THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

Case No. 2013-CP-21-00587
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.

PETITION FOR A WRIT OF CERTIORARI

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SC Court of Appeals

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Certificate of Counsel

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals in an Order dated August 18, 2017.

Statement of Issues

I. **Did the Court of Appeals Err in Deciding that the Trial Court Had Not Erred in Failing to Find as a Matter of Law that the Obstetrical Emergency Statute Was Inapplicable to this Case?**

II. **Did the Court of Appeals Err in Deciding that the Trial Court Had Not Erred in Failing to Charge the Jury 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 (hereinafter, "Fulton") brought this action in her individual capacity and as Next Friend of Bryson F., a Minor. She alleged that Dr. William L. Goldstein, and William Goldstein OB-GYN (hereinafter, collectively, "Goldstein") negligently mismanaged the shoulder dystocia which arose during delivery. 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 (pulling force) and properly performing one of the appropriate maneuvers available to safely release the shoulder, Goldstein instead improperly used excessive force. He pulled down on baby Bryson's head with sufficient force to cause the brachial plexus nerves in his neck to be overstretched and torn apart. As a result, Bryson has permanent nerve damage and lifelong disability of his right arm and shoulder.

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, Goldstein 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 Goldstein 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 obstetrical emergency affirmative defense in the Answer, Goldstein 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, Fulton requested the court find as a matter of law that the obstetrical 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). Over Fulton's objection, the trial judge charged the jury that "[g]ross negligence is the failure to exercise even the slightest care . . . ." and declined to charge the complete and accurate charge. (R. p. 921, lines 14-15); and repeated a nearly identical definition on the verdict form itself.

After deliberations, the jury reached a verdict in favor of Goldstein. (R. p. 937, line 11; p. 941, line 15-p. 942, line 13). Ultimately, the jury found that the obstetrical emergency exception applied, thereby requiring proof of gross negligence to establish liability. The jury then found that Fulton had not proven that the Defendants were grossly negligent. (R. p. 942, lines 6-10).

Fulton moved for a new trial absolute. 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).

Fulton then timely filed her notice of appeal with the trial court and Court of Appeals on June 8, 2015.

The Court of Appeals issued its unpublished decision on June 28, 2017, in which it affirmed the lower court. Fulton timely filed her Petition for Rehearing, which was denied by order dated August 18, 2017.

The amount involved in this appeal is in excess of One Million Dollars.

Statement of Facts

Genesie Fulton was working with the South Carolina Department of Corrections as a correctional officer when she learned that she and her husband were going to be having a baby. (R. p. 245, lines 1-5; p. 246, lines 11-17; p. 249, lines 3-11). Because Fulton was a diabetic, she checked and monitored her blood sugars throughout her pregnancy, but she never had any prenatal complication related to her diabetes. (R. p. 253, line 19-p. 255, line 5). Throughout her pregnancy, Fulton was a very compliant patient. (R. p. 348, line 21). She was placed on bedrest sometime around June 15 because of contractions. (R. p. 347, line 25-p. 348, line 7). On August 18, 2009, Fulton went to the hospital with contraction pains. However, the contractions stopped, and she was discharged. (R. p. 259, lines 14-18). She visited Goldstein the next day, who scheduled an induction[1] the following day, on August 20. (R. p. 259, lines 20-24). Dr. Goldstein explained at trial that he scheduled her induction because of her distance from the hospital to be sure she didn't have an issue going into labor and not being able to get to the hospital in time. (R. p. 358, lines 3-10). His decision to induce the next day was not due to any perceived emergent circumstances.

Fulton went to the hospital to be induced. (R. p. 261, lines 4-6). There were never any concerns about the child or mother's well-being at admission. No expert opined that there were

[1] Induction of labor is the bringing about contractions before the mother goes into her own labor through the use of drugs like Pitocin, to cause the muscles to contract and to "ripen" the cervix. (R. p. 103, line 5-p. 104, line 1).

any issues at all with Fulton or her child upon admission. In fact, Goldstein did not assert that there was any issue at all from admission to the time she was ready to start pushing. Goldstein ordered the drug Pitocin to strengthen and increase the frequency of contractions to speed up the delivery. He briefly reduced the amount of Pitocin he was giving the mother because it was causing her to have contractions a little more frequently than he likes to see, and due to some heart rate variability related thereto. (R. p. 379, lines 18-22). He admitted the changes were only subtle and immediately improved once Pitocin was reduced. (R. p. 379, lines 3-8).

After labor progressed, Goldstein entered the room and instructed Fulton to begin pushing. (R. p. 266, lines 16-22). The delivery was complicated by shoulder dystocia, a condition which occurs when the infant's head is out but the shoulder is lodged behind the mother's pubic bone. (R. p. 90, line 20-p. 91, line 5). Goldstein had limited knowledge and experience in resolving shoulder dystocia; and he failed to use proper techniques to resolve it. In fact, he kneeled on the floor to pull down more on Bryson's head. That action made the dystocia worse, not better. He then asked the nurses to call for someone, anyone else, to come in to the delivery room to help him. (R. p. 268, line 15-p. 269, line 5). In response, another obstetrician, Dr. Steven Coker, came to the delivery room and delivered Bryson. By simply placing his hand on Fulton's lower abdomen and applying pressure with his hand, Dr. Coker released Bryson's shoulder and delivered him within a minute of his arrival. (R. 487:12-21; 487:25-488:2; 648:3-13) Dr. Coker said, "Well, I've done what I came to do" and left. (648:3-13) In Goldstein's words, "he [Dr. Coker] came, he saw, he conquered, and he left." (R. p. 487, lines 12-21). (R. p. 487, line 25-p. 4888, line 2; p. 648, 3-13). After delivery, Fulton was informed that Bryson's right arm had been injured during the

delivery and that it was an injury to Bryson's brachial plexus nerves.[2] (R. p. 272, lines 1-17; p. 272, lines 18-25).

Fulton presented evidence that Goldstein did not possess or use the requisite knowledge and skill to safely manage shoulder dystocia. (R. p. 118, lines 2-10). Instead of properly using routine safety maneuvers and gentle traction, Dr. Goldstein deviated from the standard of care by pulling with sufficient downward force to cause permanent injury to all the nerves in Bryson's neck. (R. p. 118, lines 11-22; p. 119, line 19-p. 120, line 4; p. 120, lines 14-22). Those include individual nerves from C4 to T1. Goldstein also caused neuroma formation encompassing C4 to C8. (R. p. 189, lines 3-7).[3]

Bryson required treatment from multiple physicians and received physical and occupational therapy. (R. p. 277, lines 5-17; p. 278, lines 4-20, p. 279, lines 9-13; p. 280, lines 13-18). Upon seeing Bryson at Levine Children's Hospital in Charlotte, a pediatric physiatrist referred him to the brachial plexus clinic in Miami to see Dr. Grossman. (R. p. 281, lines 12-24). Dr. Grossman performed nerve resection surgery on Bryson at Miami Children's Hospital. (R. p. 283, lines 6-16; p. 285, lines 11-19). That resulted in only minimal improvement. Because of the injury, Bryson will require future treatment and assistance. (R. p. 171, line 11-p. 173, line 15). Due to his loss of function in his right arm, Bryson's earning capacity has been reduced. (R. p. 174, line 3-p. 175, line 19).

ARGUMENT

Introduction

[2] The brachial plexus is the network of nerves that come out of the neck and join together and then separate out again. (R. p. 185, lines 22-25). There are six of these nerves, and they are known as C4, C5, C6, C7, C8, and T1. (R. p. 186, lines 11-20). These nerves come down from the neck and go down to the muscles of the arm and allow the arm to work normally. (R. p. 186, lines 3-7).

[3] A neuroma occurs when a nerve is torn apart and the two torn ends start looking for each other and grow out in multiple different directions, ultimately forming a ball of wadded nerves. (R. p. 189, lines 16-24).

This case involves issues of first impression regarding the proper construction of S.C. Ann. Section 15-32-230, commonly known as the "obstetrical emergency statute." Fulton submits that this Court's authoritative interpretation of this statute has material importance not only to the subject case, but also to the litigation, mediation and trial of birth injury cases statewide. Without the Court's guidance, expert witnesses will be free to construe the statute and define its key words and phrases in a manner that best suits the needs of the party retaining them. That would likely result in unnecessary trials and appeals, undermining judicial economy.

Moreover, the decisions below conflict with this Court's precedents in several ways. Those include the following principles: (1) statutes in derogation of the common law must be strictly construed; (2) each word and phrase in a statute must be construed as having purpose, or it would be superfluous; and (3) it is reversible error for a trial judge to decline to charge current and applicable law on a material issue, when so requested by a party.

Fulton respectfully submits that this is exactly the type of case for which a *Writ of Certiorari* should be granted.

I. The Court of Appeals Erred in Deciding that the Trial Court Had Not Erred in Failing to Find as a Matter of Law that the Obstetrical Emergency Statute Was Inapplicable to This Case.

A. The obstetrical emergency statute must be construed in accordance with multiple canons of construction.

1. The obstetrical emergency statute must be construed as a statute in derogation of the common law.

S. C. Code Ann. Section 15-32-230 reads as follows:

> **Emergency medical and obstetrical care exceptions.**
>
> (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 may be held liable unless it is proven that the physician was grossly negligent.

(B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is 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.

Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

This case requires interpretation of sections A and C of the statute. At common law, there are of course no "emergency medical and obstetrical care exceptions," as set forth in S.C. Code Ann. § 15-32-230. Unlike the statute, the common law does not require proof that a defendant doctor was "grossly negligent" to warrant recovery of actual damages. The common law instead provides 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).

A statute that grants immunity to a physician from the consequences of his negligent acts is a statute in derogation of the common law. "[S]tatutes in derogation of the common law are to be strictly construed." *Grier v. AMISUB 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). A statute is not to be construed in derogation of common law rights if another interpretation is reasonable. *Doe v. Marion*, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004). The right to sue one's tortfeasor is a long-standing right in our legal system, which should not be abrogated by statute except through "clear legislative intent." *16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 347, 728 S.E.2d 448, 452 (2012) (Citing *Doe*, supra, 361 S.C. at 473, 605 S.E.2d at 561.) The common law will not be changed by doubtful implication. *Id.* (citing *C.J.S.*, Statutes, Section 534.) Thus, Section 15-32-230 must be strictly construed in a manner which is most consistent with the common law and which favors retention of long-established tort liability principles.

2. The obstetrical emergency statute must be construed so that every word and phrase therein is not superfluous but has meaning and purpose.

As applied to this case, the statute has three key elements which must be satisfied. Those are "genuine medical emergency,"[4] "is not medically stable," and "[is] in immediate threat" of death or serious personal injury. The latter two serve as limitations and restrictions on complete immunity from liability for one's negligence in a "genuine medical emergency." The meaning of each statutory element, and the criteria for proving each element must be different from that of any other element. One cannot be a mere restatement of the other, 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

[4] Plaintiff conceded at trial that this case involved an obstetrical emergency, but the interpretation of "genuine medical emergency" has relevance to the interpretation of other elements, the proper construction of which was preserved by Fulton.

shall be rendered surplusage, or superfluous . . . ." 82 *C.J.S.* "Statutes" § 346.). Moreover, to ignore the limitations and restrictions would distort the intent of the legislature.

A "genuine medical emergency" may thus exist with or without medical instability and with or without any "immediate threat" of harm. There are four possibilities of how these limitations and restrictions may exist in conjunction with a "genuine medical emergency": (1) neither medical instability nor "immediate threat" are present; (2) both medical instability and "immediate threat" are present; (3) there is medical instability but no "immediate threat;" and (4) there is an "immediate threat" but no medical instability. Fulfilling the definition of one element does not fulfill the definition of another, or the other would lack meaning. Proof of one element does not serve as proof of any other, or the other would have no purpose.

3. The statute must be construed to avoid a serious constitutional challenge.

Depending on how this Court construes the statute, serious constitutional issues could arise under the South Carolina and United States Constitutions. Fulton has not asserted and preserved any constitutional challenge in this case because there may be no basis for such challenge, depending on the Court's construction of the statute. Fulton takes this opportunity to point out, however, that certain interpretations could cause constitutional issues to arise, such as the right to trial by jury, due process and equal protection rights, among others. It is respectfully submitted that the statute should be construed to avoid such problems. *See, e.g., State v. Thrift,* 312 S.C. 282, 440 S.E.2d 341 (1994).

4. The statute should be construed as to avoid unjust, unreasonable or absurd results.

Goldstein has argued that the mere presence of shoulder dystocia represents proof of a genuine medical emergency AND an immediate threat of death or serious bodily injury AND an absence of medical stability. Goldstein's argument cannot withstand scrutiny. It conflates the three

statutory elements which of course must have separate and distinct meaning, requiring separate and distinct proof. The defense argument is untenable because, if accepted, it would alter the common law to the maximum extent possible, contrary to legislative intent; and would lead to absurd results. *See Kiriakides v. United Artists Commc'ns, Inc.,* 312 S.C. 271,275, 440 S.E.2d 364, 366 (1994).

For example, Goldstein's proposed construction would provide statutory immunity for all harm caused by the negligence of emergency room doctors during every "genuine medical emergency." That would be unjust, unreasonable and even absurd because the diagnosis and treatment of emergencies is the very reason for the existence of that specialty. Such doctors chose that specialty as their career. To grant them immunity from harm caused by negligence in their day to day work would wreak havoc on the long-established common law principle of fault-based tort liability.

Similarly, one of the primary purposes of the specialty of obstetrics is to manage obstetrical emergencies safely. To grant complete immunity for obstetrical negligence during every "genuine medical emergency" would betray legislative intent and distort the common law beyond recognition. The result would be unjust, unreasonable, and absurd.

Beyond those considerations, the statutory construction proffered by the defense may result in immunity from harm caused by a physician's negligence during a "genuine medical emergency" which was created by the doctor's prior negligence. How absurd would that be?

5. The statute fails to define medical instability or "immediate threat," and those phrases must be construed to signify something other than the medical instability and "immediate threat" present in any genuine medical emergency.

The statute fails to define "genuine medical emergency," "is not medically stable" and "[is] in immediate threat," among other phrases, which must be interpreted by this Court. "[T]he

cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). Undefined terms in a statute must ordinarily be interpreted in accordance with their common and ordinary usage, if doing so conveys clear and definite meaning, consistent with legislative intent. Otherwise, the principles and canons of construction apply, as set forth in Sections I A 1-4 above.

Fulton has not located any definition of "genuine medical emergency." However, "medical emergency" has been defined as "[a] serious and unexpected situation involving illness or injury and requiring immediate action." *See* https://en.oxforddictionaries.com/definition/medical-emergency. "Emergency" has been defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action;" and "an urgent need for assistance or relief." *See* https://www.merriam-webster.com/dictionary/emergency.

The common features of these definitions are the urgency and immediacy of needed medical intervention to avoid serious adverse effects on one's medical state. The legislature must have intended the "[is] in immediate threat" and "is not medically stable" restrictions on applicability of the statute to have meaning and purpose beyond that implied by the "genuine medical emergency" itself, or that phrase would be superfluous.

"Immediate" is "now" or "instantaneous," without the passage of time. For example, the precise definition has been stated as follows: "occurring or accomplished without delay; instant;" "following or preceding without a lapse of time;" "of or relating to the present time or moment." *See* www.dictionary.com/browse/immediate.

The General Assembly deliberately chose the phrase, "[is] in immediate threat," as a limitation on immunity from liability for negligence in a "genuine medical emergency." In so doing, they imbued the phrase with meaning beyond the immediacy of threat involved with every

true emergency. In the context of this case, the phrase cannot refer to the threat of harm which arises during a shoulder dystocia, which threat is implicit in any "genuine medical emergency" involving shoulder dystocia.

For these reasons, the Court must interpret "[is] in immediate threat" to have independent meaning and purpose. In doing so, the time element may be critical. "Is" represents the present tense, but at what time is the present tense to apply? If at the moment the emergency arises, the word choices would be superfluous. If interpreted to mean that that the "immediate threat" is present and existing upon the patient's arrival at the hospital, "[is] in immediate threat" would have meaning and purpose. Similarly, if the phrase is interpreted to mean that the 'immediate threat" is present when the doctor first arrives or should have arrived at the patient's bedside, that too would afford meaning and purpose to the phrase. These suggestions are illustrative, and are not intended to be the only statutory interpretations of the phrase which would convey separate meaning and purpose apart from the emergency itself. However, such interpretations, or something similar, would be in conformity with the mandates (1) to give effect to the legislative intent to restrict the scope of "genuine medical emergency;" (2) to minimize the derogation of common law; and (3) to give meaning and purpose to the limiting phrases chosen by the General Assembly.

To obtain a definition of "medically stable," one must isolate and focus on the word "stable." In the medical context, "stable" has been defined as "steady; not varying; resistant to change." *See* www.medilexicon.com/dictionary/84246. Merriam-Webster on-line does not provide a useful definition of "stable," but defines "stability," in pertinent part as: "the strength to stand or endure;" "the property of a body that causes it, when disturbed from a condition of

equilibrium or steady motion to develop forces or moments that restore the original condition." *See* https://www.merriam-webster.com/dictionary/stability.

The legislature consciously included "is no medical stability" as a limitation on immunity from liability for negligence in a "genuine medical emergency." In so doing, they intended that phrase to have meaning other than the medical instability involved with any true emergency. In the context of this case, the phrase cannot refer to any changes in medical condition associated with labor and delivery itself or a shoulder dystocia complication. These types of medical instability are implicit in any labor and delivery, and any true emergency.

"Is no medical stability" would be distinct from "genuine medical emergency" if its present tense is construed to mean (1) medical instability which is already underway when the patient is first admitted to the hospital; or (2) medical instability which is already present when the doctor first arrives or should have arrived at the patient's bedside. These are illustrative only, and are not intended as a complete list of statutory interpretations of the phrase which would provide meaning and purpose apart from the emergency itself. However, either would be consistent with the requirements to give effect to the legislative intent to limit "genuine medical emergency" and to apply other applicable canons of statutory construction.

Notably, Goldstein did not introduce any competent evidence of medical instability or "immediate threat" under any reasonable definition. He argued that proof of shoulder dystocia itself, and the risks and changes in patient status ordinarily associated with shoulder dystocia, were sufficient to prove all three statutory elements. To accept that argument, one must accept that proof of a true medical emergency itself would avoid the need to prove those two elements which restrict and limit the nature of emergency needed to invoke the protection of the statute. That would defy the intent of the legislature and the other canons of statutory construction set forth above.

B. Goldstein has the burden of proving all elements of the obstetrical emergency exception, because the statute represents an affirmative defense.

S.C. Code Ann. § 15-32-230 is an affirmative defense which 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 did plead 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 prove 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, Goldstein asserted his affirmative defense based upon the statutorily created obstetrical emergency care exception, but failed to present evidence in proof of medical instability and "immediate threat." 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,[5] a defendant physician is required to prove not only that the claim arose out of care rendered in a genuine emergency situation, but also has the burden of proving that both limiting and restricting conditions have been met. Goldstein has presented no *prima facie* evidence of either of those two limitations, medical instability or "immediate threat." Thus, he cannot escape liability for harm caused by his negligence, and the statute should not have been charged or placed on the verdict form.

C. Whether or not a patient is "medically stable" or in "immediate threat" of death or serious bodily injury are issues requiring expert testimony.

Determination of a patient's medical condition, medical stability and "immediate threat" is beyond the ambit of common knowledge, learning and understanding. Special training and learning is necessary to opine on such medical issues. *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 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

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

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 expert opinion on these medical issues came from Dr. Hall, who stated unequivocally that the patients in this case were medically stable. (R. 859:2-16) Goldstein offered no testimony from anyone that a patient was not medically stable or in "immediate threat." Given the absence of any testimony that the patient was not medically stable or in "immediate threat," the trial judge should have determined as a matter of law that the affirmative defense had not been established. For this reason alone, the statutory defense should not have gone to the jury.

Even assuming *arguendo* that a jury had the knowledge and training to analyze and determine these medical issues, the evidence introduced by Goldstein does not allow the inference of medical instability or "immediate threat" to be drawn. As proffered by Goldstein, testimony about Bryson's signs and symptoms were not tied to the statutory elements of medical instability or "immediate threat." Additionally, it conflated the three statutory elements. For all of these reasons, the obstetrical emergency statute is inapplicable to this case as a matter of law.

D. Goldstein failed to present any competent evidence that any patient was not medically stable at any point in time, from admission through discharge.

Goldstein failed to present any evidence from anyone that either of his patients was medically unstable at any time from admission to discharge. The statute unambiguously required this of Goldstein, for him to avail himself of the statutory protections. Because he failed to offer even a modicum of evidence on medical instability, the trial judge should have determined as a matter of law that the obstetrical emergency exception did not apply.

Goldstein's own testimony as an obstetrical expert does not support any medical instability in this case. After opining that he did not breach the standard of care by pulling too hard down on

Bryson's head,[6] Dr. Goldstein explained that Bryson had an umbilical cord wrapped loosely around his neck, but should still be getting adequate oxygen: "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 oxygenation problems arise when 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 either one of his patients were not "medically stable," either at admission or at any other point during labor and delivery.

Goldstein called Dr. Gower as his next obstetrical expert. In testifying to why he believes shoulder dystocia is an emergency (R. p. 510, lines 21-p. 511, line 1), Dr. Gower listed potential risks associated with shoulder dystocia and the injuries which might sometimes occur. However, he did not distinguish between those associated with the condition itself or with the mismanagement thereof; and he made no effort to discuss which, if any, were present in this case. He made no assertion whatsoever that either mother or baby in this case were not "medically stable," at any time from admission through delivery.

Goldstein's final obstetrical expert was Dr. Salley. He offered the opinion that shoulder dystocia is an obstetrical 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

[6] Dr. Goldstein 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), that he had 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 that he admitted that he was not qualified to offer any opinion on what caused Bryson's injuries in this case. (R. p. 476, lines 14-20).

"medically stable" at admission, or at any other time throughout the course of labor and delivery. Again, defense counsel chose not to ask Dr. Salley for his opinion under oath of whether the mother or child was at any time not "medically stable."

The only evidence from any source about medical stability came from Fulton's expert witness, Dr. Michael Hall. Dr. Hall testified unequivocally that both Fulton and Bryson were "medically stable" from admission through labor and delivery. (R. p. 859, lines 2-16).

Despite presenting testimony from three different obstetrical experts, Goldstein could not get a single one to assert on the record, under oath, (1) that Fulton was not medically stable, at any time from her hospital admission through her delivery of Bryson; or (2) that Bryson was not medically stable at any point from his mother's admission to through his birth. For this reason, Goldstein's 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 trial judge presented the statutory defense to the jury by charge and by verdict form; 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 as charged by the trial judge, and they found for the defense. (R. pp. 9-10).

In light of the jury's determination, Fulton was clearly prejudiced by the court's erroneous decision to submit the obstetrical emergency statute for jury consideration. Accordingly, Fulton respectfully requests that this Court reverse the trial court's denial of her motion for a new trial absolute.

E. Respondents failed to present any evidence that any patient was in immediate threat of death or serious bodily injury.

Goldstein did not present evidence that there was an "immediate threat" of death or serious bodily injury from the condition of shoulder dystocia in this case. The suggestion that brain injury or death may follow shoulder dystocia merely states the reason why it is a genuine medical emergency requiring immediate intervention by obstetricians in compliance with applicable standards of care for safe resolution of shoulder dystocia.

Shoulder dystocia itself does not represent an immediate threat of death or serious bodily injury in any meaningful statutory sense. Goldstein was at bedside when the shoulder dystocia arose, and there was absolutely no threat of death or serious harm *occurring at that moment in time.* Goldstein argues that an "immediate threat" is present any time a shoulder dystocia occurs. That interpretation would give the phrase no separate meaning and purpose, as required.

Goldstein himself 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 there was no expert testimony of any "immediate threat" in this case, there was no issue for the jury to resolve on that point. There being no competent proof, the obstetrical emergency affirmative defense fails as a matter of law. It should not have been charged or placed on the verdict form. Charging the statute prejudiced Fulton by requiring proof of gross negligence for her to recover, when the common law permits her to recover for all damages caused by ordinary medical negligence. For this reason, the trial court erred in charging the statute, and the denial of her motion for new trial absolute should be reversed.

II. The Court of Appeals erred in deciding that the trial court had not erred in failing to charge the jury on the correct and complete definition of gross negligence

After learning that the trial court intended to charge the jury on the emergency exception statute, the definition of gross negligence in his charge became vitally important to Fulton. The trial judge indicated he intended to charge the jury only that gross negligence was "the failure to exercise even the slightest care." Fulton requested the trial court to 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). The error was compounded by the incorrect and incomplete definition being placed upon the verdict form. (R. p. 9-10).

The jury determined that the emergency obstetrical exception applied. (R. p. 9-10). The verdict form reminded the jury that Fulton must now prove gross negligence. The form stated that gross negligence was defined as "a failure to exercise a slight degree of care." (R. p. 9-10). Ultimately, the jury concluded that the Fulton did not prove that Goldstein failed to exercise a slight degree of care. (R. p. 9-10).

Fulton had specifically requested the trial court to charge the jury the complete and correct definition of gross negligence, including but not limited to the portion which states that gross negligence has been defined as "the absence of care that is necessary under the circumstances." (R. p. 902, lines 9-10). In defining gross negligence, this 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 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)).

The courts below stated that Fulton's requested charge was adequately covered by the charge as a whole. That is plainly erroneous, as the only relevant part of the charge defined gross negligence as "the failure to exercise even the slightest care." It is difficult to grasp how that truncated, pro-defense definition provided any guidance to the jury that gross negligence is also "the absence of care required under the circumstances."

The error in charging and placing on the verdict form only the most pro-defense definition of gross negligence was compounded in the circumstances of this case. That is because the phrase "grossly negligent" was contained in a statute which is in derogation of the common law. As such, all parts of the statute must be construed to depart as little as possible from the common law. The erroneous charge does the opposite. It maximizes departure from longstanding time-tested principles.

The trial court's decision to limit its gross negligence charge to "failure to exercise even the slightest care" prejudiced Fulton. Repeating this incorrect and incomplete definition on the verdict form further prejudiced Fulton. The short-hand charge read to the jury did not fully explain the concept of gross negligence, but instead presented the jury with only the most defense-oriented language that is found anywhere in the case law. With the concept of gross negligence 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 versus 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 jury charge in this case did not accurately reflect the concept of gross negligence in South Carolina and skewed the definition in a manner that favored Goldstein and prejudiced Fulton. Failure to give the complete, current and correct law is reversible error.

Conclusion

For the reasons stated, Petitioner respectfully requests the Court to issue its Writ of Certiorari.

Respectfully submitted,

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