

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2016-CP-42-3178
Appellate Case No. 2017-002299

Treva C. Flowers, Tristan
Flowers, and Ashley F., an
infant under the age of
fourteen (14) years, by and
through her next friends,
Treva C. Flowers and Tristan
Flowers,

Appellants,

v.

Bang N. Giep, M.D., and
Spartanburg & Pelham OB-
GYN, P.A. (formerly
Spartanburg OB-GYN, P.A.),

Respondents.

RECORD ON APPEAL

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1 deliberations will end.

2 On answer two, if you get to it, the question two, if
3 you get it to, was this a medical emergency for the doctor?

4 I ask that you answer the question yes cause that's
5 what we've shown through the evidence, the competent,
6 credible medical evidence in this case, occurred.

7 I want to thank you again for your time. I paid
8 attention to y'all as y'all were paying attention to me.
9 And that promise I asked you at the very beginning where you
10 wait till you've heard all the evidence before you make up
11 your mind, I noticed everybody was paying attention when I
12 started putting my witnesses up, and I want to thank you for
13 that because it's important that you hear the whole story
14 from Doctor Giep, from the nurses, from the experts so you
15 can make a, a decision that considers all of the evidence.

16 And as is -- sorry as we all feel for the condition the
17 child is in, remember the judge will tell you what that --
18 the legal standard you have to apply is. That the
19 plaintiffs have the burden of proving that Doctor Giep, by
20 the greater weight of the evidence, more, more likely than
21 not, committed malpractice in the case, and we think the
22 answer to the number one question should be no on that, and
23 we ask that you handle it this way in this case.

24 Thank you very much for your time.

25 MR. HENSHAW: Gary, leave the things from Doctor Ernest

1 please.

2 MR. LOVELL: I'll just leave it all.

3 MR. HENSHAW: All right. Good. Thank you.

4 May I, Your Honor?

5 THE COURT: Mr. Henshaw.

6 MR. HENSHAW: Thank you.

7 Ladies and gentlemen, one of the things that you should
8 not leave behind when you evaluate the witnesses, and even
9 though they may come to you with a very impressive, very
10 impressive resume, all the schools they've been to, all the
11 organizations that they're members of, nonetheless, you
12 should not set aside your own common sense and judgment in
13 looking at these because a resume can impact, pad a lot,
14 particularly when the experts are biased or prejudiced as
15 many of these experts clearly were.

16 They're defense experts. They regularly round in these
17 cases, and appear in these cases. And now they've got a
18 book that's been sanctioned by the American College of
19 Obstetrics and Gynecology called Neonatal Brachial Plexus
20 Palsy, and that became apparent when Doctor Chauhan when he
21 was asked about it, and the, the key to the book, because
22 the people who control what goes into the book, is not all
23 the contributing authors. Contributing authors just get
24 cited, but it's the committee itself, the Task Force on
25 Neonatal Brachial Plexus Palsy that was put together by the

1 American College of Obstetrics and Gynecology to write this
2 book.

3 And we went down the list with Doctor Chauhan, and
4 every one of these who are obstetricians, and that's who I
5 asked about, and Doctor Grimm, who is a biomedical engineer,
6 are defense experts.

7 This is their playbook. This is what they are using
8 and coming in and saying we have a document. We have a
9 source. We have an authority that establishes what we want
10 to tell you, as a defense expert, on behalf of doctors who
11 get accused of causing these types of injuries. They put it
12 together, and that's what they have, and that's what we
13 wanted to point out.

14 Now, what's interesting about that is that Doctor
15 Gurewitsch -- I mean they can't avoid citing to people who
16 have worked for years and years in this area. And so they
17 couldn't avoid citing to both Doctor Allen and to Doctor
18 Gurewitsch because these are two of the pioneers in this
19 area of study of medicine and shoulder dystocia and the
20 stresses that can cause injury to a baby.

21 And so Doctor Gurewitsch and Doctor Allen are both
22 cited, but then we have these portions or some of the --
23 more than just these portions. We have these theories that
24 have been put out by the book as an explanation of trying to
25 suggest that there are other things that can happen during

1 the delivery that can cause injury to a baby's shoulder.

2 what did Doctor Allen tell you?

3 There are two forces at play. Two forces at play here.
4 One is a compression force, and one is a stretch force, and,
5 of course, that makes sense.

6 The uterus pushes the baby out. It compresses the
7 baby's rear end in the situation where the baby's a head
8 first baby. It compress the baby's rear end and pushes that
9 baby forward down the birth canal and out. That's a
10 compressive force. Think about that, ladies and gentlemen.

11 what that means is you're not stretching. You are
12 compressing, and, to the extent that that's a compressive
13 force, it can only push the nerves together, but there's no
14 indication at all that these nerves were damaged because of
15 a compressive force. That's a different type of injury.
16 And that's what you heard from Doctor Gurewitsch.

17 This was -- and when you have a compressive force, when
18 you have the force that can cause injury like a rupture that
19 you have ruptures here, then what you have is a stretching
20 force. And so you have Doctor Gurewitsch, after Doctor
21 Allen explains that you have these two forces at work, those
22 are the only two forces at work. Doctor Gurewitsch says
23 yes, and when you have rupture of C5, six, and seven, as
24 explained by Doctor Armenta after he did his first surgery,
25 then you have a stretch that went to such a degree that it

1 was an excessive stretching force. A traction, a traction
2 force, a pulling force. Not a pushing force. A pulling
3 force that caused injury to these nerves and that makes
4 sense.

5 What doesn't make sense is when an expert gets up and
6 tells you, and actually it was experts, that we've put a --
7 and this is a doctor -- this Doctor Ernest. He says I've
8 done all this.

9 Well, this is very interesting pronouncements, but it's
10 never been published. It's never been peer reviewed. No
11 other doctors have looked at and accepted it. It's just
12 something that he wanted to come and tell you, and what he's
13 telling you, just use your common sense here now cause this
14 is, this, this is significant, he wants to tell you that
15 he's put an instrument inside a mother's womb, uterus, while
16 she was delivering a baby and found that the uterus could
17 produce 40-pounds of pressure.

18 Now, that's a compressive force again, and he didn't
19 talk about that being a compressive force. He just wanted
20 to tell you it's 40-pounds of pressure. Then he wants to
21 tell you that the exogenous force that can be utilized in a
22 situation like this is that no doctor has ever been able to
23 do more than 35-pounds.

24 Now, this is the equivalent of whether or not the
25 doctor, like Doctor Arnett says, can pick up a suitcase and

1 then he says, you know, I can't pick up any more than
2 35-pounds.

3 Now, look at this man over there.

4 All he can lift is 35-pounds?

5 He's got a problem.

6 It does not make sense that a man his age can only pull
7 at the pace of 35-pounds. That makes no sense at all, but
8 yet, that's what this stands for. That's what this
9 represents. That's what they're trying to pull over on you,
10 that he can only do 30 -- his muscles in both of his arms
11 only have the capacity, maximum, because no doctor has ever
12 done it before, to pull a -- 35-pounds. Then what he wants
13 to tell you is, is that it takes 45-pounds to break a nerve.

14 So, what he's trying to suggest is, is that doctors can
15 not break nerves. Yet, we have a standard of care,
16 apparently around the world, cause Doctor Chauhan
17 established it was in Britain. He certainly established it
18 was in the United States cause I kept asking him is that the
19 United States standard and they all said yes. We have a
20 standard of care that says a doctor should never, never
21 apply more traction than he would in a routine delivery.
22 That's the standard of care.

23 Doctor Gurewitsch said, you know, if you -- that is the
24 standard and she admitted doctors actually apply more than
25 that. But, but the standard of care is not to apply more

1 traction than you would in a routine delivery and that's
2 about 10-pounds cause she just ever so lightly wants to hold
3 that baby because -- and the reason for the standard.
4 There's no point to have that standard unless you're trying
5 to protect something.

6 And what are they trying to protect?

7 They're trying to protect the nerves in the shoulders.
8 So, we know that if you can stick to that standard, if you
9 can keep it at what you do on a routine basis, you don't
10 cause injury to these nerves. That's the standard of care.

11 Doctor Gurewitsch is another doctor who does not want
12 to admit that she applied excessive traction to a baby, and
13 yes, and it wasn't that she wouldn't answer all the
14 questions, but she would not answer questions about that
15 particular case, and she would not tell you why and I wish
16 she would. She would of told me. But she didn't.

17 But, nonetheless, she's just another -- if you look at
18 it, she's just another doctor who doesn't want to admit that
19 they negligently caused injury to a child. That doesn't
20 mean that her, her opinions about injuries and her
21 information about what can cause these injuries and about
22 the deviation from standard of care is not applicable to
23 this case, and it very well will be used against her in her
24 case and should be. And maybe she'll be held responsible
25 for doctors who just simply will never acknowledge that they

1 used too much traction or that they bent the baby's head the
2 wrong way.

3 It is significant that this was not a -- it is
4 significant in determining Doctor Giep's concerns about what
5 happened to this baby. And remember that, when he wrote
6 this at 9:00PM and the baby was born at 8:20, the baby had
7 been taken to, by the neonatal team, to the NICU, and then,
8 some time after nine o'clock, sent up for a chest x-ray to
9 see what was going on. And later that night, Doctor Giep
10 went to -- up to the NICU and spoke with the doctors and, by
11 that time, knew there was a brachial plexus injury.

12 So, he may or may not have known at 9:00PM, when he
13 wrote this note, minimal traction performed, but the --
14 and -- but the reason that I wanted to go through this with
15 him is that there was an order that he was obviously
16 following, and then he goes back and has this at the end.
17 And, of course, the question arises and, and he says no,
18 this is just where he normally puts it, and that very well
19 may be true. It also may be that he wrote it in after he
20 went up and talked with the doctors.

21 But it -- but this is his note where he's describing
22 what happened in his delivery of Ashley F It is --
23 it is specific to that purpose and you would expect him to
24 make comment about what the traction would be just as you
25 would expect him to make comment about all of the

1 procedures, particularly where the baby is born and has a
2 medical problem.

3 And you heard Doctor Chauhan, who worked at that very
4 hospital, say he would normally expect a doctor to put in if
5 he used the Rubin II maneuver that Doctor Giep says he did.
6 He would expect that to be in the note. And when he worked
7 at Spartanburg Hospital, he put it into the note. That was
8 his practice.

9 But this is what Doctor Giep says he does, that he puts
10 in some things about the, the delivery, and does not put in
11 others. And he initially started by saying, you know, if I
12 do that as part of my routine, I don't put it in and that's
13 the reason I didn't comment about the Rubin II. Well -- and
14 it -- and if I didn't call on anybody else to help me do it,
15 then I don't put it in. That's just my procedure.

16 So, then why does he put in that he has minimum
17 traction performed?

18 He didn't call on anybody else to put their hands on
19 the baby's head and pull. Nobody else got involved in that
20 part of it, but yet that became part of his note.

21 All right. It really doesn't make any difference
22 whether he did the Rubin II or not. The baby came out in
23 about a minute and Doctor Gurewitsch says the injury had
24 already occurred when he did it. That's -- the injury
25 doesn't occur when they do the Rubin II. The injury occurs

1 when they have their hands on the baby's head and they call
2 for suprapubic pressure and they have done the McRoberts
3 maneuver.

4 It had already occurred. He had already applied too
5 much traction, and he had already bent the baby's head and
6 he had already caused the nerve damage. That's not whether
7 he did it or whether he didn't it. That doesn't make any
8 difference here at all.

9 But then minimal traction performed. So, then,
10 appropriately, two days later, Doctor Giep meets with the
11 parents, and he writes a note saying I met with the parents,
12 and I explained the reason for the vacuum extraction or why
13 the vacuum extractor was used. And he said that he
14 discussed with family, husband and wife.

15 But then he goes back into the traction part. He's
16 still thinking about it. He's still worried about it. He's
17 still concerned about it, and it's not a significant
18 difference, but now it's not just minimal traction. He's
19 now saying gentle traction and he's saying constant
20 traction, which he didn't say before.

21 Right after he did it, he didn't say general and
22 constant traction. He just said minimal traction. But he's
23 still thinking about it. He's worried about it and he ought
24 to be.

25 We agree that Doctor Giep was not an insurer of the

1 outcome here or he didn't guarantee an outcome. We don't
2 have to prove that he did ensure in order to win our case.

3 What he was obligated to do and what he had a duty to
4 do was render standard medical care to this mother and the
5 baby, and we believe the evidence shows that he probably
6 didn't do that.

7 Now, the, the -- it is not inappropriate to look at the
8 damage done to try to determine why it happened. That is
9 the way -- that is called forensics. That's what we do when
10 we do autopsies. If somebody dies under suspicious
11 circumstances, we do an autopsy and look at their tissues,
12 and we try to the -- determine from that and come to
13 conclusions with experts, such as the pathologist, why it
14 happened. And that's what happened here.

15 It was done by Doctor Armenta when he did the surgery
16 on the baby. He wasn't specifically there to try to
17 determine whether Doctor Giep stretched these nerves or not,
18 but that was what he concluded.

19 In his testimony that was presented to you, he said
20 this was a traction injury. That is the very specific word
21 he used. Traction is pulling. Traction is stretching.
22 It's not the maternal forces of labor that caused it. Those
23 are compaction forces. Not -- that's not stretching.
24 That's not traction.

25 So, it is true that, as a matter of law, you don't give

1 compensation for negligence simply because somebody had a
2 bad outcome in a medical treatment. But that doesn't mean
3 that you can't look at what was determined in the course of
4 that -- in the course of, of surgery of that particular
5 complication to determine why there wasn't -- whether there
6 was negligence and how it occurred, and whether or not you
7 should award compensation for the negligent act.

8 We're not seeking compensation just because there was a
9 bad outcome. We're seeking compensation because Doctor Giep
10 did not exercise standard medical care. He used too much
11 force. He used excessive traction. He bent the head.

12 There's -- there is some confusion by defense counsel
13 about what is required by them to prove as an affirmative
14 defense, that they are entitled to the immunity of the
15 medical emergency statute. You don't look at whether the
16 doctor is considering that it could be a -- that it could be
17 a risk of death or a risk of serious bodily injury.

18 You look at whether or not there was, in fact, to the
19 patient, an immediate risk of death or serious bodily
20 injury. And that would -- did not occur and never did occur
21 in this case because it was not going to occur. There was
22 not going to be an immediate risk of death or serious bodily
23 injury for some four minutes after the shoulder dystocia was
24 recognized. It never got that far.

25 Within one minute the baby was delivered, and the risk

1 was -- and whatever risk there were, and they weren't
2 immediate, went away.

3 Just a few more points. Well, just this is the last
4 one.

5 We're not here seeking your sympathy. The defense
6 counsel is absolutely right and the judge will instruct you
7 that sympathy should not be a part of your determination as
8 to whether my clients recover from Doctor Giep. So, leave
9 sympathy out of it.

10 Ashley will get all the sympathy, sympathy she needs
11 for the rest of her life. And so that's not what we're
12 seeking here, but this is also a two edge sword.

13 Some jurors find it difficult to make an accusation
14 against a doctor just because he's a doctor, and that
15 shouldn't come into play either. That's a type of sympathy
16 and you shouldn't use that as a basis for your decision
17 either. You need to set that aside. And if that is in your
18 mind, please do because that's the only way you can do your
19 duty as a juror.

20 I also want to thank you for your attention in this
21 case. It has -- I have been proud to represent these
22 clients. They have done a remarkable job with this child,
23 and it has been my pleasure to see them with her, and to see
24 how she has grown. I've had this case for a long time, and
25 I've seen her grow up, and she's a remarkable child, and a

1 lot of it is due to these people right here.

2 So, it has been my pleasure to represent them, and I
3 hope that I have done, done it -- done the right by them. I
4 hope I've asked all the questions that they wanted asked. I
5 hope I've investigated all that they needed to have
6 investigated. I hope I've asked all the questions that you
7 wanted asked. I hope that I haven't done anything to offend
8 you, but, if I have, please lay that aside too because it's
9 only right they be given justice regardless of what I do.

10 And so now I'm at the end of the case. I'm done. And
11 I'm turning it over to you. And I hope that you will feel,
12 at the end, that you can be proud of your decision, that you
13 can walk out of here today, and this is finished today, that
14 you can walk out of here and say, you know, we did the right
15 thing. I don't care who asked me about it later, whether or
16 not they like it, I know what the right thing is and I did
17 it.

18 Thank you.

19 THE COURT: We're gonna take a quick break before I
20 give you the instructions.

21 The clerk's gonna come and take your lunch orders, and
22 then you'll come back and I'll give you the legal
23 instructions.

24 So, please go to your jury room right now, but don't
25 begin your discussions of the case.

1 (WHEREUPON, the following takes place outside the
2 presence of the jury.)

3 THE COURT: We'll be ease while the clerk takes the
4 lunch order.

5 (WHEREUPON, a short recess was taken at this time.)

6 THE COURT: All right. Bring the jury in please, sir.

7 (WHEREUPON, the following takes place within the
8 presence of the jury.)

9 THE COURT: Mr. Foreman, ladies and gentlemen of the
10 jury, you, of course, have heard and seen all of the
11 evidence presented during the trial of the case. You've
12 also now heard the final summations of the lawyers so --
13 that have been provided to you, and I will now provide you
14 with the legal instruction that you are to apply in the
15 case, and then you'll be asked to go back and -- to begin
16 with your deliberations.

17 And, through that process, you'll examine all the
18 evidence. You'll decide the facts. You'll apply the law
19 and you will arrive at a fair and just decision, whatever
20 that decision may be.

21 It is your exclusive prerogative to determine what the
22 facts are. You do that through your own common sense
23 examination and evaluation of all of the testimony and other
24 evidence received during the trial of this case. You 12
25 jurors alone will determine what weight, value, and effect

1 to give to any particular witness' testimony or other
2 evidence in the case. Your sole objective, of course, is to
3 simply render a fair and impartial decision based upon that
4 evidence and the facts as you determine those facts to be
5 relating to that evidence and the allegations, and then your
6 application of the law as I will have provided it to you.

7 Now, under the law of this state, while you are the
8 judges of the facts, I am judge of the law, and that just
9 simply means that nobody's gonna tell you how to arrive at
10 your determination of fact in this case. You do that, as I
11 just stated, by the exercise of good judgment and common
12 sense conscientiously applied to the testimony and the
13 evidence received during the course of the trial.

14 You must, however, under your oath as a juror, accept
15 the law as I provide it to you as being the law that you are
16 to apply in this case. In other words, you are never to
17 concern yourself with what you thought the law was before
18 you came to serve as a juror this week or what you think the
19 law ought to be. You must simply, under your oath as a
20 juror, accept the law as I provide it to you as being the
21 law that you are to apply in the case, and then you simply
22 take that law and you apply it to the facts as you 12 jurors
23 determine those facts to be based upon your common sense
24 examination and evaluation of the evidence received during
25 the course of the trial.

1 Now, in this case, as you know, this is a civil action
2 arising from a physician/patient relationship that existed
3 between the plaintiffs, Treva C. Flowers and Ashley
4 F , and the defendant, Bang N. Giep, and his medical
5 practice, Spartanburg & Pelham OB-GYN, P.A. This is
6 commonly referred to as a medical negligence case or a
7 medical malpractice case.

8 Now, in this case, the plaintiff is alleging that the
9 plaintiff, Treva Flowers, was a patient of Spartanburg &
10 Pelham, OB-GYN, P.A. who was provided medical care to her
11 during her pregnancy, and eventually the birth and delivery
12 of her child, Ashley F , which was provided by
13 Bang N. Giep, M.D., who was employed by the medical
14 practice.

15 The plaintiffs further alleges that, during and in the
16 course of that professional relationship, Doctor Giep failed
17 to render medical care in accordance with the applicable
18 standard of medical care required of an obstetric physician
19 in assisting with the delivery of a child.

20 The plaintiffs further allege that Doctor Giep's
21 deviation from that applicable standard of obstetrical
22 medical care proximately caused injury to Ashley
23 F and other losses suffered by each of the plaintiffs.

24 Now, in response to those allegations and those claims,
25 the defendants admit that Doctor Giep was employed by the

1 medical group. They do admit that they did provide prenatal
2 care to Treva C. Flowers, and they do admit that Doctor Giep
3 did provide labor and delivery services to Treva C. Flowers
4 during the course of the birth and delivery of Ashley
5 F .

6 The defendants deny that the medical care that was
7 provided by Doctor Giep failed to conform to the applicable
8 standard of medical care required of an obstetric physician
9 under the circumstances then existing, and, therefore, they
10 deny that the medical care provided by Doctor Giep was a
11 proximate cause of any injury or harm that the plaintiffs
12 complain of.

13 The defendants further allege that, if the defendants
14 are shown to have, in any way, been negligent in the care
15 provided, that such conduct occurred during and in the
16 course of a genuine medical emergency situation, and,
17 therefore, under the law, the defendants are not to be held
18 responsible for that claim of negligence.

19 Now, the burden is -- always is upon the plaintiff, in
20 bringing the lawsuit, to prove their entitlement to a
21 recovery. They must prove their entitlement to a recovery
22 by what's referred, what's referred to as the greater weight
23 or preponderance of the evidence. And what is meant by the
24 greater weight or preponderance of the evidence may be
25 illustrated by your imagining a traditional set of weighing

1 scales.

2 And when the trial begins, those scales are absolutely
3 even. As the trial progresses, and evidence is received,
4 you may be placing that evidence on one side of those scales
5 or the other. That is for or against some proposition
6 asserted by one party or the other. But, in the end, after
7 you've carefully weighed all of that evidence in your minds,
8 if those scales remain absolutely even or if they tip in
9 favor of the defendant, then the plaintiff will have failed
10 in their burden of proof. That is the burden of proving
11 their entitlement to a recovery by the greater weight. And,
12 at the same time, if those scales tip even slightly in favor
13 of the plaintiff, then the plaintiff will have met their
14 burden of proof, the burden of proving their entitlement to
15 a recovery by the greater weight or preponderance of the
16 evidence.

17 Now, of course, there is no method for you to actually
18 weigh evidence. You do that through a mental exercise using
19 your own good judgment and common sense in order to
20 accomplish that task that you have been called upon to
21 perform.

22 Now, as I've told you, you are the sole judges of the
23 facts in this case. You are, therefore, necessarily, the
24 sole judges of the credibility and the believability of each
25 witness that has testified during the course of this trial.

1 You 12 jurors alone will decide what weight, value, and
2 effect to give to any particular witness' testimony or other
3 evidence in this case.

4 Again, your sole objective is to simply reach the truth
5 in the matter and to render a fair and impartial decision
6 based upon your consideration of that evidence. But, in
7 evaluating and assessing the credibility of witness'
8 testimony, there are a number of factors which you should
9 consider, and I'm going to list those factors for you.

10 You should consider the demeanor of the witness. That
11 is how the witness appeared to you when the witness
12 testified from that witness stand before you.

13 Was the witness straightforward in responding to
14 questions or was the witness hesitant or evasive in
15 responding to questions that were asked of the witness?

16 Simply put, did the witness appear to be -- appear to
17 you to be telling the truth and to have knowledge of the
18 facts to which that witness has testified. You should also
19 consider whether or not the testimony of a witness is
20 consistent or is it inconsistent with that witnesses own
21 testimony provided here in Court or whether it was
22 consistent or inconsistent with other statements, either
23 under oath or not under oath, made by that same witness
24 outside of Court. And you should consider whether or not
25 the testimony of a witness is consistent or is it

1 inconsistent with other witness' testimony and other
2 evidence received during the course of the trial.

3 You should also consider how the witness came to know
4 the facts to which that witness has testified. In other
5 words, what was that particular witness' opportunity and
6 ability to perceive the existence of those facts to which
7 that witness has testified by having previously used his or
8 her senses, and then what is that particular witness'
9 ability to be able to come into Court and to accurately
10 recollect to you as to what they have previously perceived.

11 You should also consider any bias or prejudice or
12 interest that you find a witness might have with respect to
13 a case.

14 In other words, do you find some reason that a
15 particular witness would come into Court and would testify
16 one way or another to help or hurt one side or the other?

17 And you may consider any interest that a witness might
18 have in the outcome of this case if you determine that that
19 witness does have such an interest, and you find that that
20 interest would bear upon that particular witness'
21 credibility. You should also consider whether or not the
22 testimony of a witness is strengthened or is it weakened by
23 other testimony or other evidence received during the course
24 of the trial.

25 Now, during the course of this trial, you have also

1 heard certain testimony that has been received from persons
2 who have been declared to be and qualified to testify as
3 experts in a particular field. You are instructed that,
4 although lay witnesses are generally limited to testify only
5 to facts within their own personal knowledge, experience, or
6 perception, and are not allowed to give opinions regarding
7 the matter, certain witnesses, who do have special
8 education, training, or experience in relation to a
9 particular subject matter, may be considered an expert in a
10 particular field. And when that person is qualified as an
11 expert in that field, then they may give testimony in the
12 form of an opinion as it relates to the facts of the matter
13 which is the subject of this particular lawsuit.

14 These conclusions and these opinions are evidence to be
15 considered by the jury along with all of the other testimony
16 and evidence received during the trial of the case in
17 arriving at your decision. If you find that the opinions of
18 an expert witness are not based upon sufficient education,
19 training, experience, or a proper consideration of the facts
20 that relates to this case, then the jury may reject those
21 opinions in their entirety or in part just like the jury may
22 do with any other witness that has testified during the
23 trial of the case.

24 Where there is a conflict in expert testimony, just
25 like with any other testimony, the jury must determine that

1 which is the most credible and believable based upon the
2 jury's consideration of the relative qualifications of the
3 experts and their consideration of the relevant facts
4 relating to the case as well as any bias, prejudice, or
5 interest that they may have.

6 Now, because you are the judges of the facts and
7 because you are the judges of the credibility of each
8 witness that has testified during this trial, you are
9 permitted to believe as much or as little of what a witness
10 has testified to as you deem is appropriate, and, therefore,
11 you may believe everything that a witness testified to. You
12 may choose to believe none of it. You may believe some
13 portion of a witness' testimony and reject some other
14 portion of that same witness' testimony.

15 You may believe one witness as opposed to several or
16 several as opposed to one, but whatever your good judgment
17 and common sense tells you is the most believable and
18 credible evidence and testimony is the testimony and
19 evidence that you should accept, and you should reject any
20 testimony or other evidence that you find not to be credible
21 or believable.

22 Again, your sole objective is just simply to render a
23 fair and impartial decision based upon the evidence, the
24 facts as you've determined them to be, and then your
25 application of the law that I will have provided you.

1 Now, while there are various forms of evidence such as
2 testimony, photographs, documents, charts, and other type of
3 physical exhibits, there are really only two types of
4 evidence. Either or both of those types of evidence may be
5 used to prove any fact in issue independently or in
6 combination, but the two types of evidence are direct
7 evidence and circumstantial evidence.

8 Direct evidence is the testimony of a person who
9 testifies from actual knowledge of the fact. It is
10 testimony by a person who has perceived the existence of a
11 fact by means of his or his senses, and then they come into
12 Court and they testify as to what they have previously seen
13 or heard or felt for that matter. Direct evidence proves
14 the existence of a fact directly and does not require any
15 deduction or inference to be made.

16 Circumstantial evidence, on the other hand, is the
17 proof of some other fact or set of facts, which taken either
18 singularly or collectively, may prove the existence of a
19 fact in question as a necessary consequence. That is
20 through an inference. And an inference is simply a
21 deduction of fact that may logically and reasonably be drawn
22 from the proof of some other fact or set of facts.

23 It is a fact not proven by the direct testimony of a
24 witness based upon their personal perception, but it is a
25 conclusion which might reasonably be drawn from the proof of

1 other facts. In other words, you may infer that a
2 particular event occurred or that a particular fact exists
3 based upon the proof of sufficient factual circumstances
4 which would reasonably warrant your arriving at that
5 particular conclusion.

6 The law makes no distinction between the weight or
7 value to be given to direct evidence and circumstantial
8 evidence nor is a greater degree of certainty required of
9 circumstantial evidence as opposed to direct evidence. And
10 where there is more than one reasonable inference that might
11 be drawn from the evidence in the case, it is for the jury
12 to determine what is the most probable and reasonable
13 inference to accept in the exercise of good judgment and
14 common sense.

15 Now, as you know, this is a medical negligence, medical
16 negligence lawsuit, medical malpractice lawsuit. In a
17 medical negligence lawsuit, medical malpractice lawsuit, the
18 plaintiff has the burden of proving four essential elements,
19 by the greater weight or preponderance of the evidence,
20 before the plaintiff would be entitled to a recovery of any
21 type of compensation.

22 The first element. The plaintiff must present evidence
23 in order to establish the standard of medical care
24 applicable and relevant to an obstetric physician in the
25 delivery of a child under the circumstances attendant to

1 this particular case. In other words, the plaintiff has to
2 establish what would the average competent obstetric
3 physician be expected to do or be expected to avoid doing
4 when assisting with a delivery of a child under the
5 circumstances of this particular case.

6 Secondly, the plaintiff must prove that there was an
7 inappropriate deviation or departure from the applicable
8 standard of care by the defendant physician. In other
9 words, the plaintiff must prove that the defendant's care
10 and treatment did not conform to the standard of medical
11 care applicable to and required of an obstetric physician
12 under the circumstances attendant to this particular case.

13 Thirdly, the plaintiff must prove that injury has been
14 sustained or some loss has been suffered.

15 And, fourthly, the plaintiff has to prove that it was
16 the defendant's deviation and departure from the applicable
17 standard of medical care that proximately caused some injury
18 or other loss claimed to have been suffered by the
19 plaintiffs.

20 Now, with regard to the first element, the standard of
21 care, you are instructed that the plaintiff has the burden
22 of presenting evidence establishing the generally recognized
23 standards, practices, and procedures which would have been
24 exercised by the average competent obstetric physician if
25 acting under the same or similar circumstances as

1 established by the evidence in this case. In other words,
2 the plaintiff must establish, by competent evidence, what
3 professional duty was owed by Doctor Giep to Ashley
4 F in the providing of medical care and treatment
5 relevant to that child's delivery under the circumstances of
6 this particular case.

7 In that regard, you are instructed that you are not
8 permitted to create your own standard of care in deciding
9 whether or not Doctor Giep's conduct did or did not fulfill
10 the duties imposed upon him under the law and medical
11 standards. The standard to be applied by you jurors is did
12 the defendant possess that degree, that degree of learning,
13 knowledge, and experience, and did he exercise that degree
14 of care and skill in the providing of medical care and
15 treatment to Ashley F that is required of the
16 average competent obstetric physician if providing medical
17 care and treatment under the same or similar circumstances
18 as established by the evidence in this case, and it,
19 therefore, follows that, because you not experts in the
20 field of medicine and the specialty of obstetrics that is
21 the subject of this particular case, the only way you may
22 properly determine whether or not the defendant's conduct
23 did measure up to the appropriate standard of medical care
24 is by your consideration of testimony provided during the
25 trial by persons who have been called and qualified to

1 testify as expert witnesses as to the applicable accepted
2 standards, practices, and procedures which are required of a
3 reasonably competent obstetric physician in providing
4 medical care and treatment to a patient under the
5 circumstances of -- attendant to this case.

6 In that regard, you are instructed that every patient
7 who is treated by a physician is entitled to a thorough and
8 careful examination using appropriate methods of diagnosis
9 and treatment in order for the physician to appropriately
10 determine the condition of the patient so that the
11 appropriate course of care and treatment can be properly
12 determined. When there is a risk of substantial danger
13 present, and the symptoms of the patient are consistent with
14 such a risk, the obstetric physician has a duty to respond
15 in proportion to the risk. The greater the risk of the
16 condition to the patient, the greater the duty of the
17 obstetric physician to respond appropriately and to provide
18 appropriate care in compliance with the applicable standard
19 of care.

20 In undertaking the care and treatment of a patient, the
21 law requires that an obstetric physician possess the
22 requisite degree of learning, skill, and experience
23 necessary to accomplish the purpose for which he was
24 employed, and he must exercise reasonable care, skill, and
25 diligence in the application of his knowledge, training, and

1 experience to the providing of medical care to his patient.
2 He is required to do that which the average, ordinary,
3 reasonable, competent obstetric physician would do in the
4 providing of medical care and treatment to a patient when
5 acting under the same or similar circumstances.

6 Secondly, the plaintiff must establish that the
7 defendant deviated from the applicable standard of care.
8 You are instructed that the plaintiff must establish that
9 the defendant, in this case Doctor Giep, did fail to provide
10 medical care to Ashley F in accordance with the
11 applicable standard of care. In that regard, you are
12 instructed that a physician who holds himself out to be a
13 specialist in a particular field of medicine must have the
14 same degree of learning, knowledge, experience, and skill
15 possessed by a specialist in good standing in the same field
16 or specialty, and, further, must exercise the same degree of
17 care and skill in the providing of care and treatment to his
18 patient that would have been exercised by the average
19 competent specialist in the same field of medicine if
20 providing care under the same or similar circumstances.

21 In other words, the plaintiff must prove that Doctor
22 Giep did something that an ordinary, and reasonable,
23 competent obstetric physician would not have done or Doctor
24 Giep failed to do what an ordinarily reasonable, competent
25 obstetric physician would have done if acting under the same

1 or similar circumstances attendant to this particular case.
2 And, if so, the physician would be deemed to have been
3 guilty of medical negligence by that failure to comply with
4 the appropriate standard of care.

5 You are instructed that medical negligence is never to
6 be presumed nor may negligence ever be inferred solely from
7 evidence of an injury occurring during the course of
8 treatment or from a bad consequence resulting from
9 treatment. Medical negligence must be affirmatively proven
10 by competent and credible evidence. In the absence of
11 competent and credible evidence to the contrary, it shall
12 always be presumed that the physician has properly fulfilled
13 the professional duty owed by him to his patient.

14 The law does not require of a physician absolute
15 accuracy, whether in his practice or in the exercise of his
16 judgment, nor does the law hold any physician to a standard,
17 standard of infallibility nor does it require that he
18 perform with the utmost care and skill of which some
19 physician may be capable. It does, however, require of him,
20 in the practice of his profession and skill, to possess that
21 degree of learning, knowledge, experience, and skill, and to
22 exercise that degree of skill and care which is exercised by
23 an ordinary competent obstetric physician if acting under
24 the same or similar circumstances.

25 A physician is not an insurer of a beneficial result

1 from care or treatment, but must comply with the applicable
2 medical standard of care. Negligence on the part of a
3 physician may not be inferred solely from a bad result or
4 from a known risk associated with a particular condition or
5 from child birth. The mere fact that a complication occurs
6 during the course of medical care or that, during the
7 providing of that medical care, some injury or some harm
8 occurs to the patient is not, in and of itself, sufficient
9 to establish negligence on the part of the physician. An
10 obstetric physician is not liable for a error or a mistake
11 in judgment if he applies ordinary and reasonable care
12 within the recognized and approved methods and procedures
13 and forms his judgment after careful and proper examination
14 of the patient in light of the standard of care at the time
15 that the care is rendered.

16 In order to establish negligence on the part of the
17 physician, there must be proven a departure and a deviation
18 from the generally accepted and recognized standards,
19 practices, and procedures applicable to obstetric physicians
20 acting under the same or similar circumstances which are
21 attendant to this particular case.

22 Medicine is an exact science and competent, qualified
23 physicians may differ on what is a preferable method or
24 procedure in accomplishing the purpose for which they are
25 employed. The mere fact that one physician may use a

1 different approach than another in the employment of a
2 particular method or procedure does not mean that one or the
3 other is negligent so long as the approach employed by the
4 physician complies with the medical standard of care
5 applicable to those obstetric physicians acting under the
6 attendant circumstances.

7 In other words, where there is more than one generally
8 recognized method, practice, or procedure to be employed,
9 the physician may utilize any of those approved methods in
10 the exercise of his best judgment so long as it is shown
11 that the method utilized is within the applicable standard
12 of medical care. In determining whether an obstetric
13 physician has exercised reasonable care and judgment in the
14 application of a particular approved procedure, you must
15 consider his judgment in relationship to the facts as they
16 existed at the time that the judgment was made, and not in
17 light of what hindsight might reveal.

18 You are further instructed that South Carolina Code
19 annotated Section 15-32-230 -- and the Code of Laws is just
20 these volumes, and these volumes have a lot of laws and
21 rules and regulations that govern our conduct in a variety
22 of ways, and one particular section that could be applicable
23 in this case, depending upon your determination of the
24 facts, is that particular section, 15-32-230.

25 That section provides that a physician who commits some

1 act of negligence in the course of the providing of medical
2 care and treatment to a patient in an emergency department
3 or in an obstetrical or surgical suite is not liable in a
4 claim of malpractice if that care is rendered in a genuine
5 emergency situation which involves an immediate threat of
6 death or serious bodily injury to the patient receiving that
7 care.

8 The statute further provides that the immunity and the
9 limitation on liability from a claim of medical negligence,
10 as provided for in that statute, shall only apply where it
11 is proven that the patient is not medically stable and the
12 patient is in immediate threat of either death or of serious
13 bodily injury. Where a physician claims immunity from
14 liability based upon this particular statute, the burden is
15 on the physician to establish that the care provided to the
16 patient was rendered in a genuine emergency situation, that
17 the patient was not medically stable, and was in immediate
18 threat of either death or serious bodily injury, and the
19 defendant would have the same burden of establishing
20 entitlement to liability under that statute, and the same
21 standard that the plaintiff has in proving that the
22 defendant is liable for any injury they claim to have
23 sustained.

24 So, when either party has the burden of proving
25 something to the jury, they have to prove that fact by the

1 greater weight or preponderance of the evidence.

2 Now, within the meaning of the statute, immediate
3 refers to an event which is current, present, actual,
4 existing, sudden, or urgent.

5 Serious bodily injury refers to an injury which causes
6 a substantial risk of death or which causes serious
7 permanent disfigurement or protracted loss or impairment of
8 the function of a bodily member or organ.

9 All right. So, the first two are what are the -- what
10 is the standard of care.

11 Number two, what -- was there a deviation or departure
12 from the standard of care.

13 The third element is proximate causation. The
14 plaintiff must prove that any injury to Ashley F
15 or any loss to the other plaintiffs was proximately caused
16 by Doctor Giep's medical negligence by his deviation or
17 departure from the applicable standard of medical care
18 applicable to the circumstances here.

19 The mere fact that an injury or loss has been suffered
20 or even that a person has breached a duty of professional
21 care owed to another or otherwise shown to have been
22 negligent in some respect does not, in and of itself,
23 establish liability or responsibility on the part of any
24 person unless proximate causation has also been established
25 by the greater weight or preponderance of the evidence.

1 Therefore, even if you find that the plaintiff has
2 proven Doctor Giep breached a legal duty owed to his
3 patient, and you further find that some loss has previously
4 been suffered by the plaintiff, she would still not be
5 entitled to a verdict against Doctor Giep unless you further
6 find that it was the negligence of the defendant that was a
7 proximate cause of the injury or any loss suffered by the
8 plaintiff.

9 The law defines the proximate cause of an injury to be
10 something that produces a natural chain of events, which, in
11 the end, brings about the result. In other words, the
12 proximate cause is the direct cause without which the event
13 and the resulting injury would not have occurred.

14 Where the cause of an injury may be as reasonably
15 attributed to an act or cause for which the defendant is not
16 liable as to one for which the defendant is liable, the
17 plaintiff will have failed to establish that any injury was
18 proximately caused by the fault of the defendant. It is
19 only when the fault, if any, proven on the part of Doctor
20 Giep was a proximate cause of some injury proven to have
21 been sustained and suffered by Ashley F that
22 Doctor Giep and his practice would be held responsible and
23 the plaintiff would be entitled to a verdict.

24 In order for any negligence of a defendant to be a
25 proximate cause of an injury, it necessarily -- it is

1 necessary, necessary that some harm from that negligence be
2 foreseeable. It is not necessary that the defendant did or
3 should have contemplated the particular event or harm which
4 did occur. It is sufficient if he should have foreseen that
5 his negligence would probably result in harm of some kind to
6 the patient, and that that harm was a natural and probable
7 consequence of that negligence. Where, as here, the
8 plaintiff relies upon the testimony of an expert witness or
9 witnesses to show a casual connection between an injury and
10 some alleged deviation from the applicable standard of care,
11 the testimony must meet the most probable rule.

12 It is not sufficient that the injury possibly or could
13 have or might have resulted from the cause alleged, but the
14 expert must go further and state, in some similar form or
15 fashion, that taking into consideration all of the relevant
16 factors and the evidence in this case, it is the expert's
17 professional opinion that the resulting question most
18 probably, to a reasonable degree of medical certainty, came
19 from the cause alleged.

20 I'm now going to instruct you on the law as it relates
21 to damages because the fourth element is that the plaintiff
22 has to prove that they suffered some injury and suffered
23 some loss. And so I'm gonna instruct you on the law of
24 damages, but the fact that I am instructing you on the law
25 as it relates to the issue of damages should not be taken by

1 you as any indication by me that you are to award damages in
2 this case. I must simply provide you with that explanation
3 as to the law as it relates to the issue of damages in the
4 event that you find the plaintiffs are entitled to a
5 recovery of damages based upon your consideration of the
6 evidence, your determination of fact, and your application
7 of the law to the facts as you determine them to be.

8 Now, there are two types of damages. Those two types
9 of damages are actual damages and punitive damages.
10 Punitive damages are not being sought in this case. It's
11 not applicable to the facts of this case, and they would not
12 be appropriately awarded in this particular case.

13 So, the only damages or types of damages that you will
14 be considering, if you determine damages should be awarded
15 to the plaintiffs, would be actual damages, and actual
16 damages are monies or compensation paid to the plaintiff,
17 which is intended to compensate an injured person or a
18 plaintiff, and that is to put that person as near as
19 possible as they could be placed into the same position that
20 they were in before the event occurred, and any injury was
21 sustained. In other words, actual damages would be the
22 actual expenses caused as well as other losses, both
23 tangible and intangible, suffered by the plaintiffs because
24 of some negligent conduct on the part of the defendant.

25 A plaintiff who has been personally injured or

1 sustained some loss due to the negligent conduct of another
2 is entitled to be compensated for all of those losses, both
3 tangible and intangible, which are proximately caused by
4 that negligent conduct, and such an award would properly
5 include compensation not only for those losses, cost, or
6 expenses which have already been shown to have been
7 sustained by the plaintiffs, but would also include
8 compensation for any damages which are proven to be
9 reasonably certain to occur in the future so long as they
10 are proven to have been proximately caused by the
11 negligence.

12 Now, with regard to Ashley F claim, she's
13 not seeking what are referred to as economic damages. She's
14 not seeking cost of medical care, treatment, that sort of
15 thing. Those are damages that have been -- that are being
16 sought by her parents. As her parents, they're obligated to
17 pay for those costs on behalf of a child. And so, when they
18 incur those costs on behalf of a child, then the parents may
19 recover for those costs that were incurred because of injury
20 or harm suffered by the child so long as it is the result of
21 negligence proven on the part of the defendant.

22 But with regard to Ashley F , she may be
23 compensated for damages which are noneconomic in nature, and
24 those include compensation for physical pain and suffering.
25 Pain and suffering is a material element upon which a

1 recovery may be based. Such damages have no market price.
2 They're not capable of exact measurement. There is no fixed
3 rule or standard by which such damages may be measured, and,
4 therefore, any damages to be awarded for any pain and
5 suffering suffered by Ashley F , if proven, must
6 be left to the judgment of the jury and considered in light
7 of your own life experiences, and in the exercise of good
8 judgment and common sense.

9 A person who is suffered personal injury due to the
10 negligence of another may also be entitled to compensation
11 for any mental anguish or suffering, which would include
12 fright, nervousness, grief, anxiety, worry, shock,
13 humiliation, embarrassment, apprehension, or any other type
14 of emotional distress. An injured person may recover for
15 mental anguish and other types of damages that are -- that
16 have just been described brought about by bodily injury and
17 suffering.

18 A person who has suffered physical injury due to the
19 negligence of another may also be entitled to compensation
20 for the loss of any enjoyment of life. Loss of the capacity
21 to enjoy life resulting from personal injury may also be
22 compensated for in the event you determine the plaintiff has
23 proven to have suffered such damages.

24 Like pain and suffering, those damages have no market
25 price. There is no fixed standard or rule by which they can

1 be measured. They're not -- measure. They're not capable
2 of exact measurement, but damages for the loss of an
3 enjoyment of life are designed to compensate for the
4 limitations of an injured person's ability to participate in
5 and to derive pleasure from the normal activities of daily
6 life as well as for any inability of that injured person to
7 pursue her normal talents, recreational interests, hobbies,
8 or advocations.

9 And a person who has suffered physical injury due to
10 negligence of another may also be entitled to compensation
11 for any permanent impairment of her physical and/or mental
12 or emotional condition, and that would include any
13 disfigurement resulting from physical injury or treatment
14 relating thereto as well as the loss of any bodily function.

15 Now, with regard to the parent's claim related to
16 economic damages that they contend were incurred as a result
17 of medical care and treatment provided to Ashley

18 (sic), you are instructed that the parents may be
19 entitled to compensation for all reasonable and necessary
20 expenses which were incurred for medical treatment, and that
21 would include physician's fees, hospital charges, physical
22 and mental therapy costs, medication, medical equipment, and
23 any other thing associated with that medical care and
24 treatment.

25 You are further instructed that where you are called

1 upon to determine damages, and there is evidence of future
2 damages or permanent impairment of mental or emotional
3 condition, as well as physical condition, it may be
4 necessary for you to determine, in making that award of
5 damages, the probable life expectancy of Ashley
6 F . Life expectancy is the period of time that a
7 person of a given age and sex is expected to have according
8 to statistical or actuarial tables. Life expectancy is
9 merely an estimate of the probable average remaining length
10 of life of a person, and, in this state, we have a statutory
11 table of life expectancy which has been admitted into
12 evidence and judicially noticed, and it may be considered in
13 your determining the average remaining length of life of
14 Ashley (sic) based upon her age and sex.
15 Those tables provide that a female person nine years of age
16 has a probable remaining life expectancy of 72 years.

17 So, you may consider this evidence, along with any
18 other evidence bearing upon the probable life expectancy of
19 Ashley F including her age, health, physical
20 condition, and any other relevant factors relating, relating
21 to that issue in determining her probable remaining life
22 expectancy.

23 Your verdict in this case, as in every case, must be
24 based solely upon the evidence which has been received
25 during the course of this trial. Your determination of the

1 facts that relate to the allegations as you determine them
2 to be in your application of the law as the Court has
3 provided it to you. Your verdict must be determined without
4 bias or prejudice for or against either party, and you may
5 not allow your decision to be governed by any passion,
6 prejudice, bias, emotion, sympathy, or any other
7 consideration found outside of the law and evidence in this
8 case.

9 In every case, the petit jury of the Circuit Court
10 shall consist of 12 members and all jurors in any trial must
11 agree to a verdict in order to render the same, and,
12 therefore, any decision that you reach must be unanimous.
13 All 12 of you must be in agreement before any decision may
14 be rendered and returned to the Court.

15 Now, Mr. Foreman, and ladies and gentlemen of the jury,
16 when you go back to deliberate, I'm gonna send with you, in
17 addition to all of the evidence that has, that has been
18 introduced during the trial, a verdict form. And when you
19 complete that verdict form, there's some questions on it and
20 some other provisions. And as you make those determinations
21 of fact and apply the law, and you have an answer to the
22 question, just indicate that response beneath the question
23 that's been asked.

24 The verdict form, you'll have it in there with you, but
25 the first question on the verdict form is simply do you, the

1 jury, find that plaintiffs have proven, by the greater
2 weight of the evidence, that Doctor Giep was negligent in
3 providing the medical care and that that negligence was a
4 proximate cause of some injury or loss sustained by the
5 plaintiffs. You have two potential responses, yes or no.
6 whichever that response is, circle it.

7 If your answer is, is no, then you stop and deliberate
8 no further. Then your verdict would be for the defendant
9 because no means the plaintiff has failed to prove the
10 defendant was negligent and that any injury was proximately
11 caused by any negligence.

12 If your answer is yes to that question, you do find the
13 defendant to have been negligent, and that the negligence
14 did proximately cause some injury or loss, then you go to
15 question two. Question two relates to the allegation of
16 treatment provided in a genuine emergency situation, and
17 that question simply asks do you, the jury, find that the
18 defendants have proven, by the greater weight of the
19 evidence, that the medical care rendered by the defendant,
20 through Doctor Giep, was rendered in a genuine emergency
21 situation where the patient was not medically stable, and
22 was in immediate threat of either death or serious bodily
23 injury.

24 If your answer is yes to that question, it was during
25 the course of that genuine medical emergency, then you would

1 stop and deliberate no further. Your verdict would be, in
2 that case, for the defendant. If you answer no to that
3 question, then you would proceed to the -- provisions three
4 and four of the verdict form, and three and four are simply
5 separate provisions for any damages to be awarded to Ashley
6 (sic) and any damages to be awarded to
7 Tristan Flowers, Flowers and Treva Flowers, the parents.

8 So, simply put, provision three says what is the total
9 amount of actual damages that you find have been sustained
10 by Ashley F which were proximately caused by the
11 negligence of the defendant, and, provision four, what is
12 the total amount of actual damages that you find have been
13 sustained by Treva Flowers and Tristan Flowers which were
14 proximately caused by the negligence of the defendant.

15 Once you complete the verdict form -- and let me say
16 this. In the event you determine damages are to be awarded
17 and you determine the amount, Mr. Foreman, I'm gonna ask
18 that, when you complete the verdict form, you'll see a line
19 and beneath that you'll see a dollar mark. Any damage award
20 that you find is appropriate, you need to write that out in
21 words and then you can insert the numerical equivalent below
22 it.

23 Once the verdict form has been completed, Mr. Foreman,
24 if you'll sign your name as the foreperson. You're the only
25 person that needs to sign the verdict form. Knock on the

1 door. Tell the bailiff that you've reached a unanimous
2 decision and we'll bring you back to receive that verdict.

3 When that time comes and you tell the bailiff you've
4 arrived at your decision, you may give him the evidence, or
5 her, but you will hold on to the verdict form. I'll receive
6 the verdict form from you after you return from the jury --
7 to the courtroom. So, hold on to the verdict form, but you
8 can give the bailiff all of the evidence.

9 Now, during your deliberations, there may come a time
10 where you have a question about evidence or facts that
11 relate to this case. You may even believe that there's
12 something else out there that you'd like to have and you ask
13 for something else to be submitted.

14 Please understand that the evidence that is going to be
15 introduced in this case has already been introduced. If it
16 was not introduced during the trial, it can not be
17 introduced now. So, even if there is something out there
18 that you think would be helpful, you can not have it because
19 it was not introduced. So, please don't inquire about
20 whether you can have additional evidence. You can not.
21 It's just simply what it is.

22 Now, we're gonna verify all of the exhibits before they
23 go back with the lawyers, myself, and the court reporter.
24 That doesn't mean that something doesn't get misplaced. So,
25 when you go back and you're sorting through the evidence, if

1 you think something was introduced, but you don't have it in
2 the jury room, you let me know of that fact and if it's not
3 there we'll find it. I'm just saying that anything that was
4 not introduced can not be introduced now, but everything
5 that was introduced should be in the jury room with you.

6 If you -- and I can't answer questions that relate to
7 issues of fact, but if you have a question about a witness'
8 testimony and you think that listening to that witness'
9 testimony, in whole or in part, will help you resolve that
10 question of fact, we can bring you back to listen to a
11 witness' testimony in its entirety or just some portion if
12 that's all you need.

13 I don't have transcripts of the witness' testimony.
14 So, if you need to have testimony replayed, let me know.
15 We'll bring you back and have that witness' testimony
16 replayed in whole or in part.

17 If, at anytime, you ever have a question about the law
18 that's applicable, I am permitted to answer those questions.
19 So, if you need for me to give you a complete re-instruction
20 on the law, I can. If you simply want me to give you a, an
21 explanation or a clarification of some point of law that I
22 provided, I can do that too.

23 So, if, at anytime, you have a question about the law
24 that you are to apply and you need some re-instruction,
25 explanation, or clarification, you let me know and I'll

1 provide you with that additional instruction, explanation,
2 or clarification.

3 Mr. Foreman, if, at anytime, something arises that
4 needs to be brought to my attention while you're
5 deliberating, if you'll write that, the request or that
6 question or that issue on a piece of paper, give it to the
7 bailiff. He'll provide it to me and I'll respond
8 accordingly.

9 During deliberations, if we have smokers on the jury,
10 you can smoke. I'm not recommending that, but if you want
11 to smoke, you can. You'll have to be taken outside to
12 accomplish that to a purpose. So, if you want to smoke,
13 tell the bailiff. He'll take you outside.

14 You are instructed, however, that deliberations have to
15 stop if any juror, any juror is absent for any authorized
16 purpose. So, if a juror goes to smoke or goes to the
17 restroom or whatever, deliberations should, should stop.
18 They should only resume when all 12 are present so that all
19 12 can participate in those deliberations.

20 I'm guessing that all of you -- sir?

21 THE FOREMAN: Including the alternate?

22 THE COURT: I'll get there.

23 THE FOREMAN: All right.

24 THE COURT: I'm not through yet, but I'm close.

25 I'm guessing that all of you, while you might not be

1 smokers, you are eaters and I guess you've all ordered
2 lunch. And your lunch may be here now or it may be here
3 shortly.

4 when you go back to deliberate, you will be provided
5 your lunch and you can eat it while you deliberate or you
6 can stop and eat lunch and then deliberate after you eat
7 lunch. That's up to you. I'm not gonna give you any
8 suggestions about that. That's your, that's your
9 prerogative.

10 I think that might be everything. But, if it's not,
11 I'm sure one of these lawyers will remind me that I failed
12 to provide you with some information that I should have.
13 And if I agree with that, I'll bring you back in order to
14 provide you with that additional information. If I do not
15 need to bring you back, I'll send word by way of the bailiff
16 that you may begin your deliberation. And, in that event,
17 he'll bring to the jury room all of the exhibits which have
18 been introduced, and, to you, Mr. Foreman, he'll also
19 provide the verdict form.

20 So, with that, I'm gonna ask the 12 primary jurors,
21 which does not include the alternate, 12 primary jurors will
22 please go with the bailiff to your jury room. The alternate
23 juror will stay in the courtroom with me, and you jurors are
24 instructed not to begin deliberations until I send you word
25 to do so.

1 THE ALTERNATE JUROR: Thank you, sir.

2 THE COURT: Thank you again for your participation.

3 (WHEREUPON, the following takes place outside the
4 presence of the alternate juror.)

5 THE COURT: Are there any exceptions taken to the
6 instruction or request for additions to the instruction by
7 the plaintiff?

8 MR. HENSHAW: Your Honor, we continue our objection as
9 to the charge that was given in regard to the medical
10 emergency statute for the reasons that I stated earlier, and
11 cause we do not feel that that is appropriately included in
12 this case for the reasons I stated earlier.

13 THE COURT: All right. Mr. Lovell.

14 MR. LOVELL: No exceptions or objections.

15 THE COURT: All right. Let me ask y'all to verify the
16 exhibits please before we go back.

17 (Pause.)

18 THE COURT: All right. All the exhibits are accounted
19 for?

20 MR. LOVELL: Yes, sir, Your Honor.

21 MR. HENSHAW: Yes, sir.

22 THE COURT: And you've reviewed the verdict form?

23 MR. LOVELL: Yes, sir.

24 MR. HENSHAW: Yes, sir.

25 MR. LOVELL: Yes, sir.

1 THE COURT: Take the exhibits back. Give them the
2 verdict form. Tell the jury to begin deliberations and
3 notify us when they're concluded.

4 We'll be at ease while the jury is deliberating.

5 MR. LOVELL: Thank you, Your Honor.

6 MR. HENSHAW: Thank you, Your Honor.

7 (WHEREUPON, the jury began deliberations at 12:59PM,
8 and returned with a question at 6:42PM.)

9 THE COURT: Mr. Foreman, have you and your fellow
10 jurors been able to arrive at a unanimous decision?

11 THE FOREMAN: No, sir.

12 THE COURT: Let me say that at anytime that you have
13 conflicting information, it might be sometimes difficult for
14 even two people to come to an agreement, and sometimes it
15 becomes correspondingly more difficult when you have more
16 than two people, such as 12 people, trying to come together
17 and agree on a particular fact. But, nevertheless, more
18 often than not, when we have juries selected to consider
19 evidence in cases and to render decisions, they are, more
20 often than not, able to arrive at a unanimous decision.

21 Now, if we excuse you now, it doesn't mean that anybody
22 wins or anybody loses. It just means that, at some other
23 time, some other week, we are gonna come back into this
24 courtroom and the same lawyers are gonna be here. The same
25 parties are gonna be here. The same witnesses are likely

1 gonna testify to the same information they provided you.
2 And some other 12 people are gonna be asked or called upon
3 to arrive at a decision. And I don't have any reason to
4 believe that 12 other people can do any better job than
5 coming to a decision than you can.

6 So, what I'm gonna ask you to do is to go back and to
7 continue with your deliberations in an effort to arrive at a
8 unanimous decision if you can.

9 Now, going back doesn't mean that I'm trying to coerce
10 any juror or pressure any juror into changing your mind or
11 your decision so long as it's based upon reasonable
12 information, and you're satisfied with it, you thought about
13 it, you've come to that conclusion, and you believe that
14 that's the appropriate decision. And, if that's the case,
15 nobody's gonna try to make you change your mind.

16 All I want for you to do is to go back and to simply
17 discuss it some more, reevaluate your position, share your
18 opinions, and your views with your fellow jurors in an
19 effort to try to arrive at a unanimous decision if you can
20 without doing violence to your own conscious.

21 Now, if any juror has a problem with continuing that
22 can be resolved by making a phone call, we're happy to make
23 those arrangements for you. If you have problems that can
24 not be resolved by making a phone call, I'm gonna ask that
25 you please let me know of the fact. Send me a note letting

1 me know what juror that has an issue or what the problem is
2 the jurors needs to address. And then if we can try to
3 resolve it, we can. If not, we'll try to make some other
4 arrangements.

5 But right now, I ask you to go back and please continue
6 with your deliberations, but you let me know if you need to
7 make a phone call or you have some problem that can not be
8 resolved with that phone call.

9 Okay.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: Any objection to the instruction?

13 MR. HENSHAW: None from the plaintiff, Your Honor.

14 MR. LOVELL: None from the defendant, Your Honor.

15 THE COURT: All right. we'll be at ease while we wait
16 for a decision.

17 MR. HENSHAW: Thank you, Your Honor.

18 (WHEREUPON, the jury panel continued with deliberations
19 at 6:46PM, and returned with another question at 7:32PM.)

20 THE COURT: You want to see the note?

21 (Pause.)

22 THE COURT: Bring the jury in.

23 (WHEREUPON, the following takes place within the
24 presence of the jury.)

25 THE COURT: All right. Mr. Foreman, I understand that

1 you and your fellow jurors, excuse me, wish for me to
2 reinstruct you on the law of circumstantial evidence?

3 THE FOREMAN: Yes, sir.

4 THE COURT: Well, I'm gonna go ahead and, and read you
5 the definition of direct evidence so we'll be certain we
6 understand the contrast between the two.

7 THE FOREMAN: Okay.

8 THE COURT: Direct evidence is the testimony of a
9 person who testifies from actual knowledge of that fact. It
10 is testimony by a person who has perceived the existence of
11 a fact by means of his or her senses, and then they come
12 into court and they testify as to what they have previously
13 seen or heard or felt or perceived. Direct evidence proves
14 the existence of a fact directly, and does not require any
15 deduction or inference.

16 Circumstantial evidence, on the other hand, is proof of
17 some other fact or set of facts, which taken either
18 singularly or collectively, may prove the existence of a
19 fact in question as a necessary consequence by a deduction
20 or an inference, and an inference is simply a deduction of
21 fact that may logically and reasonably be drawn from proof
22 of some other fact or set of facts. It is a fact not proven
23 by the direct testimony of a witness based upon that
24 person's personal perception, but it is a conclusion which
25 might reasonably be drawn from the proof of some other

1 facts.

2 In other words, you may infer that a particular event
3 occurred or that a particular fact exists based upon the
4 proof of sufficient factual circumstances which would
5 reasonably warrant your arriving at a particular conclusion.
6 The law makes no distinction between the weight or value to
7 be given to direct evidence and circumstantial evidence nor
8 is a greater degree of certainty required of circumstantial
9 evidence as opposed to direct evidence.

10 where more than one reasonable inference may be drawn
11 from the circumstantial evidence in the case, it is for the
12 jury to determine what is the most probable and reasonable
13 inference to accept in the exercise of good judgment and
14 common sense.

15 Okay. All right. Please retire. If you need
16 additional instructions, let me know.

17 (WHEREUPON, the following takes place outside the
18 presence of the jury.)

19 THE COURT: Any exception to the instruction?

20 MR. HENSHAW: None from the plaintiff, Your Honor.

21 MR. LOVELL: No, sir, Your Honor.

22 THE COURT: All right. We'll continue to be at ease.

23 (WHEREUPON, the jury returned to deliberations at
24 7:36PM, and returned with a verdict at 8:25PM.)

25 THE COURT: I'm told the jury has reached a verdict.

1 Are you ready to receive it?

2 MR. HENSHAW: Plaintiff's ready, Your Honor.

3 MR. LOVELL: Yes, Your Honor.

4 THE COURT: All right. Bring them in please.

5 (WHEREUPON, the following takes place within the
6 presence of the jury.)

7 THE COURT: Mr. Foreman, have you and your fellow
8 jurors reached a unanimous decision?

9 THE FOREMAN: Yes, Your Honor.

10 THE COURT: And have you reflected that decision on the
11 verdict form as requested?

12 THE FOREMAN: Yes, Your Honor.

13 THE COURT: And did you sign your name as the
14 foreperson?

15 THE FOREMAN: Yes, sir.

16 THE COURT: If you'll please hand that over to the
17 bailiff.

18 (WHEREUPON, the foreman complies.)

19 THE COURT: All right. In response to the special
20 interrogatory verdict form in Case Number 2016-CP-42-03178,
21 in response to the questions asked of jury by way of a form,
22 the first question, do you find that the plaintiffs have
23 proven, by the greater weight or preponderance of the
24 evidence, that the defendants, by and through Bang N. Giep,
25 were negligent in the providing the medical care during and

1 in the course of the birth and delivery of Ashley
2 F , and that such negligence was a proximate cause of
3 some injury or other loss sustained by the plaintiffs?

4 The jury's response is yes.

5 Question 2. Do you find that the defendants have
6 proven, by the greater weight or preponderance of the
7 evidence, that the medical care rendered by the defendants,
8 by and through Bang N. Giep, during the birth and delivery
9 of Ashley F was rendered in the genuine
10 emergency situation where she was not medically stable, and
11 was in immediate threat of either death or serious bodily
12 injury?

13 The jury's response is yes.

14 Signed by the foreperson, today's date.

15 Is this the verdict of each one of you jurors, and if
16 it is your verdict and still your verdict, I would ask that
17 indicate such by raising your right-hands.

18 (WHEREUPON, all jurors raise their right-hands at this
19 time.)

20 THE COURT: Let the record reflect that all jurors have
21 responded in the affirmative.

22 Are there any other matters we need to address with the
23 jury present?

24 MR. HENSHAW: We would like to have the jury polled,
25 Your Honor.

1 THE COURT: All right. Poll the jury please, ma'am.
2 (WHEREUPON, the jury was polled and all jurors answered
3 in the affirmative that this was and still is their
4 verdict.)

5 THE COURT: Thank you.
6 Any other matters we need to address with the jury
7 present?

8 MR. HENSHAW: No, Your Honor.

9 MR. LOVELL: No, sir.

10 (WHEREUPON, the jury was dismissed from the courtroom
11 at this time.)

12 THE COURT: Are there any matters that need to be
13 addressed before we recess?

14 MR. LOVELL: No, sir, Your Honor.

15 MR. HENSHAW: Your Honor, on, on behalf of the
16 plaintiff, I would move at this time for a new trial on the
17 grounds that the -- based upon the, the motions that I made
18 on behalf of plaintiff earlier in the case to strike the
19 medical emergency defense, and the judges -- and, and also
20 objection to your charge in regard to the medical emergency
21 defense on the grounds that it was not applicable to this
22 case as written by the statute, and further on the grounds
23 that the statute denies equal protection to patients such as
24 my clients in that they are unreasonably classified or
25 classified and categorized differently from other patients,

1 and also allows doctors such as Doctor Giep to be classified
2 and categorized differently from other doctors in a way
3 without a rational basis, and, therefore, denying my clients
4 equal protection under the law.

5 THE COURT: All right. That motion is denied.

6 Any others?

7 MR. HENSHAW: That would be the basis of a new trial
8 motion on behalf of the plaintiffs, Your Honor.

9 THE COURT: All right. Motion is denied.

10 MR. HENSHAW: Yes, sir.

11 THE COURT: Anything else?

12 MR. LOVELL: No, sir, nothing from the plaintiff.

13 MR. HENSHAW: No, sir.

14 THE COURT: All right. Court is in recess.

15 (WHEREUPON, three notes from the jury were marked as
16 Court's Exhibit Nos. 1 through 3 and received into evidence
17 at this time.)

18

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20 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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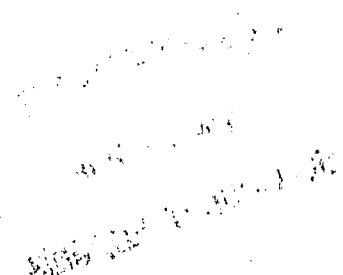
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Spartanburg County, South Carolina, on the 9th, 10th, 11th and 13th days of October, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

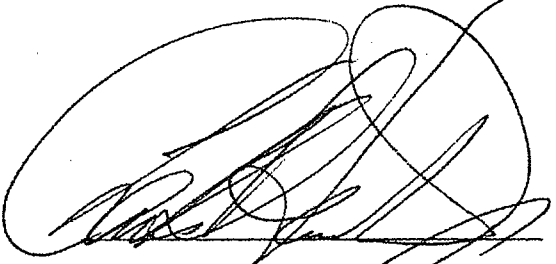
December 20th, 2017


Pamela E. Green

PAMELA E. GREEN, Court Reporter

Certificate of Counsel

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



CHARLES L. HENSHAW, JR.

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