THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2015-CP-46-00882
Appellate Case No. 2016-002008

Lorrie Dibernardo, individually and as the Personal Representative of the Estate of Anthony Dibernardo, deceased.....Appellant,

V.

Carolina Cardiology Associates, PA and Naresh Mori, MD.....Respondents,

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Petition for Rehearing

McGowan, Hood & Felder, LLC

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Lorrie Dibernardo, individually and as the Personal Representative of the Estate of Anthony Dibernardo, petitions the Court for rehearing with oral argument and reconsideration of Opinion No. 2019-UP-067 filed February 13, 2019, pursuant to Rule 221(a), SCACR. Appellant specifically asks this Court to reconsider (1) the import of *Childers v. Gas Lines, Inc.* 248 S.C. 316, 323–24, 149 S.E.2d 761, 764 (1966) and (2) the decision to summarily rely on the general proposition that res ipsa loquitur does not apply to medical malpractice cases—a fact undisputed by Appellant—in affirming the trial court. By summarily rejecting these arguments, the Court has failed to appreciate the distinction between the rejected doctrine of res ipsa loquitur and the allowed negative inference that may be drawn in medical malpractice cases, which includes the control of the instrumentality. Moreover, the Court is allowing inconsistency and uncertainty amongst the bench and bar by failing to squarely address the conflated cases upon which it relies. In support of the petition, Appellant respectfully submits the following:

I. Pertinent Facts

At trial, no one disputed the fact that Mr. Dibernardo's heart was injured during the pericardiocentesis conducted by Respondent Mori.[1] (R.553-54). More importantly, it was undisputed that if the procedure had been performed correctly, this injury would not have occurred. (R. 191, 193-94, 197, 314-15, 321, 342, 343,400). While the parties disagree on whether the sheath or the needle caused the injury during the pericardiocentesis, Respondent Mori, and both experts testified in accord that when the procedure is done properly no injury occurs. (R. 191, 193-94,

[1] Specifically, Respondent Mori; Dr. Shah; Appellant's expert, Dr. Alan Schob; and Respondents' expert, Dr. Jim Story, all agreed an abrasion/injury to the heart occurred during the pericardiocentesis performed by Respondent Mori. (R.199, 205, 400). In fact, Dr. Shah testified that "but for the injury" to Mr. Dibernardo's heart during the pericardiocentesis, Mr. Dibernardo "would not have died when he did." (R. 132). The injury was further supported by the fluoroscopy recordings and echocardiogram images, along with the medical records. (R. 196-97; Fluro # 1, Fluro # 2, Fluro # 3).

197, 314-15, 321, 342, 343, 400). Further during cross examination of Respondent Mori and his experts, Appellant elicited there was no explanation for Mr. Dibernardo's injury, but for improper control of the procedure.

Based on the testimony and evidence presented, Appellant requested a jury charge regarding the control of an instrumentality pursuant to *Childers v. Gas Lines, Inc.*, 248 S.C. at 323–24, 149 S.E.2d at 764. The requested charge stated:

> When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords a reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

(R.602). The trial court declined to give the charge, finding it did not reflect the medical malpractice burden of proof. (R.541). Appellant's counsel noted his objection for the record and the requested charge was marked as a court's exhibit. (R.541-42, 602). The jury subsequently returned a verdict in favor of Respondents. (R.1).

II. The Court Confuses Res Ipsa Loquitor and Negative Inference of Negligence

Res ipsa loquitur speaks for itself. The doctrine arises in a context in which "there is *no evidence, circumstantial or otherwise*, at least none of sufficient probative value, to show negligence, apart from the postulate, which rests on common experience and not on specific circumstances of the instant case . . . ." *Id.* (emphasis added).

In contrast to res ipsa loquitur, our courts allow circumstantial evidence to support an inference as a means of satisfying the burden of proof requirements. *See e.g., Snow*, 305 S.C. at 553-55, 409 S.E.2d at 803-04. The distinction between res ipsa loquitur and circumstantial evidence that allows an inference of negligence is significant. The two theories are distinguished by whether the factual circumstances point merely to an occurrence "without any tendency to indicate the responsible human agency" or if there is some indication of "fault of omission or

commission upon the part of the defendant." *Eickhoff*, 199 S.C. ____, 20 S.E.2d at 155. The first scenario cannot prove negligence without invoking res ipsa loquitur while, in the second circumstance, "a fact may be established prima facie by circumstantial evidence . . . without invoking the distinctive doctrine of res ipsa loquitur." *Id.* Since *Eickhoff*, South Carolina courts have continually invoked a flexible case-by-case approach in the use of circumstantial evidence to warrant the inference of negligence. *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965) (explaining when circumstantial evidence is relied upon to meet the burden of proof, "the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation").

Consistent with this approach, our courts have acknowledged an inference of negligence, as set forth in Appellant's requested charge, is appropriate for control of an instrumentality. In *Childers v. Gas Lines, Inc.*, the Court explained a reasonable inference can be drawn when an injury occurs from an instrumentality under the known management of the defendant, and an accident of such nature does not occur if the instrument had been managed with proper care, in the absence of explanation. 248 S.C. 316, 323–24, 149 S.E.2d 761, 764 (1966) ("negligence may be inferred from all of the facts and attendant circumstances in the case, and where the circumstances are such as to take the case out of the realm of conjecture and into the realm of legitimate inferences from established facts, a prima facie case is made"). Res ipsa loquitur was not invoked in *Childers*, because there was a known "responsible human agency" to indicate fault and coupled with specific factual circumstances—established by testimony—warranted an inference of negligence. *Eickhoff*, 199 S.C. ____, 20 S.E.2d at 155; *See e.g., Childers*, *Sheperd v. United States Fidelity & Guaranty Company*, 233 S.C. 536, 106 S.E.2d 381 (1958) (explaining a prima facie inference of negligence is sufficient to satisfy the burden of proof for proximate cause); *see also Bramlette v.*

Charter-Med.-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (citing *Childers*) (relying on facts of instrumentality of control, the Court found in a medical malpractice action that a defendant "may be held liable for anything which appears to have been a natural and probable consequence of his negligence"). Additionally, South Carolina appellate courts have held an admission by the defendant doctor along with circumstantial evidence is sufficient to infer proximate cause in medical malpractices cases. *Green v. Lilliewood*, 272 S.C. 186, 191, 249 S.E.2d 910, 912 (1978). Thereby, demonstrating that an inference based on evidence, as well as an admission at times, is distinguishable from res ipsa loquitur because the evidence far exceeds res ipsa loquitur's no evidence standard. Accordingly, choosing to affirm this case on the basis of res ipsa loquitor avoids the actual issue before this Court.

III. *Fletcher v. Medical University of South Carolina* Must be Clarified by this Court

Conclusory reliance on *Fletcher v. Medical University of South Carolina* only furthers the disparity in our jurisprudence on this issue and invites inconsistent application of the law throughout trial and appellate courts. As discussed herein, the *Fletcher* Court haphazardly relied on piecemeal case law to support its holding. In so doing, *Fletcher* characterizes res ipsa loquitur too broadly and suggests an impractical standard to warrant an inference in medical negligence cases. The holding in *Fletcher*, as now relied on by this Court, is at odds with *Bowie by Bowie v. Hearn* 294 S.C. 344, 364 S.E.2d 469 (1988) (*Bowie II*) and *Childers*. For these reasons, this Court must clarify *Fletcher* and recognize the use of circumstantial evidence to allow a negative inference in medical malpractice cases, including control of an instrumentality.

At the outset, Appellant does not take issue with the outcome in *Fletcher*.[2] The factual circumstances are different and is of no consequence to the matter before this Court. Rather,

[2] In *Fletcher*, the plaintiff underwent a bypass surgery and afterwards experienced bloating and shortening of breath. The plaintiff argued defendant doctors failed to inform her of such potential

Appellant takes issue with the reliance on *Fletcher*'s legal reasoning because it ignores the Supreme Court's holding in *Bowie II*. As such, Appellant turns to *Fletcher*'s interpretation of South Carolina case law to explain res ipsa loquitor and thereby illuminate the distinction with circumstantial evidence and the allowed negative inference.

The *Fletcher* Court began its analysis with citation to *Cox v. Lund*, 286 S.C. 410, 334 S.E.2d 116 (1985), which sets forth the well-known burden of proof for a plaintiff in a medical malpractice case. Specifically, the burden requires the plaintiff provide: (1) evidence of the generally recognized practices and procedures which would be exercised by a competent practitioner in similar circumstances and (2) evidence that the defendant doctor departed from the practices and procedures. The *Cox* Court found that the burden was established by plaintiff's expert who opined —based on a review of relevant medical charts and x-rays—that a doctor breached the standard of care for a colonoscopy when the evidence demonstrated the decedent's colon was unprepared for the procedure and offered the opinion that no colonoscopy should have been performed. 286 S.C. at 414–15, 334 S.E.2d at 119. Thus, the general proposition is derived from *Cox* that a plaintiff must satisfy the medical malpractice burden, which can be achieved through expert testimony that is formed through the review of relevant medical charts and x-rays.

The *Fletcher* Court then turned to *Bowie by Bowie v. Hearn*, 292 S.C. 223, 355 S.E.2d 550 (Ct. App. 1987) (*Bowie I*) for the following proposition that it deemed as "precisely on point":

> Under the plaintiff's reasoning in this case [*Bowie I*] the doctors in *Cox* could simply have testified that normally colons are not perforated during colonoscopies,

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risks. 390 S.C. at 461–62, 702 S.E.2d at 373–74. The plaintiff's expert testified the defendant doctors breached the standard of care, and on cross-examination, the expert testified that the identified problem "could have occurred during this procedure even in the absence of any surgical negligence." *Id.* at 463, 702 S.E.2d at 374. The Court of Appeals found no evidence established how defendant doctors deviated from the standard of care, and therefore plaintiff was improperly seeking recovery on a theory of res ipsa loquitur when the only basis was the expert saying a breach occurred. *Id.*

> the standard of care, therefore is a doctor should not perforate the colon, and to do so violates the standard of care. Such reasoning would, in effect, make a doctor an insurer of perfect result in every surgical procedure. A doctor is not an insurer of health and negligence may not be inferred.

390 S.C. at 464, 702 S.E.2d at 374–75. The *Fletcher* Court explained because *Bowie I*'s reasoning was on point it ended all discussion. *Id.* The Supreme Court overturned *Bowie I* and allowed the plaintiff's position disparaged by *Bowie I* and *Fletcher.* Simply put, the reasoning isn't as conclusory as you can never assert such argument as *Fletcher* suggests. By making that assertion, the *Fletcher* Court incorrectly expanded the doctrine of res ipsa loquitor.

To appreciate that expansion, it's necessary to review both *Bowie* cases in their entirety. In *Bowie I*, plaintiff "sued the physician who delivered him via caesarean section because he was cut on the cheek during the procedure, resulting in a scar." *Fletcher,* 390 S.C. at 464, 702 S.E.2d at 374–75. Plaintiff's expert testified the proper standard of care would have been for defendant doctor not to cut the baby. *Bowie I*, 292 S.C. at 226, 355 S.E.2d at 552. The *Bowie I* Court found the expert's opinion to be "conclusory" and insufficient to satisfy the statutory requirements previously enunciated by the Supreme Court in *Cox*. 292 S.C. at 227, 355 S.E.2d at 552. Finding this reasoning legally unsound, the *Bowie I* Court found plaintiff failed to meet the burden of proof. 292 S.C. at 227, 355 S.E.2d at 552.

The Supreme Court reversed *Bowie I* in a per curium opinion. 294 S.C. 344, 364 S.E.2d 469 (1988) (*Bowie II*). The Supreme Court found the expert's testimony that "the use of [the] standard technique will not result in injury to the baby" was sufficient. 294 S.C. at 345, 364 S.E.2d at 469. The Court noted that defendant doctor testified that he made "swipes" with a scalpel, instead of the standard tiny incision, and this admission coupled with expert testimony was evidence that defendant doctor deviated from the standard of care. *Id.* at 346, 364 S.E.2d at 469. In sum, the Supreme Court found an expert stating the standard technique does not cause an injury,

coupled with evidence or admission by defendant doctor, is sufficient to meet the burden of proof, i.e. is not res ipsa loquitur.

Despite the reversal, the *Fletcher* Court relied on *Bowie I*'s misperception of *Cox* to find res ipsa loquitur and for the proposition that "negligence cannot be inferred." 390 S.C. at 464–65, 702 S.E.2d at 375 ("[t]he analysis in *Bowie I* is precisely on point with this case, and we discern no factual basis that would cause the reasoning in that case to be inapplicable to the facts presented here.") Appellant respectfully submits the reasoning of *Bowie I*, as interpreted by the *Fletcher* Court as res ipsa loquitur, was rejected by the Supreme Court in *Bowie II*—relying on the expert's testimony to the effect that if the procedure had been done properly, the injury would not have occurred when coupled with other evidence. This is seemingly acknowledged by the *Fletcher* Court in footnote 3 in which it states, "No self-incriminating testimony from [the defendant doctors] in this case suggests a deviation in the standard of care," however this is merely dicta and fails to set forth, and arguably ignores, the standard as outlined by *Cox* and *Bowie II*. 390 S.C. at 464 n. 3, 702 S.E.2d at 375 n. 3. Further, the suggestion that there is a requirement of self-incrimination to overcome an implication of res ipsa loquitur has never been the standard. Instead, South Carolina courts have readily relied on medical records and x-rays as the basis of circumstantial evidence in medical malpractice, as discussed *supra*. As it stands, *Fletcher* characterizes res ipsa loquitur too broadly and suggests an impractical standard to warrant an inference in medical negligence cases.

Moreover, reliance on the proposition that "negligence may not be inferred" is an incorrect statement of law. 292 S.C. at 227, 355 S.E.2d at 552. It is well settled in South Carolina that negligence can be inferred. *The Winthrop Univ. Trustees for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 162, 791 S.E.2d 152, 163 (Ct. App. 2016) ("where circumstantial

evidence is relied upon to establish liability, plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation") (internal citation omitted).[3] Both of these inconsistencies should be clarified by this Court.

In sum, the doctrine of res ipsa loquitur is inapplicable when expert testimony and other evidence, which can include admissions, demonstrate that if the procedure was done correctly the injury would not have occurred. Therefore, Appellant respectfully requests this Court reconsider its citation to *Fletcher*, and provide a rehearing as to the applicability of Appellant's requested charge.

Conclusion

For the foregoing reasons, Appellant requests this Court grant this Petition for Rehearing with oral argument.

Signature Page to Follow

[3] *See e.g.*, *McQuillen v. Dobbs*, 262 S.C. 386, 392, 204 S.E.2d 732, 735 (1974) (affirming the denial of a directed verdict when plaintiff established a reasonable inference that defendant's negligent inspection of furnace led to fire; based partially on testimony regarding recommended procedures for the proper inspection and maintenance of furnace that defendant's failed to follow); *McCready v. Atl. Coast Line R. Co.*, 212 S.C. 449, 455, 48 S.E.2d 193, 196 (1948); *Graham v. Town of Latta, S.C.*, 417 S.C. 164, 187, 789 S.E.2d 71, 83 (Ct. App. 2016); *Tucker v. Doe*, 413 S.C. 389, 401, 776 S.E.2d 121, 128 (Ct. App. 2015); *Gastineau v. Murphy*, 323 S.C. 168, 178–79, 473 S.E.2d 819, 826 (Ct.App.1996) (quoting 29 Am.Jur.2d *Evidence* § 313 (1994)), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998).

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on March 13, 2019 she served counsel for Respondent with the *Petition for Rehearing* in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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Respectfully submitted,

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March 13, 2019

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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RE: *Lorrie Dibernardo v. Carolina Cardiology*
Appellate Case No. 2016-002008
Petition for Rehearing

Dear Ms. Kitchings,

Enclosed please find Appellant's Petition for Rehearing and one copy in the above captioned matter, along with the proof of service. Please return a stamped copy with my courier. Thank you for your assistance with this matter.

With kind regards,

Whitney B. Harrison

Whitney B. Harrison

Enclosures

cc: George Cox Beighley, Esquire
Carmen Vaughn Ganjehsani, Esquire