issue was clearly raised and ruled upon by the lower court. Moreover, there is no question as to the grounds upon which Appellant sought directed verdict. Appellant moved for directed verdict on the grounds that Respondents failed to prove a patient is not medically stable and a patient is in immediate threat of death or harm. (R. p. 876

lines 10-19). Therefore, Appellants were sufficiently specific in stating the grounds for directed verdict for the trial court to rule upon the issue and for the issue to be preserved for appeal. *See e.g. Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (noting that the "objection was specific enough to allow the trial judge to understand and rule upon the alleged error."). *See also S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." citing Toal et al., App. Practice in South Carolina 57 (2d ed. 2002)).

Subsection (B) of Section 15-32-230 concerned instances where there was no previous doctor-patient relationship. If Appellant had requested this Court interpret this subsection, Respondents' concerns regarding advisory opinions would have merit. However, Appellant conceded this section is irrelevant to the facts of this case. Moreover, Appellant conceded this case involves a genuine medical emergency and therefore have not requested this Court address what constitutes a genuine medical emergency. However, issues concerning whether Defendants presented sufficient evidence to create a question for the jury on the remaining two elements are in controversy and were preserved for appeal. As such, there is a justiciable controversy that was preserved for appeal, and Appellant is not seeking an advisory opinion. *See e.g., Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983), "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute."[3]

[3] Respondents argued Appellant did not object to the jury charge on the obstetric emergency affirmative defense. To be clear, Appellant objected to the defense being presented to the jury to determine, irrespective of the charge. Appellant moved for directed verdict for the court to determine as a matter of law the defense failed. The Court ruled

C. Respondents still fail to present evidence of medical instability

Instead of a substantive challenge to Appellant's arguments, Respondents begin by critiquing the wording of Appellant's experts' unequivocal conclusions that this infant was medically stable throughout labor and delivery. Nitpicking expert conclusions, however, does nothing to prove medical stability. Respondents argue Dr. Pliskow based his opinion on post-delivery information. To be clear, Dr. Pliskow did explain how the post-delivery information confirmed what was known in real time through the strips. (R. p. 242 line 22 to 250 line 25). The APGAR scores and cord blood gases provided additional evidence confirming what was shown to Dr. Browning on the strips. *Id.* However, Dr. Pliskow never stated the post-delivery information was required for him to form his opinions, or that without this information, he could not opine the patient was not medically stable. Again, the high APGAR scores and cord blood gases simply confirmed this infant was medically stable throughout the emergency. Dr. Browning conceded this. (R. p. 531 line 1 to 532 line 7, 533 lines 10-23).

Respondents similarly attempt to critique the wording of Dr. Resnick's testimony, despite his clear opinion that this infant was medically stable throughout the emergency. Dr. Resnick explained APGAR scores of 9 and 9 show medical stability, and that the cord blood gases were what you see in a normal baby and what you want to see. (R. p. 375 lines 8-10; 378 lines 10-19). Dr. Resnick was asked and answered:

> Q: So based on that and forgetting about babies generally in shoulder dystocia situations across the board, in terms of Julia B., in this delivery, do you have an opinion sir, as to whether or not she was medically stable or unstable?
>
> A: Stable.
>
> (R. p. 378 lines20-24).

---

against Appellant. However, while Appellant did not object to the charge as given on the affirmative defense, this in no way implies Appellant abandoned their previous argument that the affirmative defense failed as a matter of law.

Dr. Resnick then explained shoulder dystocia was "a medical emergency because if you don't do anything about it, something bad could happen," so there is "a potential for medical instability if you don't do something about it." (R. p. 380 line 13 to 381 line 3). Again, however, Dr. Resnick definitively stated this infant was in fact medically stable. Even Respondents own neurological expert could state only that shoulder dystocia is "potentially dangerous.[4]" (R. p. 834 lines 2 to 3). Finally, it is important to remember who bears the burden of proof on these issues. Appellant's experts never conceded these elements. No proof of these elements came in through Appellant's case. Therefore, to create a question of fact, Respondents were required to submit competent expert opinion. Simply attacking the wording of Appellant's experts proves nothing.

Respondents acknowledge their own experts, and even Dr. Browning, conceded this infant was medically stable. Their admissions end the inquiry. Dr. Browning stated he believed his patient was medically stable. Respondents even quote their own expert's testimony that, "in hindsight we can say that the baby was medically stable." (Resp. Brief p. 13). Respondents know this to be true because the cord blood gases and APGAR scores definitely prove the infant was medically stable. Therefore, to avoid the conclusion even their own experts had to concede is shown by this evidence, Respondents argue the evidence known post-delivery should not be considered because it was only known "in hindsight."[5]

Because the purported "hindsight" evidence was admitted to show medical stability and not to prove negligence, it must be considered. It is irrelevant that Dr. Browning "did not have the benefit" of APGARs or the cord blood gases when managing the shoulder dystocia. Discussion of

---

[4] Appellant reiterates that "potential instability" is not instability. Showing a patient has the potential to become unstable does not prove that the patient was in fact medically unstable. The statute as written requires actual medical instability, not the risk of it. As evidenced by the Subsection (C) of S.C. Code Ann. § 15-32-230, which requires the patient be in immediate *threat* of death, the Legislature clearly knew how to draft the statute to allow for proof of the possibility or potential for instability to be sufficient, but clearly chose not to.

[5] In making this argument, respondents show why the questions raised by Appellant are not mere "ruminations about academic questions."

hindsight only concerns proof of whether the physician complied with the standard of care. Our Courts require that a jury "look at the doctor's actions 'under similar conditions and in like circumstances." *Keaton v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 574 (1999). The hindsight charge merely elucidates this point. *Id.* However, discussion of hindsight relates only to how a jury must evaluate a doctor's conduct. It is irrelevant to determining whether a defendant has proven elements of a statutorily created affirmative defense that is in derogation of the common law. Indeed, the hindsight charge does not even concern causation. As such, Respondents have no basis to argue that because the APGARS and cord blood gases were not known until after the emergency passed, then it should not be considered as proof or disproof of the elements of the obstetric emergency affirmative defense. Therefore, the conclusions reached by Respondents' own experts, namely that the "hindsight" evidence shows medical stability, required a determination that the obstetric emergency affirmative defense failed as a matter law.

Even assuming the cord blood gasses and APGAR scores are not considered, Respondents still fail to acknowledge that no expert for the defense ever testified that the strips were poor or that they showed this infant was not medically stable. If this is the only evidence of record to be considered with respect to medical stability, it still unequivocally supports a finding of medical stability. Respondents ignore that Dr. Browning agreed the strips showed no troubling signs (R. p. 533 lines 10-23). Respondents ignore the fact that their expert Dr. Smithson stated "the fetal heart rate monitor strips showed that the infant tolerated labor very well." (R. p. line 614:25 to 615 line 2). Respondents ignore that their expert Dr. Ernest stated, "Well, the baby's heart rate was stable; so there was a medically stable heart rate." (R. p 674 lines 14-15). The strips provided information to the physician that was knowable throughout the labor and delivery. Thus, even considering Respondents inapposite use of the hindsight rule, their remains unanimous agreement that all

objective evidence shows this infant was in fact medically stable. Therefore, the trial court should have ruled Respondents failed to prove the obstetric emergency affirmative defense.

Finally, instead of addressing Dr. Ernest's self-serving and incredulous definition of "medical stability," Respondents argue Appellant had opportunity to cross the defense experts and that Appellant did not request a specific charge to the jury on medical stability. As stated previously, Appellant has not and does not wish to appeal the language of the charge as it was given to the jury on the obstetric emergency affirmative defense. The issue preserved and raised in this appeal is whether the jury should have been given any charge at all.

To be clear, the admissions of Dr. Browning and the defense experts that this infant was medically stable when considering the post-delivery evidence ends the inquiry. For reasons previously stated, this admission required a finding by the court that the obstetric emergency affirmative defense failed as a matter of law. Nevertheless, Respondents do not even try to address the fact that Dr. Ernest's credulity-straining definition of "medically stable" falls well outside the statutory language of the obstetric emergency affirmative defense.[6] Per Dr. Ernest, despite all medical evidence in this case indicating stability, such as the heart rate or brain status, shoulder dystocia is generally an unstable condition. Guided by Dr. Ernest's own analogy, we know his definition of stability is so broad that it would include a patient whose vitals are completely normal, but who has a cut on his head that just started to bleed, and the bleeding could be stop with only pressure. (R. p. 674 line 19 to 675 line 14).

Respondents failed to address the fact that Dr. Ernest only discussed the *potential* for instability if the emergency went untreated, but not actual medical instability as required by the statute. Showing a patient may potentially become medically unstable if left untreated fails to

[6] The point is illustrated in pages 14-17 of Appellants' Brief.

prove a patient is not medically stable. If the Legislature had intended for proof of potential instability to be sufficient, it would have drafted the statute in such a manner to allow for it. Subsection (C) of S.C. Code Ann. § 15-32-230 reads that the affirmative defense applies if it is proven that the patient is in immediate *threat* of death. The Legislature could easily have included a similar word before "medically stable," such as potential, threat, or possibility, if it had been the Legislature's intent for anything less than actual medical instability to be sufficient. However, as the statute was written, it is clear this was not the Legislature's intention.

Finally, Respondents ignore that Dr. Ernest never stated there was medical instability in this case, but instead merely discussed shoulder dystocia in a general sense. Because Dr. Ernest failed to tie anything about the specifics of this delivery to a finding that this infant was not medically stable, he presented no proof that "the patient is not medically stable," meaning, *this patient in this case* is not medically stable. His statements no more prove medical instability as demanded by the statute than a plaintiff's discussion of causation generally, without claiming a negligent act in the case at hand was a cause of the injury, would prove actionable negligence. Therefore, Respondents failed to prove medical instability, and the trial court erred in failing to grant Appellant's motion for directed verdict that the affirmative defense failed as a matter of law.

D. Respondents still fail to address that Dr. Browning admitted he believed his patient was not in immediate threat of death or serious bodily injury

Again, Respondents critique the wording of Appellant's experts' unequivocal conclusions that the infant in this case was not in immediate threat of death or serious bodily injury. Again, nitpicking conclusions of experts does not prove there was an immediate threat. Moreover, noting that defense experts opined on the subject of immediate threat does not remove the admissions given by Dr. Browning that he believed his patient was not in immediate threat of death or injury.

Respondents note that Dr. Browning stated when he encounters shoulder dystocia he "is worried" about his patient. Clearly, "worry" is drastically different immediate risk of death or serious injury. Even Respondents citations to the transcript note his admission. Dr. Browning was asked, "this child was never at immediate threat of brain damage in those 45 seconds was she," to which he answered, "No." While Dr. Browning might have stated he recognized that a threat existed, he could not and did not state he believed his patient in this case was in immediate threat of death or serious injury. Respondents can recite all the risks associated with shoulder dystocia they wish, but this does not negate Dr. Browning's clear admission that this child was never in immediate threat of brain damage. Dr. Browning admitted:

> Q: This child was never at immediate threat of brain damage in those 45 seconds, was she?
>
> A: No, but you're not – what you're thinking is to resolve this right away in a correct fashion.
>
> . . .
>
> Q: But there's no immediate threat for at least five to seven minutes, true?
>
> A: Well, I would say that when you start getting over two or three minutes, there's increasing risk of problems.
>
> Q: But in the first 45 seconds, there's no immediate threat of any serious harm; true?
>
> A. True.
>
> . . .
>
> Q: As long as the shoulder dystocia is resolved within forty-five seconds, you know, as you said before the two minute mark, there's no immediate risk of any serious harm?
>
> A: Right. Generally.
>
> (R. p. 530 lines 5-8, 530 lines 16-22, 531 line 22 to 733 line 1).

Dr. Browning's own admissions close the door to his use of the obstetric emergency affirmative defense. By analogy, a criminal defendant who takes the stand and testifies she never

actually believed herself to be in danger cannot then argue self-defense through expert testimony. It would be insufficient for her experts to opine that, even if the defendant did not believe herself to be in danger, a reasonable person under the circumstances would have. For a physician to gain immunity from his negligent actions under this affirmative defense, he must have actually believed his patient to be in immediate threat of death or serious harm. Because Dr. Browning admitted he did not believe his patient to be in immediate threat of death or serious harm, he is not protected from the consequences of his actions by the statute. Therefore, the trial court erred by allowing the jury to determine if the statute applied instead of ruling as a matter of law that it did not.

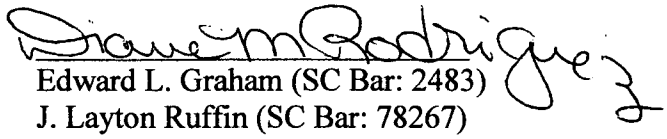
E. Respondents concede that if the trial court was in error, then Appellants were prejudiced because of the error

Respondents have not argued that even if the trial court's ruling was in error, that Appellant suffered no prejudice. Had the statute been ruled inapplicable as a matter of law, Appellants could have proven their case upon a theory of ordinary negligence. Moving the standard for liability from ordinary negligence to gross negligence is patently prejudicial. Accordingly, the trial court committed reversible error by failing to rule as a matter of law that Respondents' failed to prove the obstetric emergency affirmative defense.

CONCLUSION

Although Respondents, seek to mask evidentiary deficiencies by calling this nothing more than a "classic battle of the experts," the record shows Respondents failed to prove required elements of their affirmative defense. For the reasons stated herein and in the Final Brief, Appellant respectfully requests this Court reverse the trial court's denial of Appellants' motion for a new trial absolute and the case remanded for a new trial. Because the affirmative defense fails a matter of law, it should be considered the law of the case in the new trial that the obstetric emergency affirmative defense does not apply.

GRAHAM LAW FIRM, P.A.



Edward L. Graham (SC Bar: 2483)
J. Layton Ruffin (SC Bar: 78267)
Diane M. Rodriguez (SC Bar: 11274)
GRAHAM LAW FIRM, P.A.
Post Office Box 550
Florence, SC 29503
t. (843) 662-3281
f. (800) 859-7028

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUN 30 2017
SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2016-001551

Christy Byrd, as Next Friend of Julia B., a minor, ... Appellant,

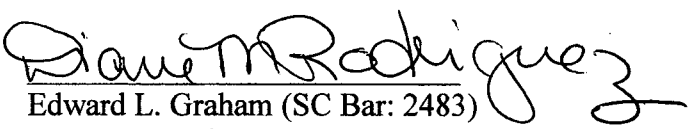
v.

McLeod Physician Associates II and Dr. John B. Browning, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that this ***Final Reply Brief of Appellant*** complies with Rule 211(b), SCACR.

GRAHAM LAW FIRM, P.A.



Edward L. Graham (SC Bar: 2483)
J. Layton Ruffin (SC Bar: 78267)
Diane M. Rodriguez (SC Bar: 11274)
GRAHAM LAW FIRM, P.A.
Post Office Box 550
Florence, SC 29503
t. (843) 662-3281
f. (800) 859-7028
Attorneys for Appellant

June 30, 2017