THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2016-CP-42-3178

Treva C. Flowers, Tristan Flowers, and Ashley F., an infant under the age of fourteen (14) years, by and through her next friends, Treva C. Flowers and Tristan Flowers,

Appellants,

v.

Bang N. Giep, M.D., and Spartanburg & Pelham OB-GYN, P.A. (formerly Spartanburg OB-GYN, P.A.),

Respondents.

BRIEF OF APPELLANT

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Statement of the Case

This medical malpractice case was commenced in the Spartanburg County Court of Common Pleas by filing a Notice of Intent to File Suit on October 7, 2011, pursuant to S.C. Code Ann. § 15-79-125. *See* Notice of Intent to File Suit (ROA 6). The matter could not be resolved by mediation, and a mediator declared an impasse between the parties on January 16, 2012. A Summons and Complaint were filed on March 12, 2012. *See* Complaint (ROA 9).

Plaintiffs Treva C. Flowers and Tristan Flowers brought causes of action on behalf of themselves and on behalf of their daughter, Ashley F., a minor child. *See* Complaint (ROA 9). The defendants were Bang Giep, M.D., and the medical practice where he was employed, Spartanburg & Pelham OB-GYN, P.A. (formerly Spartanburg OB-GYN, P.A.).

The plaintiffs alleged that on October 7, 2008, at Spartanburg Regional Medical Center, Dr. Giep, a specialist in obstetrics, undertook to medically manage the labor of Treva Flowers and the birth of Ashley F., who was a viable, female child. They alleged that when the birth became complicated by shoulder dystocia, Giep's application of traction to deliver Ashley F. caused permanent, severe injuries to cervical nerve roots contained within her left brachial plexus nerve bundle. They alleged that Dr. Giep was negligent, wanton, willful, reckless, and grossly negligent in his application of traction and in failure to properly use maneuvers to release the child from shoulder dystocia. *See* Complaint ¶¶ 10-13. (ROA 10).

The cause of action brought for Ashley F. sought compensation for permanent physical disability of the child's left shoulder, arm, and hand and for other personal injuries,

including physical disfigurement. *See* Complaint ¶ 15-16. (ROA 11). In the second cause of action, Treva and Tristan Flowers, as parents, sought recovery for extraordinary financial losses related to the child's medical, hospital, special needs, and care taking expenses during her childhood. *See* Complaint ¶ 18-19. (ROA 12).

The defendants generally and specifically denied the plaintiffs' material allegations, but admitted that Giep was an agent and employee of Spartanburg & Pelham Ob-Gyn, P.A., and was acting within the course and scope of his employment during the delivery of Ashley F. They admitted that during the delivery the child suffered from various medical conditions, including shoulder dystocia. *See* Answer ¶¶ 2-3, 5-6 (ROA 14-15).

The case came to trial on October 9, 2017.

After presentation of the evidence, the trial judge allowed defendants to amend their answer to incorporate S.C. Code Ann. § 15-32-230 (A) as an affirmative defense. (ROA 903:11-904:06). Plaintiffs' counsel moved to strike the affirmative defense on grounds that it should not be applied when there was no factual dispute that plaintiffs had prenatal care and a prior doctor/patient relationship with defendant Giep and other doctors in his medical practice pursuant to § 15-32-230(B). The motion to strike was denied. (ROA 906:13-907:15).

The trial judge told the jury, "The defendants . . . allege that if defendants are shown to have, in any way, been negligent in the care provided, that such conduct occurred during and in the course of a genuine medical emergency situation, and, therefore, under the law, the defendants are not to be held responsible for that claim of negligence." (ROA 980:13-

18). The trial judge then charged the jury with the provisions of subsections (A) and (C) of § 15-32-230, excluding the provisions of subsection (B).

> *You are further instructed that South Carolina Code annotated Section 15-32-230 and the Code of Laws is just these volumes, and these volumes have a lot of laws and rules and regulations that govern our conduct in a variety of ways, and one particular section that could be applicable in this case, depending upon your determination of the facts, is that particular section, 15-32-230. That section provides that a physician who commits some act of negligence in the course of the providing of medical care and treatment to a patient in an emergency department or in an obstetrical or surgical suite is not liable in a claim of malpractice if that care is rendered in a genuine emergency situation which involves an immediate threat of death or serious bodily injury to the patient receiving that care. The statute further provides that the immunity and the limitation on liability from a claim of medical negligence, as provided for in that statute, shall only apply where it is proven that the patient is not medically stable, and the patient is in immediate threat of either death or of serious bodily injury. Where a physician claims immunity from liability based upon this particular statute, the burden is on the physician to establish that the care provided to the patient was rendered in a genuine emergency situation, that the patient was not medically stable, and was in immediate threat of either death or serious bodily injury, and the defendant would have the same burden of establishing entitlement to liability under that statute, and the same standard that the plaintiff has in proving that the defendant is liable for any injury they claim to have sustained.*

(ROA 994:18-995:23). Plaintiffs' counsel objected to the jury instructions relating to the medical emergency statute on grounds they were not appropriate to the case for the reasons stated in plaintiffs' motion to strike. (ROA 1011:05-12).

The jury commenced deliberations and returned a verdict on October 13. In a special verdict form submitted to the jury, the trial judge asked:

> *Do you find that the plaintiffs have proven by the greater weight or preponderance of the evidence that the defendants, by and through Bang N. Giep, were negligent in the providing of medical care during the birth and delivery of [Ashley F.] and that such negligence was the proximate cause of some injury or other loss sustained by plaintiffs?*

The jury responded 'Yes,' and moved to the next question, which asked:

> *Do you find that the defendants have proven by the greater weight or preponderance of the evidence that the medical care rendered by the defendants, by and through Bang N. Giep, during the birth and delivery of [Ashley F.] was rendered in a genuine emergency situation where she was not medically stable and was in immediate threat of either death or serious bodily injury?*

The jury responded 'Yes,' and was directed to "***STOP*** and ***DELIBERATE NO FURTHER***, your verdict would be for defendants." *See* Verdict Form (Court's emphasis) (ROA 4).

The plaintiffs moved immediately for new trial, and the motion was denied. (ROA 1019:15-1020:05).

Judgment was entered on October 31, 2017. *See* Judgment (ROA 1). The plaintiffs filed Notice of Appeal with the South Carolina Court of Appeals on November 3, 2017. *See* Notice of Appeal (ROA 17).

Standard of Review

An issue regarding statutory interpretation is a question of law. *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors of law." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). Questions of statutory interpretation are questions of law, which the appellate court is free to decide without any deference to the court below." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).

Argument

Was it error to apply S.C. Code Ann. § 15-32-230(A) to the exclusion of § 15-32-230 (B) and render judgment for defendants in medical malpractice claims arising from emergency obstetrical care when the plaintiffs had a previous doctor/patient relationship with the defendant physician and other members of his practice and received prenatal care?

Statement of Facts

Treva Flowers became pregnant in 2008 and quickly employed defendant Spartanburg Ob-Gyn, P.A. for her prenatal management and delivery. (ROA 321:05-22, 382:23 – 383:06). She and her husband kept every office appointment, rotating through each physician in the practice, including defendant Giep. (ROA 322:08-21, 323:25 – 324:01, 367:07-11, 383:07-14, 384:02-05). During the pregnancy, Treva Flowers developed gestational diabetes that was controlled by diet, but her child appeared to have a normal gestation, and she was planned for vaginal, full-term delivery on or about Oct. 11, 2008. (ROA 322:24-25, 323:01-21, 326:08-09, 327:01-02, 384:09-23).

Shortly after midnight on Oct. 8, 2008, Treva Flowers went into labor at home. Several hours later she was admitted to Spartanburg Regional Medical Center for labor and delivery by Dr. Ashley Fowler, one of the physicians in Dr. Giep's practice. The mother labored in the hospital's obstetrical unit through the morning and afternoon without apparent complication and was ready to deliver her child by 8 p.m. (ROA 594:01-12, 597:15-22). Dr. Giep, who had replaced Dr. Fowler that evening, came to the mother's bedside at 8:11 p.m. when he saw a deceleration of the baby's heart-rate on a monitor screen in the hospital. (ROA 596:16-597:21). To expedite the delivery, Giep applied a vacuum extraction device to the baby's scalp at 8:18 p.m. and was able to deliver the head (ROA 617:23-618:07), but as the baby descended further in the birth canal, her left shoulder became obstructed by the mother's pubic bone. (ROA 619:18, 871:08-25), a medical condition known as shoulder dystocia.

Shoulder dystocia is a well-known complication of obstetrical medicine. Because doctors cannot predict which of their obstetrical patients will encounter shoulder dystocia during delivery (ROA 579:06-14), obstetricians are trained beginning in medical residency to diagnose and treat shoulder dystocia. (ROA 572:13-573:08). Utilizing the nursing staff and a series of well-established maneuvers, a doctor can usually enlarge the mother's birth outlet and release the baby's obstructed shoulder from the impingement in a matter of minutes. (ROA 666:20-667:03). In Ashley F.'s case, Dr. Giep delivered her at 8:20 p.m., less than two minutes after the dystocia was diagnosed at 8:19 p.m. (ROA 624:21-24, 630:20-22, 638:04-05).

To perform the maneuvers, Dr. Giep was required to place his hands on the baby's head and apply traction. (ROA 627:13-20). The direction and the amount of traction to be

applied has been well-established by generally recognized and accepted standards of care and should have been 'gentle' and with the same traction necessary to deliver a baby who is not impeded by dystocia. (ROA 655:03-09, 19-22; ROA 668:11-17). Under standard practice, the traction applied by Giep should have kept the baby's head in alignment with her spine and not flexed the baby's head significantly toward the baby's lower shoulder. Unnecessarily forceful traction could stretch nerve roots in the baby's neck and shoulder and would not meet the standard of care.

Ashley F. was born with a 'limp' left arm (ROA 638:20-21). Dr. Giep's deviation from standard care was established when Dr. Arturo Armenta, who subsequently performed surgery to repair the brachial plexus nerve bundle in Ashley's left shoulder, found that her C-5, C-6, and C-7 nerve roots had been ruptured and her C-8 nerve root had been stretched so much that it developed a neuroma caused by scarring. (ROA 71:15-72:08, 73:06-09).

Plaintiffs' biomechanics expert, Dr. Robert Allen testified permanent brachial plexus injuries involving multiple nerve ruptures and neuromas are stretch injuries known to occur following shoulder dystocia only from a physician's force and flexion of the baby's head. (ROA 119:16-17). Plaintiffs' obstetrical expert, Dr. Edith Gurewitsch, testified Ashley F.'s shoulder most probably could have been released from dystocia with traction no greater than traction applied to non-dystocia births. She said traction that ruptured three nerve roots and caused a neuroma to a fourth was unnecessarily forceful, misaligned, and deviated from standard obstetrical care. (ROA 190:09-16, 207:01-208:17, 211:04 -212:01).

The jury apparently agreed and found the defendants were negligent in the providing of medical care during Ashley's birth and delivery and caused injury. *See* Verdict Form. (ROA 4). The plaintiffs did not seek to prove gross negligence, however, and the verdict was rendered for the defendants when the jury found that the medical care occurred in a genuine emergency where Ashley F. was not medically stable and was in immediate threat of either death or serious bodily injury. *See* Verdict Form. (ROA 4).

Law

At issue is whether the trial judge should have interpreted S.C. Code Ann. § 15-32-230(A) to be applied as "separate and distinct" from S.C. Code Ann. § 15-32-230(B), rendering moot the plaintiffs' prenatal care and doctor/patient relationship with Dr. Giep and other physicians in his practice prior to the obstetrical emergency that gave rise to the medical malpractice claims. By doing so, the trial judge failed to carry out the legislature's intent to preserve the rights of plaintiffs to sue for ordinary negligence in obstetrical emergency malpractice cases where doctor/patient relationships and prenatal care had been established.

Section 15-32-230 provides as follows:

> *Section 15-32-230. (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency 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.

S.C. Code Ann. § 15-32-230.[1]

This appeal turns upon the proper application of two subsections of the same statute. Subsection (A) deals generally with "genuine" emergencies in "emergency departments, obstetrical suites, and surgical suites" and does not specify what type of care is needed to address the emergency. The physical location of the care determines whether the physician will have qualified immunity under subsection (A). *See* S.C. Code Ann. 15-32-230 (A). Non-obstetrical emergencies that sometimes require care within obstetrical suites include stroke, myocardial infarction, and acute asthma. *See* Tillet, *Nonobstetrical Emergencies in the Obstetrical Unit*, J' OF PERINAT NEONATAL NURS., 2013 Jan-Mar, 27(1): 5-7. Such nonobstetrical emergencies can also involve some of the many non-

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[1] Section 15-32-230 was a component of the South Carolina Noneconomic Damage Awards Act of 2005 which comprehensively reformed medical malpractice law in South Carolina. In addition to defining and setting limits on noneconomic damages, the Act defined 'ambulatory care facility,' 'health care institution,' 'health care provider,' 'hospital,' 'institutional general infirmary,' 'nursing home,' 'renal dialysis facility,' 'skilled nursing services,' and 'medical malpractice.' See 2005 Act No. 32, Section 2, eff July 1, 2005, for causes of action arising after that date. The Act further provided procedural provisions for Offers of Judgment, designations and requirements of expert witnesses, and requirements for expert witness affidavits. The Act required that before filing a medical malpractice lawsuit, the plaintiffs must give notice of their intent to file suit. It established mandatory mediation requirements expressly for medical malpractice actions, and it modified the Medical Disciplinary Commission. Id.

patient visitors to obstetrical suites awaiting a birth. *Id.* Subsection (A) is not specific as to the type of emergency but is only specific as to the physical location where the emergency care is being rendered. *See* S.C. Code Ann. 15-32-230 (A).

Subsection (B) deals specifically with "a medical malpractice claim *arising out of obstetrical care* rendered by a physician on an emergency basis," regardless of the physical location of the care. *See* S.C. Code Ann. 15-32-230 (B) (emphasis added). If the legislators wanted to exclude the specified qualifications for immunity contained within subsection (B), they needed only to remove the subsection from the statute. Apparently, the legislators intended subsection (B) to provide additional qualifications for immunity from claims arising out of obstetrical care.

Both subsections allow the physician to be liable for gross negligence but provide immunity from liability for ordinary negligence. *Id.* Subsection (B), however, allows the immunity from ordinary negligence only if "there is no previous doctor/patient relationship between the physician or a member of his practice with a patient" *or* if "the patient has not received prenatal care."[2]

Denying plaintiffs' motion to strike the affirmative defense raised by Section 15-32-230(A) & (C), the trial court ruled that unless gross negligence was shown the legislature intended to limit physician liability for genuine emergencies regardless of a previous doctor relationship or prenatal care. Without noting that subsection (B) was specific to obstetrical care while subsection (A) was not, the trial judge found that the

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[2] Other qualifications necessary for immunity under either subsection: (1) the patient must not be medically stable, and (2) the patient must be in immediate threat of death or serious bodily injury. Moreover, the limitation on liability only applies to care rendered before discharge from the emergency department, obstetrical suite, or surgery suite. See S.C. Code Ann 15-32-230(C).

subsections were "separate and distinct," and subsection (A) was applicable as an affirmative defense. Over plaintiffs' objection, he instructed the jury with the law of subsection (A). (ROA 1011:05-12).

> *THE COURT: Well, I'll say this is my first encounter of a trial with this particular statute, and I've read it several times. And while I think, in some respects, it's somewhat confusing, it does appear to be addressing two of - the Legislature appears, from the language, to be addressing two, what they consider, to be two separate and distinct situations. And the language would indicate that both in A, B, and in C when it says further the limitations on liability established under Sections A and B shall only apply where care is rendered prior to a patient's discharge. So, the appear to be looking at it like it's two separate and distinct situations. B, obviously, relating to a physician with no previous doctor/patient relationship with a patient. But Subsection A, which the defense contends is applicable, does say that, in an action involving medical malpractice arising out of care rendered in a genuine emergency situation, which is described in the statute, is immune from a medical malpractice claim unless gross negligence is shown, and it says no physician may be held liable unless the circumstances as set forth in Subsection A. So, based upon my reading of the statute, I think it's applicable. I do think that it, it is an affirmative defense. It has to be established by the defense, and, therefore, the motion to strike, it is denied.*

(ROA 906:13-907:12).

If Section 15-32-230(A) had not been applied as an affirmative defense to protect Dr. Giep from liability for ordinary negligence, then the jury would have determined damages arising from the ordinary negligence and judgments would have been entered for monetary amounts in accord with S.C. Code Ann. § 15-32-220.[3]

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[3] *Section 15-32-220. (A) In an action on a medical malpractice claim when final judgment is rendered against a single health care provider the limit of civil liability for noneconomic damages of the health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the*

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Sloan v. Hardee* at 498, 640 S.E.2d at 459.

In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. Hardee* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). "If the statute is ambiguous . . . courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). The statutory language must be construed considering the intended purpose of the statute. *Id.* A court must not construe a statute in a way that leads to an absurd result or renders it

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number of separate causes of action on which the claim is based, except as provided in subsection (E).

(B) In an action on a medical malpractice claim when final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).

(C) In an action on a medical malpractice claim when final judgment is rendered against more than one health care institution, or more than one health care provider, or any combination thereof, the limit of civil liability for noneconomic damages for each health care institution and each health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant and the limit of civil liability for noneconomic damages for all health care institutions and health care providers is limited to an amount not to exceed one million fifty thousand dollars for each claimant, except as provided in subsection (E).

meaningless. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 670 S.E.2d 371 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). These are well-established rules of statutory construction. *See Ranucci v. Crain*, 409 S.C. 493, 763 S.E.2d 189 (2014).

Statutes in derogation of the common law are to be strictly construed. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). "Under this rule, a statute restricting the common law will 'not be extended beyond the clear intent of the legislature.'" *Grier*, 397 S.C. at 536, 725 S.E.2d at 696. Statutes limiting a claimant's right to bring suit are subject to this rule. *Id.*

Statutes adopted at the same session of the Legislature are to be construed together, with the purpose of harmonizing them, and, if they are necessarily inconsistent, the statute dealing with common subject-matter in a minute and particular way will prevail over one of a more general nature. See *State ex rel. South Carolina Tax Com. v. Brown*, 154 S.C. 55, 151 S.E. 218 (1930); *Smith v. South Carolina State Highway Commission*, 138 S.C. 374, 136 S.E. 487.

Subsections (A) and (B) are each clear when viewed in isolation, but when the subsections are parts of the same statute, a reviewing court must look beyond the plain language of individual subsections and discern the underlying purpose of the statutes and their operational effect. *See Ranucci* at 499. Being part of the same statute, subsections (A) and (B) have a shared purpose in providing qualified immunity to physicians in various emergency situations. *Cf. Ranucci* at 499. Subsection (C), which references both (A) and (B) when providing additional qualifications for the physician's immunity, plainly states,

"[t]he limitation on physician liability [is] established by subsections (A) *and* (B). *See* § 15-32-230(C) (emphasis added).

The legislature clearly intended to have these subsections operate together to establish when qualified immunity would apply in various emergency situations and when it would not. The subsections of § 15-32-230 were not intended to be read as "separate and distinct," with subsection (A) applied in isolation to the exclusion of subsection (B). Rather, section 15-32-230 must be read so that it incorporates all provisions of the statute, including the provision of subsection (B) preserving recovery for ordinary negligence in obstetrical care if there has been a prior doctor/patient relationship or prenatal care. *Cf. Ranucci* at 499-500. Otherwise, the legislature's words demonstrating a clear intent to preserve patients' rights of recovery for negligent obstetrical care, if the patients have had either a previous doctor/patient relationship or prenatal care, will have no efficacy.

Conclusion

The judgment should be reversed, and the case remanded for a trial on damages only.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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