THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

Case No. 2013-CP-21-00587
S. Ct. App. No. 2017-001886

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

v

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

REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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

Attorneys for Petitioner

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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 Facts

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

Goldstein acknowledges that his first attempt at an episiotomy was inadequate, thereby requiring him to take time to cut a second. However, despite cutting the mother twice, Dr. Goldstein stated he still "was unsuccessful in being able to jam my hand into the vaginal canal . . . ." (R. p. 458, lines 18-20; p. 461, lines 14-24). Additionally, Goldstein did not dispute that after he was unable to resolve the shoulder dystocia that he called to "get someone in here, get someone in here. It doesn't matter. Get a doctor, anybody. Get someone in here." (R. p. 269, lines 2-4). Indeed, Goldstein acknowledged that Dr. Coker came to the room and resolved the matter, ultimately in less than a minute. (R. p. 487, line 25-p. 488, line 2; p. 648, lines 3-13). In Dr. Goldstein's own words, "he came, he saw, he conquered, and he left." (R. p. 487, lines 12-21). In Dr. Coker's words, he stated, "Well, I've done what I came to do." (R. p. 648, lines 9-10).

Goldstein highlight the APGAR scores, which are known only *after* delivery. Dr. Goldstein explained the APGAR scores showed that "the baby was improving." (R. p. 411, line 1). Goldstein similarly draw attention to the cord blood gas, which is also not known until after delivery. The cord blood gas of 7.19 was one one-hundredth below what Dr. Goldstein explained he likes to see.

(R. p. 411, lines 14-16). Finally, Goldstein notes the presence of a nuchal cord, which he explained in some cases may be tight, but "in this case, we were able to slip it over the head." (R. p. 409, lines 17-25). Importantly, Goldstein cites no testimony that any of the aforementioned, considered alone or together, caused either mother or child to not be medically stable. That is because no witness offered testimony the mother or child was not medically stable.

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

Finally, Fulton noted that Goldstein presented partial excerpts of testimony from Dr. Gomez-Carrion, Fulton's obstetric expert witness, that were elicited on cross. A more accurate presentation of her testimony reveals that Dr. Gomez-Carrion stated that, based on Dr. Goldstein's own sworn testimony, he did not exhibit the knowledge and experience needed to safely resolve shoulder dystocia. (R. p. 116, line 19-p. 117, line 12). She noted that the standard of care required a physician to not go beyond using gentle traction when managing shoulder dystocia, and Dr. Goldstein's deposition testimony showed he was not even aware that this was the standard. (R. p. 118, line 16-22). She explained the standard of care requires the physician to instruct the mother to stop pushing after shoulder dystocia is diagnosed and that Dr. Goldstein failed to do so. (R. p. 120, line 5-13). Dr. Gomez-Carrion explained why Bryson's permanent brachial plexus birth injury was caused by Dr. Goldstein's excessive pulling, (R. p. 120, lines 11-22) through the use of illustrations and recitation of transcript testimony. (R. p. 124, line 16-p. 128, line 1). Dr. Michael K. Hall, Fulton's rebuttal obstetric expert witness, similarly highlighted deficiencies in the care

provided by Dr. Goldstein but also went on to explain why both mother and infant were in fact medically stable throughout the delivery. (R. p. 859, lines 2-16). Dr. Hall's testimony was the only testimony presented by any witness regarding whether a patient was or was not medically stable.

Argument

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.

Goldstein has not challenged the characterization of South Carolina Code Section 15-32-230 as a statute in derogation of the common law. Thus, the statute 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. The immunity it provides obstetricians from professional negligence should be restricted to the maximum extent possible.

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

Goldstein has not challenged the proposition that every word and phrase in the obstetrical emergency statute must be construed so that none are superfluous, and each has meaning and purpose. Thus, "immediate threat" of death or serious personal injury and "not medically stable" must be interpreted as meaningful limitations on immunity arising out of a "genuine medical emergency." 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 shall be rendered surplusage, or superfluous . . . ." 82 *C.J.S.* "Statutes" § 346.).

There is great risk that not only a jury, but also the bench and bar will conflate the three statutory requirements, and believe that proof of any one element proves the others. Respectfully, even the trial court seems to have missed the point that there are three separate elements, with each having distinct meaning and proof requirements: However, the trial court wisely reflected that: "If I was in a spot where eight minutes might get cerebral palsy or dead, I would consider that to be an emergency." R. 842:17-19; Tr. 1116:17-19. Because the statutory elements can be so easily misunderstood, Fulton respectfully requests the Court to provide authoritative definitions to the bench and bar.

Goldstein continues to argue 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. His Return attempts to justify that argument by asserting that the concepts are interwoven and indistinct from a medical viewpoint. Even if true, it is difficult to discern how that would have any bearing on proper judicial interpretation of statutory words and phrases and application of other canons of statutory construction. If the defense argument was accepted, it would alter the common law unnecessarily, to the maximum extent possible. Such a result would defy well-established canons of construction, undermine legislative intent, and lead to absurd results. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271,275, 440 S.E.2d 364, 366 (1994).

Goldstein blames Fulton for her failure to request a charge on the proper statutory definitions of "immediate threat" and "not medically stable." That argument misses the crux of Fulton's argument: Goldstein presented no competent evidence of "immediate threat" or "not medically stable" *under any definition*. It is not a matter of the statutory elements being left undefined or improperly defined. It is a matter of Goldstein wrongly assuming that Fulton's

concession of "genuine medical emergency" satisfied the other elements without need for him to address them directly. For this reason, there was no mandate for Fulton to have requested a charge defining those terms. Moreover, the correct definition of those statutory words and phrases cannot be known with any certitude until this Court determines what they are.

Goldstein asserts that Fulton preserved only the issue of sufficiency of the evidence on medical instability, and not the presentation of the statutory defense to the jury through the charge. That is incorrect. Fulton argued at length during the charge conference about (1) the inapplicability of the statute because of Goldstein's failure to make a *prima facie* case of its required elements; (2) the inappropriateness of requiring Fulton to prove gross negligence, because the statute should be ruled inapplicable; and (3) the inappropriateness of the gross negligence charge the court intended to give. R. 838:10-24; 839:20-842:23; 843:18-845:11; 892: 12-25. Tr. 1112:10-24; 1113:20-1116:23; 1117:18-1119:11, 1166:12-25. These, collectively, were the gross negligence issues. After the court's charge, Fulton succinctly objected to these gross negligence issues. R. 935:4-12; Tr. 1282:4-12. In context, that was sufficient to preserve all issues touching on gross negligence, including the obstetrical emergency statute wherein the gross negligence provision appears.

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

Goldstein has not challenged the proposition that the obstetrical emergency statute must be construed to avoid a serious constitutional challenge. Fulton respectfully submits that the statute should be construed to avoid constitutional issues such as the right to a jury trial, due process and equal protection. *See, e.g., State v. Thrift,* 312 S.C. 282, 440 S.E.2d 341 (1994).

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

Goldstein has not challenged that expert testimony is required to prove medical instability

or immediate threat of death or serious injury. Rather, he argues that those statutory requirements can be inferred from expert testimony about various signs and symptoms. That is untrue. Testimony about any particular medical conditions, risks and other factors has no evidentiary value unless it is directly tied to both Bryson and the statutory elements.

Goldstein's expert testimony describes certain medical factors, conditions, and risks without any effort to distinguish whether those apply to Bryson Fulton or only some other unnamed patient(s). For example, Goldstein presented evidence that on very rare occasions, certain babies had been born with brain damage after a two-minute shoulder dystocia. R. 492:25-493:2; 753:17-18; Tr. 754:25-755:2; 1021:17-18. However, such evidence was presented with no attempt to explain the cause or timing of such brain damage, other than that a shoulder dystocia occurred. Id. There was no testimony of any commonality between those patients and Bryson other than the mere presence of shoulder dystocia. There was no information given about the brain damaged child's gestational age, fetal reserves, genetic composition, metabolic status, blood clotting factors, prenatal course, concurrent health problems, use of forceps or vacuum at delivery, or status of the brain before labor began. *Id.* Testifying to deleterious outcomes of other patient(s) without commonality or context provides no help to the jury. It merely provides fodder for jury speculation.

As another example, the defense discussed how umbilical cord knots or tight nuchal cords can reduce oxygenation to a baby, as though that provided important and helpful information to the jury. R. 363:7-364:3. However, that testimony applied neither to Bryson or the statutory elements, as the Goldstein later admitted that Bryson had no knot or tightness in his umbilical cord, which was loosely looped over his neck and easily slipped back over. R. 409:12-410:4. Again, the testimony had no purpose other than to serve as fodder for jury speculation.

As a final example, Goldstein claims that pre-birth fetal heart tracings and post-birth Apgar scores and cord blood gases are relevant to required proof of the statutory elements. Yet no defense expert opined that such data represented medical instability or an immediate threat of death or serious bodily injury. Indeed, Goldstein provided evidence that the purpose of such testimony was not to prove "immediate threat" or medical instability, but to offer evidence that Bryson's nerves may be more vulnerable to injury because of reduced muscle tone. R. 670:6-13; 746:22-23; Tr. 944:6-13; 1020: 22-23.

Defense testimony about medical conditions not expressly connected to Bryson has no probative value about any "immediate threat" or medical instability *in Bryson's delivery.* Testimony about Bryson's test results also have no such probative value, because it is not connected to the concepts of "immediate threat" or medical instability in his delivery.

It is not the jury's role to determine whether a cluster of medical test results and heart tracings meet the statutory requirements of "immediate threat" and medical instability. Those are medical-legal concepts which require expert testimony. When expert testimony is required to prove the basis for statutory immunity, that testimony must connect the dots between the facts and the statute. It is not sufficient to argue that "immediate threat" and medical instability are present because an emergency is present. Nor is it sufficient to present testimony about specific details of a medical situation, without reference to "immediate threat" or medical instability, then argue that the jury can determine on that basis whether undefined statutory requirements have been met. To allow such an approach is to allow rampant speculation by lay people about challenging medical-legal concepts.

In an attempt to remedy his failure to present competent evidence of "immediate threat" and "not medically stable," Goldstein now seeks to reframe Fulton's position as criticism of a failure to use "magic words." Goldstein's argument is without merit.

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

Contrasting the facts of this case to the cases cited by Goldstein makes the distinction clear. In *Gamble v. Price,* 289 S.C. 538, 541, 347 S.E.2d 131, 132 (Ct. App. 1986), the plaintiff had set forth evidence at trial through an expert witness that the plaintiff had sustained permanent disability. *Id.* at 541, 347 S.E.2d at 132. Appellant argued the plaintiff's witness did not offer his opinion that the plaintiff suffered a permanent disability, "most probably." *Id.* at 541, 347 S.E.2d at 132. The Court essentially concluded that any similar language such as "most definitely," "definitely" or "did" cause the injury is sufficient to show the expert holds his opinion with the requisite level of certainty. In the case at hand, the concern is not the level of certainty of opinions offered; it is the total failure of Goldstein's witnesses to offer opinion at any level of certainty.

Stallings v. Ratliff, 292 S.C. 349, 356 S.E.2d 414, (Ct. App. 1987), also cited by Goldstein, stated, "the critical issue was not a question involving medical knowledge and judgment, but simply a question of who was telling the truth about whether [Defendant doctor] disclosed the risk." *Id.* at 354, 356 S.E.2d at 417. The Court then noted that credibility of a witness is a question for the jury. In this case, the critical issue, whether a patient was not medically stable, clearly requires medical knowledge and judgment and is not a question of determining witness credibility.

Efforts to characterize the relevant issue as one concerning whether or not "magic words" were used is meritless. In *Stallings*, the defendant himself established that there was a duty to disclose a particular risk and the only question was whether or not he disclosed the risk. *Id.*

For these reasons, competent expert testimony is required for an obstetrician to meet his burden of proving the statutory requirements of "immediate threat" and medical instability. Goldstein failed to do so as a matter of law, warranting reversal.

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

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).

Goldstein's evidence about Bryson's alleged medical instability focused on the assertion that any child whose birth is complicated by shoulder dystocia, including Bryson, may potentially become medically unstable in the future. That assertion, even if true, does not meet the statutory requirement of "not medically stable." Had the General Assembly intended potential future medical instability to trigger the statutory protection for Goldstein, it could have easily said "subject to potential medical instability in the future" rather than "not medically stable." The legislature did not do so, because it did not intend the strained interpretation proffered by Goldstein.

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

A need for immediate treatment cannot suffice as proof of the "immediate threat" required to obtain statutory immunity. A need for immediate treatment characterizes every medical emergency.

Also, a potential future threat cannot suffice as proof of an "immediate threat" in the present, as the statute requires. Shoulder dystocia itself does not represent an immediate threat of death or serious bodily injury in any meaningful statutory sense. It creates a potential future risk, especially if mismanaged, or if occurs outside of the doctor's presence. Here, 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.* Defense experts argue that an "immediate threat" is present any time a shoulder dystocia occurs, but that interpretation would give the phrase no separate meaning and purpose, as required.

For example, Goldstein admits in his Return that his expert Dr. Gower could confirm that an obstetrician in Goldstein's position would have begun *thinking* about *possible harm.* Return 11:26-27. *Thinking* and *possible* are a far cry from "immediate threat."

Similarly, Goldstein's Return confirms that defense expert Dr. Salley could not go farther in his testimony that to discuss shoulder dystocia as a risk of brain damage from reduced oxygenation. Return 12:13-21. Yet even that testimony did not purport to describe the risk in terms of immediacy, not did it attempt to address whether such a general risk had any bearing on Bryson's birth.

Goldstein contends Fulton conceded the defense had satisfied the element that there be an "immediate threat of serious bodily injury or death." A review of what was actually discussed with the judge reveals this is false. The excerpt quoted by Goldstein notes only acknowledgment by Fulton of the existence of a "threat" but at no point concedes the immediacy of the threat as required by the obstetric emergency exception. Fulton's focus was on the inapplicability of the obstetrical emergency statute, because there had been absolutely no competent evidence presented to prove its limiting elements. Though she addressed medical stability at greater length, she also

discussed the absence of an "immediate threat" because any risk of harm was not in the present. R. 838:15-20; 840:5-13; 841:12-24. Tr. 1112:15-20; 1114: 5-13; 1115:12-24.Issue of concession aside, even if Goldstein had satisfied this element, Goldstein still wholly failed to satisfy the required medical stability element in order to receive statutory protection from negligent acts. Stated differently, satisfaction of the "immediate threat" element does nothing to satisfy the "medically stable" element, and all the elements had to be satisfied.

II. The 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.

Goldstein appears to assert that Fulton waived objection to the jury charge. Goldstein bases this argument solely on the assertion that Fulton did not also cite to her objection to the footnote on the verdict form that restated the jury charge. However, in the initial brief, Fulton stated the error of incorrectly charging the jury "was compounded by this incorrect and incomplete definition being placed upon the verdict form." (App. Final Br. p. 13). To be clear, the issue on Appeal is the error in the charge provided to the jury, in all manner by which the charge was presented to the jury. The verdict form merely restated the objected-to, incomplete definition of gross negligence. As Fulton dedicated pages of discussion concerning their issue with the charge, it is hard to understand how this issue was waived. Nevertheless, Fulton clarified that the issue appealed is the judge's failure to charge the jury on the correct and complete definition of gross negligence, both as it was read to the jury and to the extent the objected-to charge was restated on the verdict form.[1]

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

[1] As Goldstein pointed out, Fulton did in fact object to the inclusion of the charge on the verdict form at trial. (R. p. 908, line 5-14).

> 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 trial court charged only the middle sentence of the quoted charge, or at least its substance (the court changed absence of "slight care" to "even slight care" and "even the slightest care."). R. 927:8-16; 936:15-18. Tr. 1269:8-16; 1277:15-18. The defense contends that defining "gross negligence" as an absence of "slight care," "even slight care" or "even the slightest care" is sufficient to provide the complete, current and correct law. To the contrary, the above-quoted definition recognizes that gross negligence is broad enough to include reckless failures to act and intentional acts; and explains that gross negligence is a relative term, encompassing "the absence of care that is necessary under the circumstances."

Of the quoted charge's three sentences, the first and last sentences differ significantly from the middle sentence. They afford a much larger basis for a finding of gross negligence. The middle sentence is as restrictive and pro-defense a definition of gross negligence as one could imagine. It is difficult to fathom how charging only the middle sentence provides any instruction or insight to the jury about the other aspects of gross negligence in South Carolina jurisprudence. That is especially improper in the context of a statute in derogation of common law.

If a victim of obstetrical negligence must prove an absence of slight care to avoid defense immunity, that signifies that a doctor committing extreme misconduct would still likely be immune from liability. One guilty of recklessness, consciousness of wrongdoing, intentional misconduct, and/or horrific negligence would still obtain immunity if the jury was not convinced that there was an absence of *slight care.* Because the obstetrical emergency statute's grant of immunity is in derogation of the common law, any gross negligence charge under this statute should be one that

minimally disrupts the common law. Charging only the harshest, pro-defense definition does the opposite. Failure to give the complete, current and correct law in this case is reversible error.

Conclusion

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

Respectfully submitted,

GRAHAM LAW FIRM, P.A.

By: _____

Edward L. Graham (SC #2483)
Diane M. Rodriguez (SC #11274)
Post Office Box 550
Florence, SC 29503
t. (843) 662-3281
f. (800) 859-7028
Attorneys for Petitioner

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PROOF OF SERVICE

I hereby certify that one copy of the ***Petitioner's Reply to Respondent's Return Petition for a Writ of Certiorari*** in the above captioned matter was served by U.S. Mail, postage prepaid, on November 6, 2017 addressed to the following counsel of record:

Robert H. Hood (SC #2599)
Mary Agnes Hood Craig (SC #6960)
Elloree A. Gaines (SC #70509)
Deborah Harrison Sheffield, *Of Counsel* (SC #2757)
Hood Law Firm, LLC
Post Office Box 1508
Charleston, SC 29402

GRAHAM LAW FIRM, P.A.

By: _____
Edward L. Graham (SC #2483)
Diane M. Rodriguez (SC #11274)
Post Office Box 550
Florence, SC 29503
t. (843) 662-3281
f. (800) 859-7028
Attorneys for Petitioner

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