STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
Jayden W., a minor .....Appellant,

v.

Edmund Rhett, Jr., M.D., Low Country Obstetrics and Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a East Copper Regional Medical Center and AMN Services, Inc. f/k/a Nurses RX Inc,.....Defendants,

Of Whom Edmund Rhett, Jr. MD is.....Respondent.

FINAL BRIEF OF APPELLANT

Edward L. Graham
Mary H. Watters
J. Layton Ruffin
GRAHAM LAW FIRM, P.A.
383 W. Cheves St.
Florence, SC 29501

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE?

II. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THEORETICAL GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE?

III. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT?

IV. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING EXPERT WITNESS FEES?

V. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN NOT PERMITTING REPLY TESTIMONY OF DR. OAKES CONCERNING MISLEADING USE BY DEFENSE OF STATISTICS IN A MEDICAL JOURNAL ARTICLE?

VI. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE IN VIOLATION OF THE CASE MANAGEMENT ORDER?

VII. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN FAILING TO ALLOW MORE EXTENSIVE VOIR DIRE CONCERNING POTENTIAL JUROR BIAS AGAINST A MEDICAL NEGLIGENCE PLAINTIFF?

STATEMENT OF THE CASE

This is a medical negligence case involving brain bleeds and consequent brain damage sustained by minor Appellant, Jayden W., son of Appellant Jamesetta Washington, at the time of his birth on July 16, 2002. Appellants allege that Respondent Dr. Edmund Rhett, Jr., lacked proper obstetrical knowledge to manage this delivery correctly; chose to expedite Jayden's vaginal delivery by use of a vacuum extractor, which was not indicated but was in fact contradicted by Jayden's relatively high station in the mid-pelvis portion of the birth canal; and chose to use the vacuum without making any effort whatsoever to obtain informed consent or even to announce his intent to use vacuum extractor. (R. pp. 29-35) That vacuum extraction traumatically burst several blood vessels within Jayden's brain, causing him significant bleeding and consequent brain damage. (R. pp. 29-35)

The Summon and Complaint were filed on April 16, 2007 and designated as Civil Action Number 07-CP-10-1553. (R. pp. 28-36) The Complaint alleges negligence and other wrongdoing not only on the part of Dr. Rhett, but also on the part of hospital employees. Appellants named Low Country Obstetrics and Gynecology, P.A. (hereinafter, "Low Country") as a defendant because of its role as employer of Dr. Rhett, for whose torts it had *respondeat superior* liability. Appellants also named Tenet South Carolina, Inc. d/b/a East Cooper Regional Medical Center (hereinafter, "Hospital"), due to its *respondeat superior* liability for its torts of employees. Respondent Dr. Rhett's Answer raised the alleged defenses of general denial, no deviation from the standard of care, informed consent, reasonableness and good faith, pre-existing medical condition, predisposition of medical condition and unconstitutionality of punitive damages. (R. pp. 37-42) Defendant Low Country's Answer asserted a general denial. (R. pp. 43-46) Hospital's Answer alleged defenses of general denial, compliance with standards of care, failure to allege

facts sufficient to constitute a cause of action, no proximate cause, natural disease process, intervening and superseding negligence, comparative negligence and unconstitutionality of punitive damages. (R. pp. 55-61)

During discovery Appellants learned that a labor and delivery nurse was actually employed by a nurse agency, AMN Services, Inc. f/k/a Nurses RX Inc. (hereinafter, "Nurse Agency"), and not by the Hospital. Appellants obtained leave to amend the Summons and Complaint; and did so, adding the Nurse Agency as an additional Defendant. (R. pp. 7-12; pp. 47-54) Defendant Nurse Agency's answer denied liability and raised affirmative defenses. (R. pp. 79-86)

Prior to trial Appellants settled claims against both Defendant Nurse Agency and Defendant Hospital. (R. p. 258, lines 5-24) Those settlements were approved by the trial judge.

As trial against Dr. Rhett and Low Country approached, Appellant proffered demonstrative evidence for defense counsel to review and examine, in accordance with the Multi-Week Docket Case Management Order. Defense counsel proffered no demonstrative evidence for Appellant to review in accordance with the Case Management Order. (R. pp. 1-6; p. 1291, line 24 – p. 1294, line 15) Defense showed Appellant's counsel several demonstrative exhibits at the outset of trial but did not disclose any intent to use a pelvic model or a vacuum pump until they were actually used, without notice or warning of any kind, in the defense's direct examination of Dr. Rhett and one of his obstetrical witnesses. (*Id.,* R. p. 1262, line 9 – p. 1264, line 25; p. 1649, line 22 – p. 1651, line 3)

The case was scheduled for trial against Dr. Rhett and Low Country in the Charleston County Court of Common Pleas starting on July 26, 2010, with the Honorable Michael J. Baxley serving as presiding trial judge. *Voir dire* was limited, even though numerous prospective jurors

had personal or professional connections with the Defendants. (R. p. 174, line 22 – p. 211, line 12)

Prior to testimony the court denied Appellant's motion *in limine* to keep out evidence of alcohol usage by the mother the first month of pregnancy before she realized she was pregnant. (R. p. 246, lines 14-20) The Court withheld ruling on Appellant's motion *in limine* to keep out testimony of Dr. Aubrey Milunsky, a geneticist, about prenatal maternal alcohol consumption as a possible contributing cause of the child's brain bleeds and brain damage (R. p. 227, line 19 – p. 228, line 13; p. 231, line 10 – P. 235, line 3; p. 236, line 23 – p. 245, line 13) and Dr. Milunksy's unreliable and theoretical testimony that genetic factors may also have been a possible contributing cause of Jayden's brain bleeds. (R. p. 221, line 1 – p. 224, line 13; p. 224, line 21 – p. 231, line 9) Respondent's counsel suggested that the court hold Appellant's Motion *in Limine* in abeyance pending an opportunity for Appellants' counsel to *voir dire* Dr. Milunsky. (R. p. 104, lines 9-13; p.226, lines 11-13) The Court agreed to revisit the issue, leading Appellants' to believe *voir dire* of Dr. Milunsky would be allowed so the court could properly discharge its gatekeeper function. (R. p. 230, lines 15 – p. 231, line 5; p. 231, line 10 – p. 245, line 15) During trial, however, the trial court precluded Appellant from being heard on a *voir dire* challenge to the causation testimony of Dr. Milunsky (R. p. 1466, line 12 – p. 1468, line 3), and allowed the jury to hear speculative, theoretical and unreliable opinion testimony which lacked probative value, was not helpful to the jury and was highly prejudicial to Appellant. (R. p. 1464, line 18 – p. 1539, line 7)

The Defendants kept referring to a general consent form signed by Appellant Jamesetta Washington as the "informed consent" document. At the end of Defendant's case, the trial judge granted Appellants' Motion for a partial directed verdict, ruling that the general consent form did

not represent informed consent as a matter of law. (R. p. 2034, line 25 – p. 2035, line 5; p. 2035, line 25 – p. 2046, line 7)

In his charge on informed consent, the trial judge informed the jury that there was an emergency exception to the informed consent requirement, but he did not charge them on the major limitations to that emergency exception as requested by Appellants. (R. p. 2202, line 5 – p. 2206, line 11; p. 2235, line 25 – p. 2237, line 14; p. 2258, line 12 - p. 2259, line 9; R. pp. 3522-3606) The court also declined to charge the jury about the normalcy of expert witnesses being paid, despite repeated attacks by the defense on Appellant's experts on that basis. (R. p. 2237, line 15 – p. 2238, line 6; p. 2258, line 12 – p. 2259, line 9)

At the outset of jury deliberations, Appellant and Low Country announced to the court their settlement for policy limits of Low Country's insurance coverage, which settlement was entered by the Court. (R, p. 2256, line 23 – p. 2258, line 9)

The jury deliberated from 3:40 P.M. through 6:23 P.M. on August 10, 2010, and from 9:00 A.M. through 3:22 P.M., August 11, 2010, when they announced they were hopelessly deadlocked. (R. p. 2250, line 19; p. 2262, line 15; p. 2263, lines 1-11; p. 2264, line 2 – p. 2268, line 2) The trial judge gave an Allen charge. (R. p. 2264, line 3 – p. 2268, line 2) The jury went out again at 3:29 P.M.; and announced one hour and seventeen minutes later that the jury had reached a verdict in favor of Respondent Rhett. (R. p. 2268, lines 3-18; p. 2269, line 22 – p. 2270, line 17)

Post-trial interviews of jurors revealed that one juror had been biased against Appellate from the outset, and that she and the foreman both had undisclosed personal experiences with the medical profession that affected their deliberations. (R. pp. 3717-3718) Such interviews also revealed confusion by the jury about the judge's partial directed verdict on informed consent,

and his charge on an unlimited emergency exception to informed consent. (*Id.*, R, pp. 3716-3717)

Appellants made a timely Motion for New Trial Absolute. (R. p. 145) By Order dated September 1, 2010, Judge Baxley denied Appellant's Motions and entered judgment for Respondent Rhett. (R. pp. 17-18)

Thereafter, Appellants timely served and filed Notice of Appeal from Judge Baxley's said Order. (R. pp. 3719-3724) The amount involved in this appeal is indeterminate, for Appellant seeks a new trial on the claim for compensation for traumatic brain damages negligently inflicted, with an opportunity for a multi-million dollar verdict commensurate with significant non-economic damages and present value economic damages in excess of Six Million Dollars.

STATEMENT OF THE FACTS

This is an obstetrical negligence claim. Jamesetta Washington brought this case as Guardian ad Litem on behalf of her son, Jayden W., alleging that negligence committed by her obstetrician, Dr. Edmund Rhett, Jr., during Jayden's birth and perinatal period caused him to sustain severe and permanent brain damage.

Jamesetta was a student at the University of South Carolina when she became pregnant with her first child. (R. p. 974, lines 3-4) After initial pre-natal care in Columbia, Jamesetta left school and returned home to Charleston to live with her parents during the rest of her pregnancy. (R. p. 978, line 2-9; p. 983, lines 1-16; pp. 3215-3278) There she obtained further pre-natal care from Low Country Obstetrics and Gynecology, P.A. (R. p. 983, lines 17-25; pp. 3024-3109) The pregnancy was uneventful, with no serious complications until Jayden was injured being born at

East Cooper Regional Medical Center. He was born on July 16, 2002, after induction with the drug Pitocin, by vacuum extraction delivery performed by Dr. Rhett. (R. p. 987, lines 4-5; pp. 3110-3214)

Plaintiff presented evidence that Dr. Rhett was negligent in his delivery of Jayden by vacuum extraction, thereby causing injury to the minor child's brain, resulting in brain bleeds in multiple areas and severe permanent harm. (R. p. 403, line 19 – p. 588, line 18; p. 645, line 25 – p. 647, line 5; p. 655, line 21- p. 656, line 4; p. 658, lines 3-23; p. 692, line 14 – p. 693, line 8, p. 873, line 14 – p. 826, line 1; p. 874, line 12 – p. 901, line 18; p. 1052, line 23 – p. 1067, line 6; p. 1096, line 4 – p. 1097, line 14; p. 1143, line 4 – p. 1166, line 21; p. 1190, line 10 – p. 1202;, line 12; p. 2298, line 5 – p. 2401, line 3; p. 2454, line 3 – p. 2471, line 9.) Dr. Rhett's negligence includes use of a vacuum without informed consent, and without even telling the patient he intended to use a vacuum; use of a vacuum without an indication, very early in the second stage of labor; use of a vacuum when Jayden was located at a relatively high portion of the birth canal, in the mid-pelvis; use of an extra long vacuum cup, contraindicated for use in the mid-pelvis; and improper use of the vacuum in a rocking motion which applied asymmetrical forces to Jayden's brain. (R. p. 403, lines 19 – p. 588, line 18; p. 645, line 25 – p. 647, line 5; p. 655, line 21 – p. 656, line 4; p. 658, lines 3-23; p. 2298, line 5 – p. 2401, line 3; p. 2454, line 3 – p. 2471, line 9) Dr. Rhett revealed in his deposition a shockingly low level of obstetrical and anatomical knowledge. (R. p. 470, line 15 – p. 471, line 22; p. 477, line 16 – p. 574, line 20) Yet the defense obstetrical experts were willing to defend Dr. Rhett on the theory that his conduct was within two standard deviations of average quality, i.e., that he was not in the bottom 4% of obstetricians. (R. p. 1759, line 3 – p. 1760, line 3; p. 1816, line 25 – p. 1817, line 3) Dr. Rhett described the delivery inaccurately, at his deposition, as proven by a birth video of the labor and

delivery[1]. (R. p. 403, line 19 – p. 588, line 18; p. 645, line 25 – p. 647, line 5; p. 655, line 21 – p. 656, line 4; p. 658, lines 3-23)

Jayden was transferred to MUSC on the morning of July 17, 2002. (R. p. 955, lines 1-24) Brain bleeds were diagnosed at MUSC, and brain surgery was performed to remove a large clot from the posterior fossa portion of his cerebellum. (R. p. 998, lines 1-15; pp. 3294 - 3307) He has received extensive follow-up care, treatment and therapy. (R. p. 998, line 19 – p. 1008, line 22)

Most of Jayden's treatment costs have been paid to date by Medicaid. As of March, 2010, the last date as of which figures are currently available, the retail value of causally related Medicaid payments totaled $223,403.59. (R. p. 1201, line 15 – p. 1202, line 16) Because of Jayden's brain damage, he suffers developmental, motor and cognitive delays and deficits. Additional procedures and therapy will be necessary for Jayden in the future, and Jayden will need vast future care and treatment. (R. p. 692, line 14 – p. 693, line 8; p. 813, line 14 – p. 826, line 1; p. 874, line 12 – p. 901, line 8; p. 1052, line 12 – p. 1067, line 6; p. 1143, line 4 – p. 1166, line 21) His vocational opportunities will be limited to possible sheltered employment. (R. p. 1096, line 4 – p. 1097, line 14) His economic damages valued by Plaintiff's economist, Oliver Wood, based on testimony of Plaintiff's life care planner, Robert Voogt, and vocational expert, Jean Hutchinson, are in excess of six million dollars at present value. (R. p. 1199, lines 4-7).

[1] Dr. Rhett changed his testimony at trial in numerous respects after studying the fundamentals of obstetrical anatomy, vacuum extraction principles and the birth video, and after practicing testifying in front of a video camera in preparation for his appearance at trial. (R. p. 1321, line 22 – p. 1324, line 23; p. 1328, line 25 – p. 1329, line 2; p. 1329, lines 8-11; p. 1330, lines 9-16; p. 1331, lines 1-19)

ARGUMENT

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE MATERNAL USE OF ALCOHOL AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W.'S BRAIN DAMAGE.

A. Standard of Review

Determinations of relevance are largely within the trial court's discretion, and its decision to either admit or exclude evidence will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law to the prejudice of the appellant's rights. *Merrill v. Barton*, 250 S.C. 193, 195, 156 S.E.2d 862, 863 (1967). To warrant reversal on appeal, a party must show both the error of the court's ruling and resulting prejudice. *Doe v. Doe,* 324 S.C. 492, 499, 478 S.E.2d 854, 858 (Ct. App.1996).

The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Gooding v. St. Francis Xavier Hops.,* 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). "An abuse of discretion occurs when the trial court's decision is based upon error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.,* 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008). Here, the testimony of Dr. Milunsky about maternal alcohol use as a possible contributing cause of brain damage should have been precluded for several reasons. His testimony has no probative value, any minimal relevance is outweighed by its prejudicial nature, it is not helpful to the jury, it is unreliable, it violates the "most probable" requirement and its admission violates precedents and endangers public policy.

B. The Trial Court Failed to Meet its Responsibility to Keep Irrelevant Prejudicial Evidence Out of the Jury's Purview Under Rule 401, 402 and 403 S.C.R.E.

The trial court erred by failing to exclude speculative and highly prejudicial evidence concerning prenatal maternal alcohol consumption as a possible contributing cause of Jayden's brain damage. Such evidence had no probative value; and its admission was extremely prejudicial, depriving Appellant of a fair trial. For evidence to be relevant it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, S.C.R.E.; *Hoeffer v. The Citadel,* 311 S.C. at 365, 429 S.E.2d 190,(1993); *Davis v. Traylor,* 340 S.C. at 155, 530 S.E.2d 385 (Ct. App. 2000) ; *Gulledge v. McLaughlin,* 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, S.C.R.E.; *see Pike v. South Carolina Dep't of Transp.,*332 S.C. 605, 613, 506 S.E.2d 516, 520 (Ct. App. 1998), *aff'd as modified,*343 S.C. 224, 540 S.E.2d 87 (2000). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E.; *In re Robert R.,* 340 S.C. 242, 246-47, 531 S.E.2d 301, 303 (Ct. App. 2000); *Haselden,* 341 S.C. at 497 n.12, 534 S.E.2d at 301 n.12; *Hunter v. Staples,* 335 S.C. 93, 101-02, 515 S.E.2d 261, 266 (Ct. App. 1999); *see also Watson ex rel Watson v. Chapman,* 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000) ("The dictates of Rule 401 are subject to the balancing requirement of Rule 403, S.C.R.E., which requires a court

to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative.")

The facts in this case show that Jamesetta Washington, mother of Jayden, consumed alcohol in modest amounts at the outset of her pregnancy before she knew she was pregnant. (R. p. 975, lines 2-13) There is no evidence of any excessive alcohol consumption, and no evidence of any alcohol consumption later than the early prenatal period before Jamesetta realized she was pregnant. (R. p. 1494, lines 20-24) No expert for either side opined that such maternal alcohol consumption in the early prenatal period most probably caused Jayden's brain bleeds and brain damage. However, two defense experts, the geneticist, Dr. Aubrey Milunsky, and Dr. Lynn Norton, an obstetrician, testified at deposition that if the mother consumed more alcohol than she admitted, that could be a contributing cause of brain damage, but to an indeterminable degree. Dr. Milunsky theorized in his deposition that Jayden's mother may have consumed more alcohol than she admitted, and he believed her prenatal alcohol consumption was a contributing factor, but he could not ascribe a mathematical probability of even a one in a million chance that maternal alcohol ingestion caused brain bleeds or brain damage. (R. p. 1502, lines 19-24) Dr. Norton similarly testified at deposition to her belief that maternal alcohol consumption possibly caused brain damage, but she could not testify that it most probably did so. (R. p. 2689, line 6 – p. 2690, line 13). She could not testify that there was even a one in a million chance that alcohol caused brain damage in this case. *Id.* The defense was expected to offer such unreliable, speculative and theoretical causation testimony at trial, pursuant to a "multifactorial cause" theory.

Believing such testimony to be completely improper, because unreliable, based on speculation and in violation of the "most probable" cause requirement, Appellant moved *in*

limine to preclude such testimony. (R. pp. 113-115; p. 231, line 10 – p. 245, line 8) The trial judge denied the motion about excluding references to maternal alcohol consumption in the medical records, stating:

> I will tell you now that the court will not exclude the record about the alcohol abuse as a major component of the defense's case. It's known science and even among lay people it's known that you don't ingest alcohol when you may be pregnant. The court will not exclude that testimony.

(R. p. 246, lines 14-20). That ruling was erroneous because (1) there was no evidence whatsoever of alcohol "abuse"; and (2) the purported capacity of maternal alcohol ingestion to cause brain bleeds and brain damage is not with the realm of lay knowledge, (3) is not scientifically reliable as applied to this case, and (4) it utterly fails the "most probable" requirement. The court withheld its ruling on the motion to preclude expert testimony on purported alcohol causation (R. p. 245, lines 9-15), and then refused to allow *voir dire* on the subject when defense expert Dr. Milunsky was called. (R. p. 1466, line 12 – p. 1468, line 3). In fact, the trial court ruled that it would not decide until after Dr. Milunsky's testimony whether any of it was objectionable and then, if so, make a corrective charge:

> THE COURT: Counsel, the best way for me to do that and not delay these proceedings is to ask you to hold that objection and we will take it up at the end of the testimony as to whether or not there may be some objection to the science itself. If so, then the court will make a curative instruction. If not, we will remain where we find ourselves.

(R. p. 1467, line 21 – p. 1468, line 3). Unfortunately, by that time the harm had been done. Nevertheless, the court persisted in its erroneous belief that the testimony was proper. (R. p. 1602, line 18 – p. 1603, line 4; p. 1608, lines 3-13).

Dr. Milunsky was allowed to testify in the trial as follows:

> Q. And what of significance in the first trimester did you find in

the mother's records?

A. That there was a history of alcohol use in the first trimester, the first three months of pregnancy.

Q. With regard to this child and his problems and developmental delays, how is that relevant?

A. Well, it is potentially relevant in the sense that the prenatal record indicates alcohol use but does not indicate how much and precisely when. So it sits there as an undefinable concern that may or may not have to do with one or more of these items.

Q. Are these the kind of delays that you see with alcohol ingestion?

EDWARD GRAHAM: Objection. Leading, Your Honor.

THE COURT: Overruled as to that question.

THE WITNESS: There is something called fetal alcohol syndrome.

DIRECT EXAMINATION CONTINUED BY ROBERT HOOD:

Q. Say that word again, those words?

A. Fetal alcohol syndrome, that is what it is called.

Q. Yes, sir.

A. I can say that Jayden does not have the fetal alcohol syndrome.

Q. Okay.

A. However, the medical literature is very clear about something called an incomplete fetal alcohol syndrome.

Q. Incomplete?

A. Incomplete, (affirmative nod). So just like anything else in

life, there are gradations – slow, slight, not quite there yet – involvement of anything that you might care to think so. It is possible – that's all that I can say – that there was alcohol taken that wasn't so severe as to cause the entire syndrome, which by the way includes mental retardation, heart defects and other significant birth defects but was enough to cause troubles. But this is all speculation. We don't know. It sits there undefined. It's an item.

(R. p. 1491, line 18 – p. 1493, line 16) (Emphasis added.)

Q. To a medical degree of certainty, most probably, has the alcohol had an impact in this case?

A. I think I've already stated that it is not possible to, uh, assign a risk to Jayden from the alcohol taken; since, to begin with, we don't know how much was taken and when precisely it was taken. So it remains an item of concern that it could be a contributing factor, yet one of the multiple factors that are operating in Jayden's case to cause the issues or some of the issues but we don't actually know for sure.

Q. All right. Is there any way to scientifically know for sure, a hundred percent?

A. No, actually not.

Q. What about fifty-one percent?

A. No, no. There is no way to assign a population (sic) or any other kind of risk with reference to the alcohol here. It is more probably than that that Jayden's problems occurred as a consequence of multiple factors that have nothing to do with the bleeding, but rather from either the alcohol and/or his vasculature problem, his connective tissue problems.

Q. Is that your opinion to a medical degree of certainty, most probably, Doctor?

A. Yes.

(R. p. 1494, line 17 – p. 1495, line 22) (Emphasis added.)

Such testimony was admittedly speculative. It was also of no relevance and highly prejudicial. If

there was any arguable relevance, it was miniscule and greatly outweighed by the prejudicial nature of such testimony. In effect, such testimony invited the jury to speculate that Jayden W.'s brain was possibly damaged in part by his mother's excessive drinking, of which there is no evidence, but which the jury nevertheless was invited to assume may have been present, based on nothing but surmise and conjecture. Allowing such testimony poisoned the jury's perceptions of Jamesetta's pregnancy and prevented Appellant from receiving a fair trial.

When asked directly on cross-examination about the limited causal effect, if any, of maternal alcohol ingestion, Dr. Milunsky testified in pertinent part as follows:

> Q. Doctor, can you tell us today, do you believe that there is even a one in ten thousand chance that alcohol played any role in causing the damage to Jayden?
>
> A. I don't think that I can add to the statement, that it simply would reiterate it to the jury to hear it again.
>
> Q. Can you say that there is even a one in a million chance?
>
> A. That's absurd statement (sic) to talk about one in whatever number when there is no scientific basis to account for such a statement.
>
> Q. Sir, please answer yes or no. Can you tell these Ladies and Gentlemen whether there is even a one in a million chance that alcohol had any significance in this brain damage?
>
> A. No, the response –that is not "yes" or "no", the response is how do you come to one in a million? That supports that there is a statement, and there is no way for me to come up with a rational, never mind scientific, statement that could aid and abet a statement of one in any number that you might choose.
>
> ***
>
> Q. Dr. Milunsky, please turn to Page 24 of your deposition.
>
> A. Okay.

Q. Starting at Line 7, I asked the question, (reading):

Q. Would you be willing to testify at trial that there is at least – I mean, to a reasonable degree of medical certainty, there's at least a one-in-a-million chance that alcohol by the mom caused any birth defect of Jayden W.?

A. There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects.

Q. Is that a correct reading of your answer?

A. I even stated here again, multiple times already.

(R. p. 1502, line 12 – p. 1503, line 12; p. 1504, lines 3-22) (Emphasis added)

Dr. Milunsky's admissions on cross, though evasive, were consistent with his deposition testimony, which was the basis for Appellant's objection to his being allowed to express to the jury his wild speculation about excessive alcohol consumption as a possible cause of Jayden's brain damage. (R. pp. 113-115) Eliciting an admission from Dr. Milunsky during his cross-examination that his testimony was speculative and without scientific reliability does not un-ring the bell that should never have been rung. The judge should not have let the jury hear Dr. Milunsky's irrelevant prejudicial speculation. Beyond Dr. Milunsky's expert opinion there was no other evidence presented at trial that the maternal alcohol consumption played any role in causing Jayden W.'s injuries sustained during birth. The testimony of Dr. Milunsky is speculative, theoretical, and not probative of alcohol causing Jayden's brain damage. Its prejudicial nature is painfully obvious, greatly outweighing any presumed minimal probative value. Therefore, the trial court's decision to admit such testimony is in clear violation of Rule 401, 402, and 403, S.C.R.E. and was an abuse of discretion.

C. Allowing Testimony of Possible Damage From Prenatal Maternal Alcohol Use Violates Scientific Reliability Standards.

In *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), the South Carolina Supreme Court adopted a standard for admissibility of scientific evidence based on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." In considering reliability under the *Jones* standard, the Court looks at several factors, including (1) the publication and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990). Such evidence is also subject to disallowance for prejudice or lack of probative value. *Id.*

In 1993 the case of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113S.Ct. 2786, 125 L. Ed. 2d 469 (1993), altered the federal trial bench's gatekeeper role with respect to scientific evidence, requiring that such evidence must be relevant, reliable and helpful to the jury to be admitted. The Court suggested four factors to use for determining reliability; (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique. If such evidence is determined to be sufficiently relevant, reliable and helpful, the court must still consider whether its probative value is outweighed by its prejudicial effect. *Id.*

After *Daubert*, the South Carolina Supreme Court revisited the issue of admissibility of scientific evidence in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court ruled that for scientific evidence to be admissible the trial court must initially determine that the evidence

will assist the trier of fact, that the expert witness is qualified, and that the underlying science is reliable. The *Jones* factors should be used to determine reliability. *Id.* The Court noted that even if otherwise admissible, such evidence should still be precluded if its prejudicial effect outweighs its probative value. *Id.* The Court concluded the scientific evidence at issue in *Council* had been properly admitted.

The most recent state Supreme Court case to consider admissibility of scientific evidence is *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). In *Watson,* the judgment for Plaintiff was reversed because the purported expert testimony should have been disallowed, because purported experts were not qualified, and the purported scientific evidence was not reliable. The Court confirmed that reliability is a prerequisite for both scientific and technical testimony. The Court confirmed that the trial judge serves a gatekeeper role and "should be cautious in conferring an expert label upon a witness" and in allowing purported scientific evidence through such witnesses. *Id.*, 389 S.C. at 449, 699 S.E.2d at 176.

The alcohol causation testimony of Dr. Milunsky should have been disallowed because it was not helpful to the jury, was not reliable, and its prejudicial effect outweighed any potential probative value. That it was neither helpful nor reliable can be proven through Dr. Milunksy's own words: "It is not possible to...assign a risk to Jayden from the alcohol...since...we don't know how much was taken and when precisely it was taken." (R. p. 1494, lines 22-24).

> Q. And you said that you believe that Jayden has incomplete fetal alcohol syndrome?
>
> A. I did not. I did not say that.
>
> Q. What ---
>
> A. I said that he does not have fetal alcohol syndrome, as point one. Point two, that the features that he does have are consistent with

> incomplete – or that some of the features are consistent with incomplete fetal alcohol syndrome; for which there is no proof.

(R. p. 1501, line 1 – p. 1502, line 3) (Emphasis added.)

> Q. You can't express an opinion with any scientific reliability about any degree of probability or possibility, can you?
>
> A. About what?
>
> Q. That alcohol played any significant role in causing brain damage in this child?
>
> A. You're like a dog with a bone. I mean, the fact is that we made the statement here that we don't know about the contribution of alcohol taken, we don't know the volume, the amount, the timing, and its sits there as an item that cannot be resolved. It sits there nevertheless because some of the features are consistent with incomplete fetal alcohol syndrome.

(R. p. 1503, line 13 – p. 1504, line 2) (Emphasis added.)

Further, Dr. Milunsky acknowledged, "There's no scientific basis upon which to reach a statistical likelihood for the [alcohol's] role in Jayden's birth defects." (R. p. 1504, lines 15-22). Testimony from this witness about possible alcohol causation is neither helpful nor reliable, but invites speculation and theorizing about possible excessive alcohol consumption as a possible cause that cannot be quantified. Any presumed minimal probative value is greatly outweighed by the obvious prejudicial effect of such testimony.

Although the admission of such testimony is plainly erroneous, it is noteworthy that the trial judge did not even recognize his role as gatekeeper of unreliable scientific testimony. He withheld his ruling on Appellant's Motion in Limine (R. p. 245, lines 9-15), then refused Appellant's attempt to have him exercise his gatekeeper duty before Dr. Milunsky testified. (R. p. 1466, line 12 – p. 1468, line 3). Startlingly, he announced his intention to consider questions of helpfulness, reliability and prejudice only after the jury heard the challenged testimony. (R. p.

1467, line 20 – p. 1468, line 3) His attitude was that any purported scientific evidence that was in retrospect determined to be unhelpful, unreliable or prejudicial could be remedied by a corrective charge. Such a cavalier view by a trial judge of his gatekeeper role reflects a dangerous misunderstanding of *State v. Council, supra*; and *Watson v. Ford, supra*. That serious error needs to be corrected in terms strong enough for the trial bench to appreciate.

D. The Trial Court's Admission of Testimony Concerning Possible Damage From Prenatal Maternal Alcohol Use Violates the "Most Probable" Requirement.

"Before expert medical testimony is admissible on the question of causation between the plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probable' rule." *Payton v. Kearse*, 329 S.C. 51, 495 S.E. 2d 205 (Ct. App. 1995) (quoting *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E. 2d 537 (1991). *Payton* involved expert testimony of a Dr. Richards who was hired to testify for the Defendant Doctor, Dr. Kearse. He was a qualified pharmacist, who listed six possible reasons as to why Mr. Payton may have the injuries he claimed. However, much like the instant case, the expert could not testify that any one of those causes most probably caused the injuries. Therefore, the expert was properly precluded from testifying that any one or the combination of the causes caused the injury.

Dr. Milunsky's overall causation opinion expressed during direct examination was, "it is more probably that Jayden's problems occurred as a consequence of multiple factors...." (R. p. 1495, lines 13-16). A multifactorial cause theory does not permit testimony of a myriad of minor possible causation factors that each fall short of most probable cause. That is precisely the significance of *Payton v. Kearse,* supra. Yet the trial judge allowed Dr. Milunsky to testify about his speculation that multiple possible factors preceding Jayden's vacuum delivery, including maternal alcohol consumption, had contributing causal significance. Dr. Milunsky's testimony

about the significance of alcohol and other factors fell dramatically short of the most probable requirement. When asked about the alcohol factor during cross examination, Dr. Milunsky finally acknowledged, "There's no scientific basis upon which to reach a statistical likelihood for the alcohol role in Jayden's birth defects." (R. p. 1504, lines 15-18).

The trial court allowed Dr. Milunsky to speculate about possible timing and amount of maternal alcohol ingestion that was not supported by actual evidence. The Court further allowed Dr. Milunsky to theorize that such assumed excessive alcohol consumption in pregnancy was a possible contributing cause of Jayden's brain damage. Allowing such speculative and theoretical testimony is wrong on many levels, and certainly violates the "most probable" rule of *Payton v. Kearse*.

E. The Trial Court's Admission of Testimony Concerning Possible Damage From Prenatal Maternal Alcohol Use Violates Precedent.

In *Johnson v. Horry County Solid Waste Authority,* 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010) the decedent was in a single car accident after leaving a bar. After exiting her vehicle after that initial accident, she died in a second accident, as she was crushed between her car and a solid waste truck. At trial, Plaintiff made a motion *in limine* to exclude evidence of Decedent's blood alcohol level, which was .14, and evidence showing traces of marijuana and cocaine in Decedent's bloodstream. Plaintiff argued no evidence causally linked Decedent's intoxication to the second accident. At the trial court's request, the County attempted to establish such a causal connection. The County raised several arguments, but the trial court excluded the evidence under Rule 403. The Court of Appeals affirmed this ruling by recognizing that:

> ... otherwise relevant evidence may be excluded when its probative value is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....' Rule 403, S.C.R.E. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Owens,* 346 S.C. 637, 666, 552 S.E.2d

745, 760 (2001) *overruled on other grounds by State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005).

Id. at 838. The Court of Appeals agreed with the trial court that the "prejudice created by admitting decedent's blood alcohol level substantially outweighed the probative value." *Id.* at 839..

The case *sub judice* presents stronger reasons to exclude speculative and theoretical alcohol causation testimony than in *Johnson.* Unlike *Johnson*, in which a toxicology report evidenced an alcohol blood level of .14, plus marijuana and cocaine in the bloodstream, there is no evidence whatsoever that Jamesetta Washington was ever even intoxicated while pregnant. (R. p. 1494, lines 20-24) There is no evidence that she consumed more than a modest amount while pregnant. *Id.* There is no evidence that she consumed any alcohol later than early in the pregnancy before she realized she was pregnant. (R. p. 975, lines 2-13) Tests after the delivery proved she had no drugs or alcohol in her system. (R. p. 3142) The speculation and theorizing about possible causal significance of alcohol usage in this case is far less probative than in *Johnson*; and its prejudicial effect is at least as great as that in *Johnson* because the testimony invites a decision on an improper basis. Dr. Milunsky's speculative and theoretical testimony regarding maternal alcohol use as a possible contributing cause of brain damage served no purpose other than to invite a jury verdict on an improper basis and should have been excluded.

Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003), also represents compelling authority that Dr. Milunsky's speculative testimony should have been excluded. In *Kennedy,* a tractor-trailer moved in front of a pick-up truck driven by Kennedy. Kennedy's pick-up truck then struck the rear of the 18-wheeler, and Kennedy alleged that he sustained injuries caused by negligence of the tractor-trailer driver in pulling too suddenly in front of him. After

the accident Kennedy had a toxicology screening which showed the presence of marijuana in his bloodstream. *Id.* at 128-29, 595 S.E.2d at 251. Griffin sought to admit the toxicology evidence of Kennedy's marijuana as probative of the assertion that Kennedy could have stopped without hitting the tractor-trailer if he had not been adversely affected by the drug. The trial court allowed the testimony. Despite eyewitness testimony that Kennedy did have sufficient time to stop, the Court of Appeals concluded that the circumstances of the accident did not "necessarily suggest that [Kennedy] was driving under impairment." *Id.* Under those circumstances, the Court reversed a defense judgment, concluding that the danger of unfair prejudice substantially outweighed the probative value of the toxicology report. *Id.* at 128-29, 595 S.E.2d at 251.

In the instant case, speculative theorizing of possible excessive alcohol ingestion possibly later than the first month of pregnancy, being a possible contributing causal factor for brain damage, is even less probative than the toxicology evidence of marijuana use in *Kennedy.* In *Kennedy* there was evidence of recent marijuana use and delayed motor responses immediately prior to the injurious impact, whereas in this case *sub judice* there is no evidence of any maternal alcohol use within approximately eight months before the birth, and no evidence of excessive consumption in the first month. (R. p. 975, lines 2-13) Tests performed immediately after Jayden's brain bleeds were noted as negative for alcohol and illicit drugs. (R. p. 3142) Allowing Dr. Milunsky to speculate about possible causal significance of possible additional alcohol use in pregnancy and possible excessive alcohol consumption during pregnancy is manifestly improper. As the probative value of such testimony is non-existent, its prejudicial nature obvious, its utter failure to meet the "most probable" requirement, and its lack of scientific reliability, the trial judge abused his discretion in admitting the testimony and thus denied Appellant a fair trial.

F. Allowing Evidence of Alcohol Use the First Month of Pregnancy Under These Circumstances Endangers Public Policy.

This court has long recognized a public policy to protect the welfare of children. *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). In this case Jayden W.'s mother so loved her unborn child that she wrote down every substance she consumed during early pregnancy, before she realized she was pregnant, that may be important to the physician treating her and caring for her unborn child. (R. p. 984, lines 11-19) Those disclosures included drinking alcohol while in college, before she realized she was pregnant. *Id.* Every obstetrician would want a patient like Jamesetta to be honest and detail all drug or alcohol ingestion during pregnancy, for the health of the baby. Not one physician told Jamesetta that alcohol consumption in the first month or so of pregnancy, before learning she was pregnant, could be harmful to Jayden. At trial no one testified alcohol consumption most probably caused brain damage.

The rules of evidence should preclude this irrelevant, prejudicial evidence. If such evidence is nevertheless allowed, future parents may be discouraged from disclosing potentially important health information. This disincentive to disclose information is not in the best interest of future children and is thus a danger to public policy. Full disclosure to an obstetrician should be encouraged by public policy. When a patient fears that truthful information they reveal to a physician may harm them in court, by being used as a springboard for wild speculation and theorizing, such policy is jeopardized. The rules of evidence in this case failed to protect a brain-damaged baby and a loving mother, who trusted her doctor to use her truthful disclosures for her new baby's benefit. The Court's ruling was very wrong on many levels, and if not reversed sets a dangerous policy precedent.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY IMPROPERLY ADMITTING TESTIMONY REGARDING GENETIC FACTORS AS A POSSIBLE CONTRIBUTING CAUSE OF JAYDEN W'S BRAIN DAMAGE.

A. Standard of Review

The standard of review is set forth in Argument I A, *supra* at page 7. Dr. Milunsky's testimony concerning theoretical genetic factors as a possible cause of brain bleeds and brain damage should have been excluded because it lacks probative value, any presumed minimal relevance is outweighed by its prejudicial effect, it is not helpful to the jury, it is not reliable, and it violates the "most probable" requirement.

B. The Trial Court Failed to Meet its Responsibility to Keep Irrelevant Prejudicial Evidence Out of the Jury's Purview Under Rule 401, 402 and 403 SCRE.

Dr. Milunsky's testimony concerning possible causal significance of theoretical genetics factors falls into three categories: (1) Jayden supposedly has multiple birth defects that cannot all be caused by traumatic brain damage at birth; (2) Jayden supposedly has a connective tissue disorder that made the blood vessels in his brain more vulnerable to injury from traumatic vacuum suction by Dr. Rhett; (3) despite negative results from currently available genetics testing, there will supposedly be in existence at some unknown future date tests which, if then taken by Jayden, would reveal that he has a genetic syndrome not yet recognized by current developments in genetics. (R. p. 1469, line 21- p. 1539, line 7) Each will be addressed in turn.

Dr. Milunsky contends that Jayden has or had numerous alleged birth defects, many of which can be caused by traumatic brain injury at birth, and others of which are not unusual in the newborn[2]. Dr. Milunksy had never examined Jayden W., but purported to make these diagnoses

[2] Those include coloboma, a developmental imperfection of the eye (R. p. 1471, line 15 – p. 1472, line 8); hyperextensibility, or loose joints (R. p. 1471, line 12); hypotonia, or reduced muscle tone (R. p. 1479, lines 3-4); narrow blood vessels to the lung (R. p. 1471, line 25); alleged narrow blood vessel in the brain (R. p. 1471, line 24 – p. 1472, line 9); undescended testis (R. p.1474,

from two photographs and a partial review of the medical records.

Testimony of Dr. Barbara Burton, Appellant's genetics expert, was based on her physical examination of Jayden as well as a review of all relevant medical records and the negative results of five genetics tests. (R. p. 2490, line 12 – p. 2505, line 10; p. 2512, line 2 – p. 2514, line 6) Dr. Burton explained that many of the conditions identified by Dr. Milunsky either never existed, were merely transient, or represent individual variability rather than birth defects. (*Id.*, R. p. 2514, line 8 – p. 2526, line 14) She further explained that many of the conditions which Dr. Milunsky addressed were to be expected when a child is born with traumatic brain bleeds, and the others are not very unusual. Id. Because the alleged birth defects identified by Dr. Milunsky are either to be expected when a baby's brain is traumatically injured at birth or are not very unusual, such testimony had minimal relevance that was outweighed by its prejudicial nature and tendency to confuse. It should have been disallowed by the trial court as part of its gatekeeper function.

Dr. Milunsky also testified that Jayden's mother had certain conditions associated with a connective tissue disorder including spina bifida, fused vertebrae, lordosis, and an extra pair of ribs. (R. p. 1482, line 24 – p. 1484, line 10) Although there was no evidence that any such conditions were shared by Jayden, Dr. Milunsky nevertheless opined that Jayden had an inherited connective tissue disorder. Dr. Burton testified from her personal examination that Jayden did not have any connective tissue disorder; and that his mother's spine and rib issues are unrelated to connective tissue disorder. (R. p. 2515, l. 20 – p. 2519, line 22) Dr. Milunsky agreed that connective tissue disorders have never been associated with brain bleeds at birth, except

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lines 7-17); bilateral hydroceles, associated with undescended testis (R. p. 1472, line 18 – p. 1476, line 19); reduced platelet count (R. p. 1388, lines 9-13); delayed myelination (R. p. 1479, line 20 – p. 1480, line 10); strabismus, or a condition of being cross-eyed (R. p. 1481, lines 5-7); supposedly wide-spaced nipples (R. p. 1479, line 5); and supposedly prominent ears (R. p. 1480, lines 15-16).

with respect to an extremely rare genetic syndrome he admitted Jayden does not have. (R. p. 1518, line 25 – p. 1519, line 10) Thus, there was no probative value to Milunsky's testimony about connective tissue disorder, which only served to prejudice and confuse the jury about theoretical genetics factors. Moreover, even assuming arguendo that Jayden had inherited a connective tissue disorder which made him more vulnerable to brain bleeds from vacuum suction, that assumed pre-existing condition would not break the causal connection between Dr. Rhett's use of the vacuum and Jayden's resulting brain bleeds. Even Dr. Milunsky admitted that Dr. Rhett's vacuum use caused the child's brain bleeds. (R. p. 1531, lines 18-20)

Even more disturbing is Dr. Milunsky's proposition that there will be in the future tests for genetic syndromes which are not yet recognized; and his prediction Jayden would be theoretically proven to have such a syndrome, not yet recognized, if he ever took such tests, which do not yet exist. (R. p. 1504, line 23 – p. 1508, line 7) Such testimony has no probative value; and any assumed minimal relevance is greatly outweighed by its tendency to prejudice and confuse the jury.

C. Allowing Testimony of Possible Damage From Theoretical Genetics Factors Use Violates Scientific Reliability Standards.

Dr. Milunsky's testimony regarding possible brain damage from theoretical genetic factors should have been denied admissibility under *State v. Council, supra.* The testimony was neither helpful to the jury nor scientifically reliable using the *Jones* factors for reliability. This evidence was not reliable because it involves speculation about what future developments in genetics may entail, rather than an application of current science to known facts. The record discloses no basis for a reliability determination under any *Jones* factor.

Dr. Milunsky admitted during direct examination that his opinion was based on

speculation and that he could not give a more probable than not causation opinion. (R. p. 1494, line 17 – p. 1495, line 13). His testimony expressed a collision of ideas of what could possibly be a contributing cause; it could be unknown alcohol consumption, it could be an undiagnosed inherited vasculature problem, it could be an unrecognized inherited connective tissue problem. All are theories devoid of factual support, and all lack scientific reliability.

Review of the transcript shows that Dr. Milunsky's opinions had not been published or peer reviewed on his beliefs in this case, and that his opinion was in fact contrary to accepted medical knowledge. Dr. Milunsky admits that out of the 2,000 known connective tissue disorders, the supposed birth defects he says Jayden exhibits are not parallel with a single one. He cannot match it, name it, test for it, or even validate its existence, but he claims to be sure that Jayden has it, based only on his say-so. (R. p. 1509, line 18 – p. 1510, line 21). Dr. Milunsky suggested during his deposition that five tests be run to explore the nature of the alleged connective tissue disorder. (R. pp. 2766-2783). When those tests were later run, each of them returned negative, showing no genetic problem whatsoever. (R. p. 2494, line 8 – p. 2503, line 6; pp. 2588-2595) Nevertheless, Dr. Milunsky persisted in his assertion that his word should be given credence over known test results.

The trial court also had before it substantial evidence that Dr. Milunsky's trial opinions were based on an incomplete work up of Jayden W., leading to a speculative genetics theory. Dr. Milunsky never conducted a physical examination, but reviewed only two pictures of Jayden W. and limited medical records. Not once did he examine the child. He merely surmised that this child must have some not yet recognized genetic disorder without appropriate scientific process. As stated by Dr. Rhett's counsel Robert Hood, "Most syndromes are identified by examination;" however one was not completed by Dr. Milunsky. (R. p. 228, lines 21-23).

In analyzing the reliability of an expert's testimony, the "key question" is "whether it can be (and has been) tested." *Daubert, supra.* South Carolina cases are in accord. *See, e.g., Watson v. Ford Motor Co., supra.* Like the expert in *Watson,* Milunsky contends that there is a genetic syndrome for which there is no test. Such testimony is speculative, theoretical and unreliable. "Simply put, an expert does not assist the trier of fact...if he starts his analysis based on ...assumption (of the very question he was called upon to resolve)....") *Clark v. Takata Corp.,* 192 F.3d 750, 757 (7th Cir. 1999). As explained in pretrial hearings by Appellant, Dr. Milunsky suggested that five tests be completed to prove the connective tissue disorder, but even if those tests came back negative (which they did) his opinion would not change. (R. p. 225, lines 9-19). This is clearly an example of working improperly from an assumption. "When an expert proposes a theory that modifies otherwise well-established knowledge ...we would expect the importance of testing as a factor in determining reliability to be at its highest." *Bitler v. AO Smith Corp.,* 400 F.3d 1227, 1235 (10th Cir. 2004). With no indicia of reliability, the trial court improperly submitted the opinions of Dr. Milunsky to the jury.

Perhaps in evaluating the reliability of the theoretical genetics factors presented by Milunsky, the trial judge was understandably distracted by his own recent personal experiences. His brother had died earlier that year from a previously undiagnosed genetic neurodegenerative disease. (R. p. 229, lines 16-21) He had just attended a genetics conference on that disease two weeks earlier. *Id.* From those experiences he was aware of "an entire array of genetic possibilities of things that we don't yet understand, that we know are out there." (R. p. 230, lines 1-3) It is tragic that the judge lost his brother, but our awareness of an "entire array of genetic possibilities" does not mean that current speculation about possible future science should be admissible.

The testimony of Dr. Milunsky regarding proximate cause was neither helpful, reliable nor probative. It should have been precluded. The court failed to perform its role as gatekeeper to prevent the jury from hearing unreliable, speculative and theoretical testimony from Dr. Milunsky.

D. The Trial Court's Admission of Testimony Concerning Possible Damage From Theoretical Genetic Factors Violates the "Most Probable" Requirement.

"Before expert medical testimony is admissible on the question of causation between the plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probable' rule." *Payton v. Kearse*, *supra.* Dr. Milunsky's overall causation opinion expressed during direct examination was, "it is more probably that Jayden's problems occurred as a consequence of multiple factors...." (R. p. 1495, lines 13-16) The trial judge allowed Dr. Milunsky to testify about this speculation that multiple possible contributing factors preceded Jayden's brain damage, including maternal alcohol consumption, vascular problems, and purported connective tissue disorder. Yet Dr. Milunsky's testimony about the causal significance of each alleged factor fell dramatically short of the most probable requirement. When asked about the genetic syndrome factor, Dr. Milunsky admitted that Jayden did not match any known genetic disorder. (R. p. 1506, lines 24 – p. 1508, line 7). The only factor that Dr. Milunsky can clearly identify as a cause of the bleeding on the brain is the use of the vacuum on the head of Jayden W.: "It's a factor. No question." (R. p. 1531, line 20). Dr. Milunsky's opinion testimony regarding possible contributing causes of the child's brain damage is essentially the same "multifactorial cause" testimony properly excluded by this Court in *Payton v. Kearse.* Allowance thereof permitted Dr. Milunsky to speculate about theoretical causal possibilities which do not come close to meeting the "most probable" requirement for causation. This is the same danger the Court was concerned

with in *Jackson v. Bermuda Sands*, 383 S.C. 11, 17, 677 S.E. 2d 612, 615-616 (Ct. App. 2009) (where opinion testimony is not proved by scientific testing, opinions "amount to mere speculation and conjecture.") This type of testimony invites the jury to speculate about causation, and should have been precluded by its failure to meet the "most probable" requirement for admissibility.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT.

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). Ordinarily, a trial court has the duty to give a requested instruction that correctly states the law applicable to the issues and the evidence. *Singletary v. South Carolina Dept. of Educ.*, 316 S.C. 153, 447 S. E. 2d 231, 93 Ed. Law Rep. 978 (Ct. App. 1994). See also, *State v. Cooney*, 320 S.C. 107, 463 S. E. 2d 597 (1995) (the law to be charged must be determined from the evidence presented at trial).

A trial court is required to charge the current and correct law. *Stokes v. Spartanburg Regional Medical Center,* 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006). 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. *Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 427-28 (2005); *Brown v. Smalls*, 325 S.C. 547, 481 S.E.2d 244 (1997); *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983). Moreover, when general instructions to the jury are insufficient to enable to jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Stokes, supra.*

Informed consent is a key issue in this case. Although the defense continually tried to confuse the jury on this issue by referring to a general consent form as the "informed consent"

document, the trial court properly ruled that the general consent document signed by Jamesetta Washington did **not** represent informed consent, as a matter of law. (R. p. 2045, lines 13-17).

Nevertheless, Defendant still contended that he did not need to obtain informed consent to use the vacuum because of an alleged emergency. Appellant did not agree that an emergency was present, but with the issue of Dr. Rhett's failure to obtain informed consent for the use of a vacuum extractor still an issue in this case, Appellant wanted the jury to know the limitations that the law places on the emergency exception to informed consent. Appellant therefore submitted her Request to Charge #12:

> Informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. However, a physician must respect a competent patient's refusal of treatment, even in an emergency. If a competent patient refuses treatment, any medical treatment is a battery, even in an emergency.
>
> Even under the emergency exception to the informed consent doctrine, a physician should seek the consent of the patient, or, if the patient is incapable of providing consent, the consent of a family member, before administering treatment. Impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception.

(R. pp. 3666-3667) The said charge comes directly from Judge Ralph King Anderson, Jr.'s well known book on Requests to Charge. (Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, Chapter 27) It is a balanced charge, with the early part written from a strong pro-defense perspective, recognizing an emergency exception to the informed consent requirement; and the second paragraph expressing limitations on the emergency exception. In submitting the requested charge, Appellant of course desired the second paragraph to be charged concerning limitations to the emergency exception to informed consent, but in fairness expected the entire charge to be read. The trial court shockingly read only a modified version of the pro-defense portion:

> Now, let's talk about emergency situations. However, informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied. Therefore, under this ruling it is for you to decide whether a medical emergency existed at the time of the vacuum procedure requiring immediate treatment and overriding the need to obtain informed consent.

(R. p. 2205, lines 13-22) The court declined to charge the portion which expressed limitations to the emergency exception to the informed consent doctrine. (R. p. 2236, line 25 – p. 2237, line 14) Choosing not to charge such limitations, the judge misinformed the jury about the correct law. The omitted portions of the requested charge were absolutely necessary for the charge to be a correct, balanced and fair charge on South Carolina law. See *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 533 C.S. (2002); 61 Am. Jur. 2d "Physicians, Surgeons and Other Healers" §§ 157, 167 176 (2004).

Post–trial interviews revealed that the jury was in fact confused by the informed consent charge. The jury apparently agreed that improper use of a vacuum by Dr. Rhett was a cause of Jayden's brain damage, but mistakenly thought the presence of a supposed emergency situation eliminated the need for Dr. Rhett to comply with the standard of care. (R. p. 3716-3717) Further, the jury did not deliberate on informed consent as they believed that the trial court had already addressed that issue, and did not think they needed to address that issue if they found there was an emergency situation. *(Id.,* R. p. 3717) The jury obviously did not understand the charge regarding the standard of care, breaches thereof, or the effect of the lack of informed consent. They were confused by the incomplete charge on the emergency exception to informed consent. The jury did not understand that performing a vacuum extraction delivery without informed consent is a form of negligence. They had no way to know the limited circumstances in which an emergency exception to informed consent applies, as the trial judge chose not to let them know about that tremendously important part of the law on informed consent. As informed

consent was a key issue in the case, that omission represented an abuse of discretion, was material and prejudicial.

"An informed consent action is no different from any other action for professional malpractice." *Hook v. Rothstein,* 281 S.C. 541, 551, 316 S.E.2d 690, 696 (Ct. App. 1984). Because informed consent issues are subsumed under negligence under S.C. law, there was no separate issue regarding informed consent for the jury to consider, just one overall standard of care issue: Did Dr. Rhett breach the generally accepted standard of care for obstetricians under these facts and circumstances? This question could not properly be resolved under the facts of this case without a discussion by the jury on informed consent, and such a discussion could not properly occur without a correct charge on informed consent. As the jury was utterly confused by the charge which erroneously informed them of an unlimited emergency exception to informed consent, they were unable to properly deliberate the standard of care issue. Their confusion resulted from the erroneous pro-defense charge regarding the emergency exception to informed consent, without limitations thereto being revealed by the trial court.

Plaintiff's Request to Charge #12 was timely made. (R. p. 2202, line 5 – p. 2206, line 11; p. 2235, line 25 – p. 2237, line 14; p. 2258, line 12 – p. 2259, line 9; pp. 3110-3214) It involved a controlling legal principle. The trial court's failure to charge the second part of Plaintiff's Request to Charge #12 was thus reversible error under *Koutsogiannis, supra*; *Brown, supra; Baker, supra;* and *Stokes, supra.*

IV. THE TRIAL COURT ALSO ERRED AND ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE CORRECT LAW REGARDING EXPERT WITNESS FEES.

As noted in Argument III, *supra*, a trial court has the duty to give a requested instruction that correctly states the law applicable to the issues and the evidence. *Singletary, supra; Cooney,*

supra. When general instructions to the jury are insufficient to enable the jury to understand fully the law or the issues involved, a refusal to give a requested charge is reversible error. *Stokes, supra.*

Plaintiff's Request to Charge #3 addressed expert fees. It provides as follows:

> When an expert witness is called by either a plaintiff or defendant, he expects to be paid and he should be paid. You should not take into consideration the fact that the witness is paid unless there is some evidence or circumstances appearing from the evidence which would fully and reasonably convince you that the testimony of the witness has been influenced because of the sum which he has been paid as a witness.

This charge is taken directly from Judge Ralph King Andersons' book on jury instructions, and is a correct statement of South Carolina law. See *Anderson v. Campbell Tile Co.,* 24 S.E.2d 104, 108 (1943). It should have been charged because Defendants elicited testimony regarding fees from every liability expert presented by Plaintiff and also from certain damages expert(s). (R. p. 590; pp. 619-620; p. 661; p. 714-715; p. 717; p. 833, lines 6-16; p. 906, line 20 – p. 907, line 1; p. 1168, lines 21-25; p. 1169, lines 4-12) Defendant repeatedly sought to prejudice the jurors against Plaintiff by persistently arguing directly and though innuendo that Plaintiff's experts were unworthy of belief because of the fact and amount of their payment for time and work as experts in this case. *Id.* The failure to give the requested charge was prejudicial to Plaintiff, as in evident from the defense verdict.

V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT PERMITTING REPLY TESTIMONY OF DR. OAKES CONCERNING MISLEADING USE BY DEFENSE OF STATISTICS IN A MEDICAL JOURNAL ARTICLE.

The Plaintiff in a civil action must first produce and disclose the entire evidence in

support of his case; after the defendant has offered all of his evidence, the plaintiff may reply. *Clinton v. McKenzie*, 36 S.C.L. (5 Strob.) 36 (1850). Reply testimony should be limited to rebuttal of matters raised in defense. *The State v. Brian Garris*, 394 S.C. 336, 714 S.E.2d 888, 896 (Ct. App. 2011). Admission of reply testimony is within the discretion of the trial judge, and his decision will not be disturbed on appeal absent a showing of abuse of discretion. *Vernon v. Provident Life & Accident Ins. Co.* 266 S.C. 208, 222 S.E.2d 501 (1976); *Ford v. A.A.A. Highway Express*, 204 S.C. 433, 29 S.E.2d 760 (1944).

The trial court abused its discretion in this case by denying Jayden W. the ability to perform an effective rebuttal concerning the defense's misleading use of statistics from a medical journal article. The article was first addressed when Dr. Rhett took the stand at the request of his own counsel. Dr. Rhett repeatedly referred to unspecified literature regarding the risk of brain bleeds to infants born vaginally without vacuum extraction being nearly as high as such risk to babies suctioned out with a vacuum. (R. p. 1237, line 12 – p. 1238, line 18; p. 1348, line 21 – p. 1349, line 5) In so testifying, Dr. Rhett was misusing statistics from a New England Journal of Medicine article,[3] without revealing the source. Appellant's counsel knew that, and inquired about the subject article on cross-examination of Dr. Rhett in trying to verify the literary source of defendant's misleading statistics. (R. p. 1349, lines 6-20; p. 1353, line 2 – p. 1357, line 25) Counsel asked about any controls placed on the study's subjects. (R. p. 1354, lines 8-9; p. 1356, lines 15-20) Unfortunately, Dr. Rhett did not have the willingness or ability to answer questions truthfully and accurately about the specific controls used in the study. (R. p.1353, line 2 – p. 1357, line 25) Defense expert Dr. Lynn Norton also used statistics from the article in a misleading way. (R. p. 1660, line 5 – p. 1661, line 25).

[3] Dena Towner, et al., "Effect of Mode of Delivery in Nulliparous Women on Neonatal Intracranial Injury," New England Journal of Medicine, 1999; 341, R. pp. 3608-3613

Importantly, the subject article did not control for (1) gestational age; or (2) station at which vacuum was applied in the vacuum deliveries. The article did use certain weight parameters as a control for babies in its study, but the weight cutoff chosen was low enough to include many preterm babies. (R. p. 1671, line 23 – p. 1673, line 14; pp. 3608-3613)

To compare risk of brain bleeds in a population that includes preterm babies with brain bleeds in vacuum deliveries is an unfair and misleading comparison. That is because the risk of brain bleeds in preterm babies is high, because of early gestational age; and vacuums are not used on preterm babies, but are used only at or near term. To compare the risk of brain bleeds from early gestational age with the risk of brain bleeds from traumatic vacuum extraction at or near term is very misleading. Different processes are involved in causing brain damage to babies of different gestational ages. Term babies delivered by vacuum extraction with brain bleeds involve damage most probably caused by traumatic suction, while brain bleeds in preterm babies are ordinarily caused by insufficient maturation of tissues.

Moreover, the risk of brain bleeds in low or outlet vacuum extractions is relatively low, as contrasted with the much greater risk of traumatic brain bleeds when a baby is being suctioned out from higher up in the birth canal, in the mid-pelvis, from where Jayden W. was extracted. (R. p. 426, line 2 – p. 428, line 14) The defense thus misused the article's statistics in two ways: (1) by concealing that the weight limits used in the study included pre-term babies having a greatly increased risk of brain damage; and (2) by obscuring the statistical risk of brain bleeds from mid-pelvic vacuum extractions by lumping together the risk of brain damage from all vacuum deliveries, including the relatively low risk from low and outlet extractions.

Because of misleading testimony about statistics included in the article from Dr. Rhett (R. p. 1237, line 12 – p. 1238, line 18; p. 1348, line 21 – p. 1349, line 5) and Dr. Norton (R. pp.

1660-1661; pp. 1666-1667), Appellant needed to present reply testimony to explain the true and fair conclusions to be reached from the article. Through Dr. Oakes on reply, Appellant intended to show that the subject article had been misused by the defense in a tricky and deceptive way. The article itself places limitations showing that it should not be used as Defendants used it at trial:

> The limitations of our study are those inherent in a retrospective analysis. Without a systematic study of all infants, injuries may have been missed.... A major limitation is that risk factors for injury cannot be further identified because the data base does not contain information about the indications for operative delivery, such as the duration of labor and the position of the fetal head. In the absence of this information and in view of clinicians' individual preferences in choosing the mode of delivery, the study groups may not be comparable and the differences in morbidity therefore cannot necessarily be attributed to the mode of delivery.

(R. p. 2015, line 2 – p. 2018, line 17; pp. 3608-3613) Dr. Oakes should have been allowed to explain why the article is not reliable support for an argument the defense was trying to make in the case, i.e., that vacuum intervention earlier in the second stage of delivery does not materially increase the risk of brain bleeds in babies. Appellant should also have been allowed to publish through Dr. Oakes the acknowledgement in this article that it should not be interpreted as the defense did in this case. (pp. 3608-3613; p. 2015, line 2 – p. 2018, line 17) Denying Appellant the right to explain to the jury the unscientific, deceptive spin the defense was applying to this article was an error of law, an abuse of discretion, and highly prejudicial to Appellant.

The Court's refusal to allow such reply testimony was especially odd since the court originally ruled it would be allowed. In addressing the scope of reply it would allow, the trial court expressly ruled, "I will give you follow-up on the New England Journal . . . ." (R. p.1982, lines 12-13), overruling defense objections. Appellant called Dr. Oakes as a reply witness, in

part to address the misleading use of statistics from that article by the defense. Despite the Court's prior ruling, counsel for Dr. Rhett continued to object. (R. p. 2015, line 2 – p. 2018, line 17) Ultimately, the court changed its mind and disallowed the testimony, on the asserted basis that contents of a learned treatise used by a party cannot be explained or challenged by the adverse party in reply. (R. p. 2015, line 2 – p. 2018, line 17) As that ruling is plainly erroneous, Appellant surmises that the court must have been confused about the issue. Nevertheless, that erroneous ruling by the trial court forced Appellant's counsel to return to his seat dumbfounded and severely prejudiced by his inability to explain to the jury how the defense had tried to trick them into thinking that vaginal delivery is what causes most brain bleeds in newborns, rather than early vacuum intervention. (R. p. 2017, line 15 – p. 2018, line 17) Appellant was prejudiced not only by being disallowed to proceed with rebuttal he was entitled to present, but also by the court's erroneous ruling making it appear at the very end of Appellant's reply that Appellant's counsel was disobeying the trial court by improperly challenging a "learned treatise," when in fact Appellant was trying to show the Defendants' misuse of a "learned treatise." The Court's ruling placed greater emphasis on the article, as it had been misinterpreted by the defense. By disallowing Appellant's rebuttal in this fashion, the Court made the defense's erroneous and deceptive interpretation seem both correct and unimpeachable. Such error rewarded the defense's unfair and manipulative use of statistics from the article and denied Appellant a fair trial.

VI. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE IN VIOLATION OF THE CASE MANAGEMENT ORDER.

Once this case was transferred to the multi-week docket, the Court issued a Case Management Order. The Court instructed counsel they must comply with this Order more strictly

than a typical scheduling order in circuit court. With respect to exchange of demonstrative evidence, Appellant complied while Dr. Rhett did not. (R. p. 1292, line 2 – p. 1293, line 22) Not until used in Dr. Rhett's direct examination did Appellant learn of the defense's intent to use a pelvic model. (R. p. 1259, lines 14-15) In rehearsed direct examination, Dr. Rhett used a tape measure to measure seven centimeters between the ischial spines and the pelvic or vaginal outlet on his pelvic model[4]. (R. p. 1264, lines 5-15) In fact there are five centimeters between those points in a typical normal human female pelvis. (R. p. 1991, lines 21-25) The defense had not shown Appellant its pelvic model prior to its courtroom appearance during the direct examination of Dr. Rhett by attorney Hood. (R. p. 1292, lines 2-22) Not until the end of the defense case, as Appellant called Dr. Oakes in reply, was Appellant able to have an expert examine the pelvis. Dr. Oakes determined that the defense had used a pelvic model with dimensions significantly different from a pelvis in a normal human adult female (R. p. 1990, line 16 – p. 1992, line 24). Dr. Rhett's measurements were misleading for other reasons as well. (R. p. 1990, line 16 – p. 1993, line 5) Dr. Rhett's tape measurements of its dimensions in the courtroom, without admitting his pelvic model was not to scale, and without allowing Appellant a chance to see it ahead of time as required by the Case Management Order, was completely unfair and prejudicial. If the model had been submitted for Appellant's review before trial, as ordered, Appellant would have had a timely opportunity to learn the truth about the model not being to scale, object and prevent the use of a non-conforming model for misleading measurement purposes. Use of the not-to-scale pelvic model represents, under these

[4] The only possible purpose of this exercise was an attempt by the defense to fool the jury about the length of the birth canal and the station of Jayden within the birth canal when the vacuum was applied to his head. Such efforts continued with speculative testimony from defense expert Dr. Weinstein that the mother's birth canal may have been abnormally large (R.p. 1601, lines 17-25; p. 1602, lines 1-17; p. 1605, lines 17-25; p. 1606, line 1 – p. 1608, line 2), testimony the defense told the court they would not present, in response to Appellant's Motion in Limine on the issue. (R. p. 269, line 19 – p. 271, line 19)

circumstances, a knowing and willful violation of the Case Management Order which prevented a fair trial.

Not until during the defense's direct examination of its own obstetrical expert was Appellant aware that the defense would also use as demonstrative evidence a vacuum pump operated with a vacuum cup on a flat countertop railing in the front of the jury box. One of the issues in the case was Dr. Rhett's improper use of a vacuum by rocking back and forth, side to side, or up and down, which increases the risk to a baby of having blood vessels in the brain ruptured by the vacuum forces. (R. p. 458, line 23 – p. 460, line 22) When a vacuum is applied to a round object, like a baby's skull, such rocking sideways movements place dangerous asymmetric forces on the baby's blood vessels under the baby's soft pliable scalp. *Id.* The defense expert used the vacuum pump and cup on a flat surface rather than a round surface. When sideways rocking movements are applied to a vacuum cup on a flat surface, the suction breaks and the cup dislodges. The defense used its witness to make such a misleading demonstration, contending that Dr. Rhett's sideways motions could not have harmed Jayden W. because the cup would have dislodged before trauma was done to the blood vessels in the baby's brain. That represents another willful effort to deceive the jury and another knowing and willful violation of the Case Management Order. The defense should not be rewarded for its willful violations of Court Orders, which enabled the deceptive use of demonstrative evidence in trial.

Evidence presented must be sufficient to enable the fact finder to make a determination with reasonable certainty or accuracy. *Gray v. Southern Facilities, Inc.,* 256 S.C. 558, 183 S.E.2d 438 (1971). Demonstrative evidence should not be allowed when it is sprung upon opposing counsel in the middle of trial, in violation of a Case Management Order. That is particularly objectionable when its use is for the purpose of deceiving the jury. Just as junk

science from purported experts should be excluded, so too should deceptive misuse of demonstrative evidence be excluded. That its misuse is facilitated by knowing willful violation of a Court Order makes the misuse even more offensive. Defense's use of the pelvic model and vacuum pump were neither helpful to a truth-seeker nor based on reliable science. Their use was orchestrated through willful disregard of the Case Management Order, and was prejudicial to Appellant.

VII. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO ALLOW MORE EXTENSIVE VOIR DIRE CONCERNING POTENTIAL JUROR BIAS AGAINST A MEDICAL NEGLIGENCE PLAINTIFF.

A trial judge has a duty to assure that every juror is unbiased, fair and impartial. *State vs. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982). It is fundamental that every litigant entitled to a trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. *Haley vs. Blue Ridge Transfer Co. Inc.*, 802 F.2d 1532 (4th Cir. 1986), "A litigant's right to an impartial jury is a fundamental principle of our legal system." *Burke v. AnMed Health*, 393 S.C. 48, 710 S.E. 2d 84, 86 (Ct. App. 2011) quoting S.C. Code Ann. Section 14-7-1050 (2008). Although trial judges are accorded much discretion in matters of voir dire, that discretion is not unlimited; and it is the appellate court's function to correct an abuse of discretion or error of law. *Southern Bell Tel. Co. v. Shepard,* 262 S.C. 217, 204 S.E. 2d 11 (1974); *Wall v. Keels*, 331 S.C. 210, 501 S.E.2d 754 (Ct. App. 1998). A judge has the duty to assure that every juror is unbiased, fair and impartial. See, e.g., Rule 47(a), S.C.R.C.P.; *State v. Gulledge,* 277 S.C. 368, 287 S.E. 2d 488 (1982). That was not done here. As a result, Jayden W. was denied a fair trial and received a jury verdict which represents the product of bias and prejudice.

Obtaining an unbiased, fair and impartial jury is always a daunting challenge with the

current pro-business media campaigns, pro-insurance media campaigns, political messaging and media coverage of tort reform, "lawsuit abuse" and "frivolous lawsuit" issues. As recently as 2010 during congressional and senate races for both state and federal government, insurance companies spent millions of dollars on campaigns, claiming that premiums are going up because of lawsuits and advocating for defense verdicts. These campaigns are motivated in part by a desire to prejudice jurors against personal injury plaintiffs and enlist their support for tort reform. These campaigns were published and broadcast in newspapers, radio and television stations across South Carolina.

Given the mass media attempts to prejudice the public against personal injury plaintiffs, the trial judge should have conducted *voir dire* in a much more thorough and comprehensive manner than just the basics, in order to minimize the risk to Jayden W. of a biased juror being seated. Although the trial court did ask general questions about contact with the parties, the court allowed each member that was connected with the Defendants to stay on the panel after they answered leading questions about their ability to be fair and impartial in a "politically correct" way. (R. p. 178, line 9 – p. 185, line 10) That included ten prospective jurors, five current patients, three former patients, and two with professional or personal friendships. *Id.* The trial court asked about contact with witnesses (R. p. 189, line 14 – p. 191, line 17), and allowed three prospective jurors who knew defense witnesses personally or professionally to stay on the panel, after they answered leading questions "correctly" about their ability to be fair and impartial. *Id.*

Appellant acknowledges that qualifying or rehabiliting prospective jurors with leading questions about their ability to be fair and impartial is a time-honored tradition in this state. However, that does not make it right. *Bradbury v. Commonwealth,* 40 Va. App. 176, 578 S.E.2d

93 (Va. App. 2003). As the Virginia appellate court noted in Bradbury:

"... when a trial court itself becomes involved in the rehabilitation of a potential juror, we must review the court's decision to retain the person on the panel more carefully. As this Court explained in *McGill v. Commonwealth:*

> Using or permitting the use of leading questions, those which suggest a desired answer, in the *voir dire* of a prospective juror may taint the reliability of the juror's responses. Merely giving "expected answers to leading questions" does not rehabilitate a prospective juror. *Martin v. Commonwealth,* 221 Va. 436, 444, 271 S.E.2d 123, 129 (1980). Proof of a prospective juror's impartiality "should come from him and not be based on his mere assent to persuasive suggestions." *Breeden v. Commonwealth,* 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976) (quoting *Parsons v. Commonwealth,* 138 Va. 764, 773, 121 S.E. 68, 70 (1924)). When asked by the court, a suggestive question produces an even more unreliable response. *See Foley v. Commonwealth,* 8 Va.App. 149, 160, 379 S.E.2d 915, 921, [*aff'd,* 9 Va.App. 175, 384 S.E.2d 813] (1989) [(*en banc*)]. A juror's desire to "say the right thing" or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses.
>
> A trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the *voir dire* examination to assure the selection of fair and impartial jurors. *Id.* at 154-55, 379 S.E.2d at 918. The proper role for a trial judge is to remain detached from the issue of the juror's impartiality. The trial judge should rule on the propriety of counsel's questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation."

10 Va.App. 237, 242-43, 391 S.E.2d 597, 600 (Va. App. 1990).

Qualifying or rehabilitating jurors with leading questions is harmful for two very important reasons. First, it unfairly allows biased jurors to decide cases. That is because the use of leading questions by a judge in *voir dire* is at least as poor a device for truth-seeking as is asking leading questions of one's own witness on direct examination, which is generally forbidden. Rule 611 (c) S.C.R.E. Second, it demonstrates to everyone in the courtroom that *voir*

dire in South Carolina does not promote the seating of only fair impartial jurors, and to that extent is a sham. When an obviously biased juror admits to a close personal or professional relationship with a defendant physician, but says in response to the judge's leading question that she can nevertheless be fair and impartial, everyone but the judge sees through that false assurance. When the judge accepts that assurance at face value, prospective jurors may reasonably conclude that dishonesty is tolerated in the courtroom, that the civil justice system is bogus, or that the judge is tremendously naïve. Any of those inferences can lead directly to juror disrespect of the civil justice system and/or the judge himself. The jurors may well pretend to respect the judge's power and authority to seat what he deems to be a fair and impartial jury. However, human nature tells us that it is foolish to think a juror can fairly and impartially judge a personal or professional friend, just because she says so in response to a judge's leading question. If a judge has a relationship with a party or witness such that the judge should offer to recuse himself or herself, why allow jurors with the same relationship to serve? Why have a lower standard in this state for jury service?

If prospective jurors with personal connections to a defendant are nevertheless deemed to be fair and impartial, if they say they can be in response to a leading question, then surely the plaintiff should be allowed greater freedom in *voir dire* to probe prospective jurors' life experiences, attitudes and biases. Yet the Court refused to ask numerous *voir dire* questions suggested by the Appellant, including questions concerning whether anyone worked or had family working in the medical field (R. p. 3615); whether jurors believed there were too many lawsuits or too many frivolous lawsuits (R. p. 3616); whether jurors were active in political causes or parties (R. p. 3617); whether jurors had religious beliefs that would be relevant to their service as a juror (*Id).* and whether jurors had formed beliefs about the appropriateness or

inappropriateness of a victim who had sustained an injury bringing a claim in court for damages against the person considered to be responsible for the injury. *Id.* The trial court abused its discretion in this case by not allowing such inquiries.

As the affidavit of Mary Watters indicates, juror number 12 held a strong bias against the Appellant. According to other jurors, juror number 12 at the beginning of deliberations "stated her support of the Defendant's position and made it known that nothing would change her mind." (R. p. 3717) Her body language throughout trial made it obvious she was anti-plaintiff from the very beginning. *Id.* Thereafter, juror number 12 refused to engage in deliberations as instructed by the court.

The jurors interviewed, including the foreman, relate that the foreman and juror number 12 each had some memorable personal experience with medical professionals that affected their role in deliberations, but which was withheld during *voir dire*. No mention of those events was made in *voir dire*, because of the limitations placed by the Court. Had Jayden W. been allowed to ask his requested *voir dire*, these individuals and their preconceived bias and partiality could have more likely been identified and then excluded from the jury either for cause or with peremptory strikes[5].

Given the pecuniary interest of the jurors who may likely have heard the insurance industry argument or had personal beliefs that medical negligence verdicts make health insurance customers' own premiums rise, it was especially important for the Court to permit extensive examination of the prospective jurors about exposure to advertisements promoting the agenda of tort reform, low plaintiff's verdicts, and defense verdicts. An appeal to the economic self-interest of jurors is a prejudicial argument which warrants reversal. *City of Columbia vs. Myers*, 278 S.C.

[5] That the *voir dire* limitation was prejudicial is established not only by the defense verdict and the result of juror interviews (R. pp. 3716-3717), but also by the limited strikes Plaintiff had available to use with respect to multiple jurors with defense connections. (R. pp. 3626-3642)

288, 294 S.E.2d 787 (S.C. 1982). In closing argument to the jury, an attorney may not make such remarks which are unfairly calculated to arise passion or prejudice. *Gathers vs. Harris Teeter Supermarket, Inc.,* 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984). An argument by counsel which invites the jury to base its verdict on considerations not relevant to the merits of the case is improper. *Hoeffner vs. The Citadel*, 311 S.C. 361, 429 S.E.2d 190, rehearing den. (1993). The risk of harm is not qualitatively different if the appeal to economic self-interest comes from outside the courtroom prior to the trial. How can jurors motivated by economic self-interest be excluded from South Carolina juries without more extensive opportunity for *voir dire*?

Appellant recognizes that S.C. has a long history of limited *voir dire*. Yet new problems merit new solutions. Rarely has there been so much over-the-top propaganda and distortions about the civil justice system in media publications and broadcasts throughout our country and state as there is currently. Such propaganda and distortions increase the risk of unfair, biased jurors being allowed to serve. Such developments warrant expanded *voir dire* to negate or minimize that increased risk.

It is noteworthy that modern jurisprudence has recognized one's right to participate in the civil justice system as a juror; and has limited the constitutionally permissible use of peremptory strikes. *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, L.Ed. 2d 54 (1986); *McCrea v. Gheraibeh,*380 S.C. 183, 669 S.E.2d 333 (2008) *State v. Edwards,* 384 S.C. 504, 682 S.E. 2d 820 (2009), *Robinson v. Bon Secours St. Francis Health System, Inc.,* 382 S.C. 224, 675 S.E.2d 744 (2009) Those developments are right, fair and just. But in reality, limited *voir dire* increases the likelihood of attorneys basing decisions about peremptory strikes on broad stereotypes, generalizations and prejudices. How are preemptory strikes to be used efficiently and constitutionally if attorneys are denied an effective opportunity to explore the life experiences,

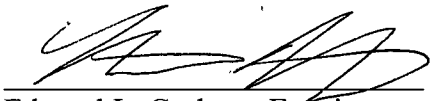
attitudes and biases of prospective jurors?

The trial court failed in its responsibility to assure a fair and impartial jury in this case. As a result, the Appellant was denied a fair trial and received a jury verdict which represents the product of bias and prejudice. The Appellant respectfully submits that the Court erred and abused its discretion in failing to permit more extensive *voir dire* examination of the jury panel, resulting in reversible error.

CONCLUSION

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

GRAHAM LAW FIRM, P.A.

BY: 

Edward L. Graham, Esquire
Mary H. Watters, Esquire
J. Layton Ruffin
383 W. Cheves St.
Florence, SC 29501
843-662-3281-T
843-665-0254-F

ATTORNEY FOR APPELLANTS

April 9, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

Jamesetta Washington, as Guardian ad Litem for
Jayden Washington, a minor .....Appellants,

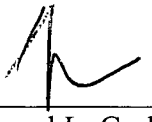
v.

Edmund Rhett, Jr., M.D., Low Country Obstetrics and Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a East Copper Regional Medical Center and AMN Services, Inc. f/k/a Nurses RX Inc.....Defendants,

Of Whom Edmund Rhett, Jr. MD is.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that this Final Brief of Appellant complies with Rule 208(a)(3), SCACR.



Edward L. Graham
GRAHAM LAW FIRM, P.A.
P.O. Box 550
Florence, SC 29503

843-662-3281-T
843-665-0254-F

ATTORNEY FOR APPELLANT

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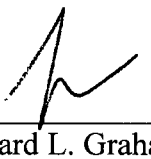
Of Whom Edmund Rhett, Jr. MD is.....Respondent.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellants, certifies that I have this 11th day of April, 2013 served copies of the Appellant's Final Reply Brief and Appellant's Final Brief by depositing them in the United States mail, first-class postage prepaid, addressed to:

Robert H. Hood, Esq.
Molly H. Craig, Esq.
Chilton Grace Simmons, Esq.
Deborah H. Sheffield, *of counsel*
Hood Law Firm, LLC
172 Meeting St.
Charleston, SC 29401



Edward L. Graham
GRAHAM LAW FIRM, P.A.
P.O. Box 550
Florence, SC 29501