

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2013-001711

Samantha Jamison as Personal Representative of the
Estate of Jayden Joenelle Jamison-Barber, Deceased..... Respondent.

v.

Ansley, L. Hilton, MD individually and as agent, Servant or
employee of Rock Hill Gynecological and Obstetrical
Associates, PA; Christopher B. Benson, MD, as agent,
servant or employee of Rock Hill Gynecological and
Obstetrical Associates, PA; and Rock Hill Gynecological
and Obstetrical Associates, PA, Defendants,

Of whom Rock Hill Gynecological and Obstetrical
Associates, PA, is the..... Appellant.

RESPONDANT'S FINAL BRIEF

James W. Boyd
Post Office Box 36425
1544 Ebenezer Road
Rock Hill, SC 29732
(803) 328-2600

D. Bradley Jordan
546 East Main Street
P.O. Box 11785
Rock Hill, SC 29731
(Tel.) (803) 817-7999

Attorneys for Respondent

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JUN 02 2014

SC Court of Appeals

Other Counsel of Record:

Mr. Thomas C. Salane
Mr. R. Hawthorne Barrett
Turner Padgett Graham & Laney P.A.
PO Box 1473
Columbia, SC 29202
(803) 254-2200
Attorneys for Appellant

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STATEMENT OF THE ISSUES ON APPEAL

- I. IS APPELLATE REVIEW OF THE ISSUE OF PROXIMATE CAUSE OF THE DEATH OF THE CHILD BY ACTIONS OF ROCK HILL GYN-OB PRECLUDED BECAUSE THOSE GROUNDS WERE NOT RAISED IN THE APPELLANT'S MOTION FOR DIRECTED VERDICT.**
- II. DID THE APPELLANT WAIVE ANY OBJECTION TO THE JURY VERDICT BECAUSE THE APPELLANT FAILED TO OBJECT TO THE VERDICT FORM.**
- III. DOES THE RECORD CONTAIN SUPPORT FOR THE VERDICT AGAINST ROCK HILL GYN-OB BASED ON ACTS OR OMISSIONS OF THE PRACTICE.**

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint in the Court of Common Pleas in York County, South Carolina. The case was tried by jury before the Honorable Steven H. John, beginning April 18, 2013. After five days at trial the case was submitted to the jury on April 12, 2013. The jury found rendered a defense verdict on behalf of Ansley, L. Hilton, MD and Christopher B. Benson, MD and found for the Plaintiff again Rock Hill Gynecological and Obstetrical Associates, P.A. and awarded the Plaintiff Ninety Thousand (\$90,000.00) Dollars in damages. The Appellant moved for a new trial or for the alternative judgment as a matter of law which Judge John denied. On April 25, 2013, the Defendants filed a Motion pursuant to Rule 59(e) which was denied by an Order filed on July 15, 2013. The Appellant filed and served a Notice of Appeal on August 29, 2013.

STATEMENT OF FACTS

On July 18, 2008, Samantha Jamison was seen by Rock Hill Gynecological and Obstetrical Associates, P.A. due to her pregnancy. An ultrasound was done and she was found to have high blood pressure.¹ Respondent presented at the office with a history of chronic hypertension.² During the course of her pregnancy the treatment for her hypertension was not effective.³

On August 9, 2008, Respondent presented at the emergency room of the hospital due to abdominal pain. She was seen by one of the physicians of Rock Hill Gynecological and Obstetrical Associates, P.A. and released.⁴ On August 25, 2008, Respondent went to Rock Hill Gynecological and Obstetrical Associates, P.A. when she had noticed that the baby was moving less.⁵

The Respondent presented to the Rock Hill Gynecological and Obstetrical Associates, P.A. and was seen by Dr. Miller on August 25, 2008. Dr. Miller noted a history of uterine rupture and a decrease in the amniotic fluid index.⁶ An ultrasound was performed on August 25, 2008.⁷ The baby's abdominal circumference was down two weeks from a previous ultrasound.⁸

Respondent went to Rock Hill Gynecological and Obstetrical Associates, P.A. on September 5, 2008 due to the baby moving less.⁹ Respondent signed in at 8:40am and a non-stress test was started as 10:00pm. A biophysical profile was started at 10:48am.

¹ R. P. 76, lines 20 - P. 81, line 4

² R. P. 278, lines 21-22

³ R. P. 279, lines 2-5

⁴ R. P. 79, line 23- P. 814, line 1

⁵ R. P. 82, line 2-9

⁶ R. P. 190, lines 2-9

⁷ R. P. 341, lines 24-25

⁸ R. P. 342, lines 23- P. 343, line 4

⁹ R. P. 83, lines 7-15

The non-stress test would have ended at approximately 10:30am plus there was a twenty (20) minute wait between 8:40am and the start of the non-stress test at 10:00am.¹⁰

Respondent was given a biophysical profile by Dr. Hilton. The biophysical profile was stopped in ten (10) minutes and Respondent was told to go directly to the hospital.¹¹

The Respondent went to the hospital and ultrasounds at the hospital were unable to detect a heart beat. The baby was dead.¹²

ARGUMENT

I. APPELLATE REVIEW OF THE ISSUE OF PROXIMATE CAUSE OF THE DEATH OF THE CHILD BY ACTIONS OF ROCK HILL GYN-OB IS PRECLUDED FROM APPELLATE REVIEW BECAUSE THOSE GROUNDS WERE NOT RAISED IN THE APPELLANT'S MOTION FOR DIRECTED VERDICT.

A motion for directed verdict shall state the specific grounds therefore. Rule 50 of the SC Rules of Civil Procedures. An Appellant's failure to raise a particular issue in its directed verdict motion precludes an Appellate review of that issue. Holly Woods Assoc. of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (S.C. App.2011).

The Appellant's Motion for Directed Verdict was as follows: "Basically, Dr. Phillips, while he testified as to the standard of care, ultimately, on cross-examination, opined under oath here in Court that anything that they did or didn't do caused the baby to die, so on the basis of the fact that he had – ultimately had no opinion that the Defendants, any of the Defendants, caused the baby's death is subject for a directed verdict."¹³ In his brief, the Appellant raises the issue that Dr. Phillip's testimony that the baby could have survived if the Respondent had gotten to labor and deliver at the hospital sooner on

¹⁰ R. P. 553, lines 1-15

¹¹ R. P. 404, lines 1- P. 406, line 14

¹² R. P. 93, lines 10- P. 94, line 1

¹³ R. P. 246, lines 10-17

September 5, 2008, was unsupported speculation and did not establish a causal link between the time the Respondent spent at the doctor's office and the baby's death. However, this was not an issue raised in the Appellant's Motion for Directed Verdict and cannot be now raised on appeal. As to the action of Dr. Miller on August 25, 2008, the Appellant raises the issue that Dr. Phillips' opinion did not satisfy the most probably standard and rested on speculation. Again, this issue was not raised by the Appellant in his Motion for Directed Verdict and cannot now be raised on appeal.

II. APPELLANT WAIVED ANY OBJECTION TO THE JURY VERDICT BECAUSE THE APPELLANT FAILED TO OBJECT TO THE VERDICT FORM.

When a party fails to object or call attention to error in a verdict form or a jury instruction until after a verdict has been rendered, the party waives such an objection and the alleged error is not preserved for review. See Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (S.C. App. 1995). Johnson v. Hoechst Celanese Corp. involved a land contamination dispute involving several properties located in the Pineforest Subdivision of Greenville County. Id. at 418. The trial judge advised counsel he intended to give the jury a color coded map as a Court exhibit which depicted the location of each plaintiff using the classifications argued by the parties. Id. at 419. The Court instructed the parties to prepare such an exhibit and corresponding verdict form. Id. The Court's exhibit and verdict form were reviewed by the parties before they were given to the jury, and after specific inquiry by the Court, there was no objection to them. Id. The jury returned a verdict in favor of the defense against all but two plaintiffs. Id. After the damages verdict was returned, the three landowners filed a JNOV motion, in which they alleged the map and verdict form inadvertently failed to designate them as

"creek plaintiffs" based on geographic location. Id at 419-420. The landowners contended the court should use its broad discretionary power to remedy this inequity because the verdicts against them were inconsistent with the other plaintiffs similarly situated. Id at 420. The JNOV motion was denied. Id. The landowners then moved for reconsideration of the denial of the JNOV or, in the alternative, a new trial. Id. This motion was then denied. Id. On appeal, the landowners contended that the trial court erred by failing to grant their motion for JNOV and that the trial court also erred by failing to grant a new trial. Id at 420-421. The landowners argued a new trial should have been granted because the verdicts were inconsistent and against the weight of the evidence. Id at 421. The Court of Appeals disagreed, and held that, because they did not raise the alleged error at the first opportunity, the landowners failed to preserve any issue regarding the Court's exhibit and verdict form. Id. In reaching its decision, the Court of Appeals additionally relied on Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 1989), holding that a party's failure to object to a jury instruction waives any alleged error in the charge.

In the present case, Rock Hill Gynecological & Obstetrical Associates, PA, failed to raise any objection to the verdict form until after a verdict was rendered by the jury. The jury form clearly gave the jury a choice of finding against any of the three defendants separately. The defendant had an opportunity to review the form, and failed to bring the Court's attention to any issues anticipated. Accordingly, the Appellant has waived any objection to the verdict form and cannot now raise the issue on appeal.

III. THE RECORD CONTAINS SUPPORT FOR THE VERDICT AGAINST ROCK HILL GYN-OB BASED ON ACTS OR OMISSIONS OF THE PRACTICE.

A verdict against the master principle alone is permissible and will be sustained where the evidence is such that the jury may conclude that the acts were committed through the agency or some other servant not joined as a defendant. Chapman-Storm Lumber Co. v. Minnesota/S.C. Land and Timber Co., 183 S.C. 131, 190 S.E. 2nd 117 (S.C. 1937). In this matter, there was ample evidence presented of negligence and causation by others than Dr. Hilton and Dr. Benson. After discussing the Respondent's condition until August 25, 2008, when she was seen by Dr. Miller, Dr. Phillips was asked:

QUESTION: Do you have a conclusion based on her condition up until August 25, 2008, what action should have been taken on August 25, 2008, that would have been within the standard of care?

ANSWER: Yes.

QUESTION: What is that conclusion?

ANSWER: Ideally, appropriately, a non-stress test and a biophysical profile would be done that day to see if this baby's suffering from the lack of oxygen developing what we call fetal acidosis from the lack of oxygen and the build-up of waste products. At the very latest you would want to do that test a week later. If you don't do it on the 25th, a week later, which is September 2nd, would be the appropriate time to do a non-stress test and a biophysical profile."¹⁴

Dr. Phillips further testified as follows:

QUESTION: Given the situation that she presented with on August 25, 2008,

¹⁴ R. P. 192, line 3-17

I believe you testified earlier that a non-stress test and a biophysical profile could have been preformed or should have been preformed that day.

ANSWER: Yes.¹⁵

Dr. Phillips testified that Respondent should have been followed up with a week after by bio-physical profiles and non-stress test. Dr. Phillips testified, "So if you don't do a non-stress test and a bio-physical profile right then and there, at the very latest you have the patient come back within a week. This particular case it would have been September 2nd. If she had come back by September 2nd and had a non-stress test and a bio-physical profile, I don't think I would be here today."¹⁶

When asked about his opinion that a non-stress test and a bio-physical profile should have been run on August 25th or within a week of that, Dr. Phillips was asked as follows:

QUESTION: Do you have an opinion to a reasonable degree of medical certainty as to if it has been run, what it would have shown?

ANSWER: Well, it would have been no worse than what it was September 5th and could be better, but abnormal enough that intervention should have taken place."¹⁷

Concerning Dr. Millers' failure to order a non-stress test and a bio-physical profile on August 25th, Dr. Phillips was asked,

QUESTION: You agree that Dr. Miller did not cause Ms. Jamison's baby to die, true?"

ANSWER: Not directly, but if Dr. Miller had ordered a non-stress test and a bio-physical profile on the 25th or a week later, certainly that contributed to the fetal demise."¹⁸

¹⁵ R. P. 213, line 17 – 21

¹⁶ R. P. 214, line 11-16

¹⁷ R. P. 220, lines 7-12

¹⁸ R. P. 239, lines 4-8

Dr. Phillips also testified that there was a delay in treatment of the Respondent prior to the time of her seeing the named physicians. Dr. Phillips testified as follows:

QUESTION: Doctor, do you have a conclusion as to whether or not there was a delay in the treatment for Samantha Jamison when she appeared at 8:40am that morning?

ANSWER: Yes, there was.

QUESTION: Okay. And, Doctor, is it your conclusion to a reasonable degree of medical certainty that the delay was a breach in the standard of care?

ANSWER: Yes, it was.

QUESTION: Doctor, do you have a conclusion to a reasonable degree of medical certainty as to whether or not that, delay in treatment caused or contributed to Jayden's death, the death of Samantha's son?

ANSWER: Yes, it did.¹⁹

Further Dr. Phillips testified as follows:

QUESTION: Doctor, do you have a conclusion as to whether or not if the doctors at Rock Hill Gyn-Ob, Drs. Hilton, Benson and others has acted within the standard of care and acted expeditiously in ordering tests and performing a c-section, whether or not Jayden would have lived?

ANSWER: Yes.

QUESTION: And, what is that opinion?

ANSWER: Jayden would have lived, because there wouldn't have been the delay in doing those two tests, and there wouldn't been subsequent delay in getting the patient to the hospital as there was in this particular case."²⁰

¹⁹ R. P. 195, lines 12-24

²⁰ R. P. 212, line 21 - P. 213, line 6

Addressing the issue of delay in treatment on September 5th, Dr Edward Karotkin, a neonatologist, testified that the child would have lived had a c-section been performed prior to 11:40am to 11:45am on that date.²¹ Dr Karyotin went on to explain in detail the basis for his opinion.²²

When asked on cross-examination concerning criticism of ultrasonographers or nurse practitioner, Robin Pruetto, Dr. Phillips testimony was as follows:

QUESTION: Dr. Phillips, you have no criticisms of the ultrasonographers or nurse practitioner, Robin Pruetto in this case. Correct?

ANSWER: Other than they should have expedited doing the non-stress test as well as the biophysical profile if – unless there was any extraneous circumstances preventing then from being done as rapidly as possible.”²³

When Dr. Phillips was asked a question concerning his statement in his deposition that he had no criticism of the ultrasonographers or nurse practitioner, Dr. Phillips testified as follows:

ANSWER: Yes, it was true. But the reason why I said that now is because after reading the deposition and testimonies of the ultrasonographers or nurse practitioner, they didn't do what was necessary to expedite the non-stress test and that ultrasonogram the biophysical profile, transcripts of which I had since the deposition.²⁴

Dr. Phillips further testified that a two hour and ten minute delay in seeing a doctor when there is reduced fetal movement is a breach in the standard of care.²⁵

²¹ R. P. 143, lines 5-11

²² R. P. 143, line 12 – P. 144, line 5

²³ R. P. 236, line 6-12

²⁴ R. P. 236, line 22-P 237, line 2

²⁵ R. P. 245, line 18-21

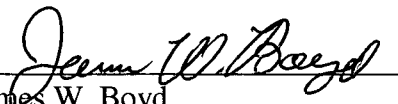
This is a reference to employees of Rock Hill Gyn-Ob other than Drs. Hilton and Benson. The Appellant argues that the Respondent's medical experts' failure to link the failure to run test prior to September 25, 2008, and the wait time on that date to the baby's death. This issue was not addressed in the Appellant's Motion for Directed Verdict and is not properly before the Court however the Appellant's reliance on this proposition is misplaced. In the case, Carver v. Medical Society of South Carolina (394 S. E.2d 125, 286 S.C. 347 (S.C. App. 1985) merely stands for the proposition that when expert testimony is not relied upon to establish proximate cause the Plaintiff must offer evidence that rises above mere speculation or conjecture. In the present case expert testimony linking the baby's death to the action of Respondent was presented. The case Hoard v. Roper Hospital 694 S.E.2d 1, 387 S.C. 539 (S.C. 2010) is relied upon by the Appellants that involved an unusual situation in which the allegations against a radiologist were that he failed to report a misplaced umbilical vein catheter. However, another doctor had reviewed the radiologist's report and decided not to move the umbilical vein catheter for other reasons. Therefore, there was no damage from the radiologist to notify the second doctor because the second doctor knew of the situation and did not act on it.

As the trial judge stated in ruling on post trial motions, "the verdict can be supported by facts and evidence in the record": regarding action of the corporation through other agents, servants, employee and/or representative that could be classified as negligent and therefore, the verdict is not inconsistent

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,


James W. Boyd
1544 Ebenezer Road
P.O. Box 36425
Rock Hill, SC 29732
(803) 328-2600

D. Bradley Jordan
546 East Main Street
P.O. Box 11785
Rock Hill, SC 29731
(Tel.) (803) 817-7999

Attorneys for Respondent

May 29, 2014

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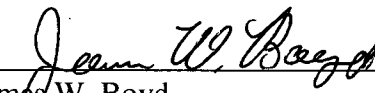
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Of whom Rock Hill Gynecological and Obstetrical
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CERTIFICATE OF COUNSEL

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


James W. Boyd
Post Office Box 36425
1544 Ebenezer Road
Rock Hill, SC 29732
(803) 328-2600

RECEIVED Attorney for Respondent

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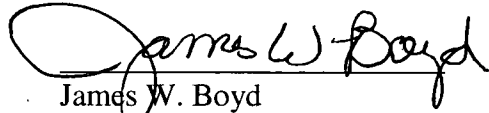
SC Court of Appeals

Of whom Rock Hill Gynecological and Obstetrical
Associates, PA, is the..... Appellant.

PROOF OF SERVICE

I, James W. Boyd, certify that I served on May 30, 2014 the within
Respondent's Final Brief on the Appellant by depositing a copy of the same in the
United States mail, postage prepaid, addressed to its attorney of record, R.
Hawthorne Barrett, PO Box 1473, Columbia, SC 29202.

I further certify that all parties required by Rule to be served have been
served.

A handwritten signature in black ink, appearing to read "James W. Boyd". The signature is written in a cursive style with a large, looping initial "J".

James W. Boyd
1544 Ebenezer Road
Post Office Box 36425
Rock Hill, SC 29732
(803) 328-2600
Attorney for Respondent

May 30, 2014