STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Michael J. Baxley, Circuit Court Judge

CASE NO. : 2007-CP-10-1553

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

vs.

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 REPLY BRIEF OF APPELLANT

Edward L. Graham
Mary H. Watters
J. Layton Ruffin

GRAHAM LAW FIRM, P.A.
383 West Cheves Street
Post Office Box 550
Florence, SC 29503
(843) 662-3281

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

RULES AND STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

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

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

STATEMENT OF THE CASE

Appellant hereby adopts and incorporates by reference the Statement of the Case as set forth in Appellant's prior Brief.

APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Appellant objects to Respondent's Statement of the Case to the extent it includes factual inaccuracies, contested factual matter, misstatements, and argument.

ARGUMENT

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

A. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Testimony Under 401 and 403, S.C.R.E.

Respondent belittles Appellant's argument by claiming it centers around Dr. Milunsky's inability to "assign a statistical number to the likelihood that alcohol use affected the Child." (Respondent's Brief at 18).[1] In fact, Appellant complains that Dr. Milunsky's opinions were based upon evidentiary assumptions not present in this case, of exceptionally prejudicial subject matter, without assigning any degree of likelihood that alcohol consumption caused the injuries sustained by Jayden. These issues came out in cross-examination. Dr. Milunsky was asked, "To a reasonable degree of certainty, most probably, has the alcohol had an impact in this case?" (R. p. 1494, ll. 17-19). Dr. Milunsky responded:

> A. I think I've already stated that it is not possible to, uh, assign a risk to Jayden from the alcohol taken; since, to begin with, we don't know how much was taken and when precisely it was taken. So it remains an item of concern that it could be a contributing factor, yet one of the multiple factors that are operating in Jayden's case to cause the issues or some of the issues but we don't actually know for sure.
>
> (R. p. 1494, l. 20 - p. 1495, l. 5).

[1] Apparently after a thorough combing of all cases nationally, in an effort to support its misperceived understanding of Appellant's argument, Respondent found a 1997 case from Iowa. *Williams v. Hedican,* 561 N.W.2d 817, 830 (Iowa 1997). This case, however, explained that simply because a theory or technique has not been widely peer-reviewed, does not mean it is scientifically invalid. *Id.* Thus, the court held that lack of *statistically significant studies* goes to weight and not admissibility. *Id.* This is vastly different from holding that expert testimony does not need to satisfy Rules 401, 403 and 702, S.C.R.E. nor a "most probable" standard.

Appellant's first complaint is that if a party is going to introduce testimony that a mother's choices harmed her child, there had better be a sufficient basis for it. What could be more prejudicial to a plaintiff in a birth injury lawsuit? Rule 403, S.C.R.E. requires that evidence be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or of misleading the jury. The evidence presented by the defense was undeniably prejudicial, and it shifted the juror's focus to issues for which there was no evidentiary support. On direct examination, Jamesetta said, "When I realized that I was late on my period, I stopped, uh, going out and using alcohol at the time." (R. p. 975, ll. 2-4). Jamesetta was asked if at any time between early November and late November, she consumed any alcohol. She replied that she did not. (R. p. 977,l l. 18-21). On cross examination, the defense asked Jamesetta if she denied using alcohol before she learned she was pregnant. She responded, "No. I used in October but once I thought I was pregnant, I went to the Health Department and I didn't drink anything after I knew I was pregnant." (R. p. 1013, ll. 18-24).

There was no evidentiary basis for Dr. Milunsky to argue that Jamesetta consumed alcohol in more than a modest amount, nor in any amount beyond the first few weeks of her pregnancy. Yet Dr. Milunsky continued to give opinions which required him to assume greater alcohol consumption than the record reflected. Defense counsel asked and Dr. Milunsky answered multiple questions related to alcohol consumption, alcohol abuse, fetal alcohol syndrome, and the harm caused by drinking during pregnancy. (R. p. 1482, ll. 4-11; p.1490, ll. 21-23; p. 1491, ll. 18-23; p. 1492, l. 2- p. 1495, l. 22). Dr. Milunsky specifically stated that he "has no idea, and the record doesn't indicate, how much alcohol" was consumed. (R. p. 1482, ll. 8-9). Nevertheless, defense counsel asked Dr. Milunsky about the causal significance of "alcohol abuse,[2]" to which Appellant's counsel objected. The court asked if this was leading, and

[2] This is just one example of the many highly inappropriate attempts by the defendant to prejudice the jury into believing: 1) that Jayden consumed more alcohol than the evidence reflected and 2) that there is evidence Jayden's injuries can be linked to alcohol consumption.

Appellant's counsel explained yes, but more importantly, it was prejudicial and assumed facts not in evidence. (R. p. 1490, l. 21 – p. 1491, l. 15).

When asked how this is relevant, Dr. Milunsky stated that "it is potentially relevant in the sense that the prenatal records indicate alcohol use but does (sic) not indicate how much and precisely when. So it sits there as an undefinable (sic) concern that may or may not have to do with one or more of these items." (R. p. 1492, ll. 2-7). Defense counsel asked, "Are these the kind of delays that you see (sic) alcohol ingestion?" (R. p. 1492, ll. 8-9). Dr. Milunsky replied:

> A. There is something called fetal alcohol syndrome.
>
> Q. Say that word again, those words?
>
> A. Fetal alcohol syndrome, that is what it is called.[3]
>
> Q. Yes, sir.
>
> A. I can say that Jayden does not have the fetal alcohol syndrome.
>
> Q. Okay.
>
> A. However, the medical literature is very clear about something called incomplete fetal alcohol syndrome.
>
> Q. Incomplete?
>
> A. Incomplete. So just like anything else in life, there are gradations – slow, slight, not quite there yet – involvement of anything that you might care to think of. It is possible – that's all that I can say – that there was alcohol taken that wasn't so severe as to cause the entire syndrome, which by the way includes mental retardation, heart defects and other significant birth defects but was enough to cause troubles. But this is all speculation. We don't know. It sits there undefined. It's an item.
>
> (R. p. 1492, l. 14 – p. 1493, l.16).

Dr. Milunsky has no basis to argue that Jamesetta drank alcohol in a sufficient quantity and for a sufficient period of time to cause alcohol related fetal injuries. No expert testified that modest alcohol consumption in the early prenatal period most probably caused or even could possibly have caused Jayden's brain injuries. In expressing his opinions, Dr. Milunsky simply assumed that Jamesetta consumed more alcohol than the evidence showed and for a longer

[3] What other purpose is there for twice repeating "fetal alcohol syndrome" (FAS) only to acknowledge Jayden does not suffer from FAS, but to attempt to prejudice the jury? This is just further evidence of the defense's attempt to poison the well with inappropriate alcohol-related testimony that even Dr. Milunsky has to admit is only speculative.

period of time than the evidence showed. Expert opinion based upon assumed facts that differ materially from the actual evidence cannot be probative.

Moreover, even if there were facts to support his assertions, Dr. Milunsky's own opinion is only that "It is possible – that's all I can say . . . . But this is all speculation . . . We don't know . . . It sits there undefined." (R. p. 1493, ll. 8-16) So while Appellant takes issue with Dr. Milunsky inappropriately basing opinions on highly prejudicial assumptions completely contradictory to the evidence, Appellant also takes issue with Dr. Milunsky's inability to assign any degree of likelihood that alcohol consumption caused or contributed to Jayden's brain injury. Accordingly, no matter what level of alcohol consumption Dr. Milunsky imagined Jamesetta to have consumed during her pregnancy, his conclusions are couched in phrases like, "it is possible," "this is all speculation," "we don't know," and "it sits there undefined." At trial, he could not even say there was a one in a million chance that maternal alcohol ingestion caused brain damage. (R. p. 1502, ll. 19-24). At least at deposition when Dr. Milunsky was asked the same question, he responded, "I don't know where you get one in a million but there's – there's no basis for one in a million. It's probably more like one in ten thousand or one in a hundred thousand or something on that order of magnitude." (R. p. 232, ll. 6-13). The probative value of Dr. Milunsky's testimony on this issue was minimal to nonexistent, and the prejudicial impact was irreparable. For these reasons, his testimony should have been excluded.

B. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Expert Testimony under 702, S.C.R.E.

Concerning the admissibility of testimony pursuant to Rule 702, SCRE, and Respondent erroneously contends Appellant confuses lack of "credibility" with lack of "reliability." To the contrary, Appellant recognizes that the trial judge must determine reliability of proffered expert testimony as an evidentiary gatekeeper, before the jury is allowed to hear the proffered expert testimony and judge its credibility. The judge in this case abdicated his responsibility to

determine lack of reliability before allowing the jury to hear unreliable causation testimony from Dr. Milunsky, tainted by assumption, speculation and the vaguest possibility.

Respondent erroneously contends Appellant misperceives the scope of reliability under the rule, and then boldly asserts that "it is commonly known from reliable medical science that maternal alcohol use can injure the baby . . . ." (Respondent's Brief at 22).[4] It is immaterial whether there is common knowledge that excessive alcohol consumption can cause injury to a baby.[5] There is no common knowledge regarding "reliable medical science" nor whether the amount of alcohol ingested by Jamesetta Washington caused brain damage to her son.

Respondent's attempt to oversimplify common knowledge regarding alcohol dangers evades the problems with Dr. Milunsky's testimony. Expert testimony must "rest on a reliable foundation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 598 (1993). Additionally, the standard for admissibility of scientific evidence "is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods." *State v. Douglas*, 367 S.C. 498, 509, 626 S.E.2d 59, 65 (Ct. App. 2006).

As previously explained, Dr. Milunsky assumes greater alcohol consumption than the record reflects. He cited no test, medical literature, or other proposed scientific basis to support the proposition that modest alcohol consumption in the first few weeks of pregnancy can cause brain bleeds or brain damage, either directly or indirectly. Dr. Milunsky did not even attempt to make that proposition or assert that his method was consistent with recognized procedures. He

---

[4] To be clear, despite Respondent's misrepresentation, Appellant's counsel never argued in opening statement that "it is commonly known from reliable medical science that maternal alcohol use can injure the baby." This is the immensely prejudicial presumption Appellant sought to have removed from the jury's purview. This statement, void of any medical or scientific authority, pays no attention to the quantity of alcohol consumed or the type of injury sustained in this case. What Appellant's counsel instead told the jury was his expectation that Dr. Rhett may misrepresent how Jamesetta's minimal alcohol conception during the first few weeks of pregnancy affected her child, before she realized she may be pregnant. Appellant's counsel asked the jury to look for whether the defense could say there was even a one in a million chance that alcohol conception caused any harm to Jamesetta's child. (R. p. 342, l. 22 – p. 344, l. 25)

[5] Again, there is a vast difference between what a jury knows generally about the harm alcohol consumption can cause to a baby and the specific timing and mechanism of injury in this case. The fact that a jury has heard that some amount of alcohol consumption, at some time during pregnancy, can cause some unidentified harm to some unidentified baby does not remove the need for specific expert testimony. There were specific facts that had to be analyzed in light of the injuries sustained to determine whether the amount of alcohol Jamesetta consumed, at the time she consumed it, could have caused the specific harm through the specific manner, namely brain bleeds, suffered by Jayden.

acknowledged, "There's no scientific basis upon which to reach a statistical likelihood for the [alcohol's] role in Jayden's birth defects." (R. p. 1504, ll. 15-22).

Claiming generally that it is commonly known that maternal alcohol use can injure a baby does not establish the reliability of Dr. Milunsky's testimony. It does not serve as a foundation for testimony that Jayden's brain bleeds and brain injury were caused or contributed to by her mother's alcohol consumption during pregnancy. Respondent has provided no explanation as to how this could occur, would occur, or did occur in this case, given the modest amounts of alcohol ingestion in evidence. If this were merely "common knowledge," no expert testimony on the subject would have been needed. Accordingly, the trial court committed error in admitting testimony on this issue.

C. Trial Judge Disregarded his Role as Gatekeeper

Appellant moved in limine to preclude expert testimony that alcohol ingestion caused Jayden's brain injuries. The trial judge initially stated that he would withhold ruling until later. (R. p. 245, ll. 9-15). However, the judge also said he would "not exclude the record about . . . the alcohol abuse as a major component of the defense's case" because "it's known science and even among lay people it's known that you don't ingest alcohol when you may be pregnant," even though there is not even a hint of alcohol abuse in this case. (R. p. 246, ll. 14-19). The trial judge said he would withhold from ruling on the causation question at the pre-trial phase because he wanted to see the supporting evidence. (R. p. 245, ll. 9-15). When Appellant sought to voir dire the expert on his causation testimony, however, the trial judge refused Appellant's request. (R. p. 1466, line 12 – p. 1468, ll. 3). Instead, the trial judge stated he would not decide until after Dr. Milunsky testified if his testimony was helpful, reliable, or prejudicial, and then make any needed corrective charges. (R. p. 1467, l. 20 – p. 1468, l. 3).[6] By refusing to address issues

[6] Respondent makes the strained argument that Appellant counsel's response of "very good" to a trial court's ruling that objections would not be heard until the end of the testimony shows counsel's acceptance of the ruling. This is inconsistent with the record as a whole. Appellant's counsel sought at the outset of trial, and throughout the trial, to first keep out and second

brought before the court, related to the reliability and admissibility of expert testimony, before the tainted evidence was heard by the jury, the trial court impermissibly eschewed its responsibilities as evidentiary gatekeeper and allowed the jury to hear scientifically unreliable, speculative testimony.

As part of the trial court's duty to determine issues of law, it "serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Importantly, the jury decides how much weight to attribute to the evidence only after the trial court makes a ruling that the particular evidence is sufficiently reliable to be admissible. *Id.* The trial judge's role is especially important when determining the admissibility of expert testimony. This evidence is beyond the realm of ordinary lay knowledge, and expert witnesses may express opinions based on facts not within their firsthand knowledge. *Id.* Accordingly, the trial court "is required to make certain preliminary findings regarding admissibility requirements, such as . . . reliability of the substance of the testimony . . . before a jury may hear the evidence." *Id.* at 389, 699 S.E.2d 169. *See also State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability.")

Permitting unreliable expert testimony to be heard by the jury, and offering to correct any deficiencies later through a curative charge, is incompatible with the judge's duties. The damage is done when the improper testimony is heard by the jury. It betrays common sense to assert the jury will disregard unreliable expert testimony simply because the judge issues a curative

---

mitigate Milunsky's abuse of the facts of this case and the unreliability of his concocted theories. Appellant's expression of civility to the tribunal does not alter Appellant's position.

instruction after the testimony is heard, which was not even done in this case. Expert testimony can have a substantial influence upon the jury. For this reason, it is imperative that trial judges execute the duties which they have been assigned. In this case, the record is clear that the trial court did not fulfill its role as gatekeeper, and evidence in violation of Rules 403, 702, S.C.R.E. was presented to the jury.

D. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Expert Testimony on Causation

Respondent argues its multifactorial causation theory is admissible because *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998) did not discuss whether an expert may opine to the combined effect of several causation theories. Respondent's argument, while inventive, would eviscerate the very principle *Kearse* sought to establish. *Kearse* acknowledged that expert medical testimony must satisfy the "most probably rule." *Id.* at 329, 495 S.E.2d 205. The court then noted the defendant's expert witness could not state any of the medications most probably caused respondent's tinnitus. *Id.* Therefore, the court held the trial judge properly excluded the defendant expert witness's testimony on causation. *Id.*

The Court in *Kearse* recognized that a party may not circumvent the well-established "most probably" standard in South Carolina by citing multiple "possible" causes. This is precisely what Respondent sought to accomplish in this case. Respondent's expert witness could not state that there was even a one-in-a-million chance that alcohol consumption caused Jayden's brain bleeds. Nevertheless, Dr. Milunsky concluded that, when alcohol consumption was considered with the alleged connective tissue disorder, these two factors "most probably" caused Jayden's injuries. Such tactics cannot be permitted. This runs in contravention to South Carolina case law. Allowing testimony on either or both of these subjects was in error.

Respondent points to South Carolina case law discussing concurrent proximate causes and contends this state recognizes a multifactorial causation theory. This is incorrect. Concurrent causation is not the same as a multifactorial theory. Concurring causes have been described as:

> "[C]oncurring causes operate contemporaneously to produce the injury, so that it would not have happened in the absence of either." In other words, "[i]f the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability."
>
> *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97 (2006). (citations omitted).

Concurrent causation recognizes that if one or more negligent acts by a party caused an injury to another then that party is liable, even if a third party's concurring negligence is also present. *Shepard v. S.C. Dep't of Corr.*, 299 S.C. 370, 375, 385 S.E.2d 35 (Ct. App. 1989). The multifactorial theory presented by the defense, however, is an attempt to overcome the "most probably" hurdle to admission of expert testimony by grouping together unrelated theories and claiming that the aggregate "most probably" caused injury to the Appellant. Thus, a theory of concurrent causes of injury is vastly different from a theory that a string of insubstantial unrelated, improbable possibilities, when taken in the aggregate, satisfies the evidentiary requirement for admission of medical expert testimony.

Appellant's issues with the multifactorial theory are threefold. First, a party should not be permitted to group together several alternate theories, no matter how insubstantial and improbable, and state that the combined sum satisfies this State's "most probable" standard. There must be some indicia as to the likelihood of the individual parts of a multifactorial causation theory for the sum to constitute "most probable" to "a reasonable degree of medical certainty." Second, a party should not be able to "piggyback" a substantially prejudicial "cause" of highly remote possibility to another "cause" somewhat greater possibility, and claim the aggregate satisfies "most probable" causation. This is fraught with potential abuse. Third, a party

should not be permitted to argue that its individually improbable causation theories somehow combined and interacted so as to create a greater aggregate probability than the sum of each individually. Without reliable scientific evidence of synergistic propensity, a party cannot argue that the sum is greater than the parts.

Irrespective of a multifactorial causation theory's viability in South Carolina,[7] Respondent's specific theory in this case should not have been submitted to the jury. In order to state there was even a remote possibility that alcohol consumption caused the injury, Dr. Milunsky had to presume alcohol consumption beyond what is reflected in the evidence. Even then, at trial he was incapable of stating there was a one-in-a-million chance alcohol caused the injuries. At deposition, he said the likelihood of alcohol causing injury was something around the magnitude of one in a hundred thousand.[8] Appellant therefore submits that the trial judge should have never allowed the jury to hear Dr. Milunsky's theory that Jayden's brain injuries were most probably caused by the mother's consuming more alcohol than the evidence reflects, which in turn created, at best, a one-in-a-hundred-thousand chance of causing Jayden's brain injuries.

E. Appellant's Efforts to "Remove the Sting" from the Trial Judge's Erroneous Denial of Appellant's Motions to Exclude Testimony Related to Alcohol Did Not "Open the Door" to Junk Science with No Indicia of Reliability or Probability

Respondent contends Appellant's counsel inexplicably introduced use of alcohol during Appellant's opening statement. The last words from the judge on this issue were:

> I will tell you now that the court will not exclude the record about alcohol about the alcohol abuse as a major component of the defense's case. It's known science and even among lay people it's known that you don't ingest alcohol when you may be pregnant. The court will not exclude that testimony.
>
> (R. p. 246, ll. 14-20).[9]

---

[7] Appellant believes that the prudent course to follow is the one already set by this Court in *Kearse*. The temptation for abuse with a multifactorial causation theory is too great to allow.

[8] As to the genetic disorder, Dr. Milunsky could not identify any currently known connective tissue disorder which Jayden suffers from. Moreover, he could not identify any known connective tissue disorder, other than brittle bone disease (which he admits Jayden did not have), that has been associated with brain bleeds.

[9] The perception and belief of alcohol's impact on a fetus during pregnancy reinforces Appellant's position that it was prejudicial and inappropriate to admit testimony on this issue.

However, the court withheld its ruling on the motion to preclude expert testimony on purported alcohol causation. (R. p. 245, ll. 9-15). So while the judge had initially said he would "withhold decision because I'd like to see the supporting evidence that you have in the deposition," the judge's ruling to admit medical record references to maternal alcohol consumption caused Appellant's counsel to take preemptive maneuvers. Appellant's counsel sought to "take the sting" out of the impending admission by addressing the issue first. [10]

Appellant counsel's discussion of matters a judge has already ruled he will permit into evidence cannot "open the door." Appellant sought to keep this testimony out, and Appellant's efforts failed. Therefore, there was no door to open. Any assumed ambiguity based on the judge's initial statement was removed by the judge's later statement he would not exclude alcohol or "alcohol abuse"[11] because it is known that "you don't ingest alcohol during pregnancy. (R. p. 246, ll. 17-19). The judge's last words on this issue were an express, unambiguous statement that "the court will not exclude that testimony." (R. p. 246, ll. 14-17). Therefore, Appellant did not open the door to Respondent's trial testimony on either issue.

Even if this Court were to determine Appellant's preemptive efforts opened the door, it cannot be said that the door was opened to allow any and all testimony, no matter the plausibility or reliability. Proffered evidence of causal significance of alcohol would still need to be assessed pursuant to rules of evidence governing relevance, prejudice, and reliability. Scientific evidence would still need to meet the standard for admissibility set forth in Rule 702, S.C.R.E. and explained in *State v. Jones*. The judge would still have to exercise his role as gatekeeper set forth in *Watson v. Ford Motor Co*. Accordingly, even if this Court were to determine Appellant's counsel made this issue relevant, the defense must still meet this state's statutory and common

[10] While defense counsel did not introduce alcohol consumption in its opening, it belabored the issue throughout Dr. Milunsky's testimony during their case-in-chief.

[11] The trial judge's mention of letting in evidence of alcohol "abuse" evidences the prejudicial impact and misunderstanding that this evidence would cause with the jury. There is no evidence of alcohol abuse. Therefore, if the judge has been prejudiced by the defendant's misrepresentation, then it is difficult to believe a jury would not make the same incorrect inference that there was evidence of alcohol abuse.

law admissibility standards. They did not, and the trial court erred in allowing the tainted testimony.

F. It is Prejudicial to Erroneously Admit Expert Testimony that a Mother Caused Her Baby's Brain Damage by Abusing Alcohol during Pregnancy Where there is No Evidence the Mother Abused Alcohol During Pregnancy

Respondents contend Appellant was not prejudiced at trial when the judge admitted testimony premised upon statements that the mother consumed alcohol in quantities sufficient to cause brain damage in her unborn child. It is difficult to imagine how implying at trial, without evidentiary basis, that a mother herself harmed her child, by drinking or abusing alcohol during pregnancy, would not be prejudicial to her case. Because of the erroneously admitted evidence, Appellant was denied her right to a fair trial. Rule 103(A), S.C.R.E. states, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Moreover, "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is presumed to be prejudicial." *S.C. State Highway Dep't v. Graydon*, 246 S.C. 509, 511, 144 S.E.2d 485 (1965). This rule "is based upon the possibility that the verdict of the jury may have been influenced, to the prejudice of the complaining party, by the improperly admitted evidence." *Id.* Moreover, "Such evidence being incompetent and having some probative value upon a material issue of fact in the case, it is presumed to be prejudicial." *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 495, 61 S.E.2d 53 (1950).

Additionally, it is noted that "[n]o definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. White*, 372 S.C. 364, 385, 642 S.E.2d 607, 617 (Ct. App. 2007) (citing *State v. Gillian*, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004)). Finally, "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." *Douglas*, 367 S.C. at 523, 626 S.E.2d at 72.

Few things in our society are looked upon with more contempt than a mother who chooses to harm her child. This is why it is so condemning to Appellant for an expert to take the stand and testify at length that while we do not know just how much or for how long Jayden's mother continued to drink during her pregnancy, we do know her child suffers from brain damage that somewhat resembles brain damage caused by alcohol consumption during pregnancy. To state several times the phrase "fetal alcohol syndrome" only to explain she does not suffer from "fetal alcohol syndrome" but possibly may suffer symptoms similar to "incomplete fetal alcohol syndrome" is unquestionably prejudicial. It is difficult to comprehend how this would not impact the juror's entire perception of the trial.

Respondent erroneously contends Appellant was not prejudiced because the jury never reached the question of causation. That argument overlooks that this is not a case where a court refused to allow evidence on the issue of causation, which refusal could not have prejudiced that party, since the jury ultimately decided the case on the basis of no breach of the standard of care. To the contrary, this case involves not refusal of proffered evidence but the court's decision to allow the jury to hear demonstrably prejudicial evidence concerning alcohol intake by a pregnant woman. That evidence is demonstrably prejudicial because the judge himself, after hearing Respondent's counsel misleading description of the proffered evidence,[12] decided to allow evidence of the "alcohol and alcohol abuse." (R. p. 246, ll. 14-20). This existed only in the mind of Respondent's counsel and the speculation of Dr. Milunsky.

This is also not a case where a slip of the tongue caused prejudicial evidence to come before the jury briefly, with little notice. To the contrary, Respondent's counsel went out of his way to construct a direct examination of Dr. Milunsky about fetal alcohol syndrome, knowing it was not present in this case. He then asked Dr. Milunsky to repeat the phrase for emphasis. (R.

[12] Counsel for the defense contended the Appellant misstated when she stopped drinking, and that Jayden's delays were "more likely caused by teratogens or alcohol." (R. p. 235, l. 8-25). Neither statement is supported by the evidence.

p. 1492, ll. 14-23). That colloquy was followed by counsel's segue into a discussion of incomplete fetal alcohol syndrome, which neither Dr. Milunsky nor any other physician had diagnosed, but which Dr. Milunsky theorized might possibly be consistent with some of Jayden's symptoms. None of that was accidental. Respondent desired for the jury to be prejudiced by his repeated improper references to the speculative possibility that alcohol consumption played a causative role for Jayden's birth injuries and brain damage. To make sure the jury did not miss the Respondent's attempt to prejudice them with speculative assumptions about excessive alcohol intake, Mr. Hood asked Dr. Milunsky a leading question about Appellant's "alcohol abuse." (R. p. 1490, ll. 21-23). That was hardly an accident, but an obvious attempt to prejudice the jury through wild speculation into believing, falsely, that Jamesetta was guilty of alcohol abuse. Tellingly, when Appellant's counsel objected to the leading question about alleged "alcohol abuse" and the assumption of prejudicial facts not in evidence, the judge focused on the leading aspect, and did not appreciate that there was no evidence in the record of alcohol abuse. (R. p. 1491, l. 1). Presumably the judge had already decided, erroneously, there was alcohol abuse, based on nothing more than wild speculation, erroneous implications and misleading descriptions by Respondent's counsel. (R. p. 246, ll. 14-20).

Respondent's harmless error argument also ignores the court's error in the jury instruction on standard of care relating to the informed consent issue. *See* Argument III, *infra*. The extremely prejudicial speculation of excessive alcohol consumption and the unreliable testimony regarding its possible causal significance caused the jury to look upon Appellant with disfavor. Such prejudicial testimony clouded the jury's view of Appellant's entire case, not just causation issues, but also standard of care issues, including informed consent.

For these reasons, Appellant was deprived of a fair trial. The improper rulings and failures by the trial judge to keep out irrelevant or minimally relevant musings about the possible

causal significance of alcohol consumption, based on pure speculation, without any reliable scientific basis, on matters that were extremely prejudicial, was prejudicial and harmful error.

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

A. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Testimony Under 401 and 403, S.C.R.E.

Dr. Milunsky paraded a list of deformities Jayden allegedly suffers from for the jury, but he admits they have nothing to do with causing bleeding in the back of the brain. (R. p. 1481, ll. 8-11). He then listed all the abnormalities Jayden's mother suffered from, including spina bifida, fused vertebrae, and lordosis. While none of these traits were shared by Jayden, Dr. Milunsky nevertheless opined that Jayden had inherited a connective tissue disorder based on his review of two photographs of the child and a partial review of the medical records. This cursory basis for diagnosis of a connective tissue disorder hardly qualifies as science.

Dr. Milunsky also could not substantiate from a scientific basis that Jayden's alleged connective tissue disorder could have caused brain bleeds directly or indirectly. When asked by defense counsel whether there is a genetic basis for the brain bleeds, Dr. Milunsky simply plugged his book and made the unremarkable observation that "everything is genetic." (R. p. 1489, ll. 20-24). Dr. Milunsky argued Jayden supposedly has a connective tissue disorder, but he could not identify any known disorder from which he suffers. (R. p. 1510, lines 18-21). Dr. Milunsky acknowledged that Jayden doesn't match any known genetic syndrome. (R. p. 1506, l. 24 – p. 1507, l. 3). Finally, Milunsky admitted he did not know of any reported incidents of brain bleeds being caused by any connective tissue disorder, other than brittle bone disease, which Jayden does not have. (R. p. 1521, l. 8 – p. 1522, l. 10).

Telling the jury that a child suffers from around a dozen genetic abnormalities is highly prejudicial, particularly when virtually all bodily characteristics in question can be caused by brain damage or are not unusual. Telling the jury that the child suffers from a connective tissue

disorder that caused the child's brain damage is also extremely prejudicial. The fact Dr. Milunsky could not cite any scientific basis to support the supposition that Jayden has a connective tissue disorder precludes his testimony on the subject from having any probative value. The fact Dr. Milunsky could not cite any scientific basis to support the supposition that connective tissue disorder or any other alleged birth defect caused Jayden's brain bleeds also precludes any potential probative value. Moreover, any probative value of Dr. Milunsky's opinions regarding alleged causal significance of Jayden's alleged connective tissue disorder is near nonexistent because Dr. Milunsky could not identify any known connective tissue disorder from which he suffers, and he could not identify any connective tissue disorder, other than one which he acknowledged Jayden did not have, that caused brain bleeds. Therefore, the near nonexistent probative value of Dr. Milunsky's testimony is outweighed by the prejudice created by presenting to the jury a list of alleged genetic abnormalities unassociated with brain bleeds.

B. Dr. Milunsky's Opinions Fail to Satisfy the Requirements for Admission of Expert Testimony on Causation

The court below should have also precluded Dr. Milunsky's testimony regarding genetic factors as a possible cause because the testimony fails the most probably test of *Payton v. Kearse*, supra. Allowing Respondent to circumvent the ruling in that case, by arguing a multifactorial causation theory, creates the very problem *Payton v. Kearse* sought to avoid, i.e., permitting the jury to be confused by testimony of speculative and remote causal possibilities. Where an expert like Dr. Milunsky cannot opine that either of two theoretical causes suggested by the defense is the most probable cause of brain damage, and cannot even opine there is a one in a million or a one-in-a-hundred-thousand chance alcohol caused the brain damage, it would make a mockery of our evidentiary jurisprudence to allow expert testimony that two improbable theories when considered together transform into the most probable cause. Appellant therefore takes issue with Dr. Milunsky's theory that Jayden's brain injuries were most probably caused by

either an unidentified connective tissue disorder with no medically established association with brain bleeds; and/or the mother consuming more alcohol than the evidence reflects, which in turn created, at best, a one-in-a-hundred-thousand chance of causing Jayden's brain injuries. That the court below allowed such testimony deprived Appellant of a fair trial.

C. The Trial Judge Disregarded his Role as Gatekeeper

Appellant sought to preclude unreliable expert testimony related to genetic factors. After hearing argument on the motion in limine, the judge noted the loss of his brother who suffered from a genetic disease. (R. p. 229, ll. 13-19). In preparing to rule on the motion in limine, he stated the following:

> And I just came, two weeks ago, from a conference on genetics with regard to his particular disease. I can tell you that one thing that geneticists are saying is that the state of the science at this time, because we have just – humans have just been able to match the geno and the – from that just the – it's opened an entire array of genetic possibilities of things that we don't yet understand, that we know are out there. So I cannot tell you that this is hocus-pocus that you're claiming that the defendants are putting up. I've got to further listen to the basis of what the geneticists say and make a determination of whether or not there is a reliable basis for it. I can tell you that from what I am hearing, not only does it not defy believability but to me it's what my understanding of the state of the science is. At this point, I deny your motion.
>
> (R. p. 229, l. 19 – p. 230, l. 13).

However, the trial court noted that the issue could be revisited, including the important determination of reliability. Paradoxically, the judge refused to allow *voir dire* or a proffer of testimony prior to admission of the evidence, which is the only way a judge can perform his duty as an evidentiary gatekeeper to determine reliability. (R. p. 230, ll. 17-24). Unfortunately, the trial court did not look at the particulars of Dr. Milunsky's testimony to determine its unreliability and thus failed to discharge its gatekeeper function. Instead, the court discussed the current state of the science as a whole, without looking at how Dr. Milunsky intended to use (or abuse) genetics. No one doubts that genetics is a budding field with seemingly endless possibilities, of which scientists have currently only scratched the surface. But this is precisely

why it is fraught with potential abuse in the courtroom. While genetics may not be "hocus-pocus," the mysticism inherent to the field gives it a false aura of infallibility. As such, a court must assess the science known at present, and determine whether it is being used in a reliable manner, based on current knowledge and not simply the expert's *ipse dixit* conclusions. This was not done in this case, and the Appellant was prejudiced as a result.

D. Appellant's Efforts to "Remove the Sting" from the Trial Judge's Erroneous Denial of Appellant's Motions to Exclude Testimony Related to Genetic Factors Did Not "Open the Door" to Junk Science with No Indicia of Reliability or Probability

Because the judge had already denied Appellant's motion to exclude Dr. Milunsky's testimony of genetics as a cause of Jayden W.'s brain damage (R. p. 224, ll. 14-17; p. 230, ll. 11-25), Appellant's comments and questions regarding that subject did not open any door, any more than comments regarding alcohol consumption. By addressing that topic early in the trial, Appellant sought to take the sting out of this subject of testimony as well.

Additionally, Appellant did not misrepresent the evidence regarding the effect of genetic factors on Jayden's brain damage. Therefore, Appellant did not open the door to the admission of evidence on these issues. With respect to comments regarding genetics, the judge unequivocally ruled, over Appellant's objection, that the defendant could introduce evidence related to Jayden's alleged connective tissue disorder.

Even if the Appellant is considered to have opened the door to certain testimony regarding genetics factors, the door cannot be opened to unreliable, speculative testimony from an expert about prejudicial matters, which amounts to junk science. That is what the trial judge allowed the Respondent to present for jury consideration in this case.

E. It is Prejudicial to Erroneously Admit Expert Testimony that Unknown Genetic Abnormalities Not Yet Identified or Known to Modern Medicine Were Responsible for the Harm.

Admitting testimony under the guise of established and sound genetic science that the child's injuries were caused by currently unknown, untestable, theoretical genetic abnormalities

clearly prejudiced the Appellant. That the jury found against Appellant on the standard of care issue does not render wrongful admission of this testimony harmless, any more than it renders the wrongful admission of alcohol consumption testimony harmless. The Respondent intended to prejudice the jury against Appellant by harping on genetics factors as a possible cause of brain damage in opening (R. p. 373, ll. 13-20), in Dr. Milunsky's testimony (R. p. 1470, l. 15 – p. 1490, l. 20), and in closing (R. p. 2134, ll. 7-10). Prejudice can be presumed from the Respondent's efforts to improperly influence the jury with speculative, unreliable and inappropriate causation evidence and from the jury's defense verdict.

III. FAILING TO PROPERLY CHARGE THE CORRECT LAW REGARDING INFORMED CONSENT PREJUDICED APPELLANT

Lack of informed consent was a key issue in this case. Although the defense sought to confuse the issue by arguing a general consent form established informed consent, the trial court properly ruled as a matter of law the form did not represent informed consent. (R. p. 2045, ll. 13-17).

To avoid a directed verdict on lack of informed consent, Respondent argued an alleged emergency absolved him of any informed consent responsibility. Appellant disputed the existence of an emergency situation because it was feigned by Respondent and his litigation team and because Respondent has *never* obtained a patient's informed consent to use a vacuum extractor. (R. 426, ll. 14-19; p. 429, l. 19 - p. 430, l. 9). In fact, Respondent routinely used a vacuum to deliver babies, in fifty percent of his vaginal deliveries (R. p. 541, ll. 12-15), whereas a typical vacuum rate is only around fifteen percent. (R. p. 541, ll. 12-13).

Nevertheless, because the Respondent claimed an emergency made informed consent unnecessary, Appellant submitted a request to charge that acknowledged an emergency exception to the informed consent requirement, but made clear the standard of care to obtain informed consent persists even in most emergency situations. The trial judge elected to keep the

first portion of the requested charge, which favored the Respondent by expressing an emergency exception to informed consent, but refused to charge the second portion, which limited the emergency exception and explained how the standard for informed consent continues to apply in most emergency situations.

The failure to read the second part of the charge prejudiced the Appellant because it falsely informed the jury that "informed consent is not required in an emergency situation because consent to a serious emergency operation may be implied." (R. p. 2205, ll. 13-22). That is an incorrect statement of the law. Thus, the jury was left to consider only whether an emergency situation existed, and if so, then informed consent is not required. As evidenced by the post-trial interviews, the jurors applied the law as charged, believing the alleged emergency eliminated the need to comply with the standard of care.

This contravenes the charge set forth in Judge Ralph King Anderson's charge book. As the charge states, even in an emergency situation, "a physician should seek the consent of the patient," and "impracticability of conferring with the patient is a prerequisite to dispensing with informed consent under the emergency exception." (Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, Ch. 27).

Respondent argues, incorrectly, that the portion of the charge the trial judge refused to charge applies only to refusal to receive treatment for religious reasons. Although *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002), did involve a violation of informed consent involving a blood transfusion of a Jehovah's witness, the case turned on issues of informed consent. Nowhere in *Harvey* does it limit itself to issues of informed consent in the context of religious beliefs. *Harvey* cited the well-established law that "South Carolina recognizes a medical malpractice cause of action stemming from a lack of informed consent." *Id.* (citing *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct. App. 1984)). *Hook* itself did not involve any issue of religion prohibition of medical treatment. The court in *Hook* had to determine whether

an action for failure to obtain informed consent existed where a doctor failed to inform a patient of the risks associated with a particular medical procedure. *Hook v. Rothstein,* at *Hook v. Rothstein*, 281 S.C. 541, 547, 316 S.E.2d 690, 695 (Ct. App. 1984). Accordingly, Respondent's argument that the limitations to the emergency exception to informed consent apply only to cases involving religious beliefs is without merit.

Respondent also makes the bizarre argument that there is great significance that the requested charge was found in a section of Judge Anderson's charge book entitled, "Medical Malpractice-Right to be Free of Unwanted Medical Treatment." Anderson, S.C. Requests to Charge-*Civil* § 27-22 (2009). That is a perfectly reasonable place for the requested charge to be located, for it suggests the rationale for the informed consent doctrine. The court in *Hook* explained, "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.* § 27-22, at 547-48, 695. The historical development and purpose of the rule was summarized by the court in *Harvey*:

> The right to be free of unwanted medical treatment has long been recognized in this country. More than one-hundred years ago, in *Union Pac. R.R. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891), the United States Supreme Court perceived that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person." In *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914), Justice Cardozo stated, "every human being of adult years and sound mind has a right to determine what shall be done with his own body...." More recently, it has been noted that "the individual's right to make decisions vitally affecting his private life according to his own conscience ... is difficult to overstate ... because it is, without exaggeration, the very bedrock on which this country was founded." *Wons v. Pub. Health Trust*, 500 So. 2d 679, 687 (Fla. Dist. Ct. App. 1987), *aff'd*, 541 So. 2d 96 (Fla. 1989). The right to control the integrity of one's own body spawned the doctrine of informed consent. *In re Duran*, 769 A.2d 497 (Pa. Super. Ct. 2001). Accordingly, the United States Supreme Court has held that a competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

Harvey at 310, 533

To fault Appellant for requesting use of a charge found in an aptly titled section makes no sense.

Finally, Respondent contends that the requested charge applies only to causes of action for battery because the Judge Anderson's charge cited to S.C. Code Ann. § 44-66-60. However, the South Carolina Supreme Court has made clear that South Carolina does not recognize an independent tort for medical battery. *Linog v. Yampolsky*, 376 S.C. 182, 187, 656 S.E.2d 355, 358 (2008). Medical intervention without the patient's informed consent gives rise not to a claim of medical battery, but of medical negligence for breach of the standard of care related to informed consent. Nothing in the charge makes it appropriate only for causes of action for battery and inappropriate for causes of action for informed consent. Accordingly, the judge committed reversible error by failing to charge the jury with the correct law regarding informed consent in emergency situations, and the strict limitations on the emergency exception to the informed consent requirement. Appellant was prejudiced because the jury received an incorrect, incomplete charge on informed consent, a material issue in the case.

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

Appellant does not disagree with Respondent's contention that a party may try to impeach an expert by showing his testimony is improperly influenced by the monetary payment he received. However, a party is also permitted to rehabilitate that witness on redirect. The fact that Appellant sought to rehabilitate a witness with questions related to whether payment influenced the witness's testimony does not remove the judge's responsibility to properly charge the jury. Appellant's redirect sought only to establish the lack of monetary influence upon the witness's testimony. Only if the evidence fully and reasonably convinces a juror that a witness has been influenced by the payment she received should the juror consider the fact that the witness was paid. The requested charge was fairly raised by the way Respondent tried the case,

and Appellant was entitled to the charge as requested, which correctly cites South Carolina law on the point. Ultimately, Appellant was prejudiced by the judge's failure to properly charge the jury on this subject.

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

Respondent contends Appellant had already introduced the subject medical journal article during direct examination of Dr. Oakes. First, this assertion is not accurate. Dr. Oakes did not introduce the article. Dr. Oakes referenced an American College of Obstetric Gynecology ("ACOG") Practice Bulletin, which included a table from the medical journal article. This is a far cry from introduction of the article. Second, even if Dr. Oakes had introduced the article, Appellant could not have reasonably anticipated the perverse manner in which Dr. Rhett intended to present the article's findings. Appellant should not be precluded from calling Dr. Rhett on the carpet for his blatant abuse of medical literature.

Cross examination is not the equivalent of reply testimony. To clear up the confusion caused by either Dr. Rhett's ignorance or deception, Appellant needed to call a rebuttal witness, Dr. Oakes, to show that the subject article had been misused by the defense.

This error in the court's ruling at the end of the Appellant's reply and so close to the end of trial prejudiced Appellant. Appellant was denied the ability to clarify deceptive testimony presented by the defense. The jury was left to believe that vaginal delivery is what causes most brain bleeds in newborns, even though this belief contradicts the findings of modern medicine. That belief was incited by the abusive use of the medical journal article by Respondent. Accordingly, instead of giving Appellant an opportunity to provide the jury with truthful information about the article in reply to Respondent's abuse of medical literature, the judge conveyed to the jury that Appellant's counsel disobeyed the rules of court by improperly

challenging a "learned treatise." Accordingly, Appellant was denied a fair trial and was prejudiced by the court's erroneous ruling.

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

Respondent argues that Appellant did not make a timely objection to the introduction of its pelvic model as demonstrative evidence. However, this argument ignores the fact that Respondent had not presented the model for review by Appellant prior to its use in court. Appellant objected once it became clear Respondent intended to misrepresent the human anatomy with its demonstrative model. The model used by Respondent was smaller than a biofidelic model, and Respondent mis-measured the distance to provide a 40% greater distance between the ischial spines and the pelvic or vaginal outlet. Without prior opportunity to inspect before trial, Appellant did not anticipate the defense's use of a smaller-than-life model, or that Respondent would purport to measure distances between landmarks on the model. The difference allowed the defense to mislead the jury about the height of a birth canal and the level of Jayden's station within the birth canal when the vacuum was applied to his head. Only when Dr. Rhett purported to measure the distance from the ischial spine to the pelvic outlet at a larger than lifelike dimension did Appellant's counsel recognize the defense's intention to mislead the jury. At that time, Appellant's counsel made a contemporaneous objection. (R. p. 1351, lines 1-6). Neither the trial court nor this Court should condone Respondent's violation of the Case Management Order and his misleading use of demonstrative evidence.

Just as shocking was the defense's demonstrative use of the vacuum pump on a flat countertop. Unlike the case where the vacuum is used on the spherical shape of a newborn's head, the vacuum suction to the table easily broke its seal when asymmetric force was applied. Again, the sole purpose was to confuse and mislead the jury, accomplished in part by violation of

the Case Management Order. Accordingly, the admission of both demonstrative devices was in error, and Appellant suffered prejudice as a result.

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

Respondent contends Appellant did not preserve objections to the trial court's refusal to make certain of her voir dire requests. Weeks before trial, Appellant submitted her *voir dire* requests. (R. pp. 3614-3619) The judge read only a few of the requests to the jury venire. The trial judged asked, "[a]re there any . . . further issues that the plaintiff wishes for me to take up at this time, on jury qualification?" (R. p. 214, lines 8-12). There was a side bar and a discussion about the judge's decision not to read Appellant's other *voir dire* requests, Appellant's objection thereto, and the judge's request that Appellant's objection be put on the record at a later time. Appellant's counsel thought he had put the *voir dire* objection on the record more expressly, but acknowledges that he has not yet located evidence of record in support.

CONCLUSION

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

Respectfully submitted,

Edward L. Graham
Mary H. Watters
J. Layton Ruffin
GRAHAM LAW FIRM, P.A.
383 West Cheves St.
Florence, SC 29503
(843) 662-3281

ATTORNEYS FOR APPELLANT

April 10, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

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

v.

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

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

CERTIFICATE OF COUNSEL

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

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

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable Michael J. Baxley, Circuit Court Judge

CASE NO.: 2007-CP-10-1553

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

v.

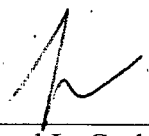
Edmund Rhett, Jr., M.D., Low Country Obstetrics and Gynecology, P.A.; Tenet South Carolina, Inc. d/b/a East Copper Regional Medical Center and AMN Services, Inc. f/k/a Nurses RX Inc.....Defendants,

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

PROOF OF SERVICE

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

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



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