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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Appellate Case No. 2016-001551

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Christy Byrd, as Next Friend of Julia B., a minor, ..... Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning, ..... Respondents.

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**PETITION FOR REHEARING**

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**GRAHAM LAW FIRM, P.A.**

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July 18, 2019

## INTRODUCTION

Petitioner hereby petitions this Court for reconsideration of its Opinion No. 5662, filed July 3, 2019. To provide a quick and convenient reference to the specific language of the medical and obstetrical emergency statute, Appellant hereby sets forth the statute in its entirety. The South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-230, provides:

> Emergency medical and obstetrical care exceptions.
>
> (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.
>
> (B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.
>
> (C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:
>
> (1) in immediate threat of death; or
>
> (2) in immediate threat of serious bodily injury.
>
> Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

## ARGUMENT

**I. The Court Overlooked and/or Misapprehended How, as a Matter of Law, Respondents Failed to Create a Jury Question of Medical Instability in Accord with the Language and Purpose of the Medical Emergency Statute.**

**A. The Court Overlooked and/or Misapprehended that Respondents Presented No Evidence of Medical Instability of This Patient, Only that Shoulder Dystocia Is an Unstable Situation and Some Patients With a Shoulder Dystocia Complication Will Become Medically Unstable.**

**1. The Court Overlooked and/or Misapprehended that the Statutory Provides that Qualified Immunity Language, "Shall Only Apply if the Patient is Not Medically Stable," Which Must Be Strictly Construed as In Derogation of the Common Law.**

This Court recognized in its Opinion that the subject statute must be strictly construed because it is in derogation of the common law. Therefore, every word and phrase must be construed so as to depart as little as possible from the common law, consistent with legislative intent and other principles of statutory construction.

The primary basis upon which to determine legislative intent is by reference to the specific words and phrases used in the statute. Such words and phrases must ordinarily be interpreted in accordance with the customary usage and meaning.

The phrasing of the statutory exception for medical stability reveals the legislative purpose. It provides that qualified immunity from claims based on ordinary negligence "shall only apply if the *patient is not* medically stable." **(emphasis added).**

That the General Assembly chose those words demonstrates that the testimony of Respondents and their experts was inapposite. Appellant draws the Court's specific attention to the words, "...the patient is not...."

"[T]he patient" makes explicit that the only medical stability that matters is that of the minor plaintiff. "[T]he patient" does not refer to patients generally, other specific patients, or the situation or context of shoulder dystocia.

"[I]s not," being in the present tense, further clarifies that actual and then current medical instability of the patient is required for Respondents to avoid the statutory exception. Proving that a patient may be in an unstable *situation* is a far cry from proving that the *patient herself is not* medically stable. Proving that other patients have been medically unstable during shoulder dystocia, or that the minor plaintiff might potentially have become medically unstable during her shoulder dystocia does no more than distract the Court from an important legal issue whether the patient, herself, was medically unstable.

If the General Assembly had intended the interpretation of the phrase proffered by Respondents, it could have easily have expressed that by choosing qualifiers like "unstable situation," "potential medical instability," or "threat" thereof. That it did not is telling, particularly where it had no difficulty expressing immediate "threat" in the same statute.

Words like "potential" harm or "threatened" harm would serve the Respondents' interests by expanding the legislature's focus beyond "the patient is not medically stable". To Respondents' chagrin, the General Assembly chose not to do so and made abundantly clear that its focus was on the patient being delivered ... in the present tense.

Strict construction of the statute leads to the same interpretation. Strict construction would circumscribe "the patient" as the minor plaintiff and "is not" as her contemporaneous condition during the shoulder dystocia. Such construction signifies that testimony about an unstable situation [italicize situation] or the minor plaintiff's *potential* future instability has no legal effect.

The only relevant testimony about her then current medical stability during the shoulder dystocia consistently asserts or admits that the minor plaintiff was indeed medically stable prior to, during and after the shoulder dystocia.

**2. The Court Overlooked and/or Misapprehended that This Case Does Not Involve a Battle of the Experts.**

In their Brief Respondents characterize this trial as a "classic battle of the experts." In dicta, the Court acknowledged a similar perspective in deciding the case. This is incorrect. Respondents and Respondents' experts gave extensive testimony about the unstable situation presented by shoulder dystocia. Appellant's experts made no effort to counter this assertion.

Appellant's experts testified extensively that the individual patient was medically stable before, during and after the shoulder dystocia. Respondents made no responsive counter. Indeed, much testimony from Respondents conceded that the patient was medically stable, despite their assertion of an unstable situation.

There is no battle of the experts when Appellant's experts' express opinions which the opposition does not challenge, and vice versa. Rather, they are addressing different specific subjects: (1) whether this patient was in fact medically stable during this particular

shoulder dystocia; and (2) whether a shoulder dystocia is an unstable situation, thereby automatically rendering the patient medically unstable without regard to her actual health condition, which was medically stable.

The issue for the Court is not whether experts on each side presented different testimony, as they obviously did. The legal question for the Court is whether Respondents' evidence of potential future patient instability, in the presence of an unstable complication, in and of itself creates a jury question about whether this individual patient was not medically stable during her particular shoulder dystocia.

Legislative intent as revealed in the statutory language says not. Strict construction says not.

If Respondents' evidence of potential future medical instability in the face of an ordinarily unstable situation has no legal significance, then it is immaterial whether or not objections to that evidence were lodged. For a variety of reasons, lawyers often refrain from asserting meritorious objections to evidence. Most frequently, as here, that is because the evidence has no legal significance.

With all evidence on point confirming the medical stability of the minor patient at all relevant times, no jury issue was created on this subject. The trial court thus erred in denying Appellant's motion for directed verdict and her post-trial motions.

**3. The Court Overlooked and/or Misapprehended that Grounds for Avoiding the Statutory Exception for a Medically Stable Patient Must Be Construed Narrowly, or It Would Be Meaningless and Superfluous.**

Every "genuine emergency" involves an unstable situation and potential medical instability. Because these factors are present in every genuine emergency, the statute must

not be construed to allow defendants to avoid the medical stability exception by invoking these always-present factors. Yet this exactly what the Respondents are asking this Court to bless.

As these factors are always present in a genuine emergency, Respondents' proposed construction would eviscerate the medical stability exception. This exception would have no significance. It would have no meaning. It would be completely superfluous, a result not to be tolerated under governing law.

Grounds for avoiding the medical stability exception should at least be restricted to cases involving satisfactory proof that the patient, herself is medically unstable. The Court should disallow avoidance of the exception based on evidence about unstable situations and potential future medical instability.

The legislative intent as reflected by statutory word choices demands no less. To the same effect are long-established and well-respected principles of statutory construction, including those previously addressed herein.

**4. The Court Overlooked and/or Misapprehended that Facts Not Known Until After Delivery Are Properly Used to Determine if a Patient was Medically Stable During a Shoulder Dystocia.**

It is axiomatic that facts not known until after birth cannot be used to prove negligence during birth. A charge on hindsight would direct the jury to disregard such evidence in evaluating whether a defendant physician was negligent.

Although the hindsight rule precludes use of after-discovered facts to prove negligence, Appellant is aware of no authority that precludes the use of such evidence to prove medical stability of a patient during an emergency. Support for using such evidence

to establish medical stability arises from the statutory language and the strict construction mandate.

By virtue of reassuring fetal heart monitor strips, excellent Apgars and cord blood gases, all experts agree that the minor was medically stable before and after the shoulder dystocia. Defense witnesses object, however, to consideration of post-birth evidence like Apgars and cord blood gases.

There will not likely ever be direct evidence of the specific effects on the baby from the shoulder dystocia. Therefore, post-birth evidence, compared with pre-birth evidence, sheds far more light on the infant's medical stability than any other potential evidence. There is no reasonable justification to disallow post-birth evidence to assess whether the infant was stable or unstable during the dystocia.

Using such evidence in this context is supported by statutory language, strict construction and common sense. Would the defense seek to disallow consideration of post-birth evidence if it proved medical instability?

**5. The Court Overlooked and/or Misapprehended that Respondents Did Not Meet Their Burden of Proving that the Statutory Exception for a Medically Stable Patient Does Not Apply.**

As the Court previously acknowledged, the medical and obstetrical emergency statute is an affirmative defense. Respondents have the burden of proof on all elements of the statute.

Under a proper construction of the statute, Respondents did not meet that burden to disprove the patient's medical stability. Although Respondents presented evidence that shoulder dystocia is an unstable situation involving a risk of potential future medical

stability, they presented no evidence that the minor plaintiff patient herself was medically unstable at any time during her particular shoulder dystocia complication.

The medical stability exception therefore applies as a matter of law, making the medical and obstetrical emergency statute inapplicable. The trial court erred in failing to so rule at the directed verdict stage and in post-trial motions.

**B. The Court Overlooked and/or Misapprehended the Significance of Dr. Browning's Recognition and Acknowledgement that His Patient Was Medically Stable. The Court Overlooked and/or Misapprehended that the Statute Is Not Intended to Provide Qualified Immunity for a Physician Who Recognizes and Acknowledges that His Patient is Medically Stable. The Court Overlooked and/or Misapprehended that Dr. Browning Knew and Admitted that His Patient Was Medically Stable.**

The purpose of the statute is to shield physicians from liability for damages caused by their ordinary negligence, in the context of medical work performed by them under extraordinary conditions. To obtain qualified immunity such conditions must involve a genuine emergency, an immediate threat of serious harm and medical instability.

The legislature has deemed physician liability for ordinary negligence to be unfair when a doctor is unexpectedly called upon to treat a patient in extremis. In such circumstances the physician may perceive a need to take hasty shortcuts and compromise his customary quality of care because of the immense time pressure. This is because he has been forced to intervene quickly under adverse unplanned circumstances in an effort to avoid a dire outcome.

When a doctor perceives no medical instability, there is no need or justification for hasty shortcuts. If he perceives no immediate threat of death or other severe harm, there is no right or reason to compromise his usual quality of patient care. The statute was not intended to convey qualified immunity to a physician who does not believe there is an emergency so severe that it must be handled outside of the normal course.

Dr. Browning knew there was no medical instability. He saw no immediate threat of death or serious bodily injury. The statute is not designed to give qualified immunity to someone in his shoes. ROA 530:5-8, 16-22; 531:22-533:1.

**II. The Court Overlooked or Misapprehended that Appellant Did Preserve the Issues Addressed in Her Briefs.**

The preserved issues arose under the umbrella of the inapplicability of the emergency statute as a matter of law. ROA 876:10-21. Certain sub-issues were raised expressly. ROA 38-48. Others were raised with more subtlety or by inference. All were raised sufficiently for the trial court to understand them and rule on them. ROA 1-4. Nothing more was required of Appellant to preserve all briefed issues for appellate review.

## CONCLUSION

For the reasons stated, Appellant requests the Court to grant a rehearing of all issues. Alternatively, Appellant requests the Court to modify its Opinion in accord with this Petition, thereby: (1) reversing the Lower Court's order denying Appellant's Motions for a Directed Verdict, New Trial Absolute and other post-trial relief; and (2) remanding for a new trial with the medical and obstetrical emergency statute ruled inapplicable as the law of the case.

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**PROOF OF SERVICE**

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I hereby certify that one copy of the ***Petition for Rehearing*** the above-referenced matter was served by electronic mail and U.S. Mail, postage prepaid, on July 18, 2019 addressed to the following counsel of record:

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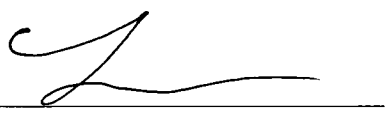

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