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STATE OF SOUTH CAROLINA  
In the Court of Appeals

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JUL 09 2015

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas  
Alison Renee Lee, Circuit Court Judge

SC Court of Appeals

Case No. 2011-CP-32-02282

Tanya Bennett, as Next Friend of  
Mykelvion T., a minor, ..... Appellant,

v.

Lexington County Health Services District, Inc.  
d/b/a Lexington Medical Center ..... Respondent.

PETITION FOR REHEARING

Edward L. Graham  
J. Layton Ruffin  
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383 W. Cheves St.  
Florence, SC 29501  
Attorneys for Petitioner/Appellant

## QUESTIONS PRESENTED

I. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY RULING IF THE DISCOVERY RULE WERE TO APPLY, WHAT WOULD TRIGGER THE RUNNING OF TIME IS DISCOVERY OF AN INJURY, RATHER THAN DISCOVERY OF A CAUSE OF ACTION OR INVASION OF RIGHTS?

II. DID THE COURT OVERLOOK OR MISAPPREHEND THAT ALTHOUGH AWARENESS OF TEMPORARY INJURY IS ORDINARILY SUFFICIENT TO TRIGGER THE RUNNING OF TIME, AWARENESS OF PERMANENT INJURY IS REQUIRED IN A MEDICAL NEGLIGENCE CASE INVOLVING BRACHIAL PLEXUS BIRTH INJURY, WHERE PERMANENT INJURY IS A CONDITION PRECEDENT TO A MERITORIOUS AND ETHICAL ALLEGATION OF MEDICAL NEGLIGENCE?

III. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE SUBJECT CLAIM WAS TIMELY COMMENCED AS A MATTER OF LAW, OR IN THE ALTERNATIVE, THAT THE PROPER DISCOVERY DATE IS A QUESTION OF FACT FOR JURY DETERMINATION?

## STATEMENT OF THE CASE

This is a medical negligence case involving a brachial plexus birth injury sustained by M. T. (hereinafter, "Son"), son of Appellant Tanya Bennett (hereinafter "Appellant," "Tanya" or "Mother"), at the time of his birth on July 23, 2001. The Mother alleges that employees of Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center (hereinafter, "Hospital") improperly managed the resolution of shoulder dystocia, a complication of vaginal delivery where the baby's top shoulder gets stuck behind the mother's pubic bone; and that such mismanagement caused permanent injury to Mykelvion's left-sided brachial plexus nerves.

The Mother as Next Friend of her Son filed the Summons and Complaint on June 17, 2011, designated as Civil Action Number 11-CP-32-02282, against original Defendants Scott Augustine, M.D. (hereinafter "Dr. Augustine") and the Hospital. (R. 7). The Complaint alleges negligence and other wrongdoing on the part of Dr. Augustine, the delivering obstetrician, and nurse employees of the Hospital. *Id.* The Mother named the Hospital as a defendant because of its role as employer of the nurses, for whose torts it had *respondeat superior* liability. *Id.* The Defendants' Answer asserted a general denial and certain affirmative defenses, including an alleged statute of limitations defense. (R. 16). By Order dated January 12, 2012, Dr. Augustine was stricken as a separately named Defendant by consent, and without prejudice, after Appellant's counsel learned he was an employee of the Defendant Hospital, a government agency. (R. 1). The Defendant Hospital has *respondeat superior* liability for torts of Dr. Augustine, as he was a hospital employee at relevant times.

On December 17, 2012, Respondent filed a motion for summary judgment. (R. 19). On March 6, 2013, Respondent filed a memorandum in support of its motion for summary judgment, arguing that the claim was time-barred. (R. 21). The Court heard the Motion for Summary Judgment on March 11, 2013, at which time Respondent submitted a supplemental memorandum. (R. 29). Appellant presented two affidavits at the hearing, one from the Mother and one from Dr. Redmond, and directed the Court's attention to controlling case law in her favor.

After the hearing, on March 13, 2013, Respondent submitted a letter to the trial judge, setting forth additional argument. (R. 217). Appellant sent the judge a responsive letter that same day. (R. 224).

The trial court signed an order granting summary judgment on May 13, 2013. (R. 3). The stated basis for granting summary judgment was that Plaintiff's Complaint was time-barred by the application of S.C. Code Ann. § 15-3-40 and S.C. Code 15-3-545(D), and that Plaintiff's claim did not have to be addressed under the discovery rule. (*Id.*) The Order alternatively held that if the discovery rule would have applied, it would not have benefited Appellant because there was sufficient evidence to establish the Mother was on notice of "an injury at birth during the first six months of [her Son's] life." (*Id.*, pg. 3).

The trial judge's Order granting summary judgment was entered of record on June 7, 2013. Appellant received written notice of the Order on June 11, 2013. Appellant filed her Notice of Appeal on June 12, 2013. (R. 212). The amount involved in this appeal is One Million, Two Hundred Thousand Dollars (\$1,200,000.00), because Appellant seeks the right to proceed with a jury trial of her Son's medical negligence birth injury claim, the value of which is capped at One

Million, Two Hundred Thousand Dollars (\$1,200,000.00) under the South Carolina Tort Claims Act (hereinafter "Tort Claims Act").

The Court issued its unpublished opinion filed June 24, 2015, by which it affirmed the trial court's order granting summary judgment. In doing so, the Court overlooked or misapprehended that although awareness of temporary injury is ordinarily sufficient to trigger the running of time, awareness of a permanent injury is required in a medical negligence case involving a brachial plexus birth injury, where permanent injury is a condition precedent to a meritorious and ethical allegations of medical negligence.

## **ARGUMENT**

### **I. DID THE COURT OVERLOOK OR MISAPPREHEND THAT IF THE DISCOVERY RULE WERE TO APPLY, WHAT WOULD TRIGGER THE RUNNING OF TIME IS DISCOVERY OF AN INJURY, RATHER THAN DISCOVERY OF A CAUSE OF ACTION OR INVASION OF RIGHTS?**

The trial court granted summary judgment based upon its erroneous belief that timeliness of the subject claim should be determined without reference to the discovery rule. However, the court also asserted that if the discovery rule were to apply, the running of time would be triggered by discovery of an injury; and alternatively held that the subject claim would be time-barred because the Mother discovered her Son's injury at or soon after birth. That alternative holding is also erroneous, because what triggers the running of time is not knowledge of an injury, but knowledge of a cause of action or invasion of rights.

South Carolina appellate courts have explained on many occasions what must be discovered to trigger the running of time. In *True v. Monteith*, the South Carolina Supreme Court held, “Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that *a cause of action exists for the wrongful conduct*. *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) (Emphasis added). Similarly, other cases have stated, “[C]ourts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that *some right of his had been invaded, or that some claim against another party might exist*.” *Hackworth v. Greenville County*, 371 S.C. 99, 103, 637 S.E.2d 320, 322 (Ct. App. 2006) (citing *Young v. South Carolina Dep't of Corrections*, 333 S.C. at 719, 511 S.E.2d at 416) (Emphasis added).

A number of other cases stand for the same proposition. See *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994) (“...the statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. This is an objective, not a subjective, determination.”) (Internal citations omitted.); *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (“The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule).”); *South Carolina Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 237, 547 S.E.2d 871, 874 (Ct. App. 2001); *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (Ct. App. 2000) (“Institution of an action based upon those temporary symptoms would likely have been premature and possibly frivolous. Moreover, the permanent injuries for which Grillo now seeks recovery would not have been

compensable at that time. Accordingly, a jury issue is presented as to the application of the statute of limitations in this case.”)

*Grillo* cited with approval *Schiele v. Hobart Corp.*, 284 Ore. 483, 587 P.2d 1010 (Or. 1978)

as follows:

We do not believe the legislature intended that the statute be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury. The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition.

*Grillo* further cited with approval *Martinez v. Humble Sand & Gravel, Inc.*, 940 S.W. 2d 139, 144 (Tex. Ct. App. 1996) aff'd, 974 S.W.2d 31 (Tex. 1998) as follows:

The court noted that the discovery rule should not be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury. The court further noted, as an example, the absurdity of requiring a sandblaster, who might know that silicosis can be related to sandblasting, to file a lawsuit at the first sign of a cough in order to protect his rights in the case that he might suffer from the disease.

The cases cited by counsel for Respondent also support the principle that what triggers the running of time is discovery of a cause of action or an invasion of rights. Respondent's memorandum stated, "Under the discovery rule, the statute of limitations begins to run *when a cause of action was discovered* or reasonably ought to have been discovered 'by the exercise of reasonable diligence.'" (R. 24) (emphasis added) quoting *Knox v. Greenville Hosp. Sys.*, *supra*. Respondent further stated that to determine whether a party has exercised reasonable diligence, the court should look to determine if "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Id.* Even more to the point, Respondent noted, "At issue in this case is when did the Plaintiffs discover *the existence of a claim . . .*" (R. 26). At oral

argument, counsel for Respondent noted that what triggers the running of time is when “exercising reasonable diligence, a person of ordinary intelligence would know that they had some right violated or they had a claim.” (R. 43:9-11).

Knowledge of an injury alone does not start the running of time to assert a claim. In a suit alleging malpractice against an attorney, the Court of Appeals stated, “Knowledge of the injury alone does not, a fortiori, give rise to suspicion of impropriety by an attorney. Rather, the limitations period is triggered by knowledge of facts, diligently acquired, sufficient to put an injured person on notice that a cause of action may exist against another.” *Peterson v. Richland County*, 335 S.C. 135, 139, 515 S.E.2d 553, 555 (Ct. App. 1999). See also *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

There is no reason the analysis in *Peterson* would not be applicable to medical malpractice cases. In such cases, the injured party typically has an injury, disease, flareup or other health condition which gives rise to the need for medical care in the first instance. Although an injury, disease, flareup or other condition may worsen, and the worsening may be well known to the patient, what is often unclear is whether the worsening of the injury, disease, flareup or condition was a natural process or was caused by medical negligence or other wrongful conduct. Similarly, treatment for one condition may lead to recognition of another condition, but it is often unclear whether that newly recognized condition was part of a natural process or was caused by medical negligence or other wrongful conduct. Indeed, the newly recognized condition may have been long present, before treatment, or may have been otherwise unrelated to the treatment. It may remain unclear for years to the patient receiving medical care that some right of his may have been invaded or that a cause of action might exist for the injury suffered.

On certain occasions, knowledge that a right has been invaded could be readily apparent. One example is wrong-side surgeries. But absent the obvious example, a reasonable patient would not and should not always conclude that he has a cause of action simply because he has suffered an unfavorable outcome or injury temporally related to medical treatment.

No reasonable patient would suspect medical negligence every time there is injury, flareup, or worsening. In fact, our case law makes clear that the mere presence of an injury or unfavorable outcome does not prove malpractice. See, e.g., *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 307-308, 457 S.E.2d 603 (1995); *Ardis v. Sessions*, 370 S.C. 229, 633 S.E.2d 905 (Ct. App. 2006). Therefore, in light of the case law and Respondent's own admissions, it was plain error for the Court to rule that the pertinent date for discovery is the date when knowledge of an injury was or should have been acquired.

**II. DID THE COURT OVERLOOK OR MISAPPREHEND THAT ALTHOUGH AWARENESS OF TEMPORARY INJURY IS ORDINARILY SUFFICIENT TO TRIGGER THE RUNNING OF TIME, AWARENESS OF PERMANENT INJURY IS REQUIRED IN A MEDICAL NEGLIGENCE CASE INVOLVING A BRACHIAL PLEXUS BIRTH INJURY WHERE PERMANENT INJURY IS A CONDITION PRECEDENT TO A MERITORIOUS AND ETHICAL ALLEGATION OF MEDICAL NEGLIGENCE?**

As this Court recognized, whether an injury is appreciated as permanent versus temporary is ordinarily immaterial in determining when time starts to run on a statute of limitation. See; e.g., *Young v. S.C. Department of Corrections*, 333 SC 714, 511 SE 2d 413 (Ct. App. 1999). However, those cases are distinguishable because potential medical negligence was in those cases inferable from the facts and circumstances of the injury and its sequelae. To the contrary, in this case there can be no meritorious and ethical evaluation of potential medical negligence as the cause of nerve damage unless and until that damage can be deemed permanent.

Obstetrical and neurological literature reveals that up to ninety to ninety-five percent of brachial plexus birth injuries are temporary, completely resolving within eighteen to twenty-four months of age. See, e.g., American College of Obstetricians & Gynecologists, *Precis: Obstetrics*, 2d ed., p.128 (2000)(Persistence rate of only 5%); Larry C. Gilstrap, III, et al., *Operative Obstetrics*, 2d Ed., p.217 (2002)(Cites various studies with recovery rates of 73%, 92%, 96%, and 91%); Kenneth F. Swaiman, et al., *Pediatric Neurology: Principles & Practice*, 4<sup>th</sup> ed., Vol. 1, p.341 (2006)(Residual weakness in 5-25% of children with brachial plexus birth injury); Joseph J. Volpe, *Neurology of the Newborn*, 5<sup>th</sup> Ed., p.974-975 (2008)(Cited various reported rates of full recovery ranging from 65% to 90%); Redmond Affidavit. When a brachial plexus birth injury is temporary, the existence of the injury itself ordinarily provides no information about the cause of the injury, or about whether the obstetrician or other birth attendant was negligent in applying greater than gentle lateral traction to the baby's head and neck. See, e.g., Robert H. Allen, et al., "Temporary Erb-Duchenne Palsy Without Shoulder Dystocia or Traction to the Fetal Head," *Obstetrics & Gynecology*, Vol. 105, No. 5, Part 2, pp. 1210-1212, May 2005 ("...this case report demonstrates prospectively and objectively that temporary Erb-Duchenne palsy can occur without shoulder dystocia or traction to the fetal head."); Edith D. Gurewitsch, et al., "Risk factors for brachial plexus injuries with and without shoulder dystocia," *American Journal of Obstetrics & Gynecology* (2006) 194, 486-492 ("The current investigation supports that intrauterine and intrapartum phenomena can contribute to the mechanism of birth-related BPP [Brachial Plexus Palsies]. Fortunately for the affected children, temporary BPP...are clinically benign."); Edith Diamante Gurewitsch, "Optimizing Shoulder Dystocia Management to Prevent Birth Injury," *Clinical Obstetrics & Gynecology*, Vol. 50, No. 3, pp. 592-606, September 2007) ("However, when temporary injury is teased from permanent injury, clinician-defined shoulder dystocia is

distinguished from researcher-defined shoulder dystocia, and when the occurrence of shoulder dystocia is separated from its management, it is readily apparent that the clinically (and legally) relevant permanent obstetric brachial plexus injuries remain the near exclusive domain of shoulder dystocia-complicated births.”).

Only when an injury is permanent does Appellant contend an inference may be made that the injury was caused by greater than gentle lateral traction or torsion (twisting of the head) applied by the obstetrician or midwife. (Id.) However, even in the context of a permanent injury, Appellant does not contend the use of greater than gentle traction or torsion is necessarily negligent. Ordinarily, a determination of negligence can be made only if the injury is permanent and the clinical situation at birth reveals no need to facilitate the delivery by using greater than gentle traction. Respondent, of course, denies negligence even where, as here, the injury turned out to be permanent. (Answer).

Having the injury persist beyond two weeks projected as the likely healing time does not signify permanence, as Dr. Augustine, who made that projection, is an obstetrician, not a pediatric neurologist. The affidavit from Dr. Redmond signifies that the injury could not be deemed permanent until it persisted at least one and one-half or two years. Similarly, Dr. Gilpin’s medical record reference to “marginal recovery” does not signify that the mother was informed the injury would be permanent, particularly in light of the fact that Dr. Gilpin is a pediatric orthopedist and Dr. Redmond, the pediatric neurologist to whom Dr. Gilpin referred the child, told her permanency could not be determined until after 18-24 months. However, there is a factual dispute about whether Dr. Gilpin’s medical record entries regarding “marginal recovery” were communicated to the mother, as her affidavit suggests otherwise. There is no significance to the mother’s having seen an attorney on January 11, 2002, to see if there was anything she

“could actually do,” for two reasons. First, because there is factual uncertainty about the purpose of that visit. Second, assuming *arguendo* that the mother was seeking advice about a possible medical malpractice claim, the presence of a meritorious suit could not have been ethically assessed until after 18-24 months.

It is inconsequential that the mother did not commence suit within nine years, where South Carolina law provides for timely commencement of suit following the period for discovery, plus seven years tolling, plus the underlying two year statute of limitations; and that provides the mother in this case with at least ten and one-half years. Not until at least 18 months after the birth injury could permanency be assessed; and absent permanency, there was no basis for discovery of a cause of action or even an ethical and meritorious allegation of medical negligence. The claim was commenced well within the ten and one-half year limitation applicable to this case.

**III. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE SUBJECT CLAIM WAS TIMELY COMMENCED AS A MATTER OF LAW, OR IN THE ALTERNATIVE, THAT THE PROPER DEISCOVERY DATE IS A QUESTION OF FACT FOR JURY DETERMINATION?**

Had the Court properly analyzed the application of the discovery rule based on when a reasonable person would have known a cause of action existed for wrongful conduct, or that some right had been invaded, it follows that the Motion for Summary Judgment should have been denied. Either the claim was timely commenced as a matter of law or there is a question of fact regarding the discovery date.

Tanya did not know and had no way of knowing that a medical negligence cause of action existed from the date of MT's birth. She knew her Son's arm was not functioning normally soon

after his birth, but Dr. Augustine told her MT's arm was hurt because of his large size, and that the injury would be temporary. (R. 112:4-8; 166:2-22; 168:4-5). Dr. Augustine's assertion that the injury was caused by MT's large size was plausible to an objective non-medical person such as Tanya, and foreseeably influenced her to believe at that time that the injury was not caused by medical negligence. Moreover, Dr. Augustine told Tanya the injury was only temporary. Temporary brachial plexus birth injuries do not support a cause of action because there is insufficient evidence to support an inference of either negligence or causation. Most brachial plexus birth injuries are temporary, and temporary brachial plexus injuries can occur without medical negligence. Only permanent brachial plexus birth injuries can be fairly attributable to medical negligence, and even then the clinical situation may signify an absence of negligence. There was no reason to suspect the injury might be permanent until Mykelvion was at least eighteen to twenty-four months of age. (R. 214). That it did not heal in the two week's healing time projected by Dr. Augustine was immaterial since he is an obstetrician and Dr. Redmond, the pediatric neurologist with greater knowledge of such matters, told her permanency could not be determined until 18-24 months. Neither Tanya nor any reasonable person could have known her Son's injury was permanent until he was at least eighteen to twenty-four months old. (Id.) Not until then could negligence and causation be fairly recognized. If eighteen or twenty-four months after birth is the correct objective discovery date to trigger the running of time, then the subject claim was timely commenced as a matter of law, because it was filed less than nine years thereafter (seven years of tolling, plus two years for the statute of limitations under the Tort Claims Act).

The affidavits of Dr. Redmond and Tanya explain that the accurate dates when permanency was determinable was no earlier than eighteen to twenty-four months after birth. Dr. Redmond performed the EMG study on October 29, 2001, when Mykelvion was approximately three months

old. (R. 214). Dr. Redmond explained, “A determination of permanence would not have been possible until the child was at least approximately 18 to 24 months old.” (R. 214). Dr. Redmond never told anyone the injury was permanent before then, “as that determination would not have been possible at that time.” Id. Tanya explained that in light of Dr. Redmond’s statement, she did not know when she first learned MT’s injury was permanent, but believed it could not have been until MT was eighteen to twenty-four months old. (R. 215).

The Court’s opinion also references the fact that Tanya consulted an attorney on January 11, 2002. Respondent offered no evidence for the reason Tanya went to see attorney David Betts. The fact that Tanya signed a medical release authorization is not sufficient to determine she was on notice she might have a cause of action against the attending physician. It is evidence only that Tanya had in fact seen an attorney by that date for some purpose and authorized him to get medical records. As the party with the burden of proof, Respondent had responsibility to establish that the meeting was for a purpose which indicated Tanya was aware that her child had a cause of action for medical negligence, or that through her interaction with this attorney, she became aware thereof. The record contains no such information. Respondent asks this Court to make a leap of logic, but that is not the proper role of a Court at the summary adjudication stage. Respondent has failed to connect the dots to show that a legal consultation for an unknown purpose somehow created knowledge of a medical negligence cause of action or an invasion of rights. Even if consultation with a lawyer for an unknown purpose were construed to reflect suspicion on Tanya’s part about potential medical negligence, suspicion alone is insufficient to trigger the running of time. (Grillo, *supra.*) Moreover, even if Tanya had asked Attorney Betts to evaluate a potential medical negligence claim, it would have been premature for such an evaluation in light of the fact that there was not yet any evidence of a permanent injury, necessary to lend credibility to

allegations of both negligence and causation. Filing this claim before eighteen to twenty-four months of age would most often represent a frivolous filing.

Finally, Tanya's testimony that Dr. Augustine said, "Oops, I hurt his arm," is no indication that a reasonable person would have known at delivery that she had a cause of action or that her rights had been invaded. This statement proves only that the Mother was aware of an injury that was present at birth. Dr. Augustine's comment is hardly an admission of liability, and no evidence was presented to suggest that Tanya interpreted his comment as an admission of negligence. Dr. Augustine asserted in his deposition that he did not state, "I hurt his arm," but did perhaps acknowledge the presence of an injury. (Dr. Augustine Dep. 75:1-78:16). Deposition testimony shows he denied responsibility for causing the injury and attributed the injury to MT's large size. (R. 168:4-5).

Most every delivery, well visit or treatment visit includes some hurt to a child. Vaccinations hurt, but they are necessary to obtain immunization. Hurt from a needle stick to a child would hardly put the parent on notice that the nurse had caused nerve damage by injecting too deeply, even if the nurse said in warning, "This is gonna hurt." Most every child delivered vaginally experiences some degree of hurt from going through the tight, bony birth canal. Such injuries may involve swelling, bruising, head molding, caput (deformed head shape), changes in muscle tone, problems breathing, reduced range of motion of an arm, etc. However, an injury apparent at birth is not evidence of negligence. If every parent had to file suit when their child experienced a hurt, to avoid the statute of limitations, our courts could become quickly overrun by frivolous lawsuits alleging temporary injuries without a sufficient factual predicate to support either negligence or causation. No one can equitably be required to file a medical negligence suit before there is an objective basis upon which to discover both that a persistent injury has occurred,

and that it occurred because of a breach of duty. Indeed, to do so would implicate ethical concerns and would represent a violation of the South Carolina Frivolous Civil Proceedings Sanctions Act S.C. Code Ann. §15-36-10 et. seq. (See also *Grillo*, supra.).

Knowledge of the presence of an injury is not what begins the running of the statute of limitations. Time for a claim does not commence until the date a person knew or should have known that a cause of action existed or that a right had been invaded, neither of which follows from the quote Tanya attributed to Dr. Augustine.

At most, this statement creates a question of fact as to whether the Mother knew or should have known a cause of action existed for medical malpractice at birth. Temporary injuries to a child during delivery are not all that uncommon. The majority of brachial plexus birth injuries resolve in a matter of days, weeks or months. Up to ninety to ninety-five percent of brachial plexus birth injuries resolve by eighteen to twenty-four months. Before eighteen months of age, such injuries cannot be said to put a parent on notice that the physician has committed medical negligence which caused the injury, especially when the principal healthcare provider informs the parent that the injury (1) occurred because of the child's size and (2) will heal. Awareness at birth of a brachial plexus birth injury provides no information to the parent to suggest that medical negligence was involved with the birth, that excessive traction by the obstetrician caused the injury, or that this injury will be anything other than temporary.

*Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 571, 608 S.E.2d 459, 462 (Ct. App. 2005) supports Respondent's position that mere awareness of an injury which may be temporary is insufficient to put a reasonable person on notice that a claim might exist. The court in *Knox* held, "The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations." *Knox*, 362 S.C. at, 571, 608 S.E.2d at,

462. The provision of medical treatment that causes temporary symptoms like discomfort or pain cannot be said to put a person on notice that a cause of action for malpractice exists. *Id.* By analogy, limited range of motion of a baby's arm, statistically likely to be temporary, should not be deemed sufficient to put a reasonable parent on notice of a cause of action for medical negligence, particularly where the obstetrician represented that the baby's large size caused the problem. Moreover, *Grillo* recognized that it is inappropriate to require commencement of an action based upon temporary symptoms, which would have the effect of requiring premature and possibly frivolous claims to be filed.

This Court could determine the claim was timely commenced as a matter of law, based on the undisputed facts that (1) temporary brachial plexus birth injuries do not implicate medical negligence; and (2) permanency cannot be determined until the child is at least eighteen to twenty-four months of age.

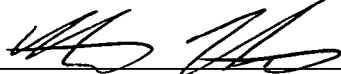
To reverse the summary judgment, however, it is not necessary to find timeliness of the claim as matter of law, as the existence of a question of fact is sufficient to preclude summary judgment. A jury could reasonably find discovery of a cause of action did not occur and should not have occurred for several years after Mykelvion's birth, as evidenced by Tanya's affidavit. A reasonable jury could find discovery did not occur and should not have occurred until at least eighteen to twenty-four months after the child's birth, when the Mother could have first become aware that the injury would be permanent. It is theoretically possible that another jury might find a reasonable person would have been on notice of a claim around the time of the child's birth. Although Appellant asserts such a finding would not be reasonable, it is abundantly clear that the evidence is at least sufficient to create a jury question. As our case law states, "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the

testimony is conflicting upon the question, it becomes an issue for the jury to decide.” *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). *See also Youmans v. S.C. DOT*, 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) (“The defendant asserting an affirmative defense bears the burden of its proof.”). “[W]hen conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide.” *Graham v. Welch*, 404 S.C. 235, 239, 743 S.E.2d 860, 863 (Ct. App. 2013). Justice would be served by allowing the claim to be adjudicated on its merits.

### CONCLUSION

For the reasons stated, Appellant respectfully prays that this Court reconsider its prior unpublished opinion filed on June 24, 2015, or in the alternative, have re-argument of the questions raised in the Petition.

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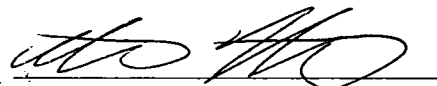
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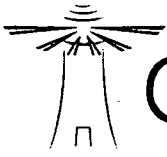
PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 9<sup>th</sup> day of July, 2015 served copies of the Petition for Rehearing upon counsel for the Respondent by depositing them in the United States mail, first-class postage prepaid, addressed to:

Weldon R. Johnson, Esq.  
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# GRAHAM LAW

Shining a Light on Safety, Guiding the Way to Justice.

Edward L. Graham  
Diane M. Rodriguez, RN-JD  
J. Layton Ruffin

July 9, 2015

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter St.  
Columbia, SC 29211

RECEIVED

JUL 09 2015

SC Court of Appeals

RE: Tanya Bennet, as Next Friend of Mykelvion T., a minor v. Lexington county Health Services District, Inc. d/b/a Lexington Medical Center.  
Case No.: 2011-CP-32-02282

Dear Ms. Kitchings:

I am enclosing for filing the original and seven (7) copies of the Petition for Rehearing of Appellant Tanya Bennett, as Next Friend of Mykelvion T., a minor, in the above referenced matter along with my firm's check for \$25.00 for the filing fee. Once clocked-in, please return one copy to our courier. By copy of this letter, I am serving, Weldon R. Johnson, Esq. *of counsel* with a copy of the same.

With kindest personal regards, I am

Yours Very Truly,

J. Layton Ruffin

JLR/cs

Enc.

cc: Weldon R. Johnson, Esq.  
*of counsel*