THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2009-CP-46-5195

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SC Court of Appeals

Angela Patton, as Next Friend of
Alexia L., a minor,

Appellant,

v.

Dr. Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P. A.
and Amisub of South Carolina, d/b/a Piedmont Medical Center,

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a medical negligence case involving a permanent brachial plexus birth injury sustained by Alexia Lumpkin (hereinafter, "Alexia" or "Daughter"), daughter of Appellant Angela Patton (hereinafter "Appellant," "Angela" or "Mother"), at the time of her birth on April 5, 2007. The Mother alleges that Respondent Dr. Gregory A. Miller (hereinafter "Dr. Miller") and/or employees of Respondents Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter "P.A.") and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center (hereinafter "Hospital") improperly managed the resolution of shoulder dystocia, a complication of head-first vaginal delivery where the baby's top shoulder gets stuck behind the mother's pubic bone; and that such mismanagement caused permanent injury to Alexia's left-sided brachial plexus nerves.

The Mother as Next Friend of her Daughter filed the Summons and Complaint on November 25, 2009, designated as Civil Action Number 09-CP-46-05195, against original Defendants Dr. Miller and the P.A. (Summons and Complaint). The Defendants' Answer asserted a general denial, and no affirmative defenses.

After discovery proceeded in the first case, the Mother as Next Friend filed a second Summons and Complaint on April 2, 2012, designated as Civil Action Number 2012-CP-46-1214, naming the Hospital as a defendant because of its role as employer of the nurses, whose negligence Appellant alleged to have been a concurrent cause of the child's injury, and for whose torts the Hospital had *respondeat* superior liability, (second Summons and Complaint). The Hospital's Answer asserted a general denial and one affirmative defense, i.e., the statutory cap on non-economic damage. An Order Consolidating Cases under the initial Civil Action Number was filed on July 12, 2012.

On April 29, 2013, Respondent Hospital filed a motion for partial summary judgment. (MPSJ-Hospital). Respondents Dr. Miller and the P.A. filed a motion for partial summary

judgment on May 24, 2013 (MPSJ-Dr/PA). The Court heard the motions for partial summary judgment on July 18, 2013. At the hearing Respondent Hospital filed a memorandum in support of its motion for partial summary judgment, arguing that the claim for pre-majority medical expenses could be asserted only by a parent individually, but the claim had been asserted by the child only, through her Next Friend, and could not be asserted now by the parent individually because it was time-barred. (Memorandum in Support). Appellant filed a memorandum of law in opposition to Defendants' motions for partial summary judgment on July 22, 2013. (Memorandum in Opposition).

The trial court signed an order granting partial summary judgment on July 24, 2013. (Order-PSJ). The stated basis for granting partial summary judgment was that the claim for pre-majority medical expenses could be asserted only by a parent individually, but the claim had been asserted by the child only, through her Next Friend, and could not be asserted now by the parent individually because it was time-barred. The trial judge's Order granting partial summary judgment was entered of record on August 2, 2013. Appellant received written notice of the Order on August 7, 2013.

On August 16, 2013, Appellant's Rule 59(e) Motion to Alter or Amend and a Motion for Leave to Amend the Complaint were filed. On October 15, 2013, Respondents emailed their responses to Appellant's motions, and these responses were filed on October 18, 2013. The hearing was held on October 17, 2013. Judge Kimball's order denying Appellant's motions was entered on November 4, 2013.

Appellant timely her Notice of Appeal on December 9, 2013. (Notice of Appeal). The amount involved in this appeal is not determinable at this time, but represents the value of Alexia's

pre-majority tort-related medical expenses, past and future estimated currently to be in the range of approximately Five Hundred Thousand to Eight Hundred Thousand Dollars ($500,000-$800,000).

STATEMENT OF THE FACTS

On April 4, 2007, Angela, Alexia's mother, was admitted to the Hospital for labor and delivery. Dr. Miller was Angela's attending obstetrician. Dr. Miller's plan was to deliver Alexia by head-first vaginal delivery. However, after delayed progress and signs of fetal distress, he ordered an emergency Caesarian Section. Before making an incision, however, he changed his mind and reverted to vaginal delivery. He then encountered a complication known as shoulder dystocia, whereby Alexia's top shoulder got stuck behind her mother's pubic bone. When Alexia was born, she did not have the ability to move her left arm normally.

Angela asserts in this action that Dr. Miller failed to perform properly certain safety maneuvers for resolving the shoulder dystocia, and instead used greater than gentle downward traction or torsion on Alexia's head and neck to try to pry the top shoulder out, thereby negligently over-stretching the brachial plexus nerves and causing permanent brachial plexus injury. (Complaint). Angela further asserts that the Hospital nurses were also negligent in their supporting role, which was a concurring cause of the injury. Defendants deny any negligence. (Answers).

Following her injuries, Alexia has received necessary and proper treatment from a host of healthcare providers, including nerve resection surgery. Alexia will need additional treatment continuing until her eighteenth birthday, as well as continued treatment after she reaches the age of majority. Accordingly, she will incur future medical bills during her entire lifetime.

This case was filed by Angela Patton as Next Friend of Alexia Lumpkin. Ms. Patton as Next Friend of Alexia sought compensation for medical expenses already incurred as well as the value of future medical care and treatment needed during Alexia's minority years, and thereafter.

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT A MINOR, THROUGH HER NEXT FRIEND, IS NOT LAWFULLY ENTITLED TO RECOVER AS PART OF HER TORT DAMAGES THE MEDICAL EXPENSES SHE INCURRED AND THE VALUE OF FUTURE TREATMENT SHE NEEDS DURING HER YEARS OF MINORITY.

In granting the Motion for Partial Summary Judgment, the trial court erroneously relied upon Respondents' assertion that a minor cannot recover in her own tort case for the medical expenses she incurred during her minority. The common law "necessaries" doctrine held that a parent has the duty of providing for a child's medical care during her minority. The common law corollary to this doctrine held that only the parent may recover in a tort case for medical expenses incurred by the minor due to the actions of a tortfeasor. In reaching this decision the trial court failed to appreciate that the need for the corollary to the "necessaries" doctrine has eroded in modern times, that it has either been abolished or curtailed in the majority of states which have recently considered the issue, and that public policy, justice, fairness, and logic dictate that either the minor or her parents should have the right to recover medical expenses incurred during her minority, so long as there is no double recovery.

A. The Necessaries Doctrine, Generally.

Denying a child the right to recover for her own tort-related medical expenses arises as a corollary to the English common law known as the necessaries doctrine. The history of the necessaries doctrine as reflected in South Carolina jurisprudence begins with the doctrine of

coverture.[1] Coverture originated in English common law during the medieval period.[2] Pursuant to this doctrine, upon marriage, the husband and wife became one person, such that "the very being of legal existence of the woman was suspended during the marriage."[3] The wife became "feme-covert" or under the protection of her husband, "her *baron* or *lord*."[4] An unmarried woman remained "feme sole" and retained the right to contract in her own name. Accordingly, a married woman had no legal responsibility for her actions, except in instances of adultery, incest, homicide, or sorcery.[5]

B. The Applicability of the Necessaries Doctrine to Women and Children in South Carolina.

The Court in *Gwynn v. Gwynn* explained that limiting a married woman's ability to contract protected her "from her own improvidence and weakness in yielding to her own generous and self-sacrificing impulses." *Gwynn v. Gwynn* 4 S.E. 229, 27 S.C. 525 (S.C. 1887). In *Gwynn*, the Court addressed whether a woman could enter a partnership with her husband to "combine their labor and skill." *Id.* The Court made clear she could not, "for the simple reason that her labor and skill already belonged to her husband." *Id.*

From the doctrine of coverture comes the necessaries doctrine, as a means of protecting women and children and ensuring that their basic needs were met. *See e.g., Trident Reg'l Med. Ctr. v. Evans*, 317 S.C. 346, 347, 454 S.E.2d 343, 344 (Ct. App. 1995). In South Carolina, the general

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[1] Some states have equated the necessaries doctrine to traditional notions of a master-servant relationship. *See, e.g., Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936). ("The father may permanently lose his parental rights to the son's services and proceeds . . . by his failure to provide necessaries for his son."); *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, 249 P.3d 767 (Ariz. 2011). Others have traced its beginnings to the concept of "paterfamilias in Roman times." *See, e.g., Shaffer-Doan v. Commonwealth*, 960 A.2d 500, 511 (Pa. Commw. Ct. 2008).

[2] Basch, Norma, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," *Feminist Studies* 5 (1979): 346–66

[3] 1 W. Blackstone, Commentaries, Book 1, Ch. 15, p. 442, 443

[4] Id.

[5] Rivers, Theodore John, "Widow's Rights in Anglo-Saxon Law," *American Journal of Legal History* 19 (1975): 208-15.

common law rule that any right of action to recover pre-majority medical expenses belongs only to the minor's parents is found in *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907). The court's analysis in *Tucker* is derived from several nineteenth century opinions, including *Newbury v. Getchell & Martin Lumber & Mfg*, 100 Iowa 441, 69 N.W. 743 (1896), *Tompkins v. West*, 56 Conn. 478, 16 A. 237 (1888), and *Fuller v. Naugatuck*, 21 Conn. 557 (1852).

The case of *Fuller v. Naugatuck* stated that expenses for the care of one's wife accrue to the husband alone. *Fuller,* 21 Conn. at 571. In the case *Tompkins v. West*, which cited to *Fuller*, the court reminded us that while an unmarried, feme sole may recover damages arising from expenses incurred attending her sickness, a married woman has no right of action for these expenses because, in coverture, the claim rests with the husband alone. *Tompkins* at 486.[6] After citing to *Tompkins*, *Newbury v. Getchell* extended the rationale precluding a wife's recovery for tort-related medical expenses to a minor. The court in *Newbury* held a minor could not recover medical expenses incurred from another's tort because the father "was liable for the support and maintenance of his minor son." *Newbury*, 100 Iowa at 457, 69 N.W. at 748. Finally, the 1907 case of *Tucker v. Buffalo* stated that a minor may not "recover for expenses incurred for which the father himself is personally liable." *Tucker*, 76 S.C. at 542, 57 S.E. at 627.

The constraints of coverture were loosened over time in South Carolina, and ultimately abolished.[7] Now, women can contract, and children can be held responsible for their own medical

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[6] *Griswold v. Penniman* noted that in coverture, choses in action "vest absolutely in the husband, on the principle that husband and wife are but one in law, and her existence, in legal consideration, is merged in his." *Griswold v. Penniman*, 2 Conn. 564 (1818).

[7] *See, e.g., Burwell v. S.C. Tax Com.*, 130 S.C. 199, 126 S.E. 29 (1924); *Gen. Stat.* 2037 (1882); 20 Stat. 1121 (1891); Gen. Stat. 3761 (1912); *S.C. Const. art. XVII*, S 9 (1895); *Sec. 400 Code of Civ. Proc.* (1932). *See also Bryant v. Smith*, 198 S.E. 20, 187 S.C. 453 (S.C. 1938) (South Carolina "has already gone very far towards complete emancipation of a married woman from the common law disabilities of coverture.")

expenses.[8] However, even though children can be held responsible for their own medical expenses, the archaic corollary to the "necessaries doctrine" still bars a minor from recovering against a tortfeasor who negligently causes the minor to incur these bills. Ironically, a doctrine intended to protect minors now denies them a remedy against a tortfeasor, even when the child is personally responsible for the payment of his own medical bills.

C. The Limited Tort Recovery Corollary to the Necessaries Doctrine No Longer Serves its Original Purpose, and Now Causes Harm upon the Class it was Designed to Protect.

1. Changes in Healthcare Over the Past Century Have Rendered the Corollary to the Necessaries Doctrine Obsolete.

The corollary to the necessaries doctrine now remains primarily as a creditor's remedy. *Trident* at 351, 346. To avoid constitutional challenge, South Carolina applies the rule reciprocally to both husband and wife. *Id.* at 348, 344. The South Carolina Court of Appeals recently stated:

> By allowing a creditor to look to both spouses for repayment, the necessaries doctrine encourages health care facilities and other suppliers to provide products and services necessary for the well-being of a family, and recognizes that marriage involves shared wealth, rights, and duties.

Id. at 345, 349.

In modern times, those duties regarding medical care are shared with third parties outside of the family. Financial responsibility for most medical care today is spread among private health insurance or government programs. When today's child needs medical treatment, options likely include some combination of: private insurance; Medicare; Medicaid; a gratuitous provider; the parent(s); and/or the child. The provider may be unpaid, in whole or in part, or the child may have to forego needed care because of parental inability to pay.

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[8] *Greenville Hosp. Sys. v. Smith*, 239 S.E.2d 657 (S.C. 1977); *Cole v. Wagner,* 150 S.E. 339 (N.C. 1929); *Scott Cnty. Sch. Dist. v. Asher*, 324 N.E.2d 496 (Ind. 1975).

That parents have the legal and moral responsibility to provide for their children's necessaries is beyond doubt, but that maxim does not necessarily result in provision of needed treatment nor actual payment of bills by the parents, particularly where an unexpected tort leads to catastrophic injury and extraordinary financial burden. The simple truth is that children may be forced to forego needed treatment, and/or required to pay medical bills out of their own resources, including a tort recovery. In a case like the instant one, the probability is that Medicaid and not the parents will pay the bills; and the child will be limited to only that precise care Medicaid approves, will be limited to receiving care from only those health care providers that accept Medicaid, and may be subject to repayment of a Medicaid lien out of her tort recovery. That is particularly troublesome here, in the context of a statutory cap on non-economic expenses.

Because parents are in fact no longer solely responsible for payment of their children's medical expenses, what equity lies in giving them the sole right to recover such damages in tort? There remains no more reason to vest parents with the exclusive right to recover their child's tort-related medical expenses than to vest a husband with the exclusive right to recover his wife's tort-related medical expenses. Both are anachronisms from a long, long time ago. As stated in *Shaffer-Doan* v. *Commonwealth of Pennsylvania*, "[T]he prohibition against a minor receiving compensation for medical expenses during minority is a common law anachronism." *Shaffer-Doan,* 960 A.2d at 511.

Interestingly, the corollary to the necessaries doctrine, now primarily a creditors' remedy, also does a poor job of protecting the rights of creditors who provided medical treatment to a minor with the expectation of repayment. Where a minor has incurred significant medical bills from an injury, it is very possible that only through recovery from a third party tortfeasor could the child or parent satisfy the debt. Limiting recovery for these bills to only the parent eliminates an avenue

of repayment. In instances such as the one presented in this case, any providers of medical care may find themselves without an adequate means of recovery for medical expenses incurred by the child.

2. The Necessaries Doctrine Serves Only to Shield Tortfeasors from Liability

Given that it does a poor job of protecting minors, families of tort victims and creditors' rights, the corollary to the necessaries doctrine serves only as an undeserved liability shield for tortfeasors and adversely affects the deserving interests of minor children, family, and health care creditors. The only protection tortfeasors deserve in this regard is avoidance of duplicative liability. That can easily be done by decreeing that minors or parents can recover for a minor's tort-related medical expenses, as long as there is only one recovery.

The limited tort recovery rule harms the very interests the necessaries doctrine was created to protect: child, family, and creditors. If parental funds for medical care are lacking in the first instance, the child may be forced to forego needed medical care, further harming the child. If medical care is obtained from private insurance or the government, the child may have to pay subrogation claims and liens out of a capped non-economic recovery, unless the subrogation and lien interests may be impaired by the child's inability to recover medical expenses from the tortfeasor. *See Ark. Dep't of Health & Human Servs. v. Ahlborn,* 547 U.S. 268 (2006); *83 C.J.S. "Subrogation," § 14.* Then the creditors would be harmed. If treatment is obtained on credit, to be paid out of the child's tort recovery, barring the child's recovery of medical expenses means that the health care creditors will seek payment from the child's recovery for capped non-economic tort damages, such as permanent injury, reduced earning capacity, physical pain, mental suffering or loss of enjoyment of life. In each such instance the tortfeasor escapes full responsibility for the

harm he caused, the child is undercompensated, and the tort recovery may be insufficient to pay the health care creditors' bills.

By preventing a minor child from obtaining compensation for medical expenses from a responsible third party tortfeasor, injustice results whenever a parental claim for such medical expenses is time-barred by a shorter statute of limitation than exists for the child's tort claim. That a shorter parental statute of limitations was not met should be immaterial, whenever the minor child's claim was timely asserted. The reasons which justify tolling for minors' tort claims apply just as forcefully with respect to medical expenses as to other elements of the child's recoverable tort damages.

South Carolina tort law requires tortfeasors to be held fully accountable for all of the natural and probable consequences of the tort. That includes the reasonable value of needed medical care, whether or not the victim can otherwise afford such care, and whether or not the tort victim pays for that care. *Haselden v. Davis*, 579 S.E.2d 293 (S.C. 2003); *Aucoin v. State ex rel Dep't of Transp. & Dev't ex rel. Dep't of Transp. & Dev't*, 712 So. 2d 62 (La. 1998). Tortfeasors should not be permitted to escape from liability by asserting arcane common law originally intended to protect minors, now mainly a creditors' remedy, as a means to harm both minors and health care creditors by limiting the child's recovery.

3. Limiting Recovery of Tort-Related Pre-Majority Medical Expenses to the Minor's Parents is Wholly Unnecessary to Ensure that Parents Both Provide for their Children and are Responsible for Debts Incurred for Their Care.

A common law rule stating that the parent is the *sole* party who may recover for the child's medical expenses is wholly unnecessary to ensure either that a creditor's rights are protected or that a child is properly cared for. Moreover, there is no justification in logic for preserving the limited tort recovery corollary to the common law necessaries doctrine into modern times.

Appellant strains to understand how the parent being the sole party entitled to recover tort-related pre-majority medical expenses furthers any legitimate interest of minors, family, creditors or tortfeasors in any way that would not be furthered if both parent and child were entitled to recover, so long as double recovery was prohibited.

The intended goal of the "necessaries" doctrine itself is laudable. It was intended to ensure spouses and children have their basic needs met. However, limiting recovery of tort-related pre-majority medical expenses to the parents does nothing to further this goal. If a parent is not the sole party capable of recovering tort-related pre-majority medical expenses, then will that parent refuse to provide for his/her child? Not only is this proposition doubtful, but neglect of the child's needs would be unlawful and would invite intervention by the Department of Social Services. Petitioner is not arguing that the parent should no longer be contractually liable for these medical expenses, only that *both* parent and child should be able to recover for them, as long as there is no double recovery. The necessaries doctrine would still hold parents contractually liable for medical expenses incurred for the treatment of their children. *S.C. Code Ann.* § 63-5-20(A) would still criminalize a parent's abandonment or failure to provide support to his or her children. Recognizing the child's ability to recover pre-majority medical expenses on her own would enhance the interests of minors, the family and their health care creditors, including government lienholders and private subrogation interests.

This purported corollary to the "necessaries" doctrine does nothing to advance or protect the interests of minor children; indeed, it only harms them. If a parent's responsibility for the care of his/her children is touted as a justification for this corollary, it is a red herring. Accordingly, Petitioner requests that this Court recognize that current economic realities mandate a departure

from the strict common law to allow both the minor and the parent to have the right to recover tort-related premajority medical expenses, so long as there is no double recovery.

4. In Light of Changes in South Carolina Law to Allow Creditors to Recover Directly against a Minor, the Necessaries Doctrine Creates an Inequity against the Class the Rule Originally Sought to Protect.

It is no longer the case that a minor cannot be held liable for medical bills incurred for her treatment. Where a parent is unable to satisfy the debts of the child, a healthcare provider may now seek recovery directly from the child. *Greenville Hospital System v. Smith*, 269 S.C. 653, 239 S.E.2d 657 (1977). In *Smith* the Court held that if the parents are unable to discharge the obligation of support, then the child or child's estate is responsible. *Id.* Since the child rather than the parent may now have responsibility to pay for medical treatment incurred during minority, then the limited tort recovery corollary to the "necessaries" doctrine does nothing to protect a minor. It only serves to prohibit a minor's recovery even where the minor may be liable for the medical expenses.

If a minor may be required to pay for his or her tort-related medical expenses, how can it be just, consistent, or logical to preclude the child from recovering directly from the tortfeasor his or her tort-related medical expenses? Allowing the necessaries doctrine corollary to stand gives tortfeasors a windfall and harms minors who now may be required to pay medical bills they incur but are denied the ability to recover from the tortfeasor. See, *Boley v. Knowles*, 905 S.W.2d 86 (Mo. 1995) (Because minors can often be held liable for medical expenses incurred for their treatment, the rationale for granting the primary cause of action for medical expenses in the parents is questionable.).

Even before *Greenville Hospital, supra*, South Carolina district courts had already acknowledged the lack of justice, fairness and logic inherent in using the "necessaries" doctrine to

preclude recovery of medical expenses incurred during minority by the minor directly. In the case of *McNeill v. United States*, 519 F. Supp. 283 (D.S.C. 1981), the Court noted:

> The issue of Matthew being able to collect for his own medical expenses was hotly contested. The reason for this is that Mr. and Mrs. McNeill have not filed suit, and the time when suit could be filed is past. Medical expenses on behalf of a child are usually included in a parent's cause of action. *Tucker v. Buffalo Mills*, 76 S.C. 539, 542, 57 S.E. 626, 121 Am.St.Rep. 957 (1907); *Hughey v. Ausborn*, 249 S.C. 470, 154 S.E.2d 839, 841 (1967); and *Kapuschinsky v. United States*, 259 F. Supp. 1, 7 (D.S.C.1966). However, this general rule is not an absolute bar, as when the parents do not assert a claim, or have waived a claim for these expenses. *67A C.J.S. Parent and Child § 142, p. 526.* Suppose both parents had died? Would the claim for medical expenses be lost? Surely it would inhere in the child, and he would be responsible to pay for his own necessary expenses from his own assets. The important point is that two claims cannot be asserted for the same item of damages.

Id. at 290. See, *also Sox v. United States* 187 F. Supp. 465, 469-470 (1960).

This Court is respectfully requested to correct this inequity which now results from a common law corollary predicated upon assumptions which no longer hold true.

5. The Necessaries Doctrine Undermines the Purposes of the Collateral Source Rule by Allowing Tortfeasors to Avoid Responsibility for Paying the Value of Tort-Related Medical Expenses Incurred During the Victim's Minority.

Precluding a minor's right to recover directly from the tortfeasor for pre-majority tort-related medical expenses represents a direct conflict with South Carolina jurisprudence on the collateral source rule. The collateral source rule does not exist to protect the tortfeasor in any fashion: it was created and intended to hold tortfeasors fully accountable for all harm their tort causes, even where the injured plaintiff receives help from another source (parents, health insurance, government programs, "Good Samaritans") or is forced to do without needed medical treatment for financial reasons.

There is an obvious conflict between the trial court's ruling in this case and this Court's 1988 ruling on the collateral source rule in *Haseldon v. Davis, supra.* Petitioner respectfully

requests this Court resolve that conflict by abrogating the corollary to the necessaries doctrine which limits recovery of tort-related pre-majority medical expenses to the minor's parents.

6. Most States Have Either Abrogated or Modified this Archaic Rule to Allow a Minor to Recover Tort-related Premajority Medical Expenses.

The modern trend of jurisprudence is to allow either child or parent to recover as tort damages the medical expenses incurred during minority, as long as there is only one recovery therefor. *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (W. Va. 2007); *Villa v. Roberts*, 80 F. Supp. 2d 1229 (D. Kan. 2000); *Johns Hopkins Hospital v. Pepper*, *supra*; *Boley v. Knowles, supra,* (the right to maintain an action to recover medical expense in relation to a child's treatment is vested jointly in the child and the parents; either the parents or the minor may maintain an action, although under no circumstances will a double recovery be allowed); *Myer v. Dyer,* 643 A. 2d 1382 (Del. Super. 1983); *Davis v. Drackett Prods. Co.,* 536 F. Supp. 694 (S.D. Ohio 1982).

Indeed, at this point, a majority of jurisdictions have either abrogated this rule, modified it, or read exceptions into it in the form of waiver or assignment from parent to child in an effort to remedy the inequity of the common law rule.[9]

As noted by the Maryland State Court of Appeals, the "necessaries" doctrine represents:

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[9] *Cabaniss v. Cook*, 353 So. 2d 784 (Al., 1977*); Blue Cross and Blue Shield of Alabama v. Bolding*, 465 So.2d 409, 412 (Ala. Civ. App. 1984); *Alaskan Village Inc. v. Smalley*, 720 P.2d 945 (Alaska, 1986); ."); *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1,supra; White v. Moreno Valley Unified School Dist.*, 181 Cal App. 3d 1024, 226 Cal. Rptr. 742 (Cal. App. 4 Dist., 1986); *Palacios v. Children's Place Retail Stores, Inc.,* 2004 WL 2943634 (Conn. Super., 2004); *Myer v. Dyer,*supra; *Lasselle v. Special Products Co.,* 106 Idaho 170, 677 P.2d 483 (1983); *Scott Cnty School Dist. v. Asher*, supra; *Villa v. Roberts*, 80 F. Supp.2d 1229 (D. Kan. 2000); *Betz v. Farm Bureau Mut. Ins.*, 269 Kan. 554, 8 P.3d 756 (2000); *Smith v. Geoghegan and Mathis,* 333 S.W.2d 254, 256 (Ky. 1960*); Aucoin v. State ex rel Dep't of Transp. & Dev't ex rel. Dep't of Transp. & Dev't,* supra; *Woodbury v. Hammond Lumber Co.,* 2003 WL 1665251 (Me. Super., 2003); *Johns Hopkins Hospital v. Pepper*, supra; *Lane v. Webb*, 220 So.2d 281 (Miss., 1969); *Boley v. Knowles*, supra; *Lopez v. Southwest Community Health Services,* supra; *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Davis v. Drackett Prods. Co.*, 536 F. Supp. 694 (S.D. Ohio 1982); *West v. Miami Valley Hospital,* 99 Ohio Misc. 2d 1, 714 N.E.2d 469 (Ohio com. Pl., 1998); *Palmore v. Kirkman Laboratories, Inc.*, 527 P.2d 391 (Oregon 1974); *Smith v. King*, No. Civ. A. 958, 1984 WL 586817 (Tenn. Ct. App. 1984); *Moses v. Akers,* supra; *Packard v. Perry*, supra; *Korth v. American Family Insurance Co.*, 340 N.W. 2d 494 (Wisc. 1983); *Shaffer-Doan v. Commonwealth*, supra.

> an acknowledgment that for certain services, a minor should not be heard to disavow a contract which by personal necessity required his or her participation. In a case of catastrophic medical injury, we can certainly conceive of a situation where the parents can afford some but not all of the injured child's past, present and future medical expenses. Assuming limitations has barred parental claims for such, the doctrine of necessaries protects an injured minor's right to recover from the tortfeasor medical expenses that his or her parents are ill-able to afford and for which he or she may ultimately be liable. Otherwise, the child would twice be victimized - once at the hands of the tortfeasor, and once by parents who, for whatever reason, failed to timely prosecute their claims for medical expenses. We cannot countenance a result that would leave the only innocent victim in such a transaction uncompensated for his or her injuries and potentially beholden to the compelled generosity of the taxpayer.
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> *Johns Hopkins Hospital v. Pepper, supra.*

The Arizona Supreme Court recently overruled prior case precedent and held that both the minor and her parent were entitled to recover pre-majority medical expenses, so long as there was no double recovery. *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1, supra.* The court in *DeSela* determined that the policy rationale for prohibiting a minor from recovering premajority medical expenses was antiquated and had been eroded by the development of Arizona's common law. *Id.* at 389, 249 P.3d at 769. Moreover, the Court noted the rule promoted piecemeal litigation, posed as a "potential trap for the unwary that can insulate defendants from liability for the child's medical expenses for reasons unrelated to the defendant's fault," and conflicted with legislative policy which provided minors with a limitations period much longer than that afforded to adults. *Id.* at 390, 249 P.3d at 770. Ultimately, the Court held, "Because the common law should adapt when circumstances make it no longer just or consistent with sound policy, we hold that the right to recover pre-majority medical expenses belongs to both the injured minor and the parents, but double recovery is not permitted." *Id.* (citation omitted).

Like the Court in Arizona, this Court should take this opportunity to correct a judicially created law which no longer has a place in modern society.

II. THE TRIAL COURT ERRED BY HOLDING THAT THE DOCTRINES OF IMPLIED OR EQUITABLE ASSIGNMENT AND WAIVER AND ESTOPPEL ARE NOT VALID MEANS OF TRANSFERENCE FROM PARENT TO CHILD OF THE PARENT'S RIGHT TO RECOVER PRE-MAJORITY MEDICAL EXPENSES.

The trial court erred by (a) holding that South Carolina does not recognize a claim of implied or equitable assignment and waiver and estoppel; and (b) holding that even if it did, neither would apply in this case. Plaintiff respectfully submits the trial court should have held that Angela Patton assigned and waived her right to recover tort related pre-majority medical expenses in favor of her child, Alexia Lumpkin. (Order p. 2). "A parent can waive his or her right to recover for damages properly belonging to the parent, [for example] medical expenses, if these damages are awarded in the child's action." *Betz v. Farm Bureau Mut. Ins. Agency of Kansas*, supra (*citing* 59 *Am. Jur. 2d Parent and Child* § 109 (1987). Additionally, while a child's medical expenses are usually part of the parent's cause of action, "this general rule is not an absolute bar, as when the parents do not assert a claim, or have waived a claim for these expenses." *McNeil v. United States*, supra, (*citing* 67A *C.J.S. Parent and Child* § 142) (*see also* 67A *C.J.S. Parent and Child* § 331 (2007)). The South Carolina district court in *McNeill* noted that the primary concern is "that two claims cannot be asserted for the same item of damages." *McNeill* at 290. However, *McNeil*, quoting *Sox v. United States*, also explained it was well settled that a parent's right to recover for cost of medical care of an injured infant "may be waived in favor of a recovery by the infant. The underlying reason for these rules is to prevent double recoveries. It is not to excuse liability." *Id.* (quoting *Sox v. United States,* 187 F. Supp. 465, 469-70 (1960)). Finally, *McNeill* noted, "[N]o reason has been suggested why a parent may not [] release to the child his right to items of damage." *Id.* (quoting 32 A.L.R.2d 1060, 1083).

South Carolina recognizes the doctrine of implied waiver. See, *Lyles v. BMI Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987). ("A waiver is an intentional relinquishment of a known right. It may be either express or implied." (citations omitted)). In determining whether there has been an implied waiver, the court looks at "the acts and conduct of the party against whom the doctrine is invoked" to determine whether "intentional relinquishment of a right is reasonably inferable." *Id.* (citing *Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 148 S.E. (2d) 369 (1966)). Additionally, "Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive." *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). In this case, Angela Patton, by acting as Alexia Lumpkin's next friend, sought pre-majority medical expenses in Alexia Lumpkin's name that resulted from the Defendants' negligence. Angela Patton and Alexia Lumpkin cannot each recover tort-related pre-majority medical expenses because courts will not allow double recovery. Angela Patton, by seeking recovery as Next Friend but not in her individual capacity, waived her right to recover pre-majority medical expenses in favor of Alexia Lumpkin. The act of choosing not to seek recovery in her own name but only as her child's representative evinces her intent for the child to be the party to recover these expenses, not her. Accordingly, when Angela Patton sought pre-majority medical expenses in her daughter's name, and did not do so in her own name, Angela Patton impliedly waived her right to recover to the benefit of her child.

Similarly, South Carolina recognizes the doctrine of equitable assignment, or implied assignment.[10] "An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, will be recognized and protected in equity." *Player v. Player*, 240

[10] "Implied assignment is sometimes called equitable assignment." *Grogan Chrysler-Plymouth, Inc. v. Gottfried*, 59 Ohio App. 2d 91, 96, 392 N.E.2d 1283, 1287 (Ct. App. 1978).

S.C. 274, 278, 125 S.E.2d 636, 638 (1962). Therefore, a parent may impliedly assign his or her claim for tort-related pre-majority medical expenses by acting as the child's "Next Friend" in a suit in which the child demands pre-majority medical expenses caused by the defendant's tortious conduct. Because both parent and child cannot not each recover pre-majority medical expenses, when the parent as Next Friend brings suit on the child's behalf but does not seek pre-majority medical expenses in her own name, the parent has assigned her rights to the child.

It appears that a South Carolina court has not been asked to determine whether the doctrines of implied assignment and/or waiver permit a parent to waive or assign her right to recover pre-majority medical expenses to her child by electing to seek recovery for these expenses only as representative of the child and not in the parent's individual capacity. This does not, however, undermine the existence of either of these doctrines in South Carolina. One cannot expect there to be an appellate court decision specific to every factual scenario that might arise under any given legal doctrine. It is sufficient to establish the existence of the doctrines, and show that these doctrines apply to the facts of this case.

Moreover, numerous jurisdictions that did not wholly abrogate the common law rule disallowing direct tort recovery of pre-majority medical expenses by a minor have acknowledged their state's recognition of the doctrine of implied or equitable assignment or recognized one's ability to waive her right in a cause of action in favor of another. [11] Doing so serves as an alternate means of avoiding the inequity of this archaic common law rule other than complete abrogation.

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[11] *See Smith v. Geoghegan & Mathis*, supra; *Lane v. Webb*, supra; *Palmore v. Kirkman Laboratories, Inc.*, supra; *Cabaniss v. Cook*, supra; *West v. Miami Valley Hospital*, supra; *Lasselle v. Special Prods. Co.*, supra; *Myer v. Dyer*, supra; *Villa v. Roberts*, supra; *Betz v. Farm Bureau Mut. Ins. Agency of Kansas*, supra; *John Hopkins Hospital v. Pepper*, supra; *Lopez v. Southwest Community Health Services*, supra; *Procanik v. Cillo*, supra; *Davis v. Drackett Prods. Co.*, supra; *Smith v. King*, supra; *Moses v. Akers*, supra; *Packard v. Perry*, supra; *Korth v. American Family Ins. Co.*, supra; *Shaffer-Doan v. Commonwealth*, supra; *Garrison v. Ryno*, supra.

Federal district courts of South Carolina, interpreting South Carolina law, have done the same.[12] Should this Court not elect to completely abrogate the archaic and anachronistic "necessaries doctrine," acknowledging the applicability of equitable and implied assignment and/or waiver in this context would, by effect, mitigate the harshness of this common law rule.

Accordingly, Appellant contends the trial court committed an error of law by not applying South Carolina law that recognizes the doctrines of equitable assignment and implied waiver to the facts of this case. The court should have concluded that Angela Patton transferred, waived, and assigned her rights to recover tort-related pre-majority medical expenses to Alexia Lumpkin.

III. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S REQUEST FOR LEAVE TO AMEND THE COMPLAINT AND FOR THE AMENDED COMPLAINT TO RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT.

The amended pleading changes the capacity in which Angela Patton demands tort-related pre-majority medical expenses incurred for past or future care of Alexia Lumpkin, from Next Friend to her individual capacity and Next Friend. The trial judge concluded that Rule 15(c) only allows an amendment changing the party against whom a claim is asserted, that the rule does not allow for the addition of a party, and that even if Rule 15(c) allowed the addition of another plaintiff, Plaintiff would not be entitled to relief because the amendment was not sought within the statute of limitations. Appellant respectfully argues that the trial court erred on all points.

A. Rule 15(c) was Created with the Purpose of Allowing an Amended Pleading to Relate Back to the Date of the Original Pleading and Avoidance of Being Time Barred by the Statute of Limitations.

Appellant notes that the very purpose of Rule 15(c) is to provide for a change in party outside the statute of limitations without the plaintiff being barred by it. The South Carolina

[12] *See McNeill v. United States*, supra; *Sox v. United States*, supra.

Supreme Court has held, "The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." *Thomas v. Grayson*, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995). This language of the South Carolina Supreme Court directly contradicts the decision reached by the trial court. For this reason alone, the trial court's ruling should be reversed on this issue.

Rule 15(c) explicitly sets forth the circumstances under which a claim or defense or a change in party may relate back to the filing of the original pleading, and thereby avoid bar by the statute of limitations. The trial court quoted Rule 15(c) as stating "the amendment '. . . relates back [only if the amendment is made] within the period provided by law for commencing the action . . . ." This is an inaccurate representation of the rule's language. What the rule actually states is:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> Rule 15(c), SCRCP

The rule does not require that the amendment be made within any given statute of limitations. Instead, the rule requires certain notice requirements be met related to any new party to be brought into the action. Therefore, the court's ruling that Petitioner had to file its Rule 15(c) amendment within any period of limitations was in error.

B. Rule 15(c) Allows Substitution of a Plaintiff.

Appellant respectfully asserts that it was error for the trial court to hold that Rule 15(c) did not permit a change in plaintiff but only in defendant.

The notes to Rule 15(c), SCRCP explain, "This Rule 15(c) is the same as the Federal Rule. The Notes of Advisory Committee on Rules for the Federal Rules of Civil Procedure – 1966 Amendment explained, "the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." Appellant has been unable to find a South Carolina case directly on point to this issue. Nevertheless, given that Rule 15(c) explicitly states that it is the same as the federal rule, and given that the notes to the federal rule make clear that Rule 15(c) would allow a change in plaintiff and defendant alike, the trial court should have ruled that Appellant was able to relate back its amended complaint which changed the capacity in which the plaintiff brought suit in this case.

The case of *Thomas v. Grayson,* supra, although perhaps not directly on point, is somewhat instructive. In this case the South Carolina Supreme Court agreed to answer certain questions certified by a United States District Court where a widow commenced a wrongful death action within the statute of limitation period, but "failed to allege her qualification and/or appointment as personal representative in South Carolina." *Id.* at 85, 456 S.E.2d at 378. Thereafter, plaintiff filed an authenticated copy of her appointment as personal representative, but did so after the statute of limitations had expired. *Id.* The plaintiff subsequently moved to amend her complaint to include her appointment as personal representative.

The Court noted that under prior law, the plaintiff would have been barred from bringing suit because she "did not have the capacity to bring an action at the time the complaint was filed because she was not recognized as personal representative." *Id.* at 86, 456 S.E.2d at 379. However, the court noted a change in the probate code which no longer required a Probate Court to determine the qualifications of a personal representative appointed in another state. *Id.* Nevertheless, the personal representative still needed to provide proof of appointment and bond.

The Court in its analysis cited to Rule 15(c), noting that it existed to "salvage causes of action otherwise barred by the statute of limitations. *Id.* at 88, 456 S.E.2d at 380. The court stated further that in determining whether an amendment related back to the date of the original pleading, the court should look to see if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading." *Id.* Ultimately, the Court held Rule 15(c) as well as 17(a), SCRCP permitted "the relation back of an amendment to the complaint to assert the qualification in South Carolina of the foreign personal representative in an action which was otherwise timely." *Id.* 88-89, 456 S.E.2d at 380.

While this case does not involve a change in the plaintiff's capacity to sue for damages involving wrongful death, it does involve a change in the plaintiff's capacity to sue for damages involving a minor's pre-majority medical expenses. The Court in *Grayson* changed prior law which held, "The rationale of the older cases was based on the idea that a change in plaintiff's capacity to sue was tantamount to bringing a new cause of action." *Id.* Accordingly, the court in *Grayson* allowed for a change in plaintiff's capacity under Rule 15(c), SCRCP.

In support of its ruling, the trial court cited language from Rule 15(c), SCRCP which stated, "[a]n amendment changing the party against whom a claim is asserted." The trial court interpreted this as a limit on which party could be substituted. Based on this interpretation, the trial court concluded that Rule 15(c) only allowed for an amendment changing a defendant. However, the problem with this interpretation is that it misperceives a limit on when a new defendant may be substituted as limiting amendments to the changing of *only* Defendants. This is incorrect. The second paragraph of Rule 15(c) was not intended to limit amendments changing the party to only defendants. It was intended to place additional restraints on the substitution of a new defendant. These additional restraints include a requirement that the "party to be brought in by amendment"

(1) have received notice of the institution of the action "within the period provided by law for commencing the action" and (2) knew or should have known "that, but for a mistake" concerning the identity of the defendant to be brought in, the action would have been brought against this Defendant from the outset. It is clear that these two limitations have no applicability when a new plaintiff is to be brought in. This is because if there is no change in defendant, then (1) the already named defendants clearly would have received such notice of institution of the action within the statute of limitations, and (2) the action would already have been brought against the proper defendant. These additional requirements for substituting a defendant exists to protect the defendant from the unfairness that might result if a new defendant is sued without the new defendant having had notice that it was susceptible to litigation during the relevant periods of limitation. Therefore, the trial court's interpretation of Rule 15(c) was in error.

C. Appellant Has Not Sought to Add a New Party, Only to Change the Capacity of a Named Party.

Finally, the court held that Rule 15(c) only allowed for the changing, not the addition, of a party. The trial court apparently understood Appellant's amendment as one to add a party. Appellant disagrees with this holding. Plaintiff Angela Patton was already named as the Next Friend of Alexia Lumpkin in this suit. Appellant sought to change Angela's capacity from the Next Friend of a minor, to the Next Friend of a minor and her individual capacity. No new name appears in the caption. No new damages not already understood to be sought have been claimed. The named defendants face no additional exposure not already asserted. Accordingly, to the extent that the court held plaintiff sought to add a party and not change the capacity of a party, the court erred in its decision.

This reasoning is supported by Justice Hearn in her dissent in *Jackson v. John Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). In *Jackson*, the court of appeals affirmed the trial court's ruling that Plaintiff sought to add Milligan as a defendant along with the previously named John Doe defendant. The Court held that Rule 15(c) did not permit the adding of a new party. *Id.* at 558-59, 537 S.E.2d at 570-71.

Justice Hearn dissented, noting that while the amended complaint indicates that the John Doe and newly named defendant are two separate individuals, the complaint contained an assertion that they were the same person. *Id.* Moreover, Justice Hearn noted that the test to use when determining if an amendment should relate back is found in the language of the rule, which is "whether the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading." *Id.* at 560, 537 S.E.2d at 571. Justice Hearn noted further, "Once litigation involving a particular conduct or a given occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion when the claim arises out of the same conduct, transaction, or occurrence as set forth in the original pleading. *Id.* (citing 6A *Charles Alan Wright and Arthur, R. Miller, Federal Practice and Procedure*§ 1496 (1990). Accordingly, Justice Hearn stated that she would have perm itted the addition of the new party.

This analysis is important for two reasons. First, if construed broadly, Justice Hearn argued for the addition of a party not just a change in party. Therefore, assuming arguendo that Appellant did not merely change the capacity under which Plaintiff brought suit but added a new plaintiff, then Justice Hearn's analysis would still permit the addition. If read narrowly, Justice Hearn argued that the Court must look more closely at what the Plaintiff is seeking to accomplish before determining whether a new party has been added or not. Accordingly, in our case where Angela

was in fact already named as a party and sought only to change her capacity from Next Friend to her individual capacity and Next Friend, then this court should allow for the amendment and allow the amendment to relate back to the filing of the original complaint.

D. The Trial Court Erred in Not Finding that Appellant Met All Requirements for the Amended Complaint to Relate Back to the Filing of the Original Pleading.

In this case, the claim for tort-related pre-majority medical expenses clearly arises out of the same conduct, transaction, and occurrence set forth in the original pleadings. The only change is the capacity in which Angela Patton seeks recovery for these damages. While Angela initially made a claim for these damages as Next Friend of Alexia Lumpkin, she now seeks recovery for these damages in her individual capacity. All damages asserted in the amended pleading arose out of the same allegations of medical malpractice set forth in the original pleading. Said differently, the same damages are sought for the same negligent conduct. Accordingly, all allegations found in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleadings, as required by Rule 15(c), SCRCP.

Secondly, all Defendants remain the same in amended pleading; therefore, Respondents cannot credibly argue that they did not have notice of the institution of the action. Respondents similarly cannot even claim that they had not received notice that these damages were being sought, as they were prayed for in the original complaint. Therefore, Respondents cannot argue that they would suffer prejudice in defending against these allegations. Similarly, Defendants cannot argue that they did not know that but for a mistake concerning the identity of the proper

party, the action would have been brought against them, since the action was in fact brought against them.[13]

There is no prejudice to Respondents by allowing Petitioner to amend the complaint in the manner requested. Respondent certainly cannot claim surprise, as the exact same damages were prayed for in the initial complaint. No harm befalls Respondents by permitting the complaint to be amended at this stage. Respondents were on notice that Plaintiff sought pre-majority medical expenses. Respondents' ability to defend this claim on the merits has not been diminished. Therefore, Respondent contends the trial court erred in failing to grant Petitioner's request to amend the complaint and have the amended complaint relate back to the filing of the original pleading.

IV. THE TRIAL COURT ERRED BY HOLDING THAT THE DEFENDANTS HAD NOT WAIVED THEIR RIGHT TO ARGUE PLAINTIFF CANNOT RECOVER PRE-MAJORITY TORT-RELATED MEDICAL EXPENSES

Initially, Appellant notes that the trial court's Order incorrectly addressed Appellant's contention that Respondents failed to assert an affirmative defense as the failure to plead statute of limitations as an affirmative defense. In fact, Appellant's position is that Respondents failed to allege as an affirmative defense Appellant's inability to recover pre-majority medical expenses.

Neither Dr. Miller and his practice nor Amisub of South Carolina pleaded Lumpkin's inability to recover pre-majority tort-related medical expenses as an affirmative defense.

[13] As previously mentioned, these two additional requirements found in the second paragraph of Rule 15(c) for the addition of a new defendant brought into the action would always be satisfied when the change in party is the Plaintiff. Accordingly, Appellant believes the proper reading of the second paragraph limits these two additional requirements to amendments which change the party against whom a claim is asserted, and not to amendments which change the plaintiff.

Respondents' failure to plead this affirmative defense has prejudiced Appellant, and Appellant respectfully submits the trial court erred in not finding this affirmative defense was waived.

South Carolina Rules of Civil Procedure Rule 8(c) states, "Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses . . . and other matter constituting an avoidance or affirmative defense." South Carolina's rule conforms to the comparable federal rule. *See* SCRCP Rule 8(c) Note to 1995 Amendment. The purpose of Rule 8(c) is "to avoid the 'surprise' defenses permissible under the old general denial answer . . . ." *Id.* at Notes to 1986 Amendment. Thus, while the rule enumerates several affirmative defenses, as the rule itself states, the list is by no means exhaustive of all available affirmative defenses which must be pled.

In South Carolina, "An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action." *FMI, Inc. v. REMAX, Inc.* 286 S.C. 343, 346-47, 333 S.E.2d 360 (Ct. App. 1985). This court also stated,

> In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.
>
> *Id.*

Affirmative defenses differ from evidentiary pleas or negative defenses, which need not be pleaded. See, *e.g. O'Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776 (Ct. App. 1983). See, *also Black's Law Dictionary* 482 (9th ed. 2009) (an affirmative defense is a "defendant's assertion of facts and arguments that, if true, will defeat plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.")

South Carolina courts will deem an affirmative defense not pled as waived, especially when the appellant has been prejudiced by the defendant's failure. In holding that a charitable hospital had to plead the limitation on liability afforded to a charitable entity, the South Carolina Court of Appeals stated that the hospital's "failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution." *James v. Lister*, 331 S.C. 277, 282-83, 500 S.E.2d 198, 201 (Ct. App. 1998). Accordingly, the court held the defendant waived the argument that damages were limited by the state's charitable limitation on liability.

In this case, an argument that a child may not recover pre-majority tort-related medical expenses in her own name is an affirmative defense. Respondents argue that, even if all Appellant's allegations are true, Appellant could not recover tort-related pre-majority medical expenses. The fact that Respondents' arguments rest upon conditional admittance of Appellant's allegations makes it an affirmative defense. Respondents' position is that, even if the court assumes all elements of Appellant's case have been established, Appellant could not recover tort-related pre-majority medical expenses. Again, this necessarily makes Respondents' arguments affirmative defenses. Respondent is not arguing that a particular element of Appellant's cause of action has not been established.

Appellant was prejudiced by Respondents' failure to plead Appellant's inability to recover pre-majority tort-related medical expense as an affirmative defense. Time remained on the statute of limitations for the mother to recover tort-related pre-majority medical expenses incurred by her child in her own name. Had Respondents properly pled this affirmative defense, Appellant could have amended the complaint to change the capacity through which Angela Patton sought pre-majority medical expenses from her acting as Next Friend, to her individual capacity. Only after

the statute of limitations had run did Respondents seek to preclude Appellant from recovery of pre-majority tort-related medical expenses. Respondents denied Ms. Patton the ability to bring suit in her own name by acquiescing to the child's demands for pre-majority medical expenses, only to move for summary judgment on this very basis after the parent's statute of limitations had run. Accordingly, Appellant respectfully submits it was error for the court to grant Defendants' motions for partial summary judgment.

CONCLUSION

For the reasons stated, the Appellant respectfully requests that this Court reverse the trial court's order granting partial summary judgment and remand for further proceedings.

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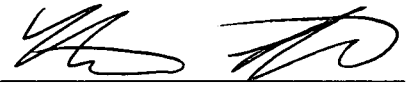
BY: 

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May 23, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

RECEIVED
MAY 27 2014
SC Court of Appeals

Case No. 2009-CP-46-5195

Angela Patton, as Next Friend of
Alexia L., a minor,

Appellant,

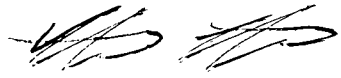
v.

Dr. Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P. A.
and Amisub of South Carolina, d/b/a Piedmont Medical Center,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that this Initial Brief of Appellant complies with Rule 208(a)(3), SCACR.



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