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

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.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant adopts the Statement of the Case as set forth in Appellant's prior brief.

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.

A. There is no prohibition to the Court of Appeals reviewing a request to change the common law where the issue has not been recently addressed by our Supreme Court.

Respondents are correct that one of the arguments Appellant presented to this Court is for a change in the common law. Moreover, Appellant does not dispute the precedential effect of *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E.626 (1907). However, Respondents are incorrect in stating that only the Supreme Court can consider arguments to change archaic common law like the ruling set forth in *Tucker* over a century ago.

Respondents failed to provide this Court with the full quote from *Bain v. Self Mem. Hosp.*, 281 S.C. 138, 314 S.E.2d 603, (Ct. App. 1984). *Bain* actually stated that the Court of Appeals lacks authority to change common law "[w]here the law *has been recently addressed by our Supreme Court* and is unmistakably clear . . . ." *Id.* at 141, 314 S.E.2d at 605. (emphasis added). The Court of Appeals in *Bain* was asked to adopt the doctrine of *res ipsa loquitur*. *Id.* The Court noted that adoption of this doctrine had been recently considered and rejected by the South Carolina Supreme Court in *Legette v. Smith*, 265 S.C. 573, 220 S.E. (2d) 429 (1975). Appellant cannot find, and indeed Respondents have not cited to, any case brought to our Supreme Court which challenges the validity of the necessaries doctrine being used to preclude a minor's recovery of pre-majority tort-related medical expenses since *Tucker*. *Hughey v. Ausborn*, 249 S.C. 470, 154 S.E.2d 839

(1967) did not consider a challenge to that use of the necessaries doctrine or any similar request for a change in the common law. The Court merely acknowledged the existence and applicability of the common law principle in *Tucker* to the case before it. Indeed, it appears that the Plaintiff in *Hughey* accepted the applicability of that use of the necessaries doctrine. What the Plaintiff challenged was the father's ability to recover punitive damages in addition to medical expenses.[1] Accordingly, the South Carolina Supreme Court has *never* revisited a challenge to the applicability of the necessaries doctrine to bar a minor's recovery of tort-related pre-majority medical expenses since *Tucker* was decided over a century ago.[2]

Respondents' "telling example" of the interplay between this State's courts of review is based upon a misunderstanding of what occurred in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) (*Boyter I*) and *Langley v. Boyter*, 286 S.C. 85, 332 S.E.2d 100 (1985), (*Boyter II*). The Supreme Court in *Boyter II* quashed the decision reached by the Court of Appeals in *Boyter I* because, procedurally, the plaintiff was barred from arguing for overruling the doctrine of contributory negligence. *Id.* at 87, 332 S.E.2d at 101. The plaintiff in *Boyter* had previously petitioned the South Carolina Supreme Court to argue for the abolition of the doctrine of contributory negligence, and the petition was denied. *Id.* Because the Supreme Court had already denied the plaintiff's petition, it was improper for the Court of Appeals to allow argument on this issue. *Id.* Accordingly, the South Carolina Supreme Court quashed the opinion of the Court of Appeals for this procedural reason; the opinion was not quashed because the Court of Appeals

[1] To this issue, the Court stated, "The father's recovery in such case is confined to his pecuniary loss." *Id.* at 476, 154 S.E.2d at 841. Appellant has not brought this issue before the Court. However, even if it had, the issue has not been addressed in almost fifty years, and therefore *Bain* would not preclude review of that issue either.

[2] Similarly, *Greenville Hosp. Sys. v. Smith* 269 S.C. 653, 239 S.E.2d 657 (1977) did not involve a challenge to the continued need to apply the necessaries doctrine to preclude recovery of pre-majority tort-related medical expenses by a minor. Therefore, Respondents' argument that this case implicitly reaffirmed the ruling in *Tucker* is without merit.

somehow lacked the ability to ever review challenges to the common law, as Respondents erroneously argue.

Subsequent case law makes this clear. The case *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998) (*Davenport II*) noted that the Supreme Court adopted Chief Judge Sander's analysis of comparative negligence as stated in *Boyter I*, and explained that *Boyter I* was "quashed on procedural grounds." *Id.* at 85, 508 S.E.2d at 573. Thus, in reviewing any case, the Court of Appeals cannot hear argument or take action which the South Carolina Supreme Court has refused to hear or take in that particular case. This point is made clear in *Ravan v. Greenville County*,315 S.C. 447, 459, 434 S.E.2d 296, 304 (Ct. App.1993), which stated, "We note first that we are precluded from granting a new trial based on these matters because the Supreme Court implicitly decided the new trial motion lacked merit by refusing to remand the case."

Indeed, *Boyter I* shows the impact the Court of Appeals has had in making changes to archaic common law. As Respondent pointed out, this State adopted the law of comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). However, in so doing, the South Carolina Supreme Court simply stated:

> Having determined comparative negligence is the more equitable doctrine, we now join the vast majority of our sister jurisdictions and adopt it as the law of South Carolina to the extent set forth below. For an exhaustive analytical discussion of the history and merits of comparative negligence, we refer the bench and bar to the opinion of Chief Judge Sanders in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct.App. 1984).
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> *Id.* at 244, 399 S.E.2d at 784.

Thus, to support its decision to adopt the law of comparative negligence, the South Carolina Supreme Court referred readers to Chief Judge Sanders' opinion in *Boyter I,* the decision it had previously quashed on procedural grounds.

Finally, *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 325 S.C. 507, 482 S.E.2d 569,1997 (Ct. App.1997) (*Davenport I*) and (*Davenport II*), supra, make clear that the Court of Appeals can in fact change the common law when it deems necessary. In *Davenport I*, the Court stated, "We choose, instead, to align South Carolina with the overwhelming majority of jurisdictions which have abolished assumption of risk as a total bar to recovery." *Id.* at 515, 482 S.E.2d at 573. In *Davenport II*, the South Carolina Supreme Court granted a writ of *certiorari*. Nowhere in *Davenport II*, did the Supreme Court mention that it was inappropriate for the Court of Appeals to abolish assumption of risk as a total bar to recovery. The Supreme Court reviewed the analysis set forth by the Court of Appeals, *affirmed* the result reached by the Court of Appeals, and modified the decision as reflected in the Court's analysis set forth in *Davenport II*. If there was any prohibition to the South Carolina Court of Appeals modifying common law, certainly the South Carolina Supreme Court would have stated so in *Davenport II*.

B. The change in common law found in *Greenville Hosp. Sys. v. Smith* created a new unfairness and burden upon the minor through application of the necessaries doctrine.

Respondents argue that medical providers still send bills to parents, not minor children. Although medical bills may still be sent to the parents[3], hospitals now seek collection from the child when the parent does not pay. This is a drastic change from the days of *Tucker*. As Respondents quoted from *Greenville Hosp. Sys. v. Smith* 269 S.C. 653, 654, 239 S.E.2d 657, 658 (1977), "the minor is not liable unless the parents are unable to pay the reasonable value of the hospital services rendered . . . ." Said differently, when parents are unable to pay for medical care rendered to a minor, the minor is now liable for the bills.

[3] It should be noted that some health care providers now send bills directly to third party obligors, such as government programs like Medicaid, Medicare, Tricare, private health insurers, or publicly affiliated health insurance carriers under the Affordable Care Act.

Post *Greenville Hosp. Sys.*, the minor still has no ability to recover the costs of her medical expenses that result from another's negligence, but it is now clear that the same minor will be held responsible for paying those costs if the parents are unable to do so. Given the substantial costs associated with healthcare in the twenty-first century, it is not hard to imagine a situation where parents are unable to pay their child's medical bills. Now, every time a child recovers for her tort claim, including no recovery for past or future pre-majority medical care, the recovery is in jeopardy of being taken by providers of past and future pre-majority medical care. This means the child will not receive full compensation for her injuries. The child will receive no recovery for pre-majority medical expenses. Money is taken from recovery for pain and suffering, diminished future wages, and future post-majority medical care to pay past or future pre-majority medical bills for which the child cannot recover. Therefore, the child is not made whole, and the tortfeasor escapes liability for the full extent of the damage caused by wrongful conduct. This unfair scenario was not contemplated by the court in *Tucker* when the necessaries doctrine was first applied to preclude minors from recovery of their own tort-related pre-majority medical expenses.

C. It is bad policy to allow the necessaries doctrine to remain a bar to a minor's recovery pre-majority tort-related medical expenses.

Our Courts have noted, "'[T]he common law changes when necessary to serve the needs of the people [and] [w]e have not hesitated to act in the past when it has become apparent that the public policy of this State is offended by outdated rules of law.'" *Marcum v. Bowden*, 372 S.C. 452, 458,643 S.E.2d 85, 88 (2007) (quoting *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992)). In *Russo*, the court modified the common law regarding the tort of alienation of affections by stating, "We find, however, that the torts of criminal conversation and alienation of affections have outlived any usefulness they may have possessed in regard to preventing the dissolution of marriages." *Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992). Just as these torts

lost their usefulness in preventing dissolution of marriages, so too has the bar to a minor's recovery of tort-related pre-majority medical expenses outlived its purported purpose. *See also McCall v. Batson*, 285 S.C. 243, 256, 329 S.E.2d 741, 748 (1985) "A rule which no longer serves a legitimate purpose should not be followed solely because of a dogged adherence to stare decisis. Stare decisis should be used to foster stability and certainty in the law, but not to perpetuate error and injustice." (*citing Fitzer v. Young Men's Christian Association*, 277 S.C. 1, 4 282 S.E. (2d) 230 (1981)).[4]

Respondents urge this Court to turn a blind eye to the modern trend of states abrogating or significantly modifying the common law's application of the necessaries doctrine to limit recovery of medical expenses by minors to eliminate or reduce its unfairness. Appellant cited numerous cases to show this trend, and this Court may find those cases helpful in analyzing the issues before the Court. For this purpose, these cases are relevant. Respondents argue the cases from foreign jurisdictions have no binding effect on this Court, but these cases were properly cited, are well-reasoned, and have persuasive authority. Even though Respondents criticize Appellant's citation of such cases, Respondents freely, though improperly, cite to unpublished opinions of the Court of Appeals. *See* Rule 268(d)(2), SCACR "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Since *Tucker*, neither the Court of Appeals nor the Supreme Court of this State has ever entered a published opinion addressing a challenge to the continued need to bar minors from recovery of tort-related pre-majority medical expenses in their own names.

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[4] Justice Sutherland wrote:

> [T]o say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.
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> *Funk v. United States*, 290 U.S. 371 (1933)

Appellant calls the common law necessaries doctrine a "creditor's remedy" because this Court calls the necessaries doctrine a "creditor's remedy." *See Trident Reg'l Medical Ctr. v. Evans*, 317 S.C. 346, 351, 454 S.E.2d 343, 346 n.2 (Ct. App. 1995) "[I]n our view, the necessaries doctrine historically has been a creditor's remedy . . . ." To be clear, Appellant has no objection to the existence of a remedy for creditors who provide medical treatment to minors. The problem with the current state of the law is that the minor is now liable to the medical provider for expenses incurred as a result of another's negligence, but the minor is barred from recovering from the tortfeasor for the same. The minor's inability to recover pre-majority tort-related medical expenses actually diminishes the value of the rule as a creditor's remedy by reducing the amount of funds available to pay the medical bills. Eliminating this bar enhances the strength of the necessaries doctrine as a remedy for creditors. Moreover, it eliminates the unfairness of requiring a minor to face the risk of having to pay these expenses while denying the minor the right to recover for the same.

Respondents argue the underlying rationale is that a parent is responsible for providing medical care to minor children and paying those expenses. However, a bar to a minor's recovery of pre-majority medical expenses does nothing to further the societal requirement that parents meet their minor children's needs. This rule no longer advances the rationale. The way medical care is both provided and paid for today is vastly different than in 1907. Medical insurance did not exist in 1907. Medicare, Medicaid, Tricare and the Affordable Care Act did not exist in 1907.

To be clear nowhere in Appellant's argument has she asserted that parents should not (a) be responsible for providing medical care to minor children or (b) be liable for expenses incurred for treatment of a parent's minor children. This is a red herring. Appellant's argument is that the common law should change to allow *both* the parent and child the right to recover tort-related pre-

majority medical expenses, so long as double recovery is prohibited. Allowing the minor to recover these damages in her own name has zero impact on the parents' obligation to furnish medical care as needed by the child. Indeed, the failure to do so is criminal. Prohibiting the minor from recovering these expenses in her own name does nothing to ensure that needed medical care is provided to the minor but instead reduces funds available for future medical care.

In her prior Brief, Appellant set forth in detail the history of the necessaries doctrine, stated precisely why modern society has outgrown that portion of the rule which precludes minors from recovery of all of their tort-related medical expenses, and explained why the continued existence of that portion of the doctrine actually harms the very group it initially sought to protect. In its current state, that portion of the doctrine serves only to shield tortfeasors from paying the full costs that result from their tortious actions and deprives the minor of a full recovery. This is in contravention of the law of South Carolina. *See Fitzer v. Greater Greenville South Carolina YMCA,* 277 S.C. 1, 3,282 S.E.2d 230, 231, (1981). ("There is no tenet more fundamental in our law than liability follows the tortious wrongdoer."). This includes liability for the reasonable value of needed medical care. Our courts have noted that South Carolina tort law requires tortfeasors to be held fully accountable for all the natural and probable consequences of their tort, including the reasonable value of medical care irrespective of whether the victim can otherwise afford the care or in fact pays for it. *Haselden v. Davis* 353 S.C. 481, 485, 579 S.E.2d 293, 295 (2003). Additionally, they disdain permitting the defendant tortfeasor to enjoy a windfall to the victim's detriment. *See Id.*

As our Courts have noted on numerous occasions, when outdated common law has outlived its usefulness, it is time for a change. The Court in *Fitzer* noted, "When the reason for a declared public policy no longer exists, we should not hesitate to abolish it and the rules which are supported

by the policy." *Fitzer*, 277 S.C. at 3-4, 282 S.E.2d at 231 (1981). Any of the purported reasons given in support of the necessaries doctrine as a bar to a minor's recovery of pre-majority tort-related medical expenses in the minor's own name are simply not justified in the twenty-first century. As stated in *Boley v. Knowles*, "Because minors can often be held liable for medical expenses incurred for their treatment, this rationale for granting the primary cause of action for medical expenses in the parents is questionable." *Boley v. Knowles*, 905 S.W.2d 86, 89 (1995). To prohibit the minor from recovering these expenses is to cause the child to "be twice victimized – once at the hands of the tortfeasor, and once by parents who, for whatever reasons, failed to timely prosecute their claims for medical expenses." *John Hopkins Hosp. v. Pepper*, 697 A.2d 1358, 1365-66 (1997). *See also Shaffer-Doan v. Commonwealth*, 960 A.2d 500, 511 (Pa. Commw. Ct.2008) ("An examination of the origins of the parents' and child's mutually exclusive claims suggest that the prohibition against a minor receiving compensation for medical expenses during minority is a common law anachronism . . . ."). Accordingly, the Court should take this opportunity to change the anachronistic common law prohibiting a minor from recovery of her own tort-related pre-majority medical expenses.

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.

A. Appellant has properly set forth facts sufficient to show a transference of the parent's claim to the child through implied waiver

"An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-159,355 S.E.2d 282, 285, (Ct. App.1987). Respondents' confusion with the operation or applicability of implied waiver stems from a misunderstanding of the parties to the transference. In this case, Angela Patton has waived her right to recover Alexia Lumpkin's

pre-majority medical expenses to the benefit of Alexia Lumpkin. Thus, Angela Patton, by seeking recovery as Next Friend of Alexia Lumpkin, and choosing not to seek any recovery in her own capacity, waived her right to recover pre-majority medical expenses in favor of Alexia Lumpkin. The conduct of choosing not to seek recovery in her own name and instead filing suit only as her child's representative, is evidence of her intent to waive any claim she had to those expenses in favor of her child.

As the transference is between Angela and her daughter Alexia, these are the two parties who would have standing to challenge whether the transference was intended. Respondents are not parties to nor were they involved with the waiver and transfer between Angela Patton and her daughter Alexia. Accordingly, the conduct to assess in determining whether an implied waiver has in fact occurred is Angela's conduct, not Respondents'.

Because of this misunderstanding by Respondents, their discussion of implied waiver as an affirmative defense or its purported use as an offensive weapon is irrelevant. There is no need for an affirmative defense to be asserted because there is no dispute between Angela and Alexia regarding the existence of an implied waiver or intent to impliedly waive the right to recover tort-related pre-majority medical costs from Angela to the benefit of Alexia. Nevertheless, Appellant notes the doctrine has not been used offensively in this case, which Respondents contend is inappropriate. Only after Respondents challenged Appellant's right to recover pre-majority medical expenses did Appellant explain the implied waiver.

Respondents point out that the specific factual scenario brought before it by Appellant has yet to be decided by a reviewing court in this State. However, simply because applicability of the doctrine of implied waiver has yet to be ruled upon under the specific factual scenario now before the Court is not evidence of the doctrine's inapplicability to the facts at hand. No litigant can expect

to have published case law specific to every fathomable factual scenario. It is without consequence that no published opinion exists analyzing a mother's implied waiver of her right to recover pre-majority tort-related medical expenses to the benefit of her child. What is important is that the doctrine exists in this State, and based upon its use and purpose, would be applicable to the facts of this case.

In other jurisdictions, however, this very factual scenario has been reviewed by appellate courts. The North Carolina Supreme Court explained, "[A] father waives this right by participating as guardian ad litem in a trial in which the minor is awarded medical expenses." *Bolkhir v. North Carolina State University*, 365 S.E.2d 898, 902 (N.C. 1988). *See also Doss v. Sewell*, 125 S.E.2d 899, 903 (N.C.1962) ("When the parent in whom the cause of action exists is the next friend and participates in the trial in which an award is made to the infant for medical expenses, the participation is a waiver of the parent's right."). In fact, these courts also noted, "It is immaterial to the defendants whether the infant or the parent asserts the claim." *Id.* From the defendants' point of view, their only concern is that there be no double recovery.

Similarly, in *Betz v. Farm Bureau Mut. Ins. Agency of Kansas*, 8 P.3d 756, 758 (Kan. 2000), the Court noted, "[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." The Court in *Myer ex rel. Myer v. Dyer*, 643 A.2d 1382, 1387 (Del. Super. Ct.1993) stated, "The Court finds that by not presenting their claim in a timely fashion and by presenting a claim on Jennifer's behalf, the adult plaintiffs have waived any claim for medical expenses which under the general rule they would normally recover" and the court held that "under the facts of this case that a separate cause of action has been filed for Jennifer and that she can seek to recover medical expenses incurred during her minority."

Finally, the South Carolina District Court case *McNeill v. United States*, 519 F. Supp. 283 (D.S.C.1981) illustrates the concept of an implied waiver as a valid means of transference. As *McNeill*, explained:

> It is settled law that the primary right of recovery for the cost of medical and nursing care of an injured infant lies with the parents, but it is equally well settled that this right 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. By not asserting within the two-year statutory period any right that they may have had to recover for such cost, the parents have absolutely and irrevocably waived any right that they may have had in that respect. This does not, however, bar the infant nor does it excuse liability.
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> *Id.* at 291 (*quoting Sox v. United States*, 187 F. Supp. 465, 469-470 (D.S.C.1960)

The court then concluded that the minor was "authorized to assert his own claim for medical expenses in the absence of one being asserted by the parents . . . ." *Id.* The same should have been permitted in this case, and it was error for the trial judge not to do so.

B. Appellant has properly set forth facts sufficient to show a transference of the parent's claim to the child through equitable assignment.

The trial court erred in failing to find that there had been an equitable assignment of Angela Patton's interest in recovery of pre-majority medical expenses incurred for treatment of Alexia to Alexia. As with implied waiver, Respondents improperly seek to challenge the validity of an assignment to which they were not a party. The assignment occurred between Angela Patton and her daughter Alexia. Angela, the party which gave to another party an interest which she held, does not challenge the validity of the assignment for any reason, including want of consideration. Respondents, who lack privity to the transference, now seek to argue the assignment fails for lack of consideration.

In this State, "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it." *Thomas Trancik, M.D., P.A. v. USAA Ins. Co.*,

354 S.C. 549, 553-554, 581 S.E.2d 858, 861 (Ct. App.2003) (citations omitted). Respondents have no standing to challenge whether adequate consideration was provided between Angela and Alexia for the transference of Angela's interest in any future recovery of tort-related pre-majority medical expenses to her daughter, Alexia. Therefore, Respondents cannot seek to undo an agreement reached between two parties who have no interest in undoing the agreement. In certain instances, a defrauded creditor may seek to undo a transfer. *See generally Albertson v. Robinson,* 371 S.C. 311, 317, 638 S.E.2d 81, 84, (Ct. App.2006). However, in this case, Respondents are not creditors, and they have asserted no basis by which they have right to challenge the assignment between Angela and Alexia. Accordingly, Respondents' argument that the assignment fails for lack of consideration is without merit. And for the foregoing reasons, the trial court erred in finding that there was no equitable or implied assignment of Angela's claim to Alexia.

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.

A. Rule 15(c) permits amendments to relate back to the filing of the original complaint

At the outset, Respondent appears to acknowledge that the trial court erred by misquoting Rule 15(c) in its order as stating, "the amendment '. . . relates back [only if the amendment is made] within the period provided by law for commencing the action . . . ." (R. p. 7). Respondents' Brief acknowledges that the Court in *Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) concluded that Rule 15(c) amendments relate back to the filing of the original complaint and that "[t]he purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." (Resp. Br. p. 25) (quoting *Grayson* 318 S.C. at 88, 456 S.E.2d at 380). Accordingly, Appellant asks this Court to correct this error of the lower court, which now appears to be uncontested.

B. Appellant is not seeking to add a new Party.

Respondents cite to *Valentine v. Davis,* 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995) for the proposition that Rule 15 does not permit amendment of a complaint to add a new plaintiff to an action and have the amendment relate back to the date of the filing of the original complaint. Despite Respondents' assertions to the contrary, Appellant has not sought to add a new party. Appellant's motion to amend sought to change the capacity in which Angela Patton brought suit in this case with respect to recovery for tort-related pre-majority medical expenses which have been and will be incurred by Alexia. No new name appears on the amendment. A change in plaintiff, or a change in the plaintiff's capacity, was contemplated by the Advisory Committee Notes for the federal version of Rule 15. Respondents acknowledge the Committee Notes envision changing plaintiffs, but argue that Appellant seeks to add a plaintiff. Again, Appellant has merely sought to change the capacity by which Angela seeks recovery for tort-related pre-majority medical expenses.

Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App.1999) illustrates the distinction. Like in this case, in *Twelfth RMA Partners* the defendants cited to *Valentine v. Davis* for the proposition that one cannot change the plaintiff through an amendment to the complaint. The Court disagreed. In distinguishing the case before it from *Valentine v. Davis*, the Court stated, "In this case, however, no new claims are being added. The court is only changing the name of the plaintiff. The subject of the claim, the underlying note on which the Smiths defaulted, is still the same." *Id.* at 641, 518 S.E.2d at 47.

The facts of this case are factually similar to that of *Twelfth RMA Partners*. First, the original Complaint already sought the pre-majority tort-related medical expenses that have been and will be incurred to treat Alexia. Second, only the capacity in which Angela seeks to recover

pre-majority medical expenses has changed. A new claim has not been added. There will be no new additional person seeking recovery for additional causes of action if the amendment is permitted. Said differently, prior to the amendment, compensation was sought for the damages inflicted upon one person, Alexia. With the amendment, compensation is sought for damages inflicted upon one person, Alexia. Third, the subject of the claim remains the same. This is still a medical malpractice action brought against the same defendants who were already on notice of suit, and the damages sought remain all damages which resulted from these defendants' negligence in the delivery of Alexia.

Similarly, *Thomas v. Grayson* by analogy shows that the amendment in this case was permissible. Faced with a motion to amend a complaint to include Plaintiff's appointment as personal representative, the Court explained that under prior law, the plaintiff "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. The Court stated, "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.* at 88-89, 456 S.E.2d at 380. *Thomas v. Grayson* allowed the plaintiff's amendment to relate back and therefore changed prior law to allow a change in the plaintiff's capacity. This is precisely what Angela seeks to do in this case: change the capacity in which she has brought suit.

The situations that were presented to the Court in *Thomas v. Grayson*, *Twelfth RMA Partners, L.P. v. National Safe Corp.*, as well as in this case are factually distinguishable from *Valentine v. James Davis Valentine v. Davis,* 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995). As noted by Respondents, *Valentine* involved a number of plaintiffs who previously had their federal lawsuit dismissed and then wanted to join as new plaintiffs in a similar action that was pending in

state court against the same defendant. *Valentine*, 319 S.C. at 171, 460 S.E.2d at 219. It is understandable that the Court in *Valentine* was not interested in allowing an entirely new group of plaintiffs to join a pre-existing lawsuit after their case had been dismissed in federal court. However, in this case, as in *Grayson* and *Twelfth RMA Partners*, Respondents will not be exposed to greater liability than they were already on notice of, no new plaintiffs are bringing new causes of action, no new factual assertions have been made, and the subject of the claims remains the same. For these reasons, the trial court erred in failing to grant the motion to amend the complaint. Had that motion been allowed, in the interests of justice, the amended pleading would have related back to the filing of the original complaint; and the harshness and inequity of the *Tucker* ruling would have thereby been avoided.

IV. THE TRIAL COURT ERRED BY HOLDING THAT THE DEFENDANTS HAD NOT WAIVED, BY FAILING TO PLEAD AS AN AFFIRMATIVE DEFENSE, THEIR ARGUMENT THAT PLAINTIFF CANNOT RECOVER PRE-MAJORITY TORT-RELATED MEDICAL EXPENSES.

A. Appellant has not abandoned this argument.

Appellant has never abandoned her argument that Respondents waived, by failing to plead as an affirmative defense, their argument that Alexia was precluded by minority from her own recovery of tort-related pre-majority medical expenses. She set forth that argument in Section IV of her Brief.

Respondents contend Appellant abandoned this issue on appeal by not challenging, in Appellant's Brief, a ruling made by the trial court in its written Order on a different subject. What Respondents neglect to mention is that the ruling Respondents accuse Appellant of failing to challenge had nothing to do with Appellant's argument that Respondents waived, by failing to plead as an affirmative defense, their argument that Alexia was precluded from her own recovery of tort-related pre-majority medical expenses. Rather, the subject holding related to an issue

Appellant had not even raised at the Rule 59(e) hearing, i.e., whether Respondents had waived a statute of limitations argument by not pleading that as an affirmative defense.

The *Hickman* language Respondents rely upon in the trial court's Order falls under Section "**B. Statute of Limitations.**" (R. p. 8). This section purports to discuss how the plaintiff attempted to raise the failure to plead a statute of limitations defense argument for the first time in the Rule 59(e) motion. The Court held the statute of limitations argument was not properly before the Court. *Id.* The Court then explained, "Even if the issue was properly presented, I find and conclude that there was no requirement that Defendants plead the statute of limitations." Accordingly, the Order explains that the statute of limitations argument was waived under *Hickman*. This entire Section B. of the Order is irrelevant because Appellant made no argument at the Rule 59(e) hearing about Respondents' failure to plead a statute of limitations bar as an affirmative defense. Appellant's failure to address this non-issue in her Brief has no bearing on the arguments Appellant has actually made.

Nowhere in the trial court's written Order was there mention of the affirmative defense argument which Appellant did make, that Respondents had waived their right to argue that a minor such as Alexia could not recover her own tort-related pre-majority medical expenses through her mother as Guardian ad Litem, by not pleading that as an affirmative defense. Therefore, although the trial court ruled the purported affirmative defense argument regarding statute of limitations was waived under *Hickman,* there was no such ruling as to the argument actually made by Appellant regarding Respondents' failure to plead as an affirmative defense its position that Angela as Guardian ad Litem for Alexia could not recover pre-majority medical expenses. By ignoring in her Brief that portion of the lower court's order that was irrelevant to her arguments at

the Rule 59(e) hearing, Appellant did not somehow abandon her ability to challenge the trial court's failure to rule in her favor on other points.

Additionally, there is no requirement that a party file a second motion for reconsideration if the trial court does not address an issue brought before it in the first motion for reconsideration. In *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006), after noting that an issue must be raised and ruled upon to be preserved, the Court explained, "However, an exception to this rule exists where an issue *is raised* but *not ruled upon* at a Rule 59(e) hearing. *Id.* at 565, 633 S.E.2d at 510. The same Court explained, "Lawyers cannot force a trial judge to address a dispute issue." *Id.* citing *South Carolina Civil Procedure* 475-76 (2nd ed. 1996). Thus, Respondent did not abandon its affirmative defense argument by not requesting through a second Rule 59(e) motion that the judge make a written ruling on the affirmative defense argument actually made by Appellant.

B. The affirmative defense argument actually asserted by Appellant was raised *and* ruled upon orally at the Rule 59(e) hearing.

The trial court decided the affirmative defense argument actually made by Appellant in Respondents' favor in its oral ruling from the bench at the Rule 59(e) hearing, and it did so on the merits. The judge explained his decision to deny Appellant's argument that Respondents waived their affirmative defense to a minor's ability to recover tort-related pre-majority medical expenses as follows:

> There is no affirmative defense required. If you deny that somebody is entitled to damages at all based on the allegations in the complaint, I think you covered it. Beside which, what is the affirmative defense? Affirmative defense generally related to the conduct of the party. The only party in that lawsuit was this child through her mother. So there was no affirmative defense to assert. It was just a denial."
>
> . . .
>
> I know of no case holding otherwise. They denied she was entitled to damages. You alleged damages for medical expenses, which are the pre-

> majority expenses in part, and they denied it. I can't say where they have to bring to anybody's attention the fact that the minor -- they just denied it. If you have a reason to deny it, you deny it.
>
> (R. pp. 185, line 21 to 186, line 14).

Nowhere does the judge mention he would not consider the argument on its merits for failure to raise the issue prior to a Rule 59(e) motion. Nowhere does the judge mention this affirmative defense argument was improperly brought before the Court. Nowhere did the trial court even mention that Appellant either waived or abandoned her right to make this argument.

In fact, the judge stated he did not consider the affirmative defense argument a new issue raised to the court. The judge noted:

> Now, I need you gentlemen to collaborate or somebody send me an order that covers the matters that the plaintiff says I didn't rule upon. One of those was the implied waiver and implied assignment. As to the rest of it, I deny. *There is nothing new raised in addition,* I'm talking 59(e) now. *There was nothing new raised that wasn't argued, considered, and ruled on or brought to my attention* and the order stands."
>
> (R. pp. 184, line 23 to185, line 7). (emphasis added).

Accordingly, the affirmative defense argument actually asserted by Appellant at the Rule 59(e) hearing was not considered new material raised.

Finally, the question to answer when determining if an issue has been preserved is whether it has "been raised to and ruled upon by the circuit court." *RRR, Inc. v. Toggas*, 378 S.C. 174, 185,662 S.E.2d 438, 443 (Ct. App.2008) (*citing Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006)). Although the written order was silent on Appellant's actual affirmative defense argument, the judge placed on the record his above-quoted reasoning for its denial. Thus, the issue was raised and ruled upon, on its merits, by the circuit court. As *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724. (2000) explained, "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after

it has considered all relevant facts, law, and arguments." Appellant presented this argument, Respondent addressed the argument in their response, both parties addressed this affirmative defense argument on its merits at oral argument, and the trial judge reached his decision on the merits of the issue. (R. p. 92; R. pp. 104, line 21 to 106, line 20; R. pp 173, line 22 to 174, line 9; R. pp. 178, line 3 to 184, line 17; R. pp. 184, line 23 to 185, line 7; R. pp. 185, line 21 to186, line 14). For this reason, the affirmative defense argument actually made by Appellant is properly before this Court for consideration.

C. Even if Appellant had waived the affirmative defense argument, the waiver of this argument does not implicate the two issue rule.

Assuming arguendo that Appellant either abandoned or waived the argument that Respondents waived their defense to a minor's claim for pre-majority medical expenses, this would not implicate the two issue rule.

As applicable to an appeal of a trial court order, where a trial judge offers two theories to support his decision and either theory would be sufficient to reach that decision, the appellant must raise exception to each theory. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 904, (2010) ("For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.") (quoting *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996). Failure to challenge one of the two bases for the judge's decision would result in the unchallenged basis becoming the law of the case. *See Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). In this situation, since a basis which would fully support a holding which is on appeal would be the law of the case, the reviewing court will affirm the lower-court ruling where the unchallenged basis is sufficient to sustain the now-challenged decision. In

the above-quoted example, a directed verdict for a defendant may be affirmed on either the basis that the statute of limitations has run or the defense of contributory negligence. If the plaintiff only challenged the holding that the plaintiff was barred by the defense of contributory negligence, but not the running of the statute of limitations, then the reviewing court will consider the failing to meet the statute of limitations deadline the law of the case and therefore a sufficient basis for affirming the trial court's directed verdict in favor of the defendant.

As relevant to this case, even if Respondents were correct and Angela had either abandoned or waived her right to argue Respondents waived their affirmative defense, this is not an alternative theory by which the judge could have granted Appellant's motion for summary judgment when considering the other arguments presented by the plaintiff. To better understand this, assume Appellant did abandon or fail to preserve her affirmative defense argument. This has no impact on Appellant's argument that this Court should abrogate the common law to allow a minor to collect tort-related pre-majority medical expenses in her own name. It also has no bearing on Appellant's argument that Angela either impliedly waived or assigned her interest to her child to recover these expenses. Finally, it has no relation to the judge's decision to deny Plaintiff's leave to amend the complaint.

D. Assuming arguendo that Appellant abandoned or failed to preserve her affirmative defense argument, the Court should nevertheless consider the issue

Respondents argue that because of a procedural technicality, Appellant did not timely object to and waived her right to argue that Respondents, by failing to plead as an affirmative defense, waived their right to argue that Alexia should be precluded from recovering tort-related pre-majority medical expenses in her own name or through her mother as Guardian ad Litem. Allowing consideration of Appellant's argument provides this Court with an additional ground by which it may avoid the harsh result of denying a minor's recovery for tort-related pre-majority

medical expenses because of a pleading technicality. Appellant contends that substantial justice requires consideration of this issue. The parties fully briefed this issue and then had opportunity to argue the issue on its merits at a hearing. Moreover, the judge provided detailed analysis for his rejection of Appellant's position and did so based upon the merits of the issue before the Court.

"The reasoning adopted by the court below is not binding upon the Supreme Court if the record discloses a correct result." *Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App.1987). Moreover, when appropriate, Courts in this State regularly give consideration to the aim of substantial justice. *See e.g. Smith v. Smith*, 386 S.C. 251, 261, 687 S.E.2d 720, 726, (Ct. App.2009) "To ensure substantial justice to the parties, the pleadings must be liberally construed." *See also Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008) "South Carolina courts have long observed that equity looks beneath rigid rules of law to seek substantial justice."

The reviewing Court looks to the record and the merits to determine if issues have been fairly determined and give consideration to whether substantial justice has been done. *See e.g. Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App.1987). Therefore, this Court is respectfully requested to review the trial court's error in failing to find that Respondents waived their right to assert the affirmative defense that Alexia could not seek tort-related pre-majority medical expenses in her own name.[5]

CONCLUSION

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

[5] *See also Patterson v. Reid,* 318 S.C. 183, 185,456 S.E.2d 436, 437 (Ct. App.1995) (after restating the adage that an issue cannot for the first time be raised in a Rule 59(e) motion, the Court then decided to address the issue on its merits).

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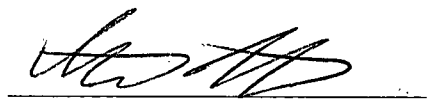
BY: 

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November 11, 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

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.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 11th day of November, 2014 served copies of the Final Appellant's Brief and Final Reply Brief upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

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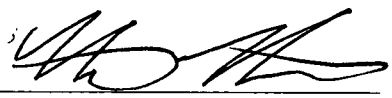

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CERTIFICATE OF COUNSEL

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Reply Brief of Appellant complies with Rule 211(b).

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