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-42-03178
Appellate Case No. 2017-002299

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.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court correctly interpret S.C. Code Ann. § 15-32-230 such that only subsections (A) and (C) of that statute apply to the facts of this case?

II. If a new trial is ordered, is any such new trial required under S.C. Code Ann. § 15-33-125 to be a new trial as to both liability and damages because Appellants were not entitled to a directed verdict as to liability in the original trial?

STATEMENT OF THE CASE

This appeal arises from a judgment entered in favor of Respondents Dr. Bang N. Giep, M.D. ("Dr. Giep") and Spartanburg & Pelham OB-GYN, P.A. (collectively, "Respondents") in a medical malpractice lawsuit based on the medical emergency defense established by section 15-32-230 of the South Carolina Code. (Tr. Vol. I, 762:22–763:14, R. 1017–18.) Appellants Treva C. Flowers ("Mrs. Flowers") and Tristan Flowers ("Mr. Flowers"), together with and on behalf of their minor daughter, Ashley F. ("Ashley") (collectively, "Appellants"), filed a Notice of Intent to File Suit on October 7, 2011, as required under section 15-79-125 of the South Carolina Code. (Notice of Intent, R. 6.) The parties were unable to resolve the matter through mediation, and the mediator declared an impasse on January 16, 2012. Subsequently, Appellants filed the Complaint on March 12, 2012. (*See* Compl., R. 9.) Appellants alleged that Dr. Giep was "negligent, wanton, willful, reckless, and grossly negligent" in his response to the shoulder dystocia which complicated Ashley's birth. (Compl. ¶¶ 11–13, R. 10–11.)

The trial of the case began on October 9, 2017, before Judge J. Derham Cole. (Tr. Vol. I, 1, R. 23.) Following the close of Appellants' case, Respondents moved for a directed verdict on the issues of liability, future damages, and punitive damages. (Tr. Vol. I, 511:4–515:23, R. 428–32.) Appellants made no motion for directed verdict at that time, and Judge Cole took Respondents' motion under advisement. (Tr. Vol. I, 511:2–528:7, R. 428–45.) Upon the close of Respondents' case, Respondents renewed their motion for directed verdict and, with the Appellants' consent, Judge Cole granted Respondents a directed verdict as to Appellants' claims for punitive damages, future damages, and gross negligence. (Tr. Vol. I, 645:6–647:5, R. 901–03.) The trial court denied Respondents' motion as to liability based on simple negligence, however, finding it was a question of fact for the jury. (Tr. Vol. I, 645:17–18, R. 901.) At that point, Respondents also moved to amend their answer to include the affirmative defense

established in South Carolina Code Section 15-32-230.[1] This motion to amend was granted without objection by Appellants. (Tr. Vol. I, 647:11–19; 648:2–6, R. 903, 904.) Although Appellants did not object to Respondents amending their answer to assert section 13-32-230 as a defense, they moved after amendment to strike the defense, contending it was inapplicable to the facts of this case. (Tr. Vol. I, 648: 9–12, R. 904.) Specifically, Appellants argued section 15-32-230(B) denies immunity "in situations where there has been an ongoing physician/patient relationship" such as the "ongoing relationship between Mrs. Flowers and [Respondents.]" (Tr. Vol I, 648:13–21, R. 904.) Judge Cole disagreed with Appellants' reading of section 15-32-230 and instead interpreted the statute as follows:

> [W]hile I think, in some respects, it's somewhat confusing . . . 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

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[1] Section 15-32-230 provides:

(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.

S.C. Code Ann. § 15-32-230.

> B shall only apply where care is rendered prior to a patient's discharge.
>
> So, they 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 under the circumstances as set forth in Subsection A.

(Tr. Vol. I, 650:15–651:8, R. 906–07.) Thus, Judge Cole determined the evidence could support the defense under subsections (A) and (C) of the statute, creating a question of fact for the jury as to whether the requirements of subsections (A) and (C) were present—in particular, presence of a genuine emergency situation where the patient is not medically stable and is in immediate threat of death or serious bodily injury. Consequently, Judge Cole denied Appellants' motion to strike. (*See* Tr. Vol I, 650:13–651:12, R. 906–07.) Appellants made no motion for directed verdict at the close of all evidence.

Judge Cole then provided the parties with his proposed special verdict form, which consisted of four questions to be posed to the jury. (Tr. Vol. I, 651:19–652:3; R. 907–08; Verdict Form; R. 4–5.) The first question asked for a determination by the jury as to whether Respondents were negligent and whether such negligence was the proximate cause of the Appellants' injuries, and, if answered in the negative, the form instructed the jury to stop deliberations. (*Id.*) The second question focused on the requirements of section 15-32-230(A) and (C), and asked the jury to determine whether the medical care provided was rendered in a genuine emergency situation where the patient was not medically stable and was in immediate threat of either death or serious injury and, if answered in the affirmative, the form instructed the jury to stop deliberations. (*Id.*) The third and fourth questions on the form, if reached, asked the jury to determine the amount of

Ashley's and Mr. & Mrs. Flowers' actual damages, respectively. (*Id.*) Appellants made no objection to the special verdict form. (Tr. Vol. I, 651:19–652:3; R. 907–08.)[2]

Following the trial court's instructions to the jury, which included instructions regarding subsections (A) and (C) of section 15-32-230 (Tr. Vol. I, 738:18–740; R. 994–96), Appellants objected to that portion of the charge based on the argument they asserted with regard to their motion to strike. (Tr. Vol. I, 756:8–12, R. 1011.) Once again the trial court asked the parties about the special verdict form, and Appellants indicated that they had reviewed it and offered no objection. (Tr. Vol. I, 756:22–25, R. 1011.)

The jury answered the first question on the special verdict form in the affirmative, finding that the Respondents were negligent and that this negligence was the proximate cause of some injury sustained by the Appellants. (Verdict Form; R. 4–5.) However, the jury then answered the second question in the affirmative, finding that the medical care provided was rendered in a genuine emergency situation where the patient was not medically stable and was in immediate threat of either death or serious injury. (*Id.*) As instructed by the verdict form, the jury then ceased all deliberations making no findings as to the amount of Appellants' actual damages. (*Id.*)

Upon this verdict being rendered, Appellants moved for a new trial based on the denial of their motion to strike the affirmative defense of section 15-32-230 and their objection to the jury

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[2] To the extent Appellants seek to challenge the verdict form, that issue is not properly preserved for this Court's review. *See Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) ("Any alleged error with the . . . verdict form [is] a trial error which must be preserved for appeal."). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (internal quotation marks omitted). While Appellants objected to certain of the trial court's jury charges, they never raised any objection or complaint regarding the verdict form or the judge's instructions thereon. (Tr. Vol. I, 756:5–765:13, R. 1011–20.)

charge on that statute. (Tr. Vol. I, 764:15–765:4, R. 1019–20.) Judge Cole immediately denied Appellants' motion for a new trial. (Tr. Vol. I, 756:5, R. 1011.) No other post-trial motions were filed. Based on the jury's responses to the special verdict form questions, Judge Cole then entered judgment in favor of the Respondents. (Judgment entered 10/31/17, R. 1–3.) No motions relating to this judgment were filed thereafter. Appellants filed their Notice of Appeal on November 3, 2017. (Notice of Appeal, R. 6–8.)

STATEMENT OF FACTS

In 2008, Mrs. Flowers became pregnant with her first child, Ashley. (Tr. Vol. I, 262:6–7; 403:12–13, R. 191, 320.) After a few weeks, she arranged with Respondent Spartanburg OB-GYN to provide her with prenatal management and delivery services. (Tr. Vol. I, 404:20–22, R. 321.) Though Mrs. Flowers was principally under the care of Dr. Ashley Fowler, during her routine appointments Mrs. Flowers was seen by various doctors in the practice on rotation, including Dr. Giep. (Tr. Vol. I, 404:20–405:22; 466:15–20, R. 321–22, 383.)

Although she was not due until October 11, 2008, in the early morning of October 7, 2008, Mrs. Flowers went into labor. (Tr. Vol. I, 407:25–408:6; 409:8–9, R. 324–26.) Shortly thereafter she was admitted to Spartanburg Regional Medical Center and was initially placed in an examining room while she was in Stage 1[3] of her labor. (*See* Tr. Vol. I, 472:5–7, R. 389.) Dr. Fowler conducted an initial evaluation of Mrs. Flowers when she first arrived, and regularly checked back with Mrs. Flowers throughout Stage 1. (See Tr. Vol. I, 295:2–5; 410:15–18, 411:21–22; 470:20, R. 224, 327–28, 387.) Mrs. Flowers' labor progressed normally and, twelve hours later, she was

[3] Stage 1 of labor is the time when contractions and cervical dilation begin, and it ends when a mother's cervix is fully dilated at 10 centimeters. (Tr. Vol. I, 548:10–18, R. 465.) Stage 2 begins when the cervix is fully dilated and the mother can begin pushing, and ends when the child is fully delivered. (Tr. Vol. I, 296:4–6; 548:17–21, R. 225, 465.)

moved to a labor and delivery room at 7:55 p.m. (Tr. Vol. I, 262:8; 295:6–8; 299:15–17; 411:1–6; 414:2–8; 415:9–11; 474:22–475:2, R. 191, 224, 228, 328, 331–32, 391–92.)

Dr. Giep, who had taken over when Dr. Fowler's shift ended, arrived in the delivery room at 8:11 p.m., responding to a drop in the baby's heartrate of more than 33% from 130 beats per minute ("BPM") to 90 BPM.[4] (Tr. Vol. I, 299:18–25; 413:23–25; 564:16–17; Tr. Vol. II, 41:16–19; 47:19–22; 48:6–9, R. 228, 330, 482, 596, 602–03; *see also* Tr. Vol. I, 412: 1–5, 10–15, R. 329.) Dr. Giep was able to accelerate the heartrate by stimulating the baby's scalp; however, the heartrate continued to fluctuate. (Tr. Vol. I, 302:16–19; Tr. Vol. II, 55:1–7, 20–24, R. 231, 610.) Concerned that the baby was not receiving enough oxygen, Dr. Giep applied a Kiwi Vacuum to the baby's scalp to expedite delivery and was able to successfully deliver the head at 8:18 p.m. (Tr. Vol. I, 203:11–14; 262:8–11; 304:8–10; 573:4–8; Tr. Vol. II, 49:6–16; 59:20–23, R. 134, 191, 233, 490, 604, 614.)

Once the baby's head had been delivered, Dr. Giep asked Mrs. Flowers to push again and applied gentle traction.[5] (Tr. Vol. II, 69:4–8, R. 624.) When the baby's shoulders did not immediately deliver and the head contracted back slightly, Dr. Giep diagnosed that the baby's left should had become obstructed by Mrs. Flowers' pubic bone, a medical condition known as shoulder dystocia.[6] (Tr. Vol. I, 205:18–19; 251:7–9; 251:13–15; Tr. Vol. II, 69:4–8; 70:5–14, R. 136, 180, 624–25.) Dr. Giep immediately stopped applying traction to the baby's head and asked Mrs. Flowers to stop pushing. (Tr. Vol. II, 28:1–6; 69:23, R. 583, 624.)

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[4] The target heartrate for infants during birth is between 110 and 160 BPM. (Tr. Vol. I, 564:14–16, R. 481.)

[5] The medical term "traction" refers to a pulling movement. (Tr. Vol. I, 168:22, R. 107.)

[6] "[T]he word dystocia means difficult delivery or difficult labor." (Tr. Vol. I, 251:6–7, R. 180.) Shoulder dystocia specifically refers to an unpredictable delivery complication in which the infant's "body is prevented from delivering . . . because the shoulder is caught up against the mother's . . . pubic bone." (Tr. Vol. I, 251:13–15; 309:4–5; Tr. Vol. II, 24:7–14, R. 180, 238, 579.)

As he was trained to do, Dr. Giep instructed the nurses to pull Mrs. Flowers' legs back into a position with her knees pressed back towards her shoulders ("the McRoberts position") in order to elevate her pubic bone relative to the position of the baby's shoulder and thereby create more room for the shoulder to deliver. (Tr. Vol. I, 162:1–3; 166:1; 263:18–22; 418:6–9; 479:21–23; 566:23–567:2; Tr. Vol. II, 25:3–16; 70:17–25; 175:10–15, R. 101, 105, 192, 335, 396, 483–84, 580, 625, 729.) Dr. Giep also had one of the nurses apply suprapubic pressure just above Mrs. Flowers' pubic bone in an attempt to rotate the baby's shoulder under the pubic bone. (Tr. Vol. I, 171:20–25; 205:24–206:2; 264:19–265:2; 417:18–418:2; 479:24–480:6; 567:9–22; Tr. Vol. II, 25:9–11; 70:17–25; 176:4–6, R. 110, 136–37, 193–94, 334–35, 396–97, 484, 580, 625, 730.) Once Mrs. Flowers was in the McRoberts position and suprapubic pressure was being applied, Dr. Giep asked her to try pushing again while he began applying gentle traction to the baby's head. (Tr. Vol. II, 71:3–23, R. 626.) When the shoulder still did not release, Dr. Giep attempted to deliver the baby's bottom arm before successfully performing a Rubins maneuver—placing his hand on the baby's back and rotating the shoulder under the pubic bone. (Tr. Vol. II, 25:15–25; 73:24–74:19, R. 580, 628–29.) As soon as the shoulder released, Dr. Giep was able to hook his fingers under the baby's armpits and gently pull her out the rest of the way. (Tr. Vol. II, 76:1–6, R. 631.) Ashley was fully delivered at 8:20 p.m. (Tr. Vol. I, 413:10; Tr. Vol. II, 83:4–5, R. 330, 638.) Following Ashley's birth she was diagnosed with a brachial plexus injury caused by ruptures of her C5, C6, and C7 nerves during birth. (Tr. Vol. I, 134:6–9; 152:7–13; 219:5, R. 73, 91, 148.)

At trial, the parties presented extensive, conflicting expert testimony regarding the proper procedure when confronted with shoulder dystocia as well as the potential causes of a permanent brachial plexus injury like the one Ashley suffered. In particular, Appellants' experts opined that Ashley's injury could only have been caused by excessive downward traction exerting between

thirty-five and forty pounds of force on her head and neck. (*See* Tr. Vol. I, 187:16–17; 189:8–9; 193:1–8; 206:3–6; 273:19–274:6; 275:17–21, R. 118, 120, 124, 137, 202–04.) On the other hand, Respondents' experts testified that brachial plexus injuries can be caused by the forces generated by a mother's contractions and can occur even when minimal or no traction is applied at all. (Tr. Vol. I, 561:6–9; 587:1–6; 593:2–7; Tr. Vol. II, 260:3–15; 262:13–21, R. 478, 504, 510, 876, 878.) The one thing upon which all the medical experts agreed, however, is that shoulder dystocia is an unpredictable, obstetrical emergency that places the baby at risk of death or serious bodily injury. (*See* Tr. Vol. I, 309:4–8; 310:1–4; 339:23–340:11; 341:4–6; 341:18–20; 564:1–3; 565:11–20; 566:1–10; 628:3–12; 628:20–629:15; 640:9, 16–19; 641:1–4, 8–9; Tr. Vol. II, 24:7–14; 48:10–12; 76:24–78:15; 140:24–25; 141:21–23; 191:10–14; 198:11–25; 199:14–19; 220:4–221:11, R. 238–39, 268–70, 481–83, 545–46, 557–58, 579, 603, 631–33, 694–95, 745, 752–53, 774–75.)

After deliberating for close to seven hours, the jury returned and indicated it had not reached an unanimous verdict. (Tr. Vol. I, 757:7–11, R. 1012.) At that time, the court gave the jury an *Allen*[7] charge and encouraged the jury to continue their deliberations. (Tr. Vol. I, 758:12–759:9, R. 1013–14.) Neither party raised any objection to the court's *Allen* charge. (Tr. Vol I, 759:12–14, R. 1014.) Less than an hour later, the jury sent a note requesting reinstruction on the law of circumstantial evidence. (*See* Tr. Vol. I, 759:18–760:2, R. 1014–15.) In order to ensure the jury fully understood the law, the court reinstructed the jury on both direct and circumstantial evidence and sent them back to continue their deliberations. (Tr. Vol. I, 760:4–761:16, R. 1015–16.) Again, neither party objected to the court's instructions. (Tr. Vol. I, 761:19–21, R. 1016.) Shortly thereafter, the jury returned and rendered its verdict. (*See* Tr. Vol. I, 761:23–763:14, R. 1016–18.)

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[7] *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896).

STANDARD OF REVIEW

Decisions regarding jury instructions and motions to strike affirmative defenses are addressed to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *See, e.g., Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012) (noting decisions as to particular jury instructions are within the trial court's discretion); *Kirkland v. Peoples Gas Co.*, 269 S.C. 431, 436, 237 S.E.2d 772, 774 (1977) (same with respect to motions to strike an affirmative defense). A trial court commits an abuse of discretion only when its decision is controlled by an error of law or is entirely unsupported by the evidence. *Stephens v. CSX Transp. Inc.*, 415 S.C. 182, 197, 781 S.E.2d 534, 542 (2015) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

A trial judge is required to charge only the current and correct law of South Carolina. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000); *McCourt v. Abernathy*, 318 S.C. 301, 305, 457 S.E.2d 603, 606 (1995). When "reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012) (citing *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000)). An erroneous jury charge is grounds for reversal only where the appellant can demonstrate error and prejudice. *Cole*, 378 S.C. at 405, 663 S.E.2d at 33.

ARGUMENT

I. The Trial Court Properly Interpreted Section 15-32-230, Correctly Denied Appellants' Motion to Strike, and Properly Instructed the Jury as to Only the Relevant Provisions of That Statute.

The controlling question before this Court is one of statutory construction: whether subsections (A) and (B) of section 15-32-230 establish physician immunity in separate circumstances or, as Appellants contend, whether subsection (B) qualifies and limits the immunity

created in subjection (A). (*See* App. Br. at 16.) Appellants do not dispute the applicability of subsections (A) and (C) of section 15-32-230—which establish immunity for ordinary negligence in medical care rendered by physicians in an emergency department, an obstetrical suite, or a surgical suite during genuine emergency situations where the patient is medically unstable and in immediate threat of death or serious bodily injury—nor do Appellants question the jury's findings of fact under these provisions.[8] S.C. Code Ann. § 15-32-230(A), (C). Indeed, the only issue on which the parties disagree, and the sole basis for Appellants' appeal, is the import of subsection (B) to the facts of this case.

A. S.C. Code Ann. § 15-32-230 is not ambiguous.

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 346, 549 S.E.2d 243, 246 (2001). "'If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.'" *Id.* (*citing Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)). Appellants do not contend that either subsections (A) or (B) of section 15-32-230 are ambiguous. In fact, Appellants admit that "[s]ubsections (A) and (B) are each clear when viewed in isolation . . . ." (App. Br. at 19.) Appellants' contention is that subsection (B) impliedly qualifies or limits the immunity granted in subsection (A) for cases involving obstetrical

[8] Respondents note that Appellants never objected to the jury's findings as incorrect or unsupported by the evidence, nor do they argue as much on appeal. (*See generally* App. Br.) Accordingly, the jury's conclusions that (1) the circumstances of Ashley's birth and delivery constituted a genuine medical emergency; (2) Ashley was medically unstable during the birth and delivery process; and (3) Ashley was in immediate threat of death or serious bodily harm are now the law of the case. (Tr. Vol. I, 763:5–13, R. 1018; *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.").)

care where the physician has a prior doctor/patient relationship with the patient. No such qualification or limitation is mentioned in (A) or (B), however, and the unambiguous immunity established in (A) clearly applies to the facts of this case.

Section 15-32-230 was added to the South Carolina Code in 2005 as part of the South Carolina Noneconomic Damages Awards Act of 2005. Prior to that time, South Carolina already had a "Good Samaritan" statute found at S.C. Code Ann. § 15-1-310 which provides that "[a]ny person, who in good faith gratuitously renders emergency care at the scene of an accident or emergency" is only liable for acts or omissions amounting to gross negligence or willful or wanton misconduct arising from that emergency care. Section 15-32-230, however is different from the Good Samaritan statute in that it is not limited to gratuitously provided care and applies only to physicians in specifically delineated situations. In particular, section 15-32-230 provides:

> (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.

S.C. Code Ann. § 15-32-230.

Looking to the plain and ordinary meaning of the separate subsections of this statute, subsections (A) and (B) address different and distinct situations establishing an immunity for simple negligence in both situations, and neither subsection operates to limit the other. Subsection 15-32-230(A) provides protection for any physician who renders care in a "genuine emergency situation" to a patient who is receiving that care in an emergency department, obstetrical suite, or a surgical suite. Thus, the immunity established in (A) is limited so as to apply only to care provided in three specific locations: (1) an emergency department; (2) an obstetrical suite; and (3) a surgical suite. There is **no** limitation on the type of medical care provided and there is **no** limitation based the existence of a prior doctor/patient relationship. The care does need to be rendered in a "genuine emergency situation," and must be rendered in one of the three places designated in this section of the statute.

Subsection 15-32-230(B), on the other hand, establishes protection for any physician who provides **obstetrical care** on "an emergency basis where there is no prior doctor/patient relationship or the patient has not received prenatal care." Therefore, the immunity established in (B) is limited to obstetrical care, and is further limited to situations in which there is no pre-existing doctor/patient relationship between the physician (or a member of his practice) and the patient, or the patient has not received prenatal care. Subsection (B) is not limited to care provided in an emergency department, obstetrical suite, or surgical suite, and would apply to care provided anywhere outside of those locations. Also, the care need not be rendered in a "genuine emergency situation," but must be rendered "on an emergency basis where there is no prior doctor/patient relationship or the patient has not received prenatal care."

Subsection 15-32-230(C) then places specific restrictions on the physician immunities provided for in both subsections (A) and (B), restricting that immunity to situations where the patient is not medically stable and is in immediate threat of death or serious bodily injury. Subsection (C) further has a temporal feature, providing that immunity only applies for care rendered before a patient is ultimately discharged from an emergency department, obstetrical suite, or surgical suite.

Thus, the first immunity created in section 15-32-230 is that ***any physician***, providing ***any type of care*** **in** ***an emergency department, obstetrical suite, or surgical suite***, in a "***genuine emergency situation***" where the patient is medically unstable and is in an immediate threat of death or serious bodily harm, is immune from liability for simple negligence. S.C. Code Ann. § 15-32-230(A). It does not matter what type of medical care is being provided. *See id.* It also does not matter if the physician (or his practice) has a prior doctor/patient relationship with the patient. *See id.* What does matter is where the care is provided—it must be care provided in an emergency department, obstetrical suite, or surgical suite. *Id.* The fact that "obstetrical suite" is specifically included in (A) unambiguously shows that this immunity applies to emergency obstetrical care (amongst other types of medical care) regardless of the existence of a prior doctor/patient relationship.

Section 15-32-230(B) then creates a separate and distinct simple negligence immunity for ***any physician*** who provides ***obstetrical care*** on an "***emergency basis***" in a situation where the patient is medically unstable and is in an immediate threat of death or serious bodily harm, ***so long as that physician (or his practice) has no prior doctor/patient relationship*** with the patient. This immunity would apply to obstetrical care provided on an emergency basis in any place, including any place outside of an emergency department, obstetrical suite, or surgical suite. Thus, subsection

(B) is a broader grant of immunity than that provided in (A), so long as the physician does not have a prior doctor/patient relationship with the patient.

In addition to the distinction between the specific locations implicated in subsection (A) and the absence of restrictions as to locations in subsection (B) Appellants also overlook a key difference in the language used in subsections (A) and (B) regarding the situation in which care is provided. Specifically, subsection (A) creates an immunity applicable to 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." S.C. Code Ann. § 15-32-230(A). In contrast, subsection (B) creates an immunity applicable to "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." S.C. Code Ann. § 15-32-230(B). Significantly, the General Assembly chose to use different phrases in these subsections rather than simply using "genuine emergency situation" or "emergency basis" in both. Under our rules of statutory construction the use of different terms or phrases in a statute shows an intent for those different terms or phrases to have different meanings. *Machin v. Carus Corp.*, 419 S.C. 527, 545, 799 S.E.2d 468, 477 (2017) (holding that "[t]he legislature's use of two separate terms makes clear that it intended two separate meanings"); *see also Wachovia Bank v. Schmidt*, 388 F.3d 414, 418–19 (4th Cir. 2004), *rev'd on other grounds*, 546 U.S. 303 (2006) (holding that "[i]t is a principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible"). The fact that these different phrases have different meanings directly effects to whom each subsection is potentially applicable.

Subsection (A) addresses a situation where a physician is providing care, planned or unplanned, and, while that care is being provided, an emergency situation relating to the health of the patient suddenly arises. Specifically, subsection (A) applies to "care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care." S.C. Code Ann. § 15-32-230(A). The fact that a "genuine emergency situation" arises during the provision of that care is a trigger for this immunity, which is then further qualified by the requirement that the care be provided in an emergency department, obstetrical suite, or surgical suite, which are the places where such "emergency situations" are most likely to occur. For example, subsection (A) would apply in a situation where a patient is having routine surgery in a surgical suite and an unexpected complication occurs rendering the patient unstable and in immediate threat of death. Subsection (A)'s specific inclusion of "obstetrical suite" in its scope would also make it applicable to a situation where a physician is delivering a baby and an unexpected complication—such as shoulder dystocia—arises, rendering the baby medically unstable and in immediate threat of death or serious bodily harm.

Subsection (B), on the other hand, addresses a situation where a physician is unexpectedly providing obstetrical care. Specifically, subsection (B) applies to "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." S.C. Code Ann. § 15-32-230(B). The fact that the care is being provided "on an emergency basis" is a trigger for this immunity. That the provision of obstetrical care by the particular physician is unplanned is further delineated by the requirement that there be no prior doctor/patient relationship or that the patient previously received no prenatal care. For example, subsection (B) would apply in a situation where a pregnant woman in labor presents herself at a doctor's office or medical

clinic or hospital, and a physician who was not expecting to provide obstetrical care is thrust into a position of providing that care to this patient. If, in that situation, a complication arises that results in the mother or the baby becoming medically unstable and in immediate threat of death or serious bodily harm, that physician is immune from liability for simple negligence.

By creating this distinction between "care rendered in a genuine emergency situation" and "obstetrical care rendered on an emergency basis," the General Assembly was addressing two distinctly different situations. While it is possible that both subsections (A) and (B) could apply to the same situation (pregnant woman in labor shows up at an emergency room), there are clearly situations that are specific to each subsection. The subsection applicable in the instant matter is subsection (A) because, while Ms. Flowers went into labor a few days early, the delivery was an expected procedure and Dr. Giep was part of the practice that was providing her with obstetrical care. What triggers subsection (A) immunity here is that, during that delivery in an obstetrical suite, a genuine emergency situation involving an immediate threat of death or serious bodily arose.

The trial court correctly interpreted the statute as applying to "two separate and distinct situations" and correctly ruled that subsection (A) would apply if the jury found that the medical care in question, which undisputedly occurred in an obstetrical suite, was rendered in a genuine medical emergency situation where the patient was not medically stable and was in immediate threat of death or serious bodily injury. (Tr. Vol I, 649:13–650:12; R. 905–06.) The trial court also correctly determined that, because there was a prior doctor/patient relationship present, that subsection (B) did not apply and that the jury need not be instructed on that inapplicable subsection. In fact, had the trial court included subsection (B) in its instruction, the inclusion of an irrelevant provision could have constituted reversible error. *Berberich v. Jack*, 392 S.C. 278,

285, 709 S.E.2d 607, 611 (2011). After being properly instructed as to the relevant portions of section 15-32-230, the jury ultimately found that the facts necessary for the application of subsection (A) were all present. (Verdict Form; R. 4–5.)

B. Subsection (B) of S.C. Code Ann. § 15-32-230 does not limit or restrict subsection (A).

Subsection (B) does not qualify or limit the effect of subsection (A) within section 15-32-230. If a statute is unclear or ambiguous, "a court must apply the rules of statutory interpretation to resolve the ambiguity and discover the intent of the legislature." *Alltel Communications, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (citing *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001)). Statutory interpretation is a question of law, the cardinal rule of which "'is to ascertain and effectuate the intent of the legislature.'" *Id.* at 320, 731 S.E.2d at 873 (quoting *Media Gen. Communications, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 147, 694 S.E.2d 525, 529 (2010)); *Protection & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 271, 789 S.E.2d 756, 758 (Ct. App. 2016); *see also Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). Thus, "[a]ll rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *S.C. Prop. & Cas. Ins. Co. Guaranty Ass'n v. Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014). "The plain language of a statute [itself] is considered the best evidence of the legislature's intent." *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 253 (2014).

When 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.'" *Centex*

Int'l, Inc. v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). Accordingly, courts must "'read the statute as a whole' and 'should not concentrate on isolated phrases within the statute.'" *Id.* (quoting *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). Thus, "[w]ords in a statute must be construed in context, and their meaning may be ascertained by reference to words associated with them in the statute." *S.C. Energy Users Comm. v. S.C. Public Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). Additionally, courts must "presume the legislature did not intend to do a futile act" and the court "is constrained to avoid an absurd result." *Buscemi*, 417 S.C. at 274, 789 S.E.2d at 760; *see also Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."). Similarly, "[o]ur courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." *Buscemi*, 417 S.C. at 274, 789 S.E.2d at 760.

Appellants contend that the immunities created in subsection (A) and (B) are not "separate and distinct," and assert that, despite the fact that (A) specifically addresses care provided in "obstetrical suites," (B) operates to limit (A) making it inapplicable to obstetrical care provided by a physician with a prior doctor/patient relationship. (App. Br. at 14.) This contention is incorrect. Appellants' forced construction would improperly limit the operation of (A), and would improperly render the specific inclusion of "obstetrical suite" in (A) to be meaningless.

By including "obstetrical suites" as one of the three locations where section (A) immunity applies, the General Assembly clearly intended obstetrical care to qualify. Appellants suggest that the General Assembly's inclusion of "obstetrical suite" in (A) was intended to apply the immunity only as to "non-obstetrical emergencies" involving obstetrical patients or medical emergencies

involving "non-patient visitors" in an obstetrical suite. (App. Br. at 15–16.) Such a tortured interpretation is nonsensical and absurd. In subsection (A), the General Assembly identified the three places physicians were likely to encounter life-threatening medical emergencies and established an immunity from simple negligence for ***any*** type care provided at those three locations. In subsection (B), the General Assembly created a separate simple negligence immunity for emergency obstetrical care provided anywhere if the performing physician had no prior relationship with the recipient.

Subsection (B) does not qualify or limit the immunity granted in subsection (A), but rather establishes its own separate immunity for physicians providing obstetrical care on an emergency basis where there is no previous doctor/patient relationship. If the General Assembly had truly intended subsection (B) to limit the immunity for emergency obstetrical care granted in subsection (A) only to situations in which there was no existing doctor/patient relationship or prior prenatal care, it easily could have included language to that effect in either subsections (A) or (B).[9] In fact, the General Assembly included limiting language in subsection (C) by providing that the liability limitations "established by subsections (A) and (B) shall *only* apply" under certain circumstances. S.C. Code Ann. § 15-32-230(C) (emphasis added). Thus, the General Assembly was perfectly capable of including qualifying language in subsections (A) or (B) had it wished to do so. *Cf. Machin v. Carus Corp.*, 419 S.C. 527, 545, 799 S.E.2d 468, 477 (2017) (noting that "if the legislature intended to allow non-parties to be included on the jury verdict form, it would have used terms other than 'defendant' and 'defendants' in drafting subsection (C), just as it used the

[9] For example, the General Assembly could have removed the word "obstetrical suite" from (A), or drafted (A) to read "arising out of care, other than obstetrical care rendered by a physician with a prior doctor/patient relationship with the patient, rendered . . . ." Alternatively, they could have drafted (B) to specify that its limitations also applied to "obstetrical care provided in an emergency department, obstetrical suite, or surgical suite."

different term—potential tortfeasor—in subsection (D)"); *Hardee v. McDowell*, 372 S.C. 413, 419, 642 S.E.2d 632, 636 (Ct. App. 2007) ("If the state legislature had intended for a contractor to collect documentation of insurance from a subcontractor once a year, it could have drafted the statute to reflect that intent.").

Appellants' argument that "the legislators intended subsection (B) to provide additional qualifications for [the] immunity [established in subsection (A)] from claims arising out of obstetrical care" is contrary to both the unambiguous language and clear intent of section 15-32-230. (App. Br. at 16.) Subsection (B) is not a restriction on the immunity established (A). It is a separate immunity that applies independently in circumstances where (A) may not apply. Subsection (C) explicitly refers to *both* subsections (A) and (B) as establishing "limitation[s] on physician liability." S.C. Code Ann. § 15-32-230(C). In other words, according to the plain language of subsection (C), subsection (B) is intended to grant *additional* immunity to that established in subsection (A), specifically for physicians who respond in obstetrical emergencies, even in locations other than an emergency department, obstetrical suite, or surgical suite, and who have no previous relationship with the patient. *See id.*; *Perry*, 409 S.C. at 140, 761 S.E.2d at 253 ("The plain language of a statute [itself] is considered the best evidence of the legislature's intent."). Furthermore, Appellants' interpretation is completely contrary to the public policy behind the General Assembly's enactment of section 15-32-230—seeking to limit physician liability in emergency medical care situation. Not only would Appellants' interpretation expand rather than limit physician liability, but it would also discourage physicians from responding to obstetrical emergencies occurring in an emergency department, obstetrical suite, or surgical suite in which their own patients become involved. That clearly cannot be and is not what the legislature intended by incorporating subsection (B) into the medical emergency statute.

The General Assembly purposely drafted subsection (A) to provide immunity to physicians rendering care in genuine emergency situations based on the locations where such care is most likely to be treated. Significantly, an obstetrical emergency could arise anywhere and, while the medical care required to address that emergency will typically occur in an obstetrical suite, it is highly likely that such care also will be rendered in locations outside of an emergency department, obstetrical suite or surgical suite, and that a physician with no prior relationship with the patient may end up providing that obstetrical care on an emergency basis. Thus, the General Assembly addressed immunity in those instances through section 15-32-230(B). It would be an absurd interpretation to suggest that the General Assembly did not intend for emergency care "in an obstetrical suite" to include obstetrical care. Such an interpretation would render the phrase "in an obstetrical suite" in subsection (A) entirely superfluous. *Buscemi*, 417 S.C. at 274, 789 S.E.2d at 760 (noting "courts must presume the legislature did not intend to do a futile act," and "statute[s] should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous").

Therefore, the only rational statutory construction of section 15-32-230 is that articulated by Judge Cole: that subsection (A) applies to any and all emergency care, including obstetrical care provided in an obstetrical suite, regardless of whether there is a preexisting doctor/patient relationship, while subsection (B) applies only in situations where a physician provides obstetrical care on an emergency basis where there is no prior doctor/patient relationship with the patient, including obstetrical care provided in locations other than those addressed in subsection (A). (*See* Tr. Vol. I, 650:15–651:12, R. 906–07.) Accordingly, subsection (A) applies to the facts of this case because Dr. Giep was providing emergency obstetrical care in an obstetrical suite, and (B) does not apply because Dr. Giep had a prior doctor/patient relationship with the patient. (*See* Tr.

Vol. I, 404:20–405:22; 466:15–20; Tr. Vol. II, 21:11–18; 40:9–12; 41:2–19, R. 321–22, 383, 576, 595–96.) Thus, Judge Cole did not abuse his discretion in denying Appellants' motion to strike or in charging the jury only on the relevant subsections (A) and (C) of section 15-32-230. *See Kirkland*, 269 S.C. at 436, 237 S.E.2d at 774 ("A motion to strike is addressed to the sound discretion of the trial judge."); *Carson*, 400 S.C. at 240, 734 S.E.2d at 158 (upholding jury charge and holding "it was within the circuit judge's discretion to omit this particular statutory language because of its perceived irrelevance to the issue of CSX's negligence and because of the risk of confusing or misleading the jury"); *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 350–51, 683 S.E.2d 818, 822 (Ct. App. 2009) (holding "jury instructions should be confined to the issues made by the pleadings and supported by the evidence"). Therefore, the judgment for the Respondents should be affirmed.

II. Pursuant to S.C. Code Ann. § 15-33-125, Any New Trial in This Case Must Be as to Both Liability and Damages and Cannot Be Limited to the Issue of Damages Alone.

To the extent Appellants seek a new trial on the issue of damages alone, such relief is improper in this case. (*See* App. Br. at 17.) Rather, should this Court reverse the trial court's judgment and order a new trial, S.C. Code Ann. § 15-33-125 requires that any such new trial must be as to both liability and damages. Section 15-33-125 of the South Carolina Code provides:

> A new trial may be granted to the plaintiff on the issue of damages only and not liability when the only reasonable inference to be drawn from all the evidence, viewed in the light most favorable to the defendant, is that the plaintiff is entitled to a verdict in his favor on the issue of liability as a matter of law. Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages.

S.C. Code Ann. § 15-33-125. This Court has repeatedly held that section 15-33-125 prohibits new trials solely on the issue of damages where the question of liability was contested. *Stevens v. Allen*, 336 S.C. 439, 453, 520 S.E.2d 625, 632 (Ct. App. 1999), *aff'd*, 342 S.C. 47, 536 S.E.2d 663 (2000)

("Since liability was contested in this case, a new trial as to damages only would be inappropriate."); *Sullivan v. Davis*, 317 S.C. 462, 468, 454 S.E.2d 907, 911 (Ct. App. 1995) ("Here, because the evidence on liability was disputed, the judge could not have directed a verdict. Therefore, the new trials must include issues of liability and damages."). The South Carolina Supreme Court has also recognized that "[s]ection 15-33-125 limits new trials on the issue of damages to situations where the plaintiff is entitled to a directed verdict on the issue of liability." *Stokes v. Denmark Emergency Med. Servs.*, 315 S.C. 263, 266, 433 S.E.2d 850, 851 (1993).

In this case, Respondents moved for directed verdict on the issue of liability and the trial court denied the motion, finding liability to be a question of fact for the jury. (Tr. 511:4–6; 645:6–18, R. 428, 901.) Not only have Appellants never move for directed verdict or JNOV on the issue of liability—effectively conceding that the issue is disputed—but Appellants explicitly argued to the trial court that Respondents' liability "would be a question of fact for the jury to determine." (Tr. 520:14–15, R. 437.) There is no question that the evidence in this case does not entitle Appellants to judgment as a matter of law on the issue of liability. The fact that the jury's verdict below included a finding of simple negligence by Respondents has no bearing on this analysis. The jury's verdict is merely a verdict, and does not equate to a "directed" verdict. In a verdict, the fact-finder determines the factual issues, in a directed verdict the court finds that "the only reasonable inference to be drawn from all the evidence, viewed in the light most favorable to the defendant, is that the plaintiff is entitled to a verdict in his favor on the issue of liability as a matter of law." Thus, pursuant to section 15-33-125, any new trial ordered would necessarily have to address both liability and damages. *See Sullivan*, 317 S.C. at 468, 454 S.E.2d at 911.

CONCLUSION

For the foregoing reasons, this Court should find no error in the trial court's jury instructions and ruling on Appellants' motion to strike, and uphold the jury's verdict and the trial court's entry of judgment in favor of Respondents.

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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-42-03178
Appellate Case No. 2017-002299

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.

CERTIFICATE OF COUNSEL

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

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