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,

Appellant,

v.

Edmund Rhett, Jr., M.D., Low County Obstetrics and Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a East Cooper 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 RESPONDENT EDMUND RHETT, JR., M.D.

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STATEMENT OF THE CASE

This case arises out of the birth of the Plaintiff Child, Jayden Washington, who was delivered by Defendant Obstetrician, Dr. Edmund Rhett, Jr. with the assistance of a vacuum extractor on July 17, 2002. The Child's mother, Jamesetta Washington, brought this action as his GAL, by filing a summons and complaint on April 16, 2007, which was subsequently amended.[1] (ROA 28, 47; Complaint; Amended Complaint, filed November

[1] The complaint originally named multiple defendants, including Dr. Rhett's practice, Low Country Obstetrics & Gynecology, and East Cooper Community Hospital; and the Plaintiff also later added AMN Services, Inc., a nurse staffing company that supplied one of the nurses on duty during the labor and delivery. However, all the other defendants have settled and the procedural history related to those parties is not material to this appeal.

4, 2009.) The Plaintiff alleged that Dr. Rhett was negligent in using the vacuum extractor and that as a result the Child suffered a brain injury.

Dr. Rhett answered denying that he was negligent in manner that proximately caused any injury to the Child. (ROA 72; Answer to Amended Complaint, filed December 1, 2009.)

The Chief Administrative Judge entered Case Management Orders setting deadlines, which included dates for the exchange of exhibit lists and an exhibit conference. Pursuant to the last amended order, the deadline for exchanging exhibit lists was February 18, 2010. (ROA 3; Order, filed 10/20/09).

After years of discovery and motions, the case finally came to trial before Judge Baxley for jury selection on July 26, 2010, and concluded after thirteen days of trial on August 11, 2010. The trial court granted a partial directed verdict to Plaintiff and instructed the jury that the General Consent Form[2] that the Plaintiff had signed upon admission to the hospital was not, as a matter of law, informed consent to the use of the vacuum extractor. (ROA 2072, ll. 17-18; 2205, l. 23-2206, l.3.) However, the jury returned a verdict for the Defendant with the answer of NO to the question: "Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?" (ROA 3714; Verdict.)

The Plaintiff filed a Motion for New Trial Absolute on August 23, 2010. (ROA 145.) The trial court denied the new trial motion by order filed September 1, 2010. (ROA 17.)

The Plaintiff filed and served a notice of appeal on September 29, 2010.

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[2]"Consent for Admission and Treatment" - Exhibit 2-004. (ROA 3499.)

STATEMENT OF THE FACTS

As in virtually all medical malpractice cases, the details of the medical care provided to the Plaintiff are found in the medical records. However, in this case, the actual delivery was videotaped[3] and the jury was provided with a unique visual record of the events as they had transpired.

According to the medical records, the Plaintiff was a 20-year-old student, living in Columbia, when she discovered that she was pregnant. She went to the Richland County Health Department in November 2001, to confirm that she was pregnant. (ROA 3283; Exhibit 5.) In January 2002, she attended her first prenatal visit at Palmetto Health in Columbia. During that visit, she provided a history that included the fact that she had last used alcohol and marijuana on November 1, 2001. (ROA 3227, 3237; Exhibit 4.)

She moved to back home to Charleston and became a patient of Defendant Dr. Rhett's partner, Dr. Osborne, at Low Country OB in March 2002. She told them that she had used alcohol (2x week) between the ages of 18 and 20, and she had stopped October 20, 2001. (ROA 3033; Exhibit 1 – Low Country records.) When she went past her due date, Dr. Osborne had her admitted to East Cooper Hospital on July 15, 2002. (ROA 3499-3500; Exhibit 107 – East Cooper Records.) Dr. Joseph, another obstetrician with Low Country, was on call and admitted the Plaintiff on the evening of July 15th, at approximately 7:00 pm and a fetal monitor was attached to monitor the Child's heart rate and the contractions. (ROA 1248, ll. 23-25; 1249, ll. 13-23.) The fetal monitoring strips are another important piece of the documentary evidence.[4]

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[3]Exhibit 75 – Videotape.
[4] ROA 3342-3498; Exhibit 102.

Dr. Joseph inserted Cervidil to induce labor, (ROA 1248, ll. 23-25); however, the Plaintiff's labor was slow. On the early morning of July 16th when Dr. Osborne came on call, he broke her water and prescribed Pictocin to start contractions (7:20am), and he also called in an anesthesiologist to administer an epidural for her pain. (ROA 1249, ll. 6-12.) When Dr. Rhett came on call at noon on July 16th, Plaintiff had been in labor for almost 18 hours. After the fetal monitor showed a dip in the Child's heart rate mid-day, Dr. Rhett examined the Plaintiff and found that she was dilated only 4-5 cm, so he stopped the Pitocin, gave her oxygen, repositioned her. The heart rate went back up and they restarted the Pitocin and continued to monitor her labor. (See ROA 3342-3498; Exhibit 107 – East Cooper Records)

Then, at approximately 7:00 pm, the heart rate had gone down again and the monitoring strips showed that the Child's heartbeat had slowed down for a prolonged period. (ROA 1254; Tr. 1342.) Upon examination, Dr. Rhett determined that the Plaintiff was fully dilated and he was ready for her to push. (ROA 1244; Tr. 1332.) However, as the videotape shows, she was exhausted from being in labor for 24 hours and she could not push. By 7:30pm, the Child's heart rate had not gone back up and it was critically necessary to deliver that baby as quickly as possible. (ROA 1635-38.) At that point, Dr. Rhett had three options to deliver that baby: perform a caesarian section or proceed with a vaginal delivery with the assistance of either forceps or a vacuum extractor. (ROA 1256-57, 1259.) Dr. Rhett determined that a c-section was not a viable option because the baby was already inside the vagina (i.e. would have had to have been literally pushed back up the birth canal to deliver by c-section), and it would have taken at least 20 minutes to prepare the operating room and the Plaintiff for surgery. (ROA

1259, 1264, 1272, 1427.) Therefore, Dr. Rhett opted to use the vacuum extractor and the Child was delivered three minutes later at 7:37 pm. The timing can be detected on the video. The cause of the Child's heart rate decelerations and the urgent need to deliver him was apparent when he was delivered with the umbilical cord wrapped around his neck. (ROA 1281, l. 17 - 1282, l. 14)(See also ROA 3342; Exhibit 107 – East Cooper Records.)

Fortunately, the Child's APGAR scores were normal when he was born.(ROA 720, ll, 22-24 – Katz.) However, he developed problems, and he was transferred to MUSC where it was determined that he had a brain bleed/hemorrhage which required surgery. (ROA 469-70.) The Plaintiff's expert in pediatric neurology testified that the Child suffers from a combination of mild to moderate problems with developmental delays consistent with neurologic injuries associated with the brain hemorrhage. (ROA 673-75.) However, the Defendant's expert testified that the Child also was born with a connective tissue disorder and a number of other genetic problems, including a colomba, hyperextensibility, pulmonary artery branch stenosis, hyperplastive tranverse sinus in his skull, a heart murmur, bilateral hydroceles, scoliosis – none of which were caused by the brain hemorrhage. (ROA 1470-82, 1489-90.)

INTRODUCTION TO ARGUMENT

The trial was a classic battle of the experts with the addition of the videotape that recorded Dr. Rhett's care and treatment culminating in the delivery of the Child with the use of the vacuum extractor. The Plaintiff presented a parade of experts to try and prove that Dr. Rhett was generally incompetent and "stupid,"[5] despite the facts that Dr. Rhett is

[5] ROA 471, ll. 18-20; 488, ll 8-14; 516, ll.15-24. See also ROA 800, l. 20 – 801, l. 4

a board-certified obstetrician and that the Plaintiff did not object to his qualifications as an expert in his field.[6] As to this delivery specifically, the Plaintiff's experts offered their opinions that Dr. Rhett deviated from the standard of care in delivering the Child in that: he should not have used a vacuum extractor;[7] he used the wrong type of vacuum[8]; he used the vacuum improperly;[9] and he failed to get informed consent for use of the vacuum extractor.[10] The Plaintiff's experts also opined that the use of the vacuum caused the brain hemorrhage[11] that resulted in all the Child's current developmental, neuromotor, and cognitive problems.[12]

Through cross-examination of Plaintiff's experts, the Defense proved that a vacuum extractor is a generally accepted device used by obstetricians to help deliver babies[13] and that hemorrhaging is a known and accepted risk which can occur when the obstetrician does nothing to deviate from the standard of care.[14] The Defense presented experts that proved to the jury that it was appropriate for Dr. Rhett to use the vacuum under the circumstances as they presented;[15] that the baby was at a low station or even "crowning" when the vacuum was applied (as seen on the video) which is the safest time

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[6]ROA 1283, ll. 8-25.

[7]ROA 458, 502, 570.

[8]ROA 2361, ll. 15-22.

[9]ROA 460.

[10]ROA 429 - 434, 570.

[11]ROA 585-587, 896.

[12]ROA 692, 821-22.

[13]ROA 639.

[14]ROA 903-04.

[15]ROA 1544-45, 1569.

to use it;[16] that he used an appropriate method in using the vacuum;[17] and the general consent form was sufficient informed consent given the emergency situation he was facing with the baby in fetal distress.[18] Defense experts also testified that the brain hemorrhage the Child suffered after the delivery was not the cause of his current problems.[19] Ultimately, the jury found that Dr. Rhett had not deviated from the standard of care and never reached the issue of proximate cause.

On appeal, the Plaintiff seeks a new trial on various grounds including challenges to the trial court's voir dire of the jury panel, admission of Defense expert geneticist's testimony on causation, the Defendant's use of demonstrative evidence, limits on her Reply, and jury instructions. Defendant submits that the evidence of record and the applicable law do not support any preserved claim of prejudicial error to justify giving the Plaintiff a new trial.

Starting with the beginning of the trial, the record will show that the Plaintiff did not make any objection to the trial court's voir dire or the failure to ask certain of her proposed voir dire questions. However, the record also will show that the trial court conducted extensive *voir dire* that covered all the points required by S.C. Code Ann. §14-7-1020, and more, to assure the parties a fair and impartial jury.

By pretrial motions in limine and various challenges during the course of the trial, the Plaintiff did object to the opinion testimony from the Defendant's expert geneticist,

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[16]ROA 1554.

[17]ROA 1552-54, 1653-54, 1743.

[18]ROA 1574, 1571, 1819.

[19]ROA 1490.

Dr. Milunsky that maternal use of alcohol and the Child's connective tissue disorder most probably were contributing causes of his problems. However, the record will also show that the Plaintiff opened the door to such expert medical opinion on those subjects by raising the issue during her opening statement and the presentation of opinions from her own experts on the same points. Beyond the preservation issue, the trial court did not abuse its discretion in admitting Dr. Milunsky's opinion testimony because it was relevant under Rules 401 and 402, SCRE, and outweighed any prejudice under Rule 403, SCRE; and because it was reliable under Rule 702, SCRE. Finally, but perhaps foremost, the Plaintiff was not prejudiced by Dr. Milunsky's testimony on causation because the jury specifically found that Dr. Rhett did not deviate from the standard of care. The jury never reached the question of proximate cause.

Plaintiff also seeks a new trial on the ground that the trial court erred in permitting the Defense to use certain demonstrative evidence. More specifically, during his testimony, Defendant Dr Rhett used a pelvic model for demonstrative purposes only to demonstrate to the jury the location of the baby's head when he used the vacuum extractor, and Dr. Norton, an OB expert, demonstrated how a vacuum extractor worked. Plaintiff asserts error because the Defendant had not produced the model or the vacuum for inspection prior to the deadline set in the Case Management Order. However, the Plaintiff did not timely make any such objection to either the model or the vacuum and she did not demonstrate any prejudice. Further, Plaintiff's and Defendant's counsel agreed at trial to show exhibits to each other prior to the witness's testimony, which both parties did, and Plaintiff's counsel did not object to the demonstrative evidence shown to them before hand at that time.

Plaintiff also maintains that the trial court did not err in limiting the scope of the examination of her OB expert, Dr. Oakes, on reply after the Defendant rested his case. Dr. Oakes had testified at length during the Plaintiff's case-in-chief about the risks of using a vacuum extractor and based his opinion on an ACOG Practice Bulletin that covered the topic of vaginal deliveries using forceps and vacuums and relied upon data from an article published in the New England Journal of Medicine. In her reply, Plaintiff sought to challenge the methodology and accuracy of the study, but the trial court acted within its discretion in limiting her from doing so because it was not new matter.

Finally, as to jury instructions, the trial court's charge to the jury, as a whole, covered the applicable law as supported by the evidence. As to Plaintiff's Request to Charge # 12, the trial court properly charged the jury on the correct law of informed consent in emergencies and the specific language requested by the Plaintiff regarding a patient's right to refuse treatment was not applicable under these facts. And as to Request to Charge # 3, the trial court did not err in refusing to charge the jury on how to consider the fact that an expert witness had been paid.

The trial court properly conducted *voir dire* to assure the parties a fair and impartial jury. The trial court also acted within its discretion in ruling on the evidentiary objections and correctly charged the jury on the applicable law. Accordingly, there is no preserved ground of prejudicial error to justify giving the Plaintiff a new trial.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING THE EXPERT OPINION TESTIMONY FROM DR. MILUNSKY REGARDING THE PLAINTIFF'S USE OF ALCOHOL DURING HER PREGNANCY AS A CONTRIBUTING CAUSAL FACTOR IN THE CHILD'S CONDITIONS.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN ADMITTING THE EXPERT OPINION TESTIMONY FROM DR. MILUNSKY REGARDING A GENETIC CONDITION AS A CONTRIBUTING CAUSAL FACTOR IN THE CHILD'S CONDITIONS.[20]

A. The Law – Medical Expert Opinion Testimony on Proximate Cause

The plaintiff in every medical practice action must prove that the defendant's negligence was a proximate cause of the plaintiff's injury. Carver v. Med. Society of S.C., 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct.App.1985); Martasin v. Hilton Head Health Sys., 364 S.C. 430, 438, 613 S.E.2d 795, 799 (Ct. App. 2005). Medical experts "must, with reasonable certainty, state that in their professional opinion, the injuries complained of *most probably* resulted from the defendant's negligence." Martasin, 613 S.E.2d at 799-800; Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998).

"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, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE.

"'Relevant evidence' means evidence having any 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, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

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[20] To the extent that these two issues arise from the testimony of the same witness, Dr. Milunsky, and they involve the same legal principals in many aspects, the Respondent is combining his arguments.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

In Daubert *v.* Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that under Federal Rule 702, before scientific evidence is admitted, the trial judge must determine that the evidence is relevant, reliable and helpful to the jury, and suggested four factors to consider in deciding reliability in scientific evidence cases: (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique. See discussion in State v. Council, 335 S.C. 1, 515 S.E.2d 508, 518 (1999).

Our appellate court did not adopt Daubert; instead, the Court has held that Rule 702, SCRE applies and provides the proper analysis for the admission of scientific evidence. State v. Council, id. In addition to determining that the expert witness is qualified, the trial court must find the evidence will assist the trier of fact and that the underlying science is reliable. Id. To determine reliability, the trial court should apply those factors as set forth in State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), to the extent applicable: (1) the publications 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. *See also* State v. Ford, 301 S.C. 485, 392 S.E.2d 781, 783 (1990).

The trial court's decision to admit expert testimony will not be reversed on appeal absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). To prove prejudice, the Plaintiff must show a reasonable probability that the jury's verdict was influenced by the challenged evidence. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

The Plaintiff argues that the trial court erred in allowing Dr. Milunsky, the Defendant's genetics expert, to testify about maternal alcohol use and genetic factors as contributing causes to the Child's brain injury at birth and his current cognitive, motor and neurological problems.[21] The Defendant maintains that the Plaintiff is not entitled to a new trial for each and all of several reasons: (1) the Plaintiff opened the door to Dr. Milunsky's testimony by raising the issues during her opening statement and by eliciting expert medical opinions on the causal connection of alcohol and genetics from her own experts; (2) Dr. Milunsky's opinions on causation were properly admitted under Rule 702, SCRE, and State v. Council; and (3) the Plaintiff was not prejudiced by Dr. Milunsky's testimony on causation because the jury found that Dr. Rhett did not deviate from the standard of care thereby never reaching the question of proximate cause.

B. The Procedural Facts -- Plaintiff's Motions & The Expert Testimony

Plaintiff filed several motions in limine seeking to exclude expert testimony as to the cause of the Child's birth injuries, motor impairments and developmental delays on the grounds that the experts' opinions did not reach the required level of reliability or probability and that such evidence would be irrelevant and prejudicial. One motion asked

[21] In her Appellant's brief, the Plaintiff discusses that Dr. Norton, one of the Defendant's expert obstetricians, testified ***at deposition*** about alcohol as a potential contributing cause. [Brief, p. 10.] However, Dr. Norton did not testify on that topic at trial.

the trial court to strike expert testimony and evidence that the Plaintiff's use of alcohol during her pregnancy is related to the Child's birth injuries or developmental delays (ROA 116; Motion and supporting memorandum, dated 7/25/10.) The other motion was directed to Defendant's expert, Dr. Milunsky, a board-certified pediatrician and geneticist, and sought exclusion of his opinions as to the causation of the Child's "birth injuries were not caused by the improper utilization of the vacuum extractor, but are the result of some unnamed, unidentified genetic disorder, undiagnosed connective tissue disorder, or maternal alcohol ingestion...." (ROA 129; Motion and supporting memorandum, dated 7/25/10.)

The trial court heard the motions at the beginning of trial, and denied the motion to exclude Dr. Milunsky's testimony about genetics as the cause of the Child's problems subject to the right to revisit the issue when he testified. (ROA 224, ll. 14-20; 230, l. 17 – 231, l. 9.) As to the issue of Dr. Milunsky's opinion on the causal effect of the Plaintiff's alcohol use, the trial court asked to see the deposition and withheld ruling. (ROA 245, ll. 9-15.) Defense Counsel agreed not to mention alcohol during opening statements, (ROA 244, ll. 10-13); however, the Plaintiff's Counsel opened the door to that very issue during his opening statement and elicited testimony from her own experts during Plaintiff's case-in-chief.

Inexplicably, Plaintiff's Counsel introduced the subject of Plaintiff's use of alcohol during his opening statement by anticipating the question: "Could consumption of alcohol is the first few weeks cause these kinds of problems? (ROA 343, ll. 9-11.) He told the jury that he had investigated that question and his experts would testify that the Plaintiff's ingestion of alcohol during the first trimester did not explain the brain bleed.

(ROA 343, l. 4 – 344, l. 9.) Plaintiff's Counsel also forecast that the defense would present expert testimony about alcohol:

> Even the defense's experts, who are going to come in and try to convince you that alcohol somehow was a problem, let's see if they can even say that there was a one in a million chance that alcohol caused harm to this child, caused any brain damage to this child. (ROA 344, ll. 12-17.)

Plaintiff then proceeded to elicit testimony from her experts as to the causal relation of her alcohol use to her Child's problems. Plaintiff's board-certified expert in pediatric neurology, Dr. Katz, testified that her use of alcohol in the first trimester was not related to the brain bleeds or any of the Child's problems. (ROA 697, l.14 – 698, l. 9.) Dr. Adler, another board-certified pediatric neurologist called by the Plaintiff, also testified to his opinion that the Plaintiff's alcohol use had no effect on the Child's brain bleeds or any of his problems. (ROA 826, ll. 9-16; 827, ll. 4-11) Dr. Zimmerman, a board-certified pediatric neuro-radiologist, testified that there was no imaging evidence of fetal alcohol syndrome. (ROA 900, ll. 14-15.) Dr. Burton, a board-certified pediatrician and clinical geneticist, testified that, in her opinion, Plaintiff's alcohol use had no impact on the Child's motor, cognitive or neurologic problems. (ROA 2485.)

The issue of genetics also was raised in the Plaintiff's opening statement. Plaintiff's counsel spoke of gene and chromosome problems and told the jury that the Child had some "oddities" and the Plaintiff had some problems that were of concern so he also had conducted an investigation on that topic. Plaintiff's Counsel told the jury that they would present testimony from one of the top geneticists in the country [Dr. Burton] who determined that "there is no gene problem here." (ROA 345, l. 1 - 347, l. 16.) Dr. Burton testified that in her opinion, the Child's brain damage was not caused by any genetic conditions. (ROA 2503, l. 13 – 2505, l. 10.)

Defense expert Dr. Milunsky is board-certified in internal medicine, pediatrics, and clinical genetics. He is a Fellow of the Royal College of Physicians. He published 25 books and teaches at Boston University School of Medicine. (ROA 1464, l. 18 – 1465, l. 11; 1469, ll. 1-20.). While Plaintiff did not object to Dr. Milunsky's qualifications as an expert in the field of genetics and pediatrics, Plaintiff's counsel attempted to question him about the scientific basis for his opinion. The trial court asked him to hold such objection about the science until the end of his testimony, to which Plaintiff's counsel agreed. (ROA 1467, l. 14 – 1468, l. 10.)[22]

Thereafter, Dr. Milunsky testified that the Plaintiff's use of alcohol in the first trimester, as evidenced in the medical records, was potentially relevant to the child's inflammatory problems and developmental delays. (ROA 1491, l. 18 – 1492, l. 7.) More specifically, Dr. Milunsky testified that while the Child did not have fetal alcohol syndrome, (ROA 1492, ll. 22-23.), his features were consistent with incomplete fetal alcohol syndrome, and that it was most probable that his problems occurred as a consequence of multiple factors that had nothing to do with the head bleed, but rather from alcohol use and/or his vascular problem, i.e. his connective tissue problems. (ROA 1495, ll. 11-22.) On cross-examination, Plaintiff attempted to have Dr. Milunsky quantify the statistical probability of whether the maternal alcohol use had any

[22] Plaintiff complains, with rather strong rhetoric, that the trial judge failed to act as "a gatekeeper" because he did not rule prior to Dr. Milunsky's testimony. However, the transcript shows that the trial judge asked Plaintiff's counsel to hold his objection to which he voiced his agreement with the reply – "very good." (ROA1468, l. 4.) The transcript does not evidence that the trial judge was "cavalier" or that he had a "dangerous misunderstanding" of his role under State v. Council. Defendant would submit that there is no error in the trial judge's handling of the matter and that Plaintiff's oversteps the proper tenor of appellate argument by suggestion that there was a "serious error that needs to be corrected in terms strong enough for the trial bench to appreciate." [See Appellant's brief, p.18.]

significance in the brain damage, but Dr. Milunsky replied that there was no scientific basis to reach any statistical likelihood. (ROA 1502, l. 12 – 1504, l.2.) Plaintiff also asked Dr. Milunsky to identify precisely what connective tissue disorder he thought the Child had; however, Dr. Milunsky explained that "he has a connective tissue disorder. We don't have a definitive syndrome name to attach, and that's not unusual, at all, especially for connective tissue conditions." (ROA 1504, l. 22 – 1510, l. 1.)

After Dr. Milunsky had testified, Plaintiff pursued her challenge to his opinion testimony on the grounds of the reliability of the science and the "most probable" standard. (ROA 1602, l. 18 – 1603, l. 22.) The trial court found that Dr. Milunsky's testimony met the most probable standard and that his testimony was sufficient to pass the test required by Rule 702. (ROA 1608, ll, 3-17.)

C. The Plaintiff opened the door to expert medical opinion on causal connection of alcohol and genetics.

Defendant submits that the Plaintiff should not be allowed to challenge the opinion testimony by Dr. Milunsky because she opened the door in her opening statement and presentation of opinions from her own experts on the same point. Cent. of Georgia Ry. v. Walker Truck Contractors, 270 S.C. 533, 243 S.E.2d 923, 925 (1978) ("Where the defendant's counsel opens the door to a certain line of inquiry, he cannot object if the inquiry when pursued by the plaintiff's counsel."); see State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct.App.2005), aff'd as modified, 378 S.C. 101, 661 S.E.2d 387 (2008) (a

comprehensive review of door-opening doctrine); State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003)(door opened in opening statement).

In Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465, 484 (Ct. App. 2005), the Court of Appeals noted that:

> The primary purpose for the rule is that of fairness and completeness of the information for making the decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder. Danny R. Collins, *South Carolina Evidence* 2.9 (2d ed.2000).

See also Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 1.4 at 12 (3d ed. 2003) (discusses that a party has to accept the consequences of her/his strategic choices in broaching a subject).

The Plaintiff opened the door on the issue of her alcohol use and genetics in her opening statement, and she proceeded to elicit opinions from her experts about the causal relationship. In all fairness, she cannot object that the Defendant posed the same question to his experts. See United States v. Lankford, 955 F.2d 1545, 1553 (11th Cir. 1992) ("fairness demands that if experts are presented, the jury must receive a full presentation on both sides of an issue"). Rather, it would have been unfair to allow the Plaintiff to present her experts' opinions that there was no causal connection and exclude defense expert Dr. Milunsky's opinion on the same issue.

D. The trial court did not abuse its discretion in allowing Dr. Milunsky's opinions on causation.

The Plaintiff complains that defense expert Dr. Milunsky's opinions were irrelevant and prejudicial under Rules 401, 402 and 403, SCRC. As discussed above, the very fact that the Plaintiff peremptorily raised the issue of her alcohol use as well as the issue of her and the Child's congenital problems establishes that the subject was relevant.

See United States v. Frazier, 387 F.3d 1244, 1270 (11th Cir. 2004) (if the testimony for one party is relevant, testimony for the other party on the same would also be relevant). Similarly, as discussed above, the fact that the Plaintiff opened the door on these subjects precludes her from complaining about any prejudice.

The Plaintiff also complains that Dr. Milunsky's opinions were unreliable under State v. Council and State v. Jones, supra. More specifically, the Plaintiff's complaint about the reliability of Dr. Milunsky's opinion on the causal connection between her alcohol use and the Child's problems appears to center on the fact that Dr. Milunsky could not assign a statistical number to the likelihood that the alcohol use affected the Child. However, our appellate courts have never set any such requirement that an expert be able to reduce his opinion to a statistical number to establish reliability under Rule 702 or State v. Council. See Williams v. Hedican, 561 N.W.2d 817, 830 (Iowa 1997) (refusing to accept argument that statistical proof has to be presented before a medical expert can testify on causation).

We do not ask the expert to give a statistical number to a question of "how sure are you?" Rather, the benchmark is "most probably." See Martasin, 613 S.E.2d at 799-800(Medical experts "must, with reasonable certainty, state that in their professional opinion, the injuries complained of *most probably* resulted from the defendant's negligence."). And, contrary to the Plaintiff's contention, Dr. Milunsky stated his opinion in the requisite standard of "to a medical degree of certainty, most probably." (ROA 1495, ll. 20-22.) Further, the Court did not, as Plaintiff claims, hold in Payton v. Kearse, that an expert is precluded from offering an opinion of a "multifactorial cause theory." [Appellant's Brief, p. 19.]

In Payton, the plaintiff claimed that the automobile accident caused tinnitus, and the defendant had a pharmacy expert review the medications taken by the plaintiff to determine if any of them had the potential to produce tinnitus as a side effect. The pharmacist identified six drugs which were documented in medical literature as having an incident or adverse reaction of tinnitus. However, he could not state to a reasonable degree of certainty whether any of medications caused the tinnitus, only that they had the "potential" to produce the reaction. The Court held that the trial court properly excluded his testimony because it did not meet the "most probably" standard. Payton v. Kearse, 495 S.E.at 211. There is no mention in the opinion that the expert offered any opinion about a combined effect of the drugs.

As the trial court charged the jury, the law clearly recognizes that causation may be "multifactorial":

> The law does not require that a defendant's negligence be the only cause or the sole cause of an injury. A defendant must compensate a plaintiff if one or more of his negligent acts or omissions was an efficient cause of the injury and, combined with other efficient causes in such a way that had there been no negligent act or omissions the injury would not have resulted or would not have been as severe. Proximate cause does not mean the only cause or the sole cause of a condition. The defendant's act can be a proximate cause of the plaintiff's injury if it was at least one of the direct, concurring causes of the injury. (ROA 2200, l. 14 – 2202, l. 4.)

See Sims v. Hall, 357 S.C. 288, 299, 592 S.E.2d 315, 319 (Ct.App.2003)("Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury."); see also Welch v. Whitaker, 282 S.C. 251, 260, 317 S.E.2d 758, 764 (Ct. App. 1984) ("most probably caused or contributed to the cause of the injury." Accordingly, the trial court properly

exercised its discretion in allowing Dr. Milunsky's opinion that the alcohol and connective tissue disorder "most probably" contributed to the Children's problems.

Plaintiff argues that the trial court's decision to allow Dr. Milunsky to testify about the causal connection of her alcohol use violated precedent found in the appellate opinions of two automobile negligence cases: Johnson v. Horry County Solid Waste Auth., 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010); and Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004). However, upon review, the opinions do not support the Plaintiff's claim of error by the trial court in this case. In Kennedy, the Court held that the trial court erred in allowing admission of evidence of the mere presence of marijuana, because there was no evidence of any causal connection between the marijuana and the accident. Similarly, in Johnson, the Court held that the trial court had wisely excluded evidence of the defendant's blood alcohol level because any relevant substantially outweighed the probative value; however, in so holding, the Court noted that no expert testimony was proffered as to how the alcohol would have impaired the driver's judgment. Here, in contrast, Dr. Milunsky's testimony was evidence of a causal connection between the Plaintiff's maternal alcohol use, as a contributing cause, to the Child's problems.

As to Dr. Milunsky's opinion that the Child has a genetic, connective tissue disorder that most probably contributed to his problems, the Plaintiff complains that his opinion is unreliable and speculative because he cannot identify the disorder by a specific name[23] and because he testified about future advances in genetic research. However,

[23]ROA 1506, l. 24 – 1507, l. 1.

Plaintiff's own expert, Dr. Burton, testified that connective tissue disorder is a recognized condition:

> The term connective tissue disorder within the field of medical genetics is used to refer to a group of conditions in which there's an inherited difference in one of the chemicals that makes up the connective tissue, which is the tissue that kinds of holds everything together in the body. (ROA 2515, l. 21 – 2516, l. 3.)

While Dr. Burton was of the opinion that the Child does not have any connective tissue disorder, her opinion does not foreclose the admissibility of Dr. Milunsky's opinion that he does, even if he cannot identify it by name; for as Dr. Milunsky testified, it is not unusual to not have a definitive syndrome name to attach to connective tissue conditions. (R. 1509, l. 22 – 1510, l. 1.) In addition, to the extent that Dr. Milunsky did testify about the future of genetics in a theoretical perspective, the Plaintiff's own counsel posed the questions on cross-examination,[24] and Dr. Milunsky's opinion was not predicated on any future discoveries.

Plaintiff misperceives the scope of the reliability component of Rule 702 and the factors articulated by the Court in State v. Council, and related precedent. The pertinent focus should not be on the credibility of Dr. Milunsky's opinion, but on the reliability of the science that underlies it. For example, in State v. Dinkins, 319 S.C. 415, 462 S.E.2d 59 (1995), the Court held that population frequency statistics for DNA test results were admissible. Then, in State v. Council, the Court held that mtDNA analysis is admissible, but the Court also reaffirmed prior decisions that the reliability of polygraph examinations had not improved sufficiently to allow their admission. In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the Court held that "barefoot insole impression"

[24] Example: "Q. And I realize that you can predict that in the future geneticists will know more about genetics than they currently know. Correct?" (ROA 1507, ll. 4-7.)

evidence was not scientifically reliable and was not admissible to identify defendant as the wearer of boot, and on subsequent appeal after a remand, the Court found that the evolution of the methodology had not deemed it scientifically reliable. 383 S.C. 535, 681 S.E.2d 580, 588 (2009). While, in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), the Court held that expert testimony related to dog tracking evidence was reliable.

As the Plaintiff argued in opening statement, it is commonly known from reliable medical science that maternal alcohol use can injure the baby, and Plaintiff's own expert testified that connective tissue disorders are medically recognized. Thus, as the Court explained in State v. Council, once the foundation of the science has been determined to be reliable, the opponent of the evidence still has a full arsenal available to rebut the evidence such as cross-examination on flaws in the analysis or testing and presentation from other experts. 515 S.E.2d at 519. The Plaintiff did just that in this case by presenting her own experts who offered their opinions on the same question and by piercing cross-examination of Dr. Milunsky which gave the jury more than ample testimony on which to decide whether to rely on his opinion.

Ultimately, it was the Plaintiff's burden to prove that some negligence by Dr. Rhett proximately caused the Child's injuries. Plaintiff's experts offered the opinion that neither the maternal alcohol use nor any connective tissue disorder caused the Child's problems; instead, she was of the opinion that the only possible cause was the brain bleed. On the other hand, the Defendant's expert offered his opinion that the brain hemorrhage was not the cause of the Child's problems and that instead, it was most probable that the maternal alcohol use and a connective tissue disorder were contributing

causes. Nothing in Rule 702 or the associated precedents forecloses this classic battle of the experts.

E. The Plaintiff was not prejudiced by Dr. Milunsky's testimony on causation because the jury found that Dr. Rhett did not deviate from the standard of care.

Finally, even if, for the sake of argument, this Court were to find that the trial court abused its discretion in allowing Dr. Milunsky's testimony on causation, Plaintiff is not entitled to a new trial because there was no prejudice. State v. Price, supra. Here, the jury's verdict and answer to the special interrogatory clearly demonstrate that there is no probability that the jury's verdict was influenced by his opinions on causation. State v. White, supra.

The first question posed to the jury on the verdict form was: "Did the Plaintiff prove by the greater weight or preponderance of the evidence that the Defendant Dr. Rhett deviated from the standard of care?" The jury answered NO. (ROA 3714; Verdict.) The jury never reached the next question about proximate cause. Thus, the Plaintiff's claim of error in the admission evidence on the element of proximate cause is immaterial. See Laurens Tel. Co. v. Enter. Bank, 90 S.C. 50, 72 S.E. 878, 882 (1911) (error in jury instruction immaterial, where jury found that the defendants had not violated the law); see also Selh v. Moore-McCormack Lines, Inc., 362 F.2d 541, 542 (2d Cir. 1966) ("In light of the jury verdict, it is unnecessary for this Court, in passing on the appeal with respect to the claims of negligence and unseaworthiness, to consider the propriety of the district court's rulings concerning the admission and exclusion of testimony by medical experts and others relating to whether plaintiff's exposure to the hot fuel oil could have aggravated a dormant cancer in his larynx. Since the jury found that there was no negligence and no unseaworthiness, they did not answer the questions

relating to proximate cause and, hence, these evidentiary rulings, whether erroneous or not, afford no basis for reversal."); Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C., 978 A.2d 852, 864 (Md. App. 2009) ("The jury ...found that neither Dr. Margolis nor Dr. Martin committed a breach in the standard of care when providing care to Dr. Orr. Thus, the jury did not proceed to determine the question of causation. Accordingly, ... appellants cannot show prejudice as a result of the trial court's refusal to give their requested "substantial factor" instruction when giving its instructions on causation.").

JURY INSTRUCTIONS

The purpose of jury instructions is to allow the jury to comprehend and render a fair verdict in the case. Builders' Lumber & Supply Co. v. Cheek, 139 S.C. 299, 137 S.E. 734 (1927). It is the trial court's responsibility to charge the jury on the applicable law as raised by the pleadings and supported by the evidence. S.C. Const. art. V, §21; Dalon v. Golden Lanes, Inc., 320 S.C. 534, 540, 466 S.E.2d 368, 372 (Ct. App. 1996) (citations omitted). "When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). "The substance of the law is what must be charged, not any particular verbiage." Daves v. Cleary, 355 S.C. 216, 584 S.E.2d 423, 427 (Ct. App. 2003) (citing Keaton, supra.). If it is found that there was any error by the trial court in refusing to give a requested charge that was not otherwise covered by the charge in its entirety, the judgment entered on the

jury's verdict should be reversed only upon demonstration of prejudice. Id.; see also generally 15 S.C. Jur. *Appeal and Error* § 81.

III. THE TRIAL COURT CHARGED THE JURY ON THE CORRECT, APPLICABLE LAW OF INFORMED CONSENT IN EMERGENCIES.

A. Law on Informed Consent

The law on informed consent is clearly stated in Melton v. Medtronic, Inc., 389 S.C. 641, 698 S.E.2d 886 (Ct. App. 2010) and Hook v. Rothstein, 281 S.C. 541, 316 S.E.2d 690 (Ct.App.1984):

> Under the doctrine of informed consent, a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose to a patient of sound mind, ***in the absence of an emergency that warrants immediate medical treatment,*** (1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure. *Hook v. Rothstein,* 281 S.C. 541, 547, 316 S.E.2d 690, 694-95 (Ct.App.1984). The basis of the doctrine is the patient's right to exercise control over his or her own body by deciding intelligently for himself or herself whether or not to submit to the particular procedure. *Id.* at 547-48, 316 S.E.2d at 695. "[T]he scope of a physician's duty to disclose is measured by those communications a reasonable medical practitioner in the same branch of medicine would make under the same or similar circumstances." *Id.* at 553, 316 S.E.2d at 698.

Melton, 698 S.E.2d at 894 (emphasis added). Ultimately, a claim for lack of informed consent is the same as any other allegation of malpractice; and the plaintiff must present expert medical evidence to establish the professional standard governing the scope of a physician's duty to inform a patient of the material risks inherent in a proposed treatment or procedure. Id.; Hook, 316 S.E.2d at 696-97.

B. Evidence as to Standard of Care on Informed Consent

One of the Plaintiff's allegations of negligence was lack of informed consent to the use of the vacuum. Despite the fact that the Plaintiff signed a General Consent Form

when she was admitted to the hospital, (ROA 3499; Plaintiff's Ex. # 103), Plaintiff claimed that the form did not specifically mention or authorize the obstetrician to use a vacuum to assist in delivering the baby, and the Defendant did not tell her he was going to use a vacuum or advise of her the risks. (ROA 990-01.) Dr. Rhett testified that he did not discuss the vacuum with the Plaintiff because there was an emergency and he did not have time, and he also thought the general consent covered it:

> Q. Did you discuss the use of the vacuum with the mother?
>
> A. No, sir, I did not.
>
> Q. Did you have time to discuss it with the mother?
>
> A. I thought that I had an obstetrical emergency that needed to be handled right away.
>
> Q. Was that covered in the informed consent that she signed?
>
> A. I think it is. It's the informed consent that we use for all of our deliveries.
>
> Q. And is that the custom and practice, to your knowledge, of other obstetricians?
>
> A. Yes, sir, that's what is done with all the vaginal deliveries that I know of, whether they are spontaneous, they have forceps or they use the vacuum.
>
> Q. Is there any requirement that you know of that the hospitals where you have staff privileges, particularly East Cooper where this baby was born, to get a separate form when a vacuum is used?
>
> A. None of the three hospitals where I have privileges require a separate form for vacuum or forceps. (ROA 1315, l. 5 – 1316, l. 6.)

Three OB/GYN experts testified that Dr. Rhett complied with the standard of care as to informed consent under the circumstances that presented during the delivery. (ROA 1893, l. 12 – 1894, l. 6 – Dr. Hobbs; ROA 1574, ll. 13-23 - Dr. Weinstein; ROA 1739, l.

22 – 1741, l. 11 – Dr. Van Dorsten.) As Dr. Van Dorsten explained, there simply was no time to give any informed consent for use of the vacuum because Dr. Rhett had to get the baby out:

> A. I didn't see any informed consent because the basic things is that there was not time to do so.
>
> Q. I would like for you to explain that in more detail.
>
> A. Well, it's common sense. You've got to get the baby out. You don't have time for a long extended discussion. If you're going to do an informed consent, you have to do it based on what an informed consent entails. So not only do you have to explain the vacuum but you also have to explain a C-section, you also have to explain forceps. So the discussion one has -- if the patient is going to make the decision, she has to have all the information in order to make that decision.
>
> Q. If you had been confronted with this clinical picture, what informed consent, if any additional informed consent, if any, would you have done in this situation?
>
> A. I probably would not have done a whole lot of informed consent because I needed to get this baby out. (ROA 1890, l. 22 – 1891, l. 21.)

Plaintiff moved for a partial directed verdict on informed consent, asking that the trial court instruct the jury as a matter of law that the General Consent Form does not represent informed consent. (ROA 2036, ll. 6-9.) Despite the expert testimony that the General Consent Form met the standard of care (see ROA 1574, ll. 13-23- Weinstein), the trial court granted the motion. (ROA 2073, ll. 16-18.)

C. The Charge to the Jury on Informed Consent in Emergencies

In the charge to the jury, the trial court virtually quoted from the correct law on informed consent as set forth in Hook v. Rothstein and Melton v. Medtronic, supra.:

> Now, let's talk about informed consent. A doctor has the duty to inform a patient of the known risk or dangers of the treatment or procedure that the

doctor proposes so that the patient will be able to make an intelligent decision as to whether to follow the doctor's proposed treatment. The basis of the doctrine of informed consent is the patient's right to exercise control over his or her own body by deciding intelligently for herself whether or not to submit to he particular procedure. ***In the absence of an emergency that requires immediately treatment,*** the doctor must tell the patient of One, the diagnosis. Two, the general nature of any proposed procedure and the course of treatment. Three, the material risks involved in the course of treatment. Four, the probability of success associated with the course of treatment. Five, the prognosis if a particular procedure is not done or course of treatment not followed. Six, the existence of any alternatives to the procedure or course of treatment.

****

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. At the close of the evidence in this case, the Court ruled that the document entitled Consent for Admission and Treatment, entered into evidence as Exhibit 2-004, does not provide informed consent for a vacuum extraction delivery. This does not mean that the issue of informed consent in this case must be decided in favor of the plaintiff, but simply means that Exhibit 2-004, alone and by itself, does not meet the requirements of South Carolina law with regard to informed consent and the vacuum extraction delivery in this case.
(ROA 2202, l. 5 – 2206, l. 11 (emphasis added).)

The Plaintiff objected to the jury charge on emergency situations because the trial court did not charge her Request to Charge # 12 in full, which read:

> 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.

(ROA 3666-67; Plaintiff's Request #12; see objection and ruling at ROA 2236, l. 7 – 2237, l. 14.)

The request to charge, literally photocopied from Judge Anderson's charge book, cites to South Carolina authority of Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002), and the Adult Health Care Consent Act, S.C. Code Ann. §44-66-60. However, Harvey[25] and §44-66-60 address claims for battery in situations of where a patient has refused medical treatment due to religious beliefs. In fact, the Request to Charge is found in Judge Anderson's charge book under Section 27-22, entitled "Medical Malpractice – Right to be Free of Unwanted Medical Treatment." Anderson, S.C. Requests to Charge - Civil, § 27-22 (2009). Here, the Plaintiff did not refuse treatment and no action for battery was made out; thus, such language was not applicable and there was no error in declining to give the requested charge. Further, there is nothing in Harvey or §44-66-60 that supports the language about any requirement that a physician seek consent from family members or "impracticability of conferring with the patient" as prerequisite to the emergency exception as presented. There was much testimony from experts for both parties about informed consent and whether an emergency was presented. Based on the evidence presented, the trial court's charge to the jury, as a whole, was correct and their verdict should be affirmed.

Plaintiff tries to prove that the jury was confused by the informed consent charge based on the Affidavit of Plaintiff's Counsel, Mary Watters, Esquire, who interviewed three of the jurors after the trial. (ROA 3716; Affidavit.) As a threshold matter, the

[25]In that case, the patient was a Jehovah's Witness and he had expressly indicated he did not want any treatment involving the use of blood or blood products during elective surgery.

Defendant submits that Ms. Watters' hearsay about what the jurors discussed with her is improper basis to challenge the jury charge under Rule 606, SCRE, because it does not prove any improper external influence on the jury's deliberations. Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371 (2008)(" Rule 606 thus draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter.") [See further detailed discussion of improper use of Affidavit under Argument VII concerning Plaintiff's challenge to the jury *voir dire.*] Furthermore, as to the substance of Ms. Watters' averments, they do not support any ground to grant a new trial based on the trial court's refusal to charge the exact language of Plaintiff's Request #12.

Ms. Watters avers that the jurors believed that the presence of a purported emergency essentially abrogated Dr. Rhett's duty to comply with the standard of care. However, that is exactly what the law provides – informed consent is not required when an emergency is presented. Thus, to the extent the jury found that there was an emergency, then they correctly concluded Dr. Rhett did not violate the standard of care in not obtaining a separate informed consent to use the vacuum.

Ms. Watters also avers that the jury misunderstood the verdict form and the trial court's ruling on her directed verdict motion about the General Consent Form. However, the Plaintiff did not raise any challenge to the verdict form.[26] Nor did the Plaintiff object to the trial court's instruction to the jury that the consent form does not provide informed consent for a vacuum extraction delivery.

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[26] The Plaintiff's only "challenge" to the verdict form at trial was grammatical. (ROA 2056-57.)

IV. THE TRIAL COURT PROPERLY REFUSED TO CHARGE THE JURY ON HOW TO CONSIDER THE FACT THAT SOME OF THE EXPERT WITNESSES RECEIVED PAYMENT FOR THEIR TESTIMONY.

As in any medical malpractice action, there were expert witnesses. The trial court charged the jury as to the weight and credibility of those experts:

> Now, you also heard the testimony of several witnesses who have special knowledge or skill, experience, training or education in a particular field and they came in and gave their opinion as an expert witness about matters in which they are skilled. In determining the weight to be given any expert opinion, you should consider the qualifications and the credibility of the experts and the reasons they give, the basis that they give for their opinions. You are not bound by those opinions. You should give them what weight, if any, you deem that they are entitled to. In this case, if you find that there has been a conflict in the testimony of expert witnesses, then you must weigh one opinion against the other. You must consider the reasons given by one as compared with those given by the other. You should consider the relative credibility and knowledge of the particular expert who testified and therefore find in favor of that expert testimony that, in your opinion, is entitled to the greater weight. (ROA 2181, l. 5 – 2182, l. 6)

While the Plaintiff does not object to the charge as given, she seeks a new trial because the trial court did not give her Request to Charge # 3 regarding "Payment of Expert Witnesses:"

> When an expert witness is called by either a plaintiff or a 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.
> • *See Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943).

(ROA 3647-48; Request #3. As to objection and ruling see ROA 2237, l. 15 – 2238, l.1.)

However, Defendant submits that there is no prejudicial error.

First, while the charge comes from Judge Anderson's charge book,[27] the cited opinion in Anderson v. Campbell Tile does not contain the requested language. In fact, the reference to payment of expert witnesses is found in the Court's quotation from American Jurisprudence, which states that "the fact that he is a paid witness" is one of the factors that a jury may consider in weighing the expert's opinion:

> 'Notwithstanding the critical comments upon the value and credibility of expert opinion testimony to be found in many opinions, it is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, ***the fact that he is a paid witness,*** the relative opportunities for study or observation of the matters about which he testifies, and any other matters which serve to illuminate his statements. In other words, the same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony. The opinion of the expert may not be arbitrarily rejected; it is to be considered by the jury in view of all the facts and circumstances in the case and of the common knowledge and experience of mankind; and when such common knowledge utterly fails, the expert opinion may be given controlling effect. 24 S.E.2d at 108 (quoting 20 Am. Jur. ¶1206) (emphasis added).

To the extent that the Defense did cross-examine Plaintiff's experts about whether they were being paid and how much, it is a proper subject of cross-examination. See 98 C.J.S. *Witnesses* § 644 ("A physician who testifies in a personal injury action may be asked by whom the physician was paid or from whom the physician expects payment, as well as how much he or she expects to be paid ...") (footnotes omitted). The transcript will show that the Plaintiff's own counsel took the opportunity to redirect her experts with questions that sought to confirm that the payments had no influence on their

[27]Anderson, S.C. Requests to Charge - Civil, § 1-6 (2009).

opinions. (ROA657, l. 13 – 658, l. 12 – Oakes. ROA 849, ll. 7-17 – Adler. ROA 925, ll. 4-12 – Zimmerman.) Thus, ultimately, even if any error could be found in the refusal to give the Plaintiff's requested charge, the general charge on witness credibility, quoted above, together with the Plaintiff's redirect questions adequately covered the point and there is no prejudice to warrant a reversal.

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN LIMITING THE PLAINTIFF ON REPLY FROM ASKING QUESTIONS OF HER EXPERT, DR. OAKES, ABOUT THE NEW ENGLAND JOURNAL OF MEDICINE ARTICLE BECAUSE IT WAS NOT NEW MATTER.

The Court of Appeals addressed the scope of reply testimony and the standard of review in McGaha v. Mosley, 283 S.C. 268, 322 S.E.2d 461, 466(Ct. App. 1984):

> 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; it should not be used to complete plaintiff's case in chief. *Daniel v. Tower Trucking Co.,* 205 S.C. 333, 32 S.E.2d 5 (1944). 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).

See also Trial Handbook for South Carolina Lawyers § 8:3 (citing McGaha v. Mosley -- "This generally means that the judge should restrict rebuttal to the issues identified and pursued by the other party's own witnesses.").

Plaintiff seeks a new trial on the stated ground that: "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," and argues that: "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." [Appellant's brief, p. 34, 36-37.] Defendant Dr. Rhett respectfully submits that the Plaintiff had the opportunity to explore the topics of the article in direct examination of her own expert and in cross-examination of Defendant and his expert, and the trial court properly exercised its discretion in sustaining his objections to questions posed to Plaintiff's expert that were not the proper subject of reply.

First, contrary to the Plaintiff's assertion[28], the Medical Journal article was introduced by the Plaintiff when she presented Dr. Oakes, her OB/GYN expert, as the first witness called at trial. During Dr. Oakes' direct examination, the Plaintiff introduced Practice Bulletin (No. 17) from the American College of Obstetrics and Gynecology (ACOG), which is titled "Operative Vaginal Delivery".. The ACOG Bulletin, which was issued in June 2000, covers the topic of vaginal deliveries using forceps and vacuums. (ROA 3312, Plaintiff Ex. 31; ROA 519, l. 10 – 521, l. 5.) The Bulletin contains tables of statistics on risks of intracranial hemorrhage from various types of deliveries (spontaneous vaginal, caesarian section, use of forceps, use of vacuum) that are based on data from an article published in the New England Journal of Medicine.[29]

In his direct testimony, Dr. Oakes read from the Bulletin about how ACOG had redefined the classification of stations and the types of forceps deliveries (ROA521, ll. 15-24), potential newborn complications of vacuum assisted deliveries (ROA 522, ll. 5-

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[28] Plaintiff asserts in her brief that the article was first addressed when Dr. Rhett took the stand at the request of his own counsel. [Appellant's brief, p. 34.]

[29] Towner, Deena, "Effect of Mode of Delivery in Nulliparous Woman on Neonatal IntraCranial Injury,"(December 2, 1999); (ROA 1352, ll. 17-22; 3608.)

17); and the overall risk (5%) of serious complications with vacuum extraction. (ROA _523, ll. 7-10). On redirect, Dr. Oakes testified further about that 5% risk, and specifically introduced the subject of the Journal article. (ROA648, l. 19 – 649, l. 1)[30]. Dr. Oakes's testimony on redirect contained an extensive discussion of the Journal article, (ROA 648, l. 19 – 653, l. 4), in which he explained what he believed to be the difficulties with the analysis, and opined that the information is not "completely applicable in this case," (ROA 653, ll. 3-4), because the table did not contain data for risks of a mid forceps vacuum. (ROA 653, l. 24 – 654, l. 2).

Plaintiff raised the issue of the Journal again in cross-examination of Dr. Rhett about the foundation for his knowledge of the risk of brain bleeds with use of a vacuum. (ROA 1349, ll. 6-11).[31] However, Dr. Rhett could not recall if that particular article was the source of his knowledge of the risks (ROA1353, ll. 2-23), and on further cross, he testified that he had not read the complete article. (ROA 1356, l. 15 – 1357, l. 5.) The transcript shows that Plaintiff was allowed to cross-examine Dr. Rhett fully about the Journal article, and there is absolutely no justification for the Plaintiff's accusations that "Dr. Rhett did not have the willingness or ability to answer questions truthfully and accurately about the specific controls used in the study." [Appellant's brief, p. 35.]

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[30]"As I showed you, the overall risk is approximately five percent. If we just look at intracranial hemorrhage, that's how they end up here in this table and that's based upon an article that was published in the New England Journal of Medicine of a review of a large number of deliveries from the state of California."

[31] Defendant initially objected to the question based on the ground that the Plaintiff failed to follow Rule 803(17), SCRE, on the proper use of a learned treatise, to which Plaintiff's counsel replied that he would follow the rule. (ROA 1351, l. 18 – 1352, l. 14.)

Defendant questioned Dr. Norton, a defense OB/GYN expert,[32] about the Table in the ACOG Bulletin, and Dr. Norton referred to the Journal article as the source of the data on the risks which evidenced a lower risk of intracranial hemorrhage with vacuum assisted delivery compared to use of forceps, and clinically similar risks of bleeding with vacuum compared to c-section (ROA 1659, l. 24 – 1661, l. 25.) On cross-examination, Plaintiff questioned Dr. Norton about the data and risks and whether the Journal took into account low v. mid station use of a vacuum and also questioned him about the weight of the babies in the data and the relative risk to preemies. (ROA 1671, l. 13 – 1673, l. 14). Dr. Norton also testified, on cross-examination, specifically referencing the Journal article:

> [T]his article from The New England Journal that we share, we see that babies can bleed no matter how they are delivered. This was a situation where this baby needed to be delivered regardless and there's -- there's going to be some babies that are going to have brain bleeds regardless of how they are delivered. There is increased association with brain bleeds with operative deliveries, vaginal or Caesarean section and that can be an association and not a cause. (ROA 1696, l. 19 – 1697, l. 5.)

Again, Plaintiff was allowed full cross-examination of Dr. Norton about the Journal and there is not justification for the accusation that Dr. Norton used the statistics from the article in a misleading way. [Appellant's brief, pp. 35-36.]

Eleven days into the trial, at the close of the Defendant's case, the trial court inquired as to the Plaintiff's plans for reply. Plaintiff voiced the intention to question her expert, Dr. Oakes about the Journal article. (ROA 1975, ll. 11-15.) The Defendant objected (ROA 1977, ll. 1-20) on the ground that this was not a new topic. To the trial court's inquiry as to what was new, the Plaintiff's counsel replied:

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[32] ROA 1612, ll. 5-13.

> EDWARD GRAHAM: If Your Honor please, the New England Journal studies all vacuum deliveries and all certain other types of deliveries of babies that are twenty-five hundred grams or larger. Then it purports to draw conclusions about the relative degree of risk from brain bleeds from different modes of delivery. The last paragraph in there says that it should not be used for the purpose that they are trying to use it for. I also -- I would like to bring out that it doesn't make any distinction between outlet, low and mid-pelvic vacuums, which makes all the difference in the world to the relative degree of risk of vacuum deliveries. In terms of C-section and that sort of thing, it includes babies who were just very small -- twenty-five hundred grams is very small, many pre-term babies would fall into that category with increased risk of brain bleeds. (ROA 1981, ll. 1-22.)

Even though the distinction between outlet (also called "crowning"), low, and mid-pelvic vacuums and the weight of the babies had already been explored during the cross-examination of Dr. Norton, the trial court agreed to allow the Plaintiff to go into the Journal. (ROA 1985, ll. 11-21.)

The question posed to Dr. Oakes on reply, however, did not address the proposed topic of the distinction between low compared to mid-pelvic use of a vacuum. Rather, Plaintiff sought to challenge the methodology and accuracy of the study in comparing vaginal deliveries to c-sections:

> Q. Doctor, do you have an opinion to reasonable degree of medical certainty as to whether or not the methodology used in that study accurately reflects the relative risk of a vacuum delivery and a normal spontaneous vaginal delivery and a C- section after labor? (ROA 2015, l. 20 – 2016, l. 1)

The trial court sustained the Defendant's objection:

> THE COURT: Counsel, I am going to sustain that. Earlier the New England Journal was put forth as a learned treatise and now being attacked, and that would not be an appropriate follow-up in reply. The Court sustains the objection. Are there any other areas which you believe are new for this witness. (ROA 2016, ll. 5-12.)

However, the trial court allowed plaintiff's counsel to rephrase the question:

> Q. Dr. Oakes, reference has been made to a table that appears, Table 1, in Practice Bulletin Number 17, that reflects certain degrees of risk of intracranial hemorrhage from different modes of delivery. Could you please tell us -- do you have an opinion to a reasonable degree of medical certainty as to whether or not the approach used in the article had an influence on the relative degrees of risk set forth in this table. If so, please explain. (ROA 2016, l. 22 – 2017, l. 7.)

Defense counsel again objected that it was not new, to which the Plaintiff's counsel argued that it was new because: "Dr. Van Dorsten[33] talked about it and he said, based on the New England study, these statistics are applicable to all deliveries. I would just like to explain the parameters of the study, just to explain what it really shows." (ROA 2017, ll. 18-24) The trial court sustained the Defendant's objection that it was beyond the scope of rebuttal. (ROA 2018, ll. 12-14.)

In her appellate brief, the Plaintiff rants about the controls in the study and the unfair and misleading comparisons of risks because the study included preterm babies. However, the Plaintiff proposed the ACOG Bulletin as the standard and opened the door on the article in her case through Dr. Oakes. Further, the Defendants did not, as the Plaintiff accuses, misuse the article in a "tricky and deceptive way: by concealing the weight limits used in the study or by obscuring the statistical risks of brain bleeds." [Appellant's Brief, p. 36-37.]

The Plaintiff quotes from the article about the limitation of the study based on data that may have been missed in the retrospective analysis, and argues that Dr. Oakes should have been allowed to explain that the article was not reliable to support the Defense's position about the relative risks in using the vacuum. [Appellant's brief, p.37.] First, the Defendant objects to the quotation from the article because, while the article

[33]The transcript does not show that Dr. Van Dorsten testified about the Journal. It would appear that Counsel was referring to Dr. Norton's testimony.

was discussed and shown to the witness, it was never admitted into evidence or presented to the Court or the jury, and should not be included in the Record on Appeal, (Rule 210, SCACR), or referenced to the Court in this appeal. In any event, the Plaintiff had ample opportunity to question the witnesses (plaintiff expert Dr. Oakes, defendant Dr. Rhett, and defense expert Dr. Norton) about the article and never attempted to ask them about that limitation.

Despite the Plaintiff's invective against the Defendant with accusations of concealment, deception, manipulation, and trickery, the transcript will show that during this 2½ week trial, the Plaintiff had more than sufficient opportunity to question the witnesses about the article. On this record, the trial court did not abuse his discretion in limiting the questioning of Plaintiff's expert, Dr. Oakes on reply, and, certainly, if any abuse might possibly be found, if was not prejudicial so as to warrant a new trial.

VI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN PERMITTING THE DEFENSE TO USE DEMONSTRATIVE EVIDENCE.

Since it was anticipated that the trial of this case would take several weeks and there were a large number of witnesses and substantial amounts of documentary evidence, the Chief Administrative Judge entered a Case Management Order setting deadlines, which included dates for the exchange of exhibit lists and a counsels' exhibit conference (February 18, 2010). (ROA 1; Order, filed 10/20/09). Much was accomplished at the exhibit conference in reviewing and premarking trial exhibits, but the task was arduous and the parties agreed to exchange demonstrative exhibits at a separate time. However, the parties never reconvened to exchange the demonstrative exhibits. Instead, Plaintiff's and Defendant's counsel agreed to show each other the demonstrative exhibits prior to the witnesses taking the stand. (ROA 1294, ll. 6-15.)

Plaintiff seeks a new trial because the Defendant did not present two pieces of demonstrative evidence for review/inspection prior to the trial beginning, namely a pelvic model and a vacuum pump.[34] However, the record will show that the Plaintiff did not make any timely objection to the use of either the pelvic model or the vacuum pump to preserve her complaints. Lastly, Plaintiff was not prejudiced in any way to justify a new trial.

A. Plaintiff did not timely object to the use of the pelvic model.

During his direct examination, Defendant Dr. Rhett used a pelvic model to point out parts of the anatomy to explain the station of the baby. (ROA 1259, l. 14 – 1260, l. 8). Plaintiff did not make any objection when Dr. Rhett first presented and used the model. However, when Dr. Rhett indicated that he was going to use the model to measure the ischeial spine to the bony part, Plaintiff did object on the ground of relevance:

> EDWARD GRAHAM: Your Honor, we object to what I anticipate is going to be the use of a measuring instrument to measure a dimension that has absolutely no relevance. (ROA 1263, ll. 1-4.)

The trial court overruled the objection, subject to Plaintiff's right to cross-examine. It was only later, during a break in testimony that Plaintiff brought up the issue of the case management order; yet the Plaintiff did not make any motion. Rather the Plaintiff asked the trial court to consider award of sanctions or to instruct the jury that the Defendant has violated the case management order:

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[34]Plaintiff asserts that she complied with the case management order, but throughout trial, Plaintiff's counsel did not share some of his demonstrative exhibits until the day of or the night before the witness was to testify. (ROA 1294, ll. 6-25.)

> Your Honor, today, during the direct examination of the Defendant Dr. Rhett, we were introduced, for the first time, during his examination to five demonstrative exhibits that had never been listed, never shown to us, never hinted about in any way, consisting of an electrode, the forceps, the pelvic model and two awards. They used two blowups that they hadn't told us about but at least those blowups of the strips were from strips that we had discussed as coming into evidence. Now I understand that they are getting ready to try to use the animation that they first showed to us on the day of closing (sic). If Your Honor please, I wanted to call this to your attention. To me, I think that it shows a willful violation of the court rules and I would just ask Your Honor, in your discretion, to consider whether these circumstances are appropriate for an imposition of an Order for sanctions and also whether Your Honor believes that it would be appropriate to give an instruction to the jury that the defense has violated the court orders by springing exhibits in trial that they did not exchange with us, as we had done with them in accordance with the sprit and the letter of discovery. (ROA 1292, l. 15 – 1293, l. 19.)

The trial court correctly found that there was no harm and, in a wise exercise of its discretion, declined to impose sanctions or give any curative instruction.[35] (ROA 1295, ll. 3-11.) Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (The imposition of sanctions is generally entrusted to the sound discretion of the trial court.)

B. The Plaintiff did not timely object to the demonstrative use of the vacuum pump.

Dr. Norton, one of the Defendant's OB/GYN experts, brought a vacuum pump with her to trial and demonstrated how it works. (ROA 1649, l. 22 – 1651, l. 7). Plaintiff complains that the use of the pump was a willful violation of the Case Management Order, and that the demonstration was misleading and a willful effort to deceive the jury. First, defense counsel showed the pump to plaintiff's counsel prior to Dr. Norton taking the stand, and again, Plaintiff did not object prior to or during Dr. Norton's testimony.

[35] Defendant submits that an instruction to the jury that the a party has violated a discovery/scheduling order is not within the range of authorized or appropriate sanctions. See Rule 37, SCRCP; Karppi, supra.

There was no objection from the Plaintiff at the time that Dr. Norton conducted her demonstration. Plaintiff did not take the opportunity to question Dr. Norton about the pump and her demonstration during his cross-examination. However, Plaintiff's Counsel asked that the pump be made a court's exhibit (#36) because he intended to use it in Plaintiff's case on reply. (ROA 1679, l. 20 – 1681, l. 20.) The transcript further shows that the trial court allowed the Plaintiff to raise the issue of the pump demonstration on reply (ROA1982, ll. 2-4, ll. 15-17), and Plaintiff's expert, Dr. Oakes testified that:

> Q. While you were out of the courtroom, there was a demonstration through one of the defendant's witnesses using the vacuum cup and the pump to apply on this surface right here (wooden jury rail) and movements were made to the left and the right, resulting in a pop-off. Let me ask you, sir, what if anything does that demonstration, that type of demonstration, have to do with the delivery of a baby with a vacuum?
>
> A. It has no relationship because what one is doing is applying the vacuum to a flat surface. That -- the whole purpose of this instrument is to have the scalp in this, it's not to be flat. So it is going to much more easily pop off of a flat surface than it is than a concave one or a convex one. (ROA 2013, l. 11 – 2014, l. 4.)

Accordingly, not only did the Plaintiff not preserve any timely objection to the Defendant's use of the pump, she was not prejudiced because she used it to her own advantage in reply.

VII. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN CONDUCTING JURY *VOIR DIRE*.

A. Purpose and Scope of Voir Dire ~ Standard of Review

"It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial." State v. Holland, 261 S.C. 488, 201 S.E.2d 118,

122 (1973). Concomitantly, S.C. Code Ann. § 14-7-1020 provides that the court must question jurors to determine if they can be indifferent:

> **Jurors may be examined by court; if juror is not indifferent, he shall be set aside.** The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

It is the responsibility of the trial court is to focus the scope of *voir dire* examination as described in § 14-7-1020.[36] Wilson v. Childs, 315 S.C. 431, 438, 434 S.E.2d 286, 291 (Ct. App. 1993). However, "the manner in which these questions are pursued and the scope of any additional *voir dire* is within the sound discretion of the trial court." Id.; see also Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 109, 512 S.E.2d 510, 517 (Ct. App. 1998) (citations omitted); Norris v. Ferre, 315 S.C. 179, 181, 432 S.E.2d 491, 492 (Ct. App. 1993). "On appeal, this court will rely on the judgment of the trial judge who is able to observe the character and demeanor of the jurors, unless the record firmly establishes an abuse of discretion." Creighton, id.

B. The Trial Court's Voir Dire

The transcript will show that the trial court conducted extensive *voir dire* that covered all the points required by §14-7-1020 and more to assure the parties a fair and impartial jury. The trial court questioned the jurors about connections to the attorneys

[36] Rule 47(a), SCRCP, provides that the examination of jurors may be conducted by the trial judge or the attorneys; however, it is considered the better practice for the trial judge to conduct the examination. State v. Britt, 237 S.C. 293, 311, 117 S.E.2d 379, 388 (1960) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

and law firms, connections to the parties, connection to the witnesses, knowledge about the facts of the case, whether the jurors had ever filed a lawsuit or been sued, whether the jurors or a member of their immediate family had ever had a claim or dispute with a physician or medical care entity regarding care or treatment, whether the juror had ever been a witness in a medical malpractice case, whether any family member was employed by Low Country OB, East Cooper, or Nurses Rx, whether any juror had ever had complications from a vacuum assisted delivery, whether any juror was a member of Greater St. Luke AME Church or Triangle Church, whether any juror ever had an unsatisfactory experience with medical personnel, and whether juror or any family member ever had a vacuum assisted delivery. (See ROA 174 - 216.)

The Plaintiff had submitted (30) proposed voir dire questions five months prior to trial (Plaintiff's Request for Voir Dire, dated 2/26/11). The questions asked by the trial court covered many of those requests; however, the transcript does not show that the Plaintiff made any objection to any of the questions asked or the trial court's failure to ask any other of his Requests.

Thirty-two jurors stood in response to one or more of the questions and the trial court asked each one whether the connection/experience would prevent them from being fair and impartial. The Plaintiff did not voice any objection to the trial court's questioning to determine whether the jurors could be fair and impartial.[37]

[37] The transcript will show that once the jury was impaneled, the trial court did ask the Plaintiff "is there any objection to the jury draw procedure that the court employed or the strikes imposed by the other side? EDWARD GRAHAM: No, Your Honor." (ROA 217, ll. 21-25; see also 219, ll. 2-25).

C. The Plaintiff did not preserve any challenge to the trial court's voir dire.

The basis of the Plaintiff's challenge to the juror *voir dire* is difficult to discern. Plaintiff's issue is stated as: "Did the trial court err and abuse its discretion in failing to allow more extensive voir dire concerning potential juror bias against a medical malpractice plaintiff?" [Appellant's brief, p. 1] Plaintiff begins his argument with a diatribe about media coverage and political debate on tort reform, [38] and argues that the trial court should have conducted *voir dire* "in a more thorough and comprehensive manner than just the basics." The Plaintiff complains that the trial court did not ask questions concerning whether anyone worked or had family working in the medical field; whether jurors believed there were too many lawsuits or too many frivolous lawsuits; whether jurors were active in political causes or parties; whether jurors had religious beliefs that would be relevant to their services as a juror; whether jurors had formed beliefs about victims bringing lawsuits. [Appellant's brief, p. 44.]

Although the Plaintiff submitted proposed voir dire questions prior to trial, the transcript does not reveal that the Plaintiff timely expressed any such argument to the trial court at trial when he was conducting voir dire. Accordingly, the Plaintiff did not preserve any issue that might be based on the fact that the trial court did not ask all or any specific questions in the Requests for *Voir Dire* that Plaintiff submitted prior to trial. "Absent a timely objection to the examination of a juror, the issue is not properly preserved for appeal." Creighton, 512 S.E.2d at 517 (citing State v. Ivey, 331 S.C. 118, 122, 502 S.E.2d 92, 94 (1998); Hollins v. Wal-Mart Stores, Inc., 381 S.C. 245, 672

[38] Consistent with the vitriolic tone of his brief, Plaintiff's counsel contends that: "These campaigns are motivated in part by a desire to prejudice jurors against personal injury plaintiffs and enlist their support for tort reform." [Appellant's Brief, p. 42.]

S.E.2d 805 (Ct. App. 2008) (challenge to trial court's purported limitation of plaintiff's *voir dire* of juror waived where plaintiff failed to object to denial of further *voir dire* or ask trial court to conduct further *voir dire*); 15 S.C. Jur. *Appeal and Error* § 81; see also Watson v. Chapman, 343 S.C. 471, 540 S.E.2d 484, 489 (Ct. App. 2000)("Making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination.")

While the Plaintiff concedes that the trial court did ask "general questions" to determine contact with the parties, he complains that when jurors stood in response, the trial court asked "leading" questions about whether they could be fair and impartial in a "politically correct" way. [Appellant's Brief, p. 42.] Plaintiff also acknowledges that the trial court followed the "time-honored tradition" questioning the jurors about their ability to be fair and impartial, Plaintiff simply claims that it is not right and expounds upon a strident challenge to our jury *voir dire* practices. Again, the Plaintiff did not preserve any issue for appeal because he never objected to the trial court's questions – not once.

The Plaintiff attempts to show that she was prejudiced through the affidavit of her trial counsel, Mary Watters, who interviewed three jurors after the trial.[39] Ms. Watters avers her beliefs as to how the jury misinterpreted the charges, misperceived the evidence, misunderstood the trial court's rulings, and misunderstood the verdict form. (ROA 3716-17; Watters Affidavit, ¶ 2a-e.) In her Affidavit, Ms. Watters further avers that one juror (#12) "held a bias against the Plaintiff and/or counsel from the outset of

[39] It is notable that one of the jurors, Heather Benton, had identified herself as a patient of Low Country OB/GYN and affirmed to the trial court that she could still be fair and impartial. (ROA 181, ll. 5-13.)

trial as evidenced by her behavior during trial, her negative and dismissive body language and looks toward Plaintiff and Plaintiff's counsel as well as her overtly positive and friendly behavior and looks toward Defendant, Defendant's family and defense counsel;" and that juror (#12) made it known to the jury at the beginning of deliberations that she supported the Defendants and that nothing would lead her to change her mind. (ROA 3717; Affidavit ¶2f-g.) Finally, Ms. Watters avers that Juror #12 and one of the jurors who spoke with her (Mr. Sewell) had not disclosed certain personal experiences with medical personnel or facilities that may have affected their ability to be fair and impartial. (ROA 3718; Affidavit ¶2h.)

Again, as a threshold matter, the Defendant submits that the Affidavit is improper under Rule 606, SCRE, to challenge the jury's verdict because it does not prove any improper external influence on the jury's deliberations. Traditionally, a juror's testimony was not admissible in order to prove either his own misconduct or that of fellow jurors. Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008); State v. Thomas, 268 S.C. 343, 234 S.E.2d 16 (1977); Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974). Rule 606, SCRE, as effective since 1990, however, alters the common law to allow jurors to offer testimony, albeit on a very limited basis, to challenge the validity of a verdict:

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

As the Court noted in Shumpert v. State, " Rule 606 thus draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." 661 S.E.2d at 371.

Notwithstanding, the prohibition and specific limitations in Rule 606, the Court has judicially recognized an exception to allow juror testimony involving internal misconduct when necessary to ensure fundamental fairness. Shumpert v. State, supra (citing State v. Hunter, 320 S.C. 85, 463 S.E.2d 314, 316 (1995) (juror alleged that verdict was tainted by racial prejudice); and State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)(juror alleged that jury began deliberations prematurely)). In Shumpert, the Court found that the juror's "affidavit [did] not measure up to the high bar that precedent sets for the seriousness of allegations that juror testimony must raise before it may be admitted." Id. at 372. There, the Court found that the juror's averments about confusion and internal influences was pure speculation without any specific factual support:

> We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

Here, Ms. Watters' averments, as in Shumpert, about confusion and internal influences are speculation without any specific factual support; moreover, they are, in large part, totally irrelevant to her challenge to the *voir dire*. In addition, Ms. Watters' complaint

about Juror #12's trial demeanor is not preserved because Plaintiff never raised the issue to the trial court during the proceedings. See S.C. Code Ann. §14-7-1030 (objections to jurors waived if nor made before juror is impaneled or charged).

Finally, as to the complaint about the jurors (#12 and Sewell) alleged failure to respond to *voir dire* about personal experiences with medical personnel, it does not tend to show any prejudicial error in the *voir dire*. To the extent that it might present a separate issue which Plaintiff has not raised,[40] the averment simply is too vague to substantiate any ground to reverse the trial court's exercise of discretion in denying the new trial motion. In Thompson v. O'Rourke, 288 S.C. 13, 339 S.E.2d 505, 506 (1986), the Court enunciated the standard for granting a new trial when it is discovered that a seated juror fails to fully respond to *voir dire* questioning:

> [R]elief is required only when the court finds the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the parties' peremptory challenges. The inquiry must focus on the character of the concealed information, not the mere fact that a concealment occurred.

As quoted in Gray v. Bryant, 298 S.C. 285, 379 S.E.2d 894, 896 (1989).

"The granting of a new trial based on a juror's failure to honestly respond to the court's *voir dire* remains within the sound discretion of the trial court. Morris v. Jensen, 309 S.C. 153, 420 S.E.2d 710 (Ct.App.1992). A circuit judge's decision to issue such an order will not be reversed absent an abuse of discretion. *Id.*" Long v. Norris & Associates, Ltd., 342 S.C. 561, 538 S.E.2d 5, 9-10 (Ct. App. 2000). Beyond the fact that the Plaintiff has not presented any preserved issue on appeal as to the jury voir dire, there is nothing in this record to show that the trial court abused his discretion in denying the

[40] Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Plaintiff's motion for a new trial. A fair and impartial jury heard eleven days of testimony and after deliberating for almost 10 hours, they rendered a fair and just verdict which should be affirmed.

CONCLUSION

Based on the foregoing, the trial court properly conducted *voir dire* to assure the parties a fair and impartial jury. The trial court also acted within its discretion in ruling on the evidentiary objections and correctly charged the jury on the applicable law. The jury returned a verdict for the Defendant based on the specific finding that Defendant Dr. Rhett did not deviate from the standard of care in delivering the Plaintiff's Child. Accordingly, there is no preserved ground of prejudicial error to justify giving the Plaintiff a new trial.

Wherefore, the Defendant Dr. Edmund Rhett, Jr. respectfully requests that the Court summarily[41] affirm the judgment entered on the jury's verdict.

[41] Defendant submits that the law and record are so clear on what issues are preserved for appellate review that oral argument will not aid the Court. Rule 215, SCACR.

Respectfully submitted,

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Certification of Counsel

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

March 11, 2013

Molly H. Craig

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,

Appellant,

v.

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

Defendants,

OF WHOM Edmund Rhett, Jr., MD is

Respondent.

Certificate of Service

I certify that on this 11th day of March, 2013, a copy of the Final Brief of Respondent (Edmund Rhett, Jr., MD) was served on Appellant and all other Counsel for Record by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed as listed below:

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