STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

RECEIVED
AUG 05 2019
SC Court of Appeals

Case No. 2013-CP-21-00690
Appellate Case No. 2016-001551
Opinion No. 5662, filed July 3, 2019

Christy Bryd, as Next Friend of Julia B., a minor,

Appellant,

v.

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

Respondents.

RETURN TO PETITON FOR REHEARING

In this obstetrical medical malpractice action, the Appellant Mother alleges that the Respondent Obstetrician was negligent in treating the shoulder dystocia emergency that occurred during delivery of her Infant. After a trial on the merits, the jury returned a verdict for Respondent Physician and his practice under the Obstetrical Medical Emergency Exception. As indicated by the special verdict form, the jury found that "the Defendants prove[d] by a greater weight or preponderance of the evidence that the facts of this case arise out of a genuine emergency situation where the patient is not medically stable and there is an immediate threat of death or serious bodily injury," and that Dr. Browning did not "act in manner that was grossly negligent." This Court affirmed the Trial Court's denial of the Appellant's motion for a new trial and/or JNOV, and the

Appellant has petitioned for rehearing. As requested by the Court, the Respondents Dr. John B. Browning and Mcleod Physician Associates II submit this Return to the Appellant's petition for rehearing.

I. The Court did not overlook and/or misapprehend the law or the evidence of record which establishes that the conflicting medical evidence and expert testimony created a jury question on whether the patient was not medically stable under Emergency Medical and Obstetrical Care statute, S.C. Code § 15-32-230.

The South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-230, referred to as "the obstetric emergency exception" and quoted in full in the Court's opinion, 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.

Contrary, to the Appellant's contentions, the Court did not overlook and/or misapprehend any of the elements of the limitation of medical malpractice liability provided for in the Emergency

Medical and Obstetrical Care statute, S.C. Code § 15-32-230, nor did the Court overlook and/or misapprehend the applicable rules of statutory construction.

The opinion demonstrates that the Court properly considered the provisions of the statute and correctly identified the three requisite elements, and the opinion also demonstrates that the Court considered the statute as being in derogation of common law and applied strict construction. As set forth in the opinion, the Court agreed with the Appellant that:

> [U]nder a strict construction of the statute, the physician must prove all of the three required elements: (1) the claim arises out of a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient was under an immediate threat of death or serious bodily injury.

All the expert testimony establishes beyond dispute, and the Appellant concedes that the shoulder dystocia presented a genuine emergency, but she still tenaciously insists that there was no evidence that the Infant was medically unstable. Despite the Appellant's attempt to deconstruct the statute with a strained interpretation and skewed perception of the medical evidence and expert opinions, this Court properly considered the three elements and the conflicting evidence which created a question for the jury to answer.

The Appellant argues that while the Infant might have become medically unstable if enough time had passed, the Emergency Obstetrical Care Exception does not apply because Dr. Browning delivered the Infant before she became unstable. However, while the statute speaks of "a genuine emergency," "immediate threat" and "not medically stable" as three separate elements, the medical opinion testimony of record overlaps and conflicts on these points and creates a jury issue on the statute.

The Appellant further argues that the Court overlooked and/or misapprehended that this case does not involve a battle of the experts. However, the Court's opinion evidences that it properly reviewed and considered the conflicting testimony of all the medical experts regarding

the relevant issues of the existence of a real emergency, the medical stability of the patient, and the very real threat of serious bodily injury or even death. The Court noted that Appellant's experts opined that the Infant was medically stable during the delivery; however, the Court also noted conflicting opinions from Dr. Smithson, Dr. Ernest, and Dr. Duchowny on the point of medical stability.

While the Appellant attempts to negate the existence of a jury issue based on her perceived distinction in the testimony between potential and real/active instability in those critical 45 seconds, the Court properly concluded that the disputed opinions did create a jury issue on the emergency exception. Perhaps most significantly on this point, the Court specifically noted and quoted from the testimony of Dr. Duchowny, Defense expert pediatric neurologist, who testified without any equivocation that the Infant and Mother were unstable:

> Q: And there was no indication in this case that either mother or baby were not medically stable; true?
>
> A: ***They were unstable***. Any situation where a baby is hung up in the birth canal is potentially a very dangerous situation and it is one that presents an immediate danger of bodily harm of either - - either morbidity, brain injury or death.

[Emphasis added.] The Appellant also insists that the Respondent Obstetrician made an "admission" of stability that justifies a JNOV. However, as this Court noted, the jury also heard other testimony from Dr. Browning, and properly concluded that whatever inconsistences exist, they were for the jury, and the Appellant is not entitled to a JNOV on the exception.

In her petition for rehearing, the Appellant seems to be raising some new issue about a "charge on hindsight," and refers to a "hindsight rule" without citation to any authority. However, this is was not an issue that was preserved in in her briefing. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR."). Likewise, to the extent that the Appellant

complains about the references to "hindsight" in the expert opinions, she did not make any relevant objection to the testimony at trial. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Ultimately, any question as to expert's reliance on "hindsight" in forming his opinion goes to his credibility which is properly a question for the jury.

II. The Court did not overlook or misapprehend that Appellant failed to raise and preserve certain issues in her appeal.

On appeal, the Appellant has complained that the Respondents' experts have been allowed to misinterpret the meaning of the term "medically stable" as including potential instability. The Court held that the Appellant failed to present this argument to the trial court, and thus the issue is not preserved, citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The Appellant makes a conclusory argument that the "sub-issue" was adequately preserved under the umbrella of her argument on the inapplicability of the emergency statute as a matter of law. However, the Court correctly noted that Appellant affirmatively agreed with the jury charge on the emergency medical and obstetrical care statute without requesting the charge provide a definition of "medical stability." Nor did Appellant make any arguments in her posttrial motion relating to the definition of "medical stability." Accordingly, the Court properly concluded that point was not preserved for appellate review.

III. Additional Sustaining Ground -- The Respondent Physician is entitled to judgment from any personal liability pursuant to S.C. Code §33-56-180, because he was employed by a charitable organization and the jury found that he was not grossly negligent.

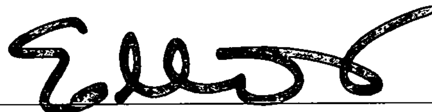
The Respondent Physician raised an additional sustaining ground that was not addressed by the Court in its opinion. While the Respondent submits that the Court correctly affirmed the denial of the posttrial motions on the emergency exception, the Respondent also would submit that the

judgment for Dr. Browning can be sustained on the separate ground that, as an employee of a charitable organization, he is immune from personal liability under S.C. Code §33-56-180 based on the jury's finding that he was not grossly negligent as discussed in more detail in his brief.

CONCLUSION

WHEREFORE, based on the foregoing in addition to the arguments and citations in their Brief, the Respondents respectfully submit that the Trial Court properly submitted the Emergency Obstetrical Care Exception of Section 15-32-230, to the jury where the Patient conceded that the presentation of shoulder dystocia constituted a genuine emergency situation and there is evidence – even if conflicting – that the Infant and Mother were not medically stable and they were in immediate threat of death or serious bodily injury. Accordingly, the Court properly upheld the jury's verdict in favor of the Respondents and the Petition for Rehearing should be denied.

Respectfully submitted,



Hood Law Firm, LLC

Mary Agnes Hood Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street
P.O. Box 1508
Charleston, SC 29402
(843) 577-4435
Info@hoodlaw.com

Attorneys for Respondents

August 1, 2019

STATE OF SOUTH CAROLINA

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William H. Seals, Jr., Circuit Court Judge

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v.

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Respondents.

Certificate of Service

The undersigned certifies that on this 1 day of August, 2019, a copy of the Return to the Petition for Rehearing of Respondents McLeod Physician Associates II and Dr. John B. Browning, was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the address listed below:

Edward L. Graham, Esquire
Graham Law Firm, P.A.
33 Market Point Drive
Greenville, SC 29607

HOOD LAW FIRM, LLC

Mary Agnes Hood Craig (SC #6960)
Elloree A. Ganes (SC #70509)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630

Attorneys for the Respondents
McLeod Physician Associates II and
Dr. John B. Browning

HOOD
LAW FIRM
LLC

ELLOREE A. GANES
Partner
DIRECT DIAL: (843) 577-1208
E-MAIL: Elloree.Ganes@hoodlaw.com

August 1, 2019

RECEIVED
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Christy Byrd, as Next Friend of Julia Byrd, a minor v. McLeod Physician Associates II and Dr. John B. Browning,
C/A No. 2013-CP-21-00690, Florence CP
Appellate Case No. 2016-001551
HLF File No. 25.056

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the Respondents' Return to the Petition for Rehearing in the above matter, which we are serving on all other counsel of record, along with the original and one (1) copy of the Certificate of Service. Please return a clocked-in copy of each in the envelope provided.

Kind regards,

Yours truly,

Elloree A. Ganes

EAG/jad
Enclosure

cc: Edward L. Graham, Esquire

172 Meeting Street, Charleston, SC 29401
Phone: (843) 577-4435 • Fax: (843) 722-1630 • Email: Info@hoodlaw.com
www.hoodlaw.com

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HOOD LAW FIRM, LLC
172 MEETING STREET
P.O. BOX 1508
CHARLESTON, SC 29401

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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