

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

RECEIVED

SEP 14 2017

S.C. SUPREME COURT

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

Appellants,

v

v.

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

Respondents.

APPENDIX
Vol 3 of 3

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**SUPPLEMENTAL RECORD ON APPEAL
VOLUME 3**

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Transcript of Trial, May 4-8-2015:

Brittany Prince

Cross 1

1 with your mother when Bryson was born. Do you remember
2 that?

3 A Yes, sir.

4 Q And you consider that delivery to have been an
5 emergency, didn't you?

6 A Yes, sir.

7 Q And the entire time that you were in the room, Dr.
8 Goldstein didn't do anything but devote his efforts
9 towards delivering Bryson. Isn't that true?

10 A Yes, sir.

11 Q He stayed right there and he tried to deliver Bryson.

12 A Yes, sir.

13 Q And you weren't frustrated with anything he was trying
14 to do at the time?

15 A No, sir.

16 Q And you stayed in the delivery room until he was
17 delivered, didn't you?

18 A Correct.

19 Q Do you remember when the other doctor came in to help
20 Dr. Goldstein deliver the baby?

21 A Yes, sir.

22 Q Do you think it was about a minute after he came in that
23 the baby was delivered?

24 A I really can't remember the time, but it could have been
25 less than five minutes, but I can't really remember the

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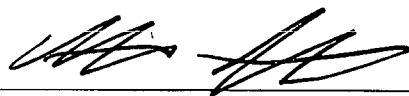
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: _____



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April 26 2016

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FAILING TO FIND AS A MATTER OF LAW THAT THE OBSTETRIC EMERGENCY STATUTE WAS INAPPLICABLE TO THIS CASE?**
- II. DID THE TRIAL COURT ERR IN FAILING TO CHARGE THE JURY ON THE CORRECT AND COMPLETE DEFINITION OF GROSS NEGLIGENCE?**

STATEMENT OF THE CASE

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

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

are they parties to this appeal. An Amended Complaint was filed on April 30, 2015. (R. pp. 37-42).

The case went to trial against Respondents in the Florence County Court of Common Pleas beginning on May 4, 2015, with the Honorable Michael G. Nettles serving as presiding trial judge. Trial started on a Monday and concluded that Friday, May 8, 2015. Despite alleging the obstetric emergency affirmative defense in their Answer, Respondents put forth no evidence at trial on several of the elements required for a defendant to avail itself of the statutorily created defense. For this reason, after the defense rested, Appellants requested the court find as a matter of law that the obstetric emergency affirmative defense did not apply to this case and must not be included in the jury charge or on the verdict form. (R. p. 838, line 8-p. 839, line 1; p. 839, line 20-p. 842, line 23). Ultimately, the Court determined it was a question of fact to go to the jury. (R. p. 845, lines 12-15). After understanding that the judge intended to include the obstetric emergency affirmative defense in the jury charge and on the verdict form, Appellants next inquired of the judge how he intended to define “gross negligence” for the jury. (R. p. 902, lines 1-3). After learning that the trial court intended to charge that “gross negligence is the failure to exercise even the slightest care,” Appellants requested the trial court to charge the correct and complete definition of gross negligence that was necessary for the jury to correctly understand the concept of gross negligence under South Carolina law. (R. p. 902, lines 4-12). The trial court denied the request and stated that “there’s just going to be a short definition on what gross negligence is.” (R. p. 902, lines 13-16). Indeed, the jury was charged only that “[g]ross negligence is the failure to exercise even the slightest care” (R. p. 921, lines 14-15).

Deliberations began around 6:00 PM, and just after 10:00 PM that Friday, the jury reached a verdict in favor of the Defendant. (R. p. 937, line 11; p. 941, line 15-p. 942, line 13). Ultimately,

the jury found that the obstetric emergency exception applied, thereby requiring gross negligence. The jury then found that the Plaintiff did not prove that the Defendants were grossly negligent. (R. p. 942, lines 6-10).

Appellants moved for a new trial absolute, and the judge agreed to hear the motions on a future date. (R. p. 946, line 11-p. 947, line 11). Appellants then filed a motion for new trial absolute on May 15, 2015, (R. pp. 51-67). The trial judge heard oral argument on May 19, 2015. The Court entered its order denying the motion for new trial on the same date. (R. pp. 5-8). Appellants then timely filed their notice of appeal with the trial court and court of appeals on June 8, 2015. The amount involved in this appeal is in excess of One Million Dollars.

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 Genesie 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, Genesie was a very complaint 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, Genesie went to the hospital with pains and was told she was contracting. However, the contractions stopped, and she was dismissed. (R. p. 259, lines 14-18). She visited Dr. Goldstein the next day, who then scheduled an induction¹ 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

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).

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.

Genesie 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 any issues at all with Genesie or her child upon admission. In fact, Dr. Goldstein did not assert that there was any issue at all from admission to the time she was ready to start pushing. Briefly Dr. Goldstein 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. (R. p. 379, lines 18-22). However, he admitted the changes were only subtle and immediately improved once Pitocin was reduced. (R. p. 379, lines 3-8).

After labor progressed, Dr. Goldstein entered the room and instructed Genesie 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 stuck behind the mother's pubic bone. (R. p. 90, line 20-p. 91, line 5). Dr. Goldstein failed to use proper techniques to resolve the shoulder dystocia and 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). Another obstetrician, Dr. Steven Coker, came to the delivery room. In less than a minute, in Dr. Goldstein's words, "he came, he saw, he conquered, and he left." (R. p. 487, lines 12-21). By simply placing a little pressure just above the mother's pubic bone, Dr. Coker freed the stuck shoulder and delivered Bryson in less than a minute. (R. p. 487, line 25-p. 4888, line 2; p. 648, 3-13). Dr. Coker said, "Well, I've done what I came to do" and then left. (R. p. 648, lines 9-10). After delivery, Genesie 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).

Plaintiffs presented evidence that Dr. Goldstein did not exhibit the requisite knowledge in terms of implementing any number of maneuvers to safely manage shoulder dystocia. (R. p. 118, lines 2-10). Instead of properly employing these maneuvers in connection with gentle traction (pulling), Dr. Goldstein deviated from the standard of care by pulling with sufficient 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). The force applied by Dr. Goldstein onto Bryson's nerves was sufficient to damage each and every one of the brachial plexus nerves innervating his right arm, from C4 to T1 and caused neuroma formation encompassing C4 to C8. (R. p. 189, lines 3-7).³

Bryson required treatment from an orthopedic physician, and he 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). Eventually, Bryson was seen at Levine Children's Hospital in Charlotte and was referred to the brachial plexus clinic in Miami, Florida 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). Because of the injury, Bryson will require future therapy, surgery, and casting. (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).

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).

ARGUMENT

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

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

As an initial matter, Appellants note that at common law, there is no “emergency medical and obstetrical care exceptions,” as set forth in S.C. Code Ann. § 15-32-230.⁴ The common law states that the plaintiff in a medical malpractice lawsuit must:

(1) Present evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, AND

(2) Present evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the plaintiff.

Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985).

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

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

S.C. Code Ann. § 15-32-230 is an affirmative defense and must be pleaded or is waived. In *Howard v. South Carolina Dep't of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App.

⁴ The specific requirements of this affirmative defense are discussed *infra*.

2000) our Courts noted, “Affirmative defenses are waived if not pled.” In accordance with this requirement, Respondents pled the obstetrical care exception as an affirmative defense.

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

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

(A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician⁵ may be held liable unless it is proven that the physician was grossly negligent.

⁵ In this case, this lawsuit went to trial on claims against a “physician” only. No claims were asserted at trial against any “non-physician” such as a hospital, nurse, corporation (for profit or non-profit), governmental entity, or any other person or entity not otherwise properly defined as a “physician.”

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

- (1) in immediate threat of death; or
- (2) in immediate threat of serious bodily injury.

S.C. Code Ann. § 15-32-230 (A) and (C).⁶

In order for a physician to avoid liability by asserting this affirmative defense for negligent actions he would otherwise be liable for at common law, the physician must prove all the required elements of the statute. For a medical malpractice claim arising out of obstetrical care,⁷ a defendant physician is required to present evidence that: (1) the claim arises out of care rendered in a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient is in immediate threat of either death or serious bodily injury.⁸ If all these requirements have been met, then the physician is not responsible for his own negligent conduct unless it is proven that the physician was grossly negligent.

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

Respondents wholly failed to present any evidence from anyone that any patient was not medically stable at any point in time from admission to discharge. Respondents failed to present any testimony on this issue for any period of time that Dr. Goldstein had assumed the care of Genesis and her unborn child. The statute unambiguously required this of Dr. Goldstein. Therefore, it was incumbent upon Dr. Goldstein, the party pleading the affirmative defense, to present evidence on this point. As the actor in the suit with regard to the affirmative defense, the

⁶ Section (B) involves a claim where there is "no previous doctor/patient relationship" between the physician and the patient or the patient did not receive prenatal care. This section is not applicable to the facts of this litigation.

⁷ Appellants concede that this case involves a claim for medical malpractice arising out of obstetrical care.

⁸ Additionally, the statute explains this limitation on liability only applies to care rendered prior to the patient's discharge from the emergency department or the obstetrical or surgical suite.

burden of proof rested upon Dr. Goldstein to establish his affirmative defense. Dr. Goldstein failed to produce any evidence at all that his patient or patients were not medically stable. Because Respondents failed to offer even a modicum of evidence on medical stability, the trial judge should have determined as a matter of law that the obstetric emergency exception did not apply.

Respondents first offered the testimony of the Defendant Dr. Goldstein, both as a fact witness and as an obstetrical expert. He determined, in his expert opinion, that he did not breach the standard of care in terms of pulling too hard.⁹ Using exhibits, Dr. Goldstein explained that during shoulder dystocia, “The baby should be getting oxygen I’ve seen true knots, double true knots in the cord, but, you know, we can’t see the cord so, you know, the baby should be getting adequate oxygen.” (R. p. 362, line 4-p. 363, line 16). Dr. Goldstein also noted that sometimes the umbilical cord is wrapped tightly around the baby’s neck, but that “in this case, we were able to slip it over the head.” (R. p. 409, lines 12-25).

Importantly, defense counsel did not even attempt to get Dr. Goldstein to allege under oath that his patients were not medically stable, either at admission or at any other point during the course of labor and delivery. He did not provide any such testimony regarding Genesis’s state when she first entered the hospital for induction, nor did he provide any such testimony regarding her state throughout the course of her labor and delivery. Dr. Goldstein failed to provide the same with regard to Bryson. Moreover, he made clear he did not believe there was risk of brain damage that would have justified using excessive traction in this case. (R. p. 489, lines 18-23).

⁹ He made such a determination despite testifying under oath that he didn’t think there was a standard of care for traction, (R. p. 455, lines 6-15), that he didn’t know whether it would be inappropriate to apply more than gentle traction, (R. p. 456, lines 6-13), that an obstetrician simply uses “the traction that’s necessary to get the baby delivered,” (R. p. 471, lines 8-10), despite having no memory of being trained to avoid using more than gentle traction (R. p. 466, line 22-p. 467, line 2), that he had no memory of how much traction he used at any point during Bryson’s delivery (R. p. 473, lines 4-7), that he had no memory of how much he pulled any time he’d encountered shoulder dystocia (R. p. 474, lines 8-12), and despite Dr. Goldstein admitting that he was not qualified to offer any opinion on what caused Bryson’s injuries in this case. (R. p. 476, lines 14-20).

Respondents called as their next obstetrical expert, Dr. Gower. Dr. Gower provided his opinion regarding why, generally, shoulder dystocia is considered an emergency. (R. p. 510, lines 21-p. 511, line 1). In support, he set forth the general risks associated with shoulder dystocia and the injuries which may occur.¹⁰ However, despite going over what is generally known to be the risks of the condition, he made no effort to discuss which were present in this case at the time Bryson was about to be delivered. He made no assertion whatsoever that either mother or baby in this case were not medically stable, from the time of admission and throughout labor and delivery.

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

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

¹⁰ This discussion of potential risks and injuries did not seek to separate out which were caused by the condition and which were caused by mismanagement of the condition.

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

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

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

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

Similarly, Respondents did not present evidence that there was an immediate threat of death or serious bodily injury from the condition of shoulder dystocia. The suggestion that brain injury or death may follow shoulder dystocia merely states the reason why it is important for obstetricians to comply with standards of care for safe resolution of shoulder dystocia. Shoulder dystocia itself does not represent an immediate threat of death or serious bodily injury. It is only the failure to resolve the shoulder dystocia in accordance with the standards of obstetrical care that creates the potential risk of death or serious bodily injury.

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

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

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

The trial court erred in failing to charge the jury the correct and complete definition of gross negligence. After learning that the trial court intended to charge the jury on the emergency exception statute, despite Appellants' argument that Respondents had not presented evidence on all elements of the affirmative defense, Appellants sought to ensure that an accurate and complete definition of gross negligence be charged to the jury. The trial judge indicated he only intended to

charge the jury that gross negligence was defined as “the failure to exercise even the slightest care,” Appellants requested the trial court charge the remaining relevant and appropriate language. (R. p. 902, line 4-p. 902, line 12). To this request, the trial court replied, “there’s just going to be a short definition on what gross negligence is.” (R. p. 902, lines 13-16). Indeed, the jury was charged only that “[g]ross negligence is the failure to exercise even the slightest care” (R. p. 921, lines 14-15). The error was compounded by this incorrect and incomplete definition being placed upon the verdict form. (R. p. 9-10).

The jury determined the emergency obstetrical exception applied. (R. p. 9-10). The verdict form reminded the jury that now the Plaintiffs must 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 plaintiffs did not prove that the defendants failed to exercise a slight degree of care. (R. p. 9-10).

“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)).

Appellants specifically requested the trial court charge the jury that gross negligence also means “the absence of care that is necessary under the circumstances.” (R. p. 902, lines 9-10). In defining gross negligence, the Supreme Court has stated:

Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. *Etheredge v. Richland County School Dist. 1*, 341 S.C. 307, 534 S.E.2d 275 (2000). It is the failure to exercise slight care. *Id.* Gross negligence has also been

defined as a relative term and means the absence of care that is necessary under the circumstances. *Hollins v. Richland County School Dist. 1*, 310 S.C. 486, 427 S.E.2d 654 (1993).

Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283, (2003)

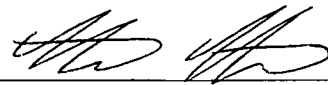
The Court of Appeals has acknowledged the same, noting, “The Supreme Court has held that ‘gross negligence is a relative term, and means the absence of care that is necessary under the circumstances.’” *Rakestraw v. South Carolina Dep’t of Highways & Pub. Transp.*, 323 S.C. 227, 231, 473 S.E.2d 890,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

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

CONCLUSION

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

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April 29, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAY 03 2016

SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael Nettles, Circuit Court Judge

Appellate Case No. 2015-001237

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

Appellants,

v

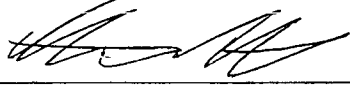
v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certify that this Final Brief of Appellants
complies with Rule 211(b), SCACR.

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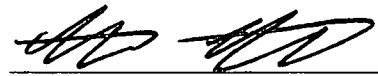
Respondents.

PROOF OF SERVICE

I hereby certify that one copy of the *Appellants' Final Brief* and *Appellants' Final Reply Brief* in the above captioned matter was served by U.S. Mail, postage prepaid, on May 2, 2016 addressed to the following counsel of record:

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**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Florence County
Court of Common Pleas

Michael Nettles, Circuit Court Judge

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Respondents.

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STATEMENT OF THE ISSUES ON APPEAL

Respondents would restate the issues on appeal as:

- I. Did the Trial Court properly charge the jury on the obstetrical emergency statute, S.C. Code Ann. § 15-32-230, where the Plaintiffs allege medical malpractice by the Defendant Obstetrician in delivering Plaintiff Infant when he presented with shoulder dystocia and:
 - A. The Plaintiff conceded that the presentation of shoulder dystocia constituted “a genuine emergency situation;”
 - B. The Plaintiff conceded that the Infant was “in immediate threat of death” or “in immediate threat of serious bodily injury;” and
 - C. There was disputed evidence that the Infant’s condition was “not medically stable.”
- II. Did the Trial Court properly charge the jury on the definition of gross negligence?

STATEMENT OF THE CASE

This is a medical malpractice action arising out of the labor and delivery of a baby boy, Bryson F. (hereinafter referred to as Infant) on August 20, 2009. His mother, Genesie Fulton (hereinafter referred to as Patient or Mother), brought this action in her individual capacity and on behalf of her minor son, seeking damages for a permanent brachial plexus nerve injury that the Infant suffered during delivery. She filed a summons and complaint on February 28, 2013, alleging that her Obstetrician, Dr. William Goldstein and his practice (hereinafter referred to as Dr. Goldstein or the Obstetrician) failed to properly manage and resolve a condition of shoulder dystocia which occurred during his delivery. [ROA 11; Complaint.] Dr. Goldstein filed an answer, denying the allegations and asserting various defenses, including the limitation on liability found in the Emergency Medical Obstetrical Care Exception found in S.C. Code Ann. §15-32-230. [ROA 29; Answer, April 26, 2013.] An amended complaint was filed on **

An amended complaint [improperly captioned second amended complaint] was filed on April 30, 2015. [ROA 37; Amd. Complaint.] An Answer to the amended complaint was filed on May 4, 2015. [ROA 43; Answer.]

The case came to trial before the Honorable Michael G. Nettles, and a jury in the Florence County Court of Common Pleas on May 4-8, 2015. The Trial Court charged the jury on the Emergency Medical Obstetrical Care Exception, §15-32-230, [ROA 921; Tr. 1269:8-16], and presented a verdict form to the jury with special interrogatories. The jury returned a verdict for Dr. Goldstein, finding as to the Obstetrical Medical Emergency Exception, that “the facts of this care arise out of a genuine emergency situation where the patient is not stable and there is an immediate threat of death.” Having so found that

the exception applied, the jury was instructed by the charge and the verdict form that the plaintiff was required to prove gross negligence. The jury found that the plaintiff “has not proved that the defendant breached the standard of care.” [ROA 7; Verdict.]

The Patient filed a motion for a new trial on May 15, 2015. [ROA 51; Motion.] The Trial Court issued its order on May 19, 2015, denying the motion. [ROA 5; Order.] The Patient served a Notice of Appeal on June 8, 2015.

STATEMENT OF THE FACTS

Medical Evidence of the Obstetrical Emergency during Labor and Delivery

The Patient Mother was admitted for scheduled inducement of labor on August 20, 2009 at 36 weeks gestation. Dr. Goldstein artificially ruptured the membranes at 7:18 am and the labor proceeded uneventfully until 1:15 pm when the medical staff observed variables in the fetal heart rate. [ROA 586; Tr. 860 – Nurse Collins.] The Infant had reached plus 3 station and when the heart rate dipped to the 60s, Dr. Goldstein opted to use a vacuum (instead of forceps) to get the baby past the perineum. [ROA 731; Tr. 1005:15 – Dr. Salley.] The head was delivered after two pulls, but then at 1:44 p.m., Dr. Goldstein recognized that they were facing an emergency of shoulder dystocia. [ROA 394; Tr. 659.]

“[T]he definition of shoulder dystocia is when the head comes out, so the fetal head is out and the shoulder gets stuck under the pubic bone.” [ROA 90; Tr. 173: 21-24.] Shoulder dystocia is an unpredictable and unpreventable risk to any pregnancy. [ROA 130, 140; Tr. 213, 223.]

Dr. Goldstein and the nurses immediately took the appropriate measures to address this medical emergency. The nurses performed a McRoberts maneuver by

hyperflexing the Mother's legs and abducting her thighs to change her position and began applying suprapubic pressure. [ROA 397-8; Tr. 662-63.] Dr. Goldstein performed first one, then a second, episiotomy to make room for him to reach in to guide the baby's shoulders. [ROA 398, 403; Tr. 663, 668.] Meanwhile, one of the first things that Dr. Goldstein had done when he recognized the emergency was to call in another obstetrician. [ROA 404; Tr. 669.] Dr. Coker arrived within three minutes, he assessed the patient and took over applying the suprapubic pressure, the shoulders delivered, and the baby was born at 1:49pm – within five minutes of the shoulder dystocia being recognized. [ROA 394, 403; Tr. 659, 668.]

During this process, Dr. Goldstein found that the nuchal cord was around the baby's neck and he successfully reduced the cord over the infant's head. [ROA 409; Tr. 674:12-13.] The Infant was hypotonic ("floppy") on delivery and intubated by the pediatric staff. [ROA 415; Tr. 680. ROA 616; Tr. 890. ROA 669; Tr. 943-44.] The Infant's APGAR at one minute was one, after five minutes it was four, it was five at 10 minutes, and seven at 15 minutes. [ROA 415; Tr. 680.] Initial blood tests of the cord blood showed that the Infant had a poor pH at 7.19. [ROA 411; Tr. 676.] Fortunately, the Infant quickly responded to the care and treatment of the pediatric staff in attendance and ultimately showed no signs of any brain injury. [ROA 670,133; Tr. 944, 214.] However, the Infant did suffer permanent brachial plexus nerve damage which the Patient alleges was caused by Dr. Goldstein using excessive traction delivering the shoulders.

Expert Opinions on the Standard of Care

Plaintiff's obstetrical expert, Dr. Gomez-Carrion, opined that Dr. Goldstein acted appropriately, when confronted with the medical emergency, by ordering McRoberts and suprapubic pressure. [ROA 131; Tr. 214.] She also opined that Dr. Goldstein acted appropriately and reasonably, when the suprapubic pressure and McRoberts were initially unsuccessful, by trying to insert his hand into the vagina and rotate the baby. [ROA 131-2; Tr. 214-15.] Dr. Gomez-Carrion agreed that "you can have a permanent brachial plexus injury and it does not always mean that the doctor did something wrong." [ROA 135; Tr. 218:1-4.] However, she was of the opinion that Dr. Goldstein caused the permanent injury to the Infant's brachial plexus nerve by using "excessive" traction to resolve the shoulder dystocia - even though she could not quantify how much traction was used. [ROA 120; Tr. 203. ROA 135; Tr. 218: 5-12.] In fact, she acknowledged that "there is no way to measure traction" and "nobody can say exactly or to specify how much traction was used." [ROA 136; Tr. 219:1-3. ROA 135; Tr. 218:11-12.] In contrast, the defense expert pediatric neurologist, Dr. Jacobson, opined that the Infant's brachial plexus injury did not result from excessive traction by Dr. Goldstein. [ROA 667; Tr. 941.]

Evidence of the Imminent Danger to the Infant

All of the medical expert opinion evidence establishes that time was of the essence in delivering the Infant because it was only a matter of matter of minutes before the Infant would have suffered brain damage or died. Dr. Goldstein explained the urgency of delivering the Infant as quickly as possible because if a baby stays in the birth

canal for a prolonged period of time, it can suffer brain damage due to lack of oxygen, or even die. [ROA 422; Tr. 687:1-10.]

Plaintiff's own obstetrical expert Dr. Gomez-Carrion testified that shoulder dystocia is an emergency situation with a risk of fetal death, and she agreed that: "And if a baby is not timely delivered in the face of shoulder dystocia, a medical emergency, the baby can die." [ROA 130; Tr. 213:10-13.] She testified that timing is critical because according to the obstetrical literature, an obstetrician has only six or seven minutes to safely get a baby out or there is a risk of brain damage or even death. [ROA 130; Tr. 213:16-17.] Fortunately, Dr. Goldstein was able to get the Infant delivered within five minutes and the pediatric staff successfully resuscitated the Infant.

ARGUMENT

Jury Instructions and Appellate Review

When instructing the jury, the trial court is required to charge the jury the current and correct principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. *Clark v. Cantrell*, 339 S.C. 369, 389-90, 529 S.E.2d 528, 539 (2000).

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." Rule 51, SCRCP. An issue is not preserved for appellate review where the objection was made at trial on different grounds. *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601-02 (1999).

“An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence.” *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (citing *Clark v. Cantrell*, *supra*). On appellate review of challenged jury charges, the court construes the trial court's charge as a whole in light of the evidence and issues presented at trial. *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). Even if some error is found in the trial court's jury charge, the judgment on the jury's verdict will not be reversed except upon a showing of prejudice. *Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001).

I. THE TRIAL COURT PROPERLY CHARGED THE JURY ON THE OBSTETRICAL MEDICAL EMERGENCY EXCEPTION AS PROVIDED IN §15-32-230.

Applicable Law – Limitation on Liability for Emergency Obstetrical Care

The South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code Ann.

§ 15-32-230, provides:

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.

The limitation on liability is an affirmative defense and, as such, the defendant physician has the burden of proving that the limitation applied upon proof of which, the plaintiff patient bears the burden of proving gross negligence. *Strange v. S.C. Dept. of Highways & Pub. Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994) (“The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense.”); *Niver v. S.C. Dep’t of Highways & Pub. Transp.*, 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990) (limitations on liability under Tort Claims Act are affirmative defenses); *James v Lister*, 331 S.C. 277, 283, 500 S.E.2d 198, 201 (Ct. App. 1998) (holding that the limitation on liability for charitable organizations, section 33–55–210(A) constitutes an affirmative defense); *Stewart v. Richland Mem’l Hosp.*, 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (governmental entity’s burden to establish that the limitation on liability applied, and plaintiff’s burden to establish gross negligence).

A. The Plaintiff conceded that the presentation of shoulder dystocia constituted “a genuine emergency situation.”

Every obstetrical expert – both Plaintiffs’ and Defendants’ testified that shoulder dystocia is a medical emergency. [ROA 77, 130; Tr. 160:21, Tr. 213:7-9 – Dr. Gomez-Carrion. ROA 239; Tr. 446:23-24 – Dr. Resnick. ROA 510; Tr.782:17-20 – Dr. Gower. ROA 793; Tr. 1067:20 – Dr. Salley. ROA 853; Tr. 1127:8 - Dr. Hall.] The Patient Mother also testified that it was an emergency situation. [SROA 1; Tr. 145:4-6.] The Patient even expressly conceded that there was “a genuine emergency situation:”

MR. RUFFIN: Well, it's not a matter of being a medical emergency, because we know it's a medical emergency. [ROA 840; Tr. 1114:21-22.]

THE COURT: A genuine emergency situation. You concede that?

MR. RUFFIN: Yes. Shoulder dystocia is a medical emergency. [ROA 841; Tr. 1115:12-15.]

B. The Plaintiff conceded that the Infant was “in immediate threat of death” or “in immediate threat of serious bodily injury.”

The Plaintiff Patient argues on appeal that the Defendant Obstetrician “failed to present any evidence that any patient was in immediate threat of death or serious bodily injury.” [Appellants’ Brief, p. 11-12.] This argument is unfounded and should be rejected for several reasons: first, and foremost, the Patient conceded that there was an immediate threat of death or serious bodily injury; second, she did not raise this issue to the trial court; and third, there is ample evidence of the immediate threat of brain damage or death.

During the colloquy concerning the Emergency Obstetrical Care Exception, the Patient stated:

THE COURT: Involving an immediate threat of death or serious bodily injury.

MR. RUFFIN: The threat is there. If it had been seven, eight, nine minutes, that would have possibly become a reality. But the section 1, I believe it is, is applicable. We argue the exception to, a little bit further down, I can't quite remember exactly what sub-part it is, but it says A and B can be applied unless, and then it says, the patient is medically stable. [ROA 841; Tr. 1115:16-24.].

When counsel concedes a point in the trial court, the question cannot be raised in the appellate court. *Southern Ry. Co. v. Routh*, 161 S.C. 328, 159 S.E. 640, 642 (1931); *Gatewood v. Moses*, 39 S.C.L. 244, 246 (S.C. App. L. 1852) (a party will not be allowed to raise a ground on appeal that has been expressly waived in the circuit court.) Nor can a party change his arguments on appeal:

Appellant's present argument is not preserved for consideration on appeal. Prior to the charge, appellant objected to instructing the jury on the statute, arguing there was no evidence as to his location at the time of the shooting. He did not claim, as he does now, that there is no requirement the trial judge instruct the jury on the unlawful possession statute or the charge constituted a comment on the facts in violation of the Constitution. Since he did not object at trial on the same grounds as raised on appeal, the issue is not preserved for review.

State v. Smith, 522 S.E.2d at 601; *Gatewood v. Moses*, id.

When the Plaintiff made her objection to the Emergency Obstetrical Care Exception statutory charge, she only noted one ground – the absence of evidence that the Infant was not medically stable:

MR. RUFFIN: Your Honor, we take exception to their request for inclusion of the Obstetrical Emergency Statute. It is inapplicable as a matter of law to this case based on one of the exceptions included. They have offered zero testimony that [the Infant] was medically unstable in this case. [ROA 838; Tr. 1112:10-15. See also ROA 841; Tr. 1115.]

The Plaintiff also objected to the Emergency Obstetrical Care Exception on the verdict form on the “not medically stable” ground:

I just want to make sure we are protected with our objection to the obstetrical emergency exception on the verdict form and we just believe that the not medically stable or medically stable is its own basis by which to avoid the obstetric medical emergency exception. [ROA 909; Tr. 1257:5-9]

Similar to *State v. Smith*, the Patient objected to a charge on the Obstetrical Emergency Care Exception arguing that there was no evidence that either patient was not medically stable. She did not claim, as she does now, that there was no evidence of an immediate threat. Since she did not object at trial on that ground, it is not preserved for review.

Third, but not least, the Patient's argument is not supported by the evidence of record. Patient argues that Dr. Goldstein "confirmed" that the Infant was delivered before there was any immediate risk or threat of brain damage. However, the transcript, as she cited, does not support any such "confirmation:"

Q: It was. It was. I plead guilty, sir. Let me try to break it down. We heard you talk about risk of brain damage. All right? You're not claiming there was any imminent risk of brain damage that justified you in using too much traction, are you?

A: No, I'm not implying that I used too much traction -- [ROA 489; 754:18-23.]

This was not a concession that there no was immediate risk or threat of brain damage. This was a denial that he used too much traction, and when Dr. Goldstein completed his next answer, he clarified the threat: "-- but from the literature there's been episodes of hypoxic ischemic encephalopathy that occurred within two minutes of the head to shoulder interval." [ROA 489-90; Tr. 754:25-755:2.]

The Patient also cites to specific transcript pages/lines where defense expert, Dr. Gower, supposedly confirmed that the Infant was not in immediate risk or threat of death or brain damage. [Appellants' Brief, p. 12.] However, those transcript excerpts only

show the expert's opinion of whether the medical records show that Dr. Goldstein perceived there was a threat:

Q: In fact, in this case was there ever in your opinion any indication that Dr. Goldstein feared for the baby's life?

A: No, I didn't have any indication of that. [ROA 570; Tr. 842:16-19.]

Q: But I thought you just told me that you didn't see any indication that Dr. Goldstein had any concerns of those. Is that do you think he should have and didn't?

A: Well, I mean, I would have had to know what he was thinking at the time and so I -- he wouldn't have -- that would have been maybe his thought process, but I don't know how I would know, so I guess my assumption is that we're always thinking about that.

Q: Okay. So, you're just assuming he may have had that. You didn't actually see anything in the ---

A: Correct.

Q: --- medical records or any documentation ---

A: That's exactly right.

Q: --- or deposition. Okay. So, there was nothing that you ever saw that indicated he was in fear of the baby's life or that there was an imminent risk of brain damage?

A: No, I don't have indication of that. [ROA 571-72; Tr. 843:16- 844:7.]

The transcript shows that Dr. Gower actually acknowledged that the risk was a matter of only four to five minutes and that any obstetrician would be thinking about possible brain damage:

Q: Well, and including your review of the records, et cetera, in this case, there was nothing there that occurred during this shoulder dystocia and the way it was managed that raised a concern to you that there was an imminent risk of brain damage.

A: Well, you know, we're talking about four or five minutes to, to get the baby out and we're talking about umbilical cord compression and we know there is a time in that the baby is not getting adequate oxygen and your pH is going down and your oxygen level's going down, your carbon dioxide is going up and so you have that, so yeah, it would be incumbent on any of us in that situation to begin at some point to be thinking about how is this, how's this baby doing as far as the blood flow to the brain. [ROA 571; Tr. 843:1-15.]

Another defense expert, Dr. Mark Salley, also testified about the risk of brain damage:

...the number one risk, again, is oxygen deprivation to the baby where the baby doesn't get enough oxygen and that creates injury to the baby's brain. I don't know if any of the jurors have seen a child with cerebral palsy, but that's one of the consequences of low oxygen, so that's always the most concerning problem when you have a baby that's stuck. [ROA 726; Tr. 1000:16-22.]

During shoulder dystocia delivery, shoulder impaction and prolonged head to body delivery interval can lead to birth asphyxia and subsequent neonatal hypoxic ischemic encephalopathy, which is big words for saying brain damage for not enough oxygen. [ROA 747; Tr. 1021:7-11.]

Accordingly to reports, as testified by Dr. Salley, "permanent neurological injury can occur as soon as two minutes after shoulder impaction," [ROA 747; Tr. 1021:17-18:]

The Patient's basic argument appears to be that because the Infant was safely delivered within five minutes instead of pushing the limit at the seven-eight minutes critical danger zone there was no "immediate" threat. However, the standard for jury charges is: "If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). As recounted above, there was abundant evidence of an immediate threat to support the Trial Court's decision to charge the Obstetrical Emergency Care Exception, §15-32-230.

C. There was evidence that the Infant was “not medically stable”.

As discussed above, the Patient’s objection – at trial – was the alleged lack of evidence that the Patient was “not medically stable.” As a threshold matter, it is notable that our statute does not define medical stability, and the Patient did not request any jury charge to define the term.¹ Although there was ample testimony about the dire risks and Despite the Infant’s perilous condition at birth, the crux of the Patient’s argument is that

¹ Several other states have enacted similar limitations on liability for emergency medical care. See, i.e. Ga. Code Ann. § 51-1-29.5 (West); Tex. Civ. Prac. & Rem. Code Ann. § 74.153 (West). However, those other statutes do not contain any comparable provision requiring proof that the patient was “not medically stable.”

Medical stability is a concept found in workers compensation law in some jurisdictions, but it relates to the distinction between temporary v. permanent benefits. 82 Am. Jur. 2d *Workers' Compensation* § 363 (“Once a workers' compensation claimant is medically stable, he or she is no longer in the period of recovery, and the total temporary benefits cease.”) Under this concept the Infant certainly would not be considered medically stable.

Perhaps the most relevant jurisprudence on the concept of medical stability can be found in the federal Anti-Dumping statute, EMTALA, 42 U.S.C. § 1395dd, where medical stability is a key element. The EMTALA requires that hospitals with emergency rooms provide limited stabilizing treatment to or an appropriate transfer of any patient that arrives with an emergency condition. The Act defines “to stabilize” as “to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual....” 42 U.S.C. § 1395dd(e)(3)(A). *Bryan v. Rectors & Visitors of Univ. of Virginia*, 95 F.3d 349, 352 (4th Cir. 1996). It has been noted that the statutory definition does not correspond to a medical definition:

EMTALA’s definition of “stability” does not share the same meaning as the medical term “stable condition,” which “indicates that a patient’s disease process has not changed precipitously or significantly,” Tabor’s *Cyclopedic Medical Dictionary* 1861 (Clayton L. Thomas ed., 17th ed.1993); see also *Mosby’s Medical, Nursing, & Allied Health Dictionary* 1474 (Kenneth N. Anderson et al. eds., 4th ed.1994) (defining “stable condition” as “a state of health in which the prognosis indicates little if any immediate change”).

St Anthony Hosp. v. U.S. Dep’t of Health & Human Servs, 309 F.3d 680, 694 (10th Cir. 2002). It should be fair to say that neither the Mother nor the Infant were in any condition for transport during the delivery. There also should not be any dispute that the Infant’s condition during delivery was changing minute to minute.

neither Dr. Goldstein nor his expert used the term “not medically stable.” However, neither the statute nor basic medical malpractice precedent requires that experts use any “magic words.”

For example, our Appellate Courts have held on a number of occasions that medical experts do not have to use the magic words “most probably” in offering causation opinions. See *Gamble v. Price*, 289 S.C. 538, 541, 347 S.E.2d 131, 132 (Ct. App. 1986) (discussion of precedents). The Court has also held that a medical expert does not have to use any “ritual incantation of certain magic words” to establish a breach of the standard of care. *Stallings v. Ratliff*, 292 S.C. 349, 353, 356 S.E.2d 414, 417 (Ct. App. 1987). Although neither Dr. Goldstein nor his expert witnesses specifically recited that the Infant was “not medically stable,” their testimony and that of the other medical witnesses (as well as of the medical records) provide sufficient evidence to support the trial court’s decision to charge the jury on the Emergency Obstetrical Care Exception.

Prime evidence of the Infant’s perilous medical condition includes the fact, as noted above, that the nuchal cord was wrapped around his neck, which providentially Dr. Goldstein was able to remove during the delivery. On delivery, the Infant was hypotonic – “floppy”; he had a low pH of 7.19; and he had “very low” APGAR scores. Dr. Jacobson, the defense expert pediatric neurologist, testified that the initial APGAR of one means that the Infant’s “tone was very low and it also signifies that the baby has had significant stress and significant hypoxia,” [ROA 669-70; Tr. 943:24 – 944:2.] According to Dr. Salley, the Infant’s first APGAR of one was “about as bad as it gets.” [ROA 747; Tr.1021:1-2.]

On reply, the Patient elicited testimony from her expert, Dr. Hall, using the “magic words” that the Patient Mother and Child were both medically stable during the course of the management of the shoulder dystocia. [ROA 859; Tr. 1133.] While he testified that the pH of 7.19 was not terrible, Dr. Hall also testified that there were some variables of risks of brain damage during the four minutes immediately prior to delivery, including the cord wrapped around the neck. [ROA 859, 857; Tr. 1133, 1131.] However, he insisted that the Infant resuscitated “quite well” with no signs of brain damage. [ROA 860; Tr. 1134:23.]

Patient argues paradoxically that while the Infant might have become medically unstable if enough time had passed, the Emergency Obstetrical Care Exception does not apply because the risk did not materialize. [ROA 842; Tr. 1116:-15-16.] 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.” [ROA 842; Tr. 1116:16-18.]

While the statute speaks of “a genuine emergency,” “immediate threat” and “not medically stable” as seemingly separate elements, the medical evidence is not quite so distinct. And, while it is apparent from the trial testimony that there was a dispute between the different experts as to implications of the Infant’s medical condition at the time of delivery, there was sufficient evidence presented for the jury to decide, on proper instructions from the Trial Court, whether the Exception applied.

II. THE TRIAL COURT CHARGED THE JURY ON THE CORRECT LAW DEFINING GROSS NEGLIGENCE.

Since the Emergency Medical and Obstetrical Care Exception statute requires that the plaintiff prove gross negligence, it was incumbent on the Trial Court to charge the jury on what that term means. During the charge conference, Plaintiff Patient raised this point:

MR. RUFFIN: And, Your Honor, are you including a charge that defines gross negligence and, if so, I was wondering how it is defined?

THE COURT: It says, "Gross negligence is the failure to exercise even the slightest care, while negligence is the failure to exercise due care. That's about as simple as you can get.

MR. RUFFIN: Your Honor, I think there is another definition that I've found that says, it means, "The absence of care that is necessary under the circumstances." It says it's also been defined as. And that's found in Pack and Associates versus Marine Institute.

THE COURT: There's also going to be some discussion about gross negligence and willfulness and the punitive damage charge, but as far as it relates to this, there's just going to be a short definition of what gross negligence is. [ROA 902; Tr. 1176:1-16.]

The Trial Court charged the jury on the definition of gross negligence as follows:

In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation in an obstetrical suite where the patient is not stable and there is a threat of death or serious bodily injury to the patient, no physician may be held liable unless it is proven that the physician was grossly negligent. Grossly negligent. Let me define what that is. Gross negligence is the failure to exercise even the slightest care while negligence is the failure to exercise due care. [ROA 921; Tr. 1269:8-16.]

If the Obstetrical Medical Emergency Exception applies, Plaintiff must prove gross negligence, that the breach was more than carelessness, but a failure to exercise even a slight degree of care. [ROA 930; Tr. 1277:15-18]

Plaintiff noted the following objection to the jury charge as given:

MR. RUFFIN: Your Honor, nothing other than what I said previously about the gross negligence. There are two or three definitions that are included and I think that just including the slight care one is the one most favorable to the Defendant and I think it would be more accurate to include the other definitions, as well. I think that's it. I mean, if we start, you know, we've already got our question about the verdict form ...
[ROA 935; Tr. 1282:4-11.]

On the jury verdict form, the Trial Court included a definition of gross negligence in a footnote: “*If the Obstetrical Medical Emergency Exception applies the Plaintiff must prove gross negligence (that the breach was more than carelessness, but was a failure to exercise a slight degree of care).” [ROA 9; Verdict p. 1.] While the Plaintiff Patient made an objection to the footnote on the verdict form at trial, [ROA 908; Tr. 1216:5], she has not raised that issue on appeal.²

“This Court has defined gross negligence in a number of ways.” *Hollins v. Richland Cty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993).

In *Anderson v. Ballenger*, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932), we held that it was “**the failure to exercise slight care.**” In subsequent cases, it has been defined as “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.” *Richardson v. Hambright*, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) (Emphasis supplied). We have also stated that “[g]ross negligence is a relative term, and means **the absence of care that is necessary under the circumstances.**” *Hicks v. McCandlish*, 221 S.C. 410, 415, 70 S.E.2d 629 (1952) (Emphasis supplied).

Id. (emphasis added); *Clark v. S. Carolina Dep't of Pub. Safety*, 362 S.C. 377, 382, 608 S.E.2d 573, 576 (2005); *Pack v. Associated Marine Institutes, Inc.*, 362 S.C. 239, 245, 608 S.E.2d 134, 138 (Ct. App. 2004).

² See *Maus v. Pickens Sentinel Co.*, 258 S.C. 6, 186 S.E.2d 809 (1972) (objection to jury charge is waived where it is not argued in brief).

The trial court did not refuse to charge on gross negligence. In fact, the trial court correctly charged that gross negligence “is the failure to exercise even the slightest care” as defined in many appellate opinions. The Patient seeks to reverse the jury’s verdict and retry the case because the Trial Court declined to charge the additional/alternative language “the absence of care that is necessary under the circumstances.” However, the Trial Court’s refusal to charge the additional language does not amount to reversible error because the instruction given was correct and fairly covered the definition of gross negligence.

“It is not error to refuse a request to charge when the substance of the request is included in the general instructions.” *Brown v. Stewart*, 557 S.E.2d at 686 (citing *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 160, 345 S.E.2d 711, 715 (1986)).

When reviewing a jury charge for alleged error, an appellate court must consider the “charge as a whole in light of the evidence and issues presented at trial.” *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). “A jury charge is correct if ‘[w]hen the charge is read as a whole, it contains the correct definition and adequately covers the law.’ ” *Id.* at 496, 514 S.E.2d at 574 (quoting *State v. Johnson*, 315 S.C. 485, 487 n. 1, 445 S.E.2d 637, 638 n. 1 (1994)). A jury charge which is substantially correct and covers the law does not require reversal. *Id.* at 496–98, 514 S.E.2d at 575.

Stewart v. Richland Mem’l Hosp., 567 S.E.2d at 513; *Martin v. Columbia Elec. St. Ry., Light & Power Co.*, 84 S.C. 568, 66 S.E. 993, 994 (1910) (no error to refuse to read party’s request to charge where point was covered in general instructions).

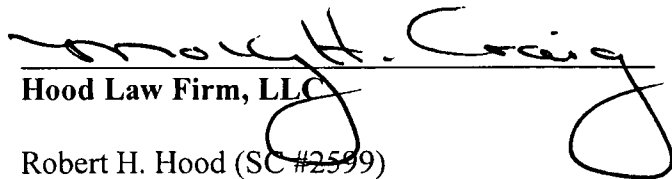
“The substance of the law is what must be instructed to the jury, not any particular verbiage.” *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 514 S.E.2d at 574 (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)). Considering the trial court’s jury charge as a whole, the gross negligence definition was free of error and the

absence of the requested additional language was not misleading in any prejudicial manner as to justify reversing the jury's verdict.

CONCLUSION

WHEREFORE, based on the foregoing, the Respondents respectfully submit that the trial court charged the jury as to the correct principles of law that apply based on the evidence adduced in support of the issues raised in the pleadings. The trial court properly charged the jury on the Emergency Obstetrical Care Exception, S.C. Code Ann. § 15-32-230, where the Patient conceded that the presentation of shoulder dystocia constituted a genuine emergency situation and that the Infant was in immediate threat of death or serious bodily injury, and there was evidence that the Infant's condition was not medically stable. The trial court also charged the jury a correct definition of gross negligence. Accordingly, the Court should affirm the jury's verdict in favor of the Respondents.

Respectfully submitted,



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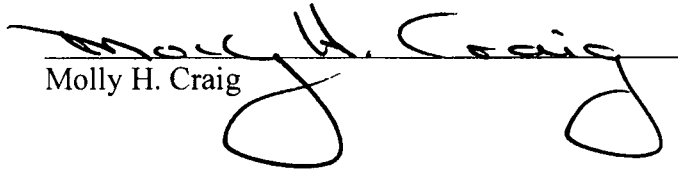
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May 2, 2016

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 2, 2016


Molly H. Craig

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MAY 06 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

RECEIVED

MAY 06 2016

Michael Nettles, Circuit Court Judge

SC Court of Appeals

C.A. No. 2013-CP-21-00587

App. No. 2015-001237

Genesie Fulton, individually, and as Next Friend of
Bryson F., a minor,

Appellants,

v.

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L. William Goldstein OB-GYN,

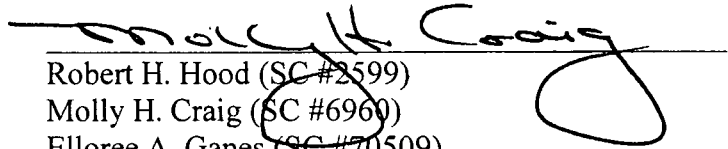
Respondents.

Certificate of Service

The undersigned certifies that on this 3rd day of May, 2016, a copy of the Final Brief of Respondents L. William Goldstein, M.D., individually and d/b/a L. William Goldstein OB-GYN, was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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A handwritten signature in black ink, appearing to read "Molly H. Craig", is written over a horizontal line. The signature is fluid and cursive, with the last name "Craig" being more prominent.

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THE STATE OF SOUTH CAROLINA
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STATEMENT OF THE CASE

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

RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

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

Respondents acknowledge that Dr. Goldstein's first attempt at an episiotomy was inadequate, thereby requiring Dr. Goldstein to take time to cut a second. However, despite cutting the mother twice, Dr. Goldstein stated he still "was unsuccessful in being able to jam my hand into the vaginal canal" (R. p. 458, lines 18-20; p. 461, lines 14-24). Additionally, Respondents do not dispute that after Dr. Goldstein was unable to resolve the shoulder dystocia that he called to "get someone in here, get someone in here. It doesn't matter. Get a doctor, anybody. Get someone in here." (R. p. 269, lines 2-4). Indeed, Respondents' acknowledge 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).

Respondents 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). Respondents similarly draw attention to the cord blood gas, which is also not known until after delivery. The cord blood gas of 7.19 was one one-hundredth below what Dr. Goldstein explained he likes to see. (R. p. 411, lines 14-16). Finally, Respondents note the presence of a nuchal cord,

which Dr. Goldstein explained in some cases may be tight, but “in this case, we were able to slip it over the head.” (R. p. 409, lines 17-25). Importantly, Respondents cite no testimony that any of the aforementioned, considered alone or together, caused either mother or child to not be medically stable. That is because no witness offered testimony the mother or child was not medically stable.

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

Finally, Appellants note that Respondents presented partial excerpts of testimony from Dr. Gomez-Carrion, Appellants’ obstetric expert witness, that were elicited on cross. A more accurate presentation of her testimony reveals that Dr. Gomez-Carrion stated that, based on Dr. Goldstein’s own sworn testimony, he did not exhibit the knowledge and experience needed to safely resolve shoulder dystocia. (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).¹ Dr. Michael

¹ In their statement of facts, Respondents include the opinion of a *neurologist*, Dr. Jacobson, under the subheading “Expert Opinions on the Standard of Care,” that the amount of traction used by Dr. Goldstein, an *obstetrician*, during Bryson’s delivery was not “excessive.” It is unclear why Respondents sought to elicit obstetric standard of care opinions from a neurologist at trial. It is also unclear why Respondents would highlight such incompetent expert

K. Hall, Appellants' 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 TRIAL COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE OBSTETRIC EMERGENCY STATUTE WAS INAPPLICABLE TO THIS CASE.

A. Introduction

A statute that grants a physician immunity from the consequences of his negligent acts that disable and disfigure an infant is a statute in derogation of the common law. Respondents do not dispute this. Further, Respondents do not dispute that the negligence immunity statute must therefore be strictly construed, in a manner that disturbs established common law only to the extent necessary to affect the clear intent of the legislature.² Respondents acknowledge that the negligence immunity statute is an affirmative defense. They acknowledge that as such, the defendant physician bears the burden of proving *all* elements of the defense. Despite this admission, Respondents still fail to cite *any* testimony that either Bryson or his mother Genesie were not medically stable, under any definition³ of medically stable, at any point in time from

witness testimony in an appellate brief. To be clear, Neurologists are not obstetricians, do not deliver babies, have little to no experience beyond a rotation in medical school delivering babies, and have no understanding of whether an amount of traction used by an obstetrician is excessive or not.

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

³ The assertion by Respondents that Appellants did not request a jury charge defining medically stable misses the crux of Appellants' argument. The argument is that Respondents offered no evidence or testimony that a patient was not medically stable *under any definition*. Therefore, the issue should not have gone to the jury. It is not a matter of the element being left undefined or improperly defined. It is a matter of the element being wholly ignored. For this reason, Appellants have not sought to define "medically stable." Nevertheless, Respondents cite to two wholly irrelevant definitions of "medically stable" in their brief. The Am. Jur. 2d *Worker's Compensation* definition makes no sense outside the context of workers' compensation. Similarly, the EMTALA definition is irrelevant. In fact, despite

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

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

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

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

acknowledging the EMTALA definition does not correspondent to a medical definition, Respondents nevertheless discuss how they would have satisfied this non-medical, statutorily-specific definition. But again, Respondents ignore that no witness presented testimony that a patient was not medically stable, even under these inapplicable definitions.

Not only do Respondents' ad hoc attempt fail to actually cite any testimony that a patient was not medically stable, it also conflates the elements "genuine emergency" and "immediate threat" with "medically stable." This is evidenced both by the failure to include a section presenting evidence that the patient was not medically stable in their Statement of Facts and from their arguments. Respondents note that there "was ample testimony about the dire risks" (Resp. Brief p. 14). A risk or a threat is a *possibility*. Pointing to a threat does not demonstrate that something is actually affecting a patient, causing them to not be medically stable. Moreover, Respondents' argument of a purported paradox further highlights their conflation of the elements. To attempt to show a patient was not medically stable, Respondents cite the trial judge's testimony that "[i]f I was in a spot where eight minutes might get cerebral palsy or dead, I would consider that to be an *emergency*." (R. p. 842, lines 16-18). Respondents are exactly right. This evidence may indeed show that there was a genuine *emergency*. However, it says nothing about medical stability and merely conflates the elements of emergency or immediate threat with medical stability.

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

patient is medically stable, then the physician is not shielded from responsibility for the harm caused by his negligent acts.⁴

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

In response to Appellants' argument that Respondents presented no testimony that a patient was not medically stable, Respondents now appear to argue that it was within the jury's province to reach the conclusion that a patient was not medically stable by inferring as much from the sparsely scattered facts cited to in Respondents' brief. This argument, however, ignores the fact that determination of patient's medical condition is beyond the ambit of common knowledge and learning. Special training and learning is necessary to opine on a patient's medical condition. *See*

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

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

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 the person to give guidance and assistance to the jury in solving a problem about which the jury’s good judgment and average knowledge is inadequate”).

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

Even assuming a jury had the knowledge and training to analyze and diagnose a patient’s medical condition, the evidence referenced by Respondents does not allow the inference of medical instability to be drawn. Respondents point to only one piece of information that Dr. Goldstein could have been aware of during his management of Genesie’s labor and delivery; the presence of a nuchal cord. Unfortunately for Respondents, no witness offered any testimony that the nuchal cord in this case caused any issues, let alone that it was a basis from which a witness

could opine that Bryson was not medically stable. The best Dr. Goldstein could do is describe the ways a nuchal cord sometimes might affect the baby and describe *other* situations where he had been faced with more complicated nuchal cord presentations. Thus, at best, he described how a nuchal cord in some situations poses a risk to the baby. Notably, he never stated that the nuchal cord in this case had any effect at all on the child; that the cord was tight, knotted, or wrapped multiple times around the infant's neck; or that this child was not medically stable. In fact, Dr. Goldstein said on multiple occasions that in this case, all he had to do was slip the cord over the infant's head.⁶ He never stated the presentation of the nuchal cord caused any issue and certainly did not state Bryson was not medically stable as a result of or due to the nuchal cord.

⁶ At trial, Dr. Goldstein explained:

Q: Now, explain to us, in this situation [shoulder dystocia], is the baby getting oxygen

A: The baby should be getting oxygen. I mean, here's the placenta, but you can't see the cord here so, you know, the cord could be, you know, trapped between the back of the head, or the cord could be wrapped around the neck. I've seen as many as three wraps around the neck. I've seen true knots, double true knots in the cord, but, you know, we can't see the cord so, you know, the baby should be getting adequate oxygen.

Q: When you say it's wrapped around the neck, what are you talking about?

A: I mean some babies have long umbilical cords and during the process of growth and development the cord becomes looped around the neck and, you know, sometimes it can be real tight and that can -- you know, when the baby has a contraction, or when the mother has a contraction and pushes on the baby and pushes the baby down, the cord can constrict around the neck and it doesn't cut off the breathing of the baby, but it cuts off the blood supply to the baby which is where the baby gets the oxygen

(R. p. 363, line 7-p. 364, line 3).

Dr. Goldstein continued:

A: She had a nuchal cord and fortunately we were able to reduce the cord over the baby's head.

Q: Okay. Now, I want you to stop right there and in your delivery note, I want you to explain the medical significance of where the nuchal cord was.

A: The cord is looped around the baby's neck so, you know, sometimes these are tight nuchal cords and when they're tight then they, they compress the umbilical cord and that compresses the blood flow to the baby and reduces the baby's oxygenation during labor and during pushing.

Q: Okay. And when you saw that the nuchal cord was wrapped around the baby's neck, what did you do?

A: Well, fortunately, in this case, we were able to slip it over the head.

Q: Okay. What I'm trying to find out is what does it mean when you say nuchal cord reduced.

The remaining two pieces of information cited by Respondents are also of no assistance. Like the nuchal cord, these facts exist alone, without any discussion of how they support a finding a patient was not medically stable. Respondents first note the infant had a pH score of 7.19. The only testimony offered concerning the significance of cord blood gas at 7.19 came from Dr. Goldstein, who stated, "That shows that the pH was a little bit low. We like to see them above 7.2." (R. p. 411, lines 12-16). Dr. Goldstein's comment that the cord blood gas was one one-hundredth below what he likes to see is a far cry from opining that the patient was not medically stable. Its significance and effect on a patient's medical condition went unexplained. It simply exists as a fact untied to the question of whether or not a patient was or was not medically stable. If it indeed showed the patient was not medically stable, certainly defense counsel would have asked one of the witnesses to offer such opinion. They did not, and we are left only with conjecture concerning why Respondents would not put the question to their witnesses.

Similarly, Respondents noted the APGAR scores were low, but again, there was no evidence or testimony regarding how this affected or related to a patient's medical stability. Respondents have simply noted that the APGAR scores were low but left this fact untied to any discussion or opinion regarding how this impacts or affects a patient's medical stability. In fact, Dr. Goldstein explained the APGAR scores were going up when rechecked and how that showed the baby was improving. (R. p. 410, line 21-p. 411, line 6).

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

A: That means that we slipped the cord over the baby's head and reduced it from being around the baby's neck. (R. p. 409, lines 12-p 410, line 4)

about medical stability. Dr. Jacobson stated it was his opinion that the low APGAR score meant the baby's tone was low, and that this might make the infant more vulnerable to injury. (R. p. 669, Line 11-p. 670, line 13). Dr. Jacobson explained that while the APGAR score was low at birth "it perked up pretty quick after birth." (R. p. 670, p. 23-25). Like Dr. Jacobson, defendant expert witness Dr. Salley discussed the low APGAR score only when providing his opinion as to the cause of Bryson's brachial plexus birth injury. (R. p. 746, line 1-3). He made no comment at all concerning whether it permitted a determination that a patient was not medically stable or how this affected the patient.

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

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

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

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

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

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

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

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

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

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

Respondents contend Appellants conceded the defense had satisfied the element that there be an "immediate threat of serious bodily injury or death." A review of what was actually discussed with the judge reveals this is false. The excerpt quoted by Respondents notes only acknowledgment by Appellants of the existence of a "threat" but at no point concedes the immediacy of the threat as required by the obstetric emergency exception. Issue of concession aside, even if Respondents

had satisfied this element, Respondents still wholly failed to satisfy the required medical stability element in order to receive statutory protection from negligent acts. Stated differently, satisfaction of the “immediate threat” element does nothing to satisfy the “medically stable” element, and all the elements had to be satisfied.

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

Respondents appear to assert that Appellants waived objection to the jury charge. Respondents base this argument solely on the assertion that Appellants did not also cite to Appellants’ objection to the footnote on the verdict form that restated the jury charge. However, in the initial brief, Appellants stated the error of incorrectly charging the jury “was compounded by this incorrect and incomplete definition being placed upon the verdict form.” (App. 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 Appellants dedicated pages of discussion concerning their issue with the charge, it is hard to understand how this issue was waived. Nevertheless, Appellants clarify that the issue appealed is the judge’s failure to charge the jury on the correct and complete definition of gross negligence, both as it was read to the jury and to the extent the objected-to charge was restated on the verdict form.⁸

The error in allowing the obstetric immunity from negligence statute to go the jury is compounded by the error of omitting all definition of what constitutes gross negligence. The definition of gross negligence was incompletely, and therefore incorrectly charged to the jury. Appellants requested the full, accurate, and complete definition be charged. The court refused,

⁸ As Respondents pointed out, Appellants did in fact object to the inclusion of the charge on the verdict form at trial. (R. p. 908, line 5-14).

stating it would only give the jury a “short definition on what gross negligence is.” (R. p. 902, lines 13-16). The short definition cut out the very parts Appellants requested be charged, thereby limiting what constitutes gross negligence under South Carolina law.

A trial judge must “declare the law” to the jury. *Baker v. Weaver*, 279 S.C. 479, 482 309 S.E.2d 770, 771 (Ct. App. 1983) (citing S.C. Const. art. V, § 17 (1985)). The purpose of jury instructions is to enlighten the jury and aid it in arriving at a correct verdict. *State v. Leonard*, 292 S.C. 133, 355 S.E.2d 273 (1987). Where a party requests additional instruction involving a substantial feature of the case, it is prejudicial for the trial judge to refuse to give the correct instruction. See *Baker v. Weaver* at 483, 309 S.E.2d at 772 (stating, “Because the requested additional instruction involved a substantial feature of the case . . . it was prejudicial to [Appellant]’ position for the trial judge not to have given the jury an instruction concerning those principles.”).

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

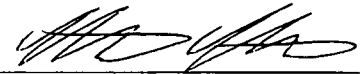
Respondents acknowledged in their brief, “This Court has defined gross negligence in a number of ways” and that “gross negligence is a relative term, and means the absence of care that is necessary under the circumstances.” *Hollins v. Richland Cty. Sch. Dist. One*, 310 S.C. 486, 490, 427 S.E.2d 654,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

Finally, the requested language is not a mere repeat or restatement of the charged, "even slightest of care" language. A review of the jury charge in its entirety reveals that no substantial equivalent of the requested language was included in the general instructions. (R. p. 909-935). Therefore, it cannot be argued that the "substance of the request" was included elsewhere in the charge. If requested additional definition is an accurate reflection of the law that has not otherwise been stated, and the definition may alter a jury's understanding of a substantial feature of the case, then it is prejudicial error not to charge the additional language. The trial court should not charge only the definition most favorable to a single party, and omit other language necessary for the jury to accurately apply the law to the facts as presented. In this case, such language was refused, and Appellants suffered prejudice as a result.

CONCLUSION

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

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April 29, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAY 03 2016

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

SC Court of Appeals

Michael Nettles, Circuit Court Judge

Appellate Case No. 2015-001237

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

Appellants,

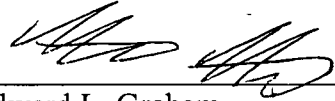
v

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

Respondents.

CERTIFICATE OF COUNSEL

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

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v

v.

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

Respondents.

PROOF OF SERVICE

I hereby certify that one copy of the *Appellants' Final Brief* and *Appellants' Final Reply Brief* in the above captioned matter was served by U.S. Mail, postage prepaid, on May 2, 2016 addressed to the following counsel of record:

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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

Appellate Case No. 2015-001237

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 2017-UP-265
Heard June 5, 2017 – Filed June 28, 2017

AFFIRMED

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Robert H. Hood, Mary Agnes Hood Craig, and Elloree A.
Ganes, all of Hood Law Firm, LLC, of Charleston, and
Deborah Harrison Sheffield, of Columbia, for
Respondents.

PER CURIAM: In this medical malpractice case, Genesie Fulton—individually and as next friend for Bryson F., a minor—appeals, arguing the trial court erred in (1) not finding as a matter of law the obstetric emergency statute was inapplicable to this case and (2) not charging the jury on the correct and complete definition of gross negligence. We affirm.

1. The evidence presented was sufficient to charge the jury with the obstetrical emergency statute. See S.C. Code Ann. § 15-32-230 (Supp. 2016)¹; *Stewart v. Richland Mem'l Hosp.*, 350 S.C. 589, 595, 567 S.E.2d 510, 513 (Ct. App. 2002) (explaining the statute provides a limitation on liability as an affirmative defense, and the defendant physician has the burden of proving the limitation applies and the plaintiff patient bears the burden of proving gross negligence). The trial court ruled it was proper to charge the jury with the obstetrical emergency statute because it was a factual question for the jury and there was "plenty of ammunition on both sides for argument." "If there is any evidence to support a jury charge, the

¹ S.C. Code Ann. § 15-32-230 (Supp. 2016) provides:

(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.

trial [court] should grant the requested charge." *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). The obstetrical experts testified that shoulder dystocia is a medical emergency. Fulton conceded this point but contended that unless it lasted for five or six minutes, it would not involve the immediate threat of death or serious bodily injury. We conclude from all of the testimony in the record the jury could have found the baby was not medically stable and in immediate threat of death or serious bodily injury. Therefore, the trial court did not abuse its discretion in charging the statute. *See State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) (stating the trial court's decision regarding a jury charge will not be reversed in appeal absent an abuse of discretion).

2. The trial court is required to charge only the current and correct law of South Carolina. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000); *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 362, 725 S.E.2d 112, 120 (Ct. App. 2012). "A jury charge that is substantially correct and covers the law does not require reversal." *Magnolia N. Prop. Owners' Ass'n*, 397 S.C. at 363, 725 S.E.2d at 120. The court charged the jury, "Gross negligence is the failure to exercise even the slightest care while negligence is the failure to exercise due care." We find the jury charge was substantially correct and covered the law; therefore, it does not require reversal.

AFFIRMED.

SHORT, WILLIAMS, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUL 06 2017

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

SC Court of Appeals

Michael Nettles, Circuit Court Judge

Appellate Case No. 2015-001237

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

Appellants,

v

v.

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

Respondents.

PETITION FOR REHEARING

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QUESTIONS PRESENTED

- I. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE OBSTETRIC EMERGENCY STATUTE WAS INAPPLICABLE TO THIS CASE?**
- II. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED IN FAILING TO CHARGE THE JURY ON THE CORRECT AND COMPLETE DEFINITION OF GROSS NEGLIGENCE?**

STATEMENT OF THE CASE

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

As an initial matter, Appellants note that at common law, there is no “emergency medical and obstetrical care exceptions,” as set forth in S.C. Code Ann. § 15-32-230.¹ The common law states that the plaintiff in a medical malpractice lawsuit must:

(1) Present evidence of the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances, AND

(2) Present evidence that the defendant doctor departed from the recognized and generally accepted standards, practices and procedures in the manner alleged by the plaintiff.

Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985).

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

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

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

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

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

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

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

obstetrical or surgical suite, no physician² may be held liable unless it is proven that the physician was grossly negligent.

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

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“The circuit court must charge the current and correct law to the jury.” *Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003) (citing *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995)). Additionally, “Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error.” *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983) (citing *Eaddy v. Jackson Beauty Supply Co.*, 244 S.C. 256, 136 S.E.2d 297 (1964)).

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

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

Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283, (2003)

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

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

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

CONCLUSION

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

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July 6, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

RECEIVED

Michael Nettles, Circuit Court Judge

JUL 06 2017

SC Court of Appeals

Appellate Case No. 2015-001237

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

Appellants,

v.

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

Respondents.

PROOF OF SERVICE

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

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Attorneys for Appellant



GRAHAM LAW

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

Edward L. Graham
Diane M. Rodriguez

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July 6, 2017

JUL 06 2017

SC Court of Appeals

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

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

Dear Ms. Kitchings:

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

With kindest personal regards, I am

Yours Very Truly,

Edward L. Graham

ELG/bh

Enclosures as cited above.

Enclosures

cc: Elloree A. Ganes, Esquire
Mary Agnes Hood Craig, Esquire
Deborah Harrison Sheffield, Esq.

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Appendix p. 1092 of 1099

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

C.A. No. 2013-CP-21-00587

App. No. 2015-001237

Ct. App. Opinion No. 2017-UP-265 – Filed June 28, 2017

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JUL 19 2017

SC Court of Appeals

Genesie Fulton, individually, and as Next Friend of
Bryson F., a minor,

Appellants,

v.

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

Respondents.

Return to Petition for Rehearing

This Court has issued an unpublished opinion affirming the judgment entered in favor of the Respondents on the jury's verdict. Herein the Respondents submit this Return to the Appellant's petition for rehearing.

In this medical malpractice case, Genesie Fulton brought this action in her individual capacity and on behalf of her minor son, seeking damages for a permanent brachial plexus nerve injury that the Infant suffered during delivery based on allegations that her Obstetrician, Dr. William Goldstein failed to properly manage and resolve a condition of shoulder dystocia which occurred during his delivery. Dr. Goldstein denied the negligence allegations and asserted the limitation on liability found in the Emergency Medical Obstetrical Care Exception found in S.C.

Code Ann. §15-32-230, which requires proof of gross negligence to impose liability on an obstetrician for treatment rendered during labor and delivery where there is a genuine emergency situation involving an immediate threat of death or serious bodily injury and the patient is not medically stable.

The Appellants moved for a directed verdict on the grounds that the Respondents had not presented sufficient evidence that the patient was not medically stable to support a jury issue on the obstetrical emergency statute. However, the Trial Court denied the motion and charged the jury on the statutory exception which included a definition of gross negligence as “failure to exercise even the slightest care” and “failure to exercise even a slight degree of care.” The jury returned a verdict for Dr. Goldstein, making a specific finding that “the facts of this case arise out of a genuine emergency situation where the patient is not stable and there is an immediate threat of death. The jury further found that the Plaintiffs had not proven that Dr. Goldstein was grossly negligent.

Appellants argue on appeal that the trial court erred in (1) not finding as a matter of law the obstetric emergency statute was inapplicable to this case and (2) not charging the jury on the correct and complete definition of gross negligence. This Court properly affirmed and the petition for rehearing should be denied.

First, the Trial Court properly charged the jury on the obstetrical emergency statute based on the concessions made and the evidence presented: (1) the Plaintiff conceded, and experts testified, that the presentation of shoulder dystocia constituted “a genuine emergency situation;” (2) the Plaintiff conceded, and experts testified, that the Infant was “in immediate threat of death” or “in immediate threat of serious bodily injury;”¹ and (3) there was disputed medical

¹ As an additional reason on this point, the Appellants did not raise this point in its motion. They

evidence in the expert testimony from which the jury could find that the Infant's condition was "not medically stable."

Second, the Trial Court charged the jury on a correct definition of gross negligence. Gross negligence has been defined as "failure to exercise even a slight degree of care." Anderson v. Ballenger, 166 S.C. 44, 55, 164 S.E. 313, 317 (1932); Hollins v. Richland Cty. Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993). The Appellants complain that the Trial Court did not add language that gross negligence is "the absence of care that is necessary under the circumstances."² The jury charge was substantially correct and covered the law; therefore, it does not require reversal. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000); Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 362, 725 S.E.2d 112, 120 (Ct. App. 2012); *see also* Martin v. Columbia Elec. St. Ry., Light & Power Co., 84 S.C. 568, 66 S.E. 993, 994 (1910) (no error to refuse to read party's request to charge where point was covered in general instructions).

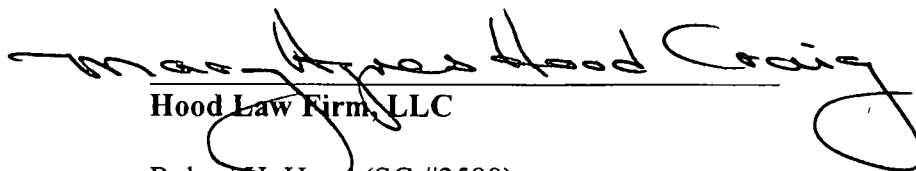
CONCLUSION

WHEREFORE, based on the foregoing, the Respondents respectfully submit that the Court properly affirmed the judgment on the jury's verdict, and the Petition for Rehearing should be denied.

only argued the "not medically stable" point: "Your Honor, we take exception to their request for inclusion of the Obstetrical Emergency Statute. It is inapplicable as a matter of law to this case based on one of the exceptions included. They have offered zero testimony that [the Infant] was medically unstable in this case." [ROA 838:10-15. See also ROA 841. 909.]

² Respondents maintain, in the alternative, that this issue was abandoned when the Appellants did not raise any challenge to the same definition of gross negligence on the verdict form. *See* Maus v. Pickens Sentinel Co., 258 S.C. 6, 186 S.E.2d 809 (1972) (objection to jury charge is waived where it is not argued in brief).

Respectfully submitted,



Hood Law Firm, LLC

Robert H. Hood (SC #2599)
Mary Agnes Hood Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Deborah H. Sheffield, *Of Counsel*, (SC #2757)
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Attorneys for Respondents

July 17, 2017

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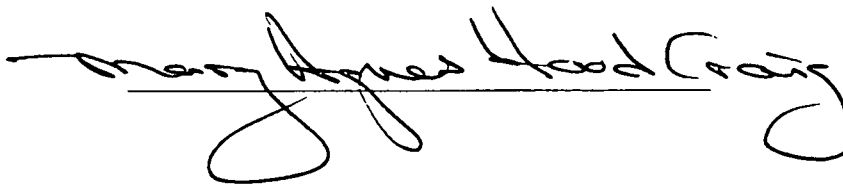
SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certifies that on this 17th day of July, 2017, a copy of the foregoing Return was served on the Appellants by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

Edward L. Graham, Esquire
Diane M. Rodriguez, Esquire
Graham Law Firm, P.A.
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Florence, SC 29503

Edward L. Graham, Esquire
Diane M. Rodriguez, Esquire
Graham Law Firm, P.A.
P.O. Box 604
Sumter, SC 29151-0604



July 17, 2017

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JUL 19 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

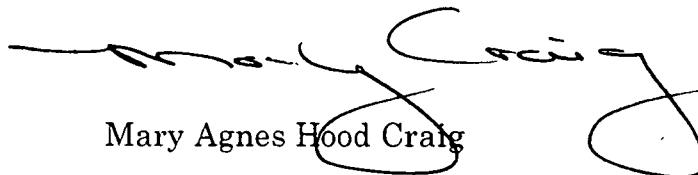
Re: Genesie Fulton, individually, and as Next Friend of Bryson F., a minor v L. William Goldstein, M D., individually and d/b/a L. William Goldstein OB-GYN
C/A No. 2013-CP-21-00587, Florence CP
Appellate Case No. 2015-001237
HLF File No. 25.053

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Respondents Return to the Petition for Rehearing in the above-referenced matter. Please return a clocked-in copy in the envelope provided. By copy of this letter we are serving counsel for the Appellant.

Kind regards,

Yours truly,



Mary Agnes Hood Craig

MHC/jad
Enclosure

cc: Edward L. Graham, Esquire
Diane M. Rodriguez, Esquire

The South Carolina Court of Appeals

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

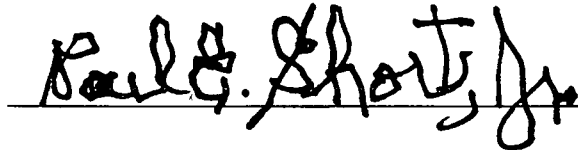
v.

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

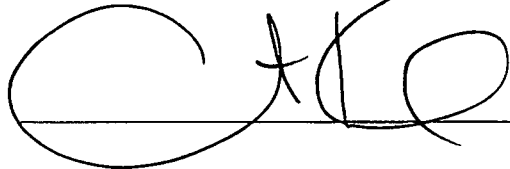
Appellate Case No. 2015-001237

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Edward L. Graham, Esquire
Diane M. Rodriguez, Esquire

FILED

August 18, 2017

John Layton Ruffin, Esquire
Elloree A. Ganes, Esquire
Mary Agnes Hood Craig, Esquire
Robert H. Hood, Esquire
Deborah Harrison Sheffield, Esquire
The Honorable Michael G. Nettles