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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The Respondents respectfully submit this Return in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

As her primary argument on appeal, Angela Patton¹ asked the Court of Appeals to abrogate a longstanding principle of South Carolina's common law. This is a medical malpractice case in which the minor plaintiff claims the doctor and nurses who participated in her delivery breached the applicable standards of care. Patton challenges a decision by the trial court to grant partial summary judgment in favor of all Respondents. The trial court based its decision on the common law rule Patton sought unsuccessfully to change.

On November 25, 2009, Alexia L. ("the Minor"), through her "Next Friend" Angela Patton,² filed a Summons and Complaint against Dr. Gregory A. Miller and his medical practice, Rock Hill Gynecological & Obstetrical Associates, P.A. ("RHGO"). [R. p. 11.] The pleadings did not list Patton as a party in her own right, nor did they purport to allege or assert any claims on her behalf. [R. p. 11.] All causes of action were alleged, and all relief was sought, in the Minor's name only. [R. p. 11.] Dr. Miller and RHGO filed and served a timely Answer that denied the Minor's entitlement to any relief.

In April 2012, the Minor, again through Patton as her "Next Friend," filed a substantially similar Summons and Complaint against the Respondent Amisub of South Carolina d/b/a

¹ Although Patton is not an actual party, the Respondents will use the name "Patton" in this Return in place of the more generic "Petitioner." This usage will prevent any confusion that might arise from using the names "Patton," "the Minor" and "Petitioner" at different times. However, the use of "Patton" should not be construed as an admission or agreement that Patton is actually a party in this action. As discussed below, she clearly is not.

² Patton is the Minor's mother.

Piedmont Medical Center.³ [R. p. 22.] Amisub filed and served a timely Answer which also denied the plaintiff's ability to obtain any of the relief requested in the Complaint. [R. p. 33.] All of the parties then agreed to consolidate the two cases under the docket number of the first action, and the trial court filed an order to that effect on July 12, 2012.

Amisub filed a Motion for Partial Summary Judgment on April 29, 2013. [R. p. 48.] In that motion, Amisub argued that the Minor was not entitled to claim any damages for her pre-majority medical expenses, as that right belonged to her parents. [R. p. 50.] Amisub further argued that the applicable statutes of repose and limitations had expired, thereby barring any future claim by Patton for those medical expenses. [R. pp. 50-57.] Several weeks later, Dr. Miller and RHGO also filed a Motion for Partial Summary Judgment based on the same grounds. [R. p. 46.]

Both motions came before the Honorable S. Jackson Kimball on July 18, 2013. After hearing oral arguments and considering written submissions by the parties, Judge Kimball filed an Order granting partial summary judgment to all Respondents on August 2, 2013. [R. p. 3.] In the Order, Judge Kimball ruled that Patton, in her capacity as "Next Friend" of the Minor, was not a party to the case and could not assert any claims on her own behalf. [R. pp. 3-6.] This left the Minor as the only plaintiff, and because she was a minor, she could not seek to recover any pre-majority medical expenses or related necessities under established South Carolina law. [R. pp. 3-6.] Therefore, Judge Kimball granted summary judgment in the Respondents' favor as to any and all claims for pre-majority medical expenses and related necessities. [R. pp. 3-6.] Judge Kimball then declined to make any ruling on the statute of repose/statute of limitations issues because Patton was not a party to the action. [R. pp. 3-6.]

³ Respondent Amisub of South Carolina d/b/a Piedmont Medical Center is properly identified as Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center.

On August 16, 2013, Patton filed a Rule 59(e) Motion to Alter or Amend, which was combined with a Motion for Leave to Amend the Complaint. [R. pp. 72-87.] The Respondents submitted briefs in opposition to those motions, and Judge Kimball conducted a second hearing on October 17, 2013. At that hearing, Patton's attorney withdrew the request to amend the Complaint as to Amisub. [R. p. 164, line 11 – p. 165, line 16; p. 170, lines 1-14.] On November 4, 2013, Judge Kimball filed an Order that denied both of Patton's motions and left the original decision intact. [R. pp. 7-10.]

Patton filed and served a timely Notice of Appeal following Judge Kimball's second Order. The Court of Appeals held oral arguments on May 12, 2015, at which time Patton's attorneys rested on the briefs as to the first issue on appeal and proceeded to argue the other three. The Court of Appeals filed an unpublished opinion affirming Judge Kimball's rulings on July 22, 2015 (No. 2015-UP-367). Patton then filed a Petition for Rehearing, which the Court of Appeals denied in an Order filed on September 17, 2015.

ARGUMENT

I. **The Court of Appeals' decision does not warrant review by this Court under the standards set forth in Rule 242, SCACR.**

According to the South Carolina Appellate Court Rules, “[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR (emphasis added). The rule goes on to list five situations in which the granting of a writ of certiorari usually occurs. Those situations include cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) substantial constitutional issues are directly involved; and (5) a federal question is included, and the Court of Appeals' decision conflicts with a decision of the United

States Supreme Court. Rule 242(b), SCACR. *See also* Toal, Vafai & Muckenfuss, *Appellate Practice in South Carolina* (2nd Ed.) at 276. The Respondents submit that the present case does not fall into any of those categories, and no “special and important” reason exists for the Court to review the Court of Appeals’ decision. Therefore, the Court should deny the petition.

Three of the factors listed in Rule 242(b) are facially inapplicable and do not require extensive discussion. There was no dissent in the Court of Appeals, and the case does not involve any constitutional issues or federal questions. Patton has not even argued otherwise. Thus, subsections (2), (4), and (5) of Rule 242(b) are plainly not at issue here.

The remaining two factors are similarly lacking. First, this case does not contain any novel legal issues. The primary purpose of Patton’s appeal is an attempt to change a common law rule that South Carolina’s courts have followed for more than a century. This hardly constitutes a novel legal issue. Similarly, the secondary issues raised by Patton all involve the application of settled law, not novel theories or issues. This appeal simply does not raise or address anything new in the law, which makes item (1) of Rule 242(b) inapplicable.

Second, the result in the Court of Appeals does not conflict with any prior decision by this Court. In fact, the Court of Appeals cited and expressly followed this Court’s precedent on both the primary issue of the necessities doctrine and the other, secondary issues.⁴ The Court of Appeals neither questioned that precedent nor called on this Court to examine any of the rules governing its decision. Instead, the Court of Appeals applied the common law as established by this Court. As a result, item (3) of Rule 242(b) does not support the petition.

⁴ Although Patton asks this Court to review the Court of Appeals’ opinion in its entirety, her focus appears to be seeking a change in the common law “necessaries doctrine.” Patton devotes most of her time and effort to that one request. As to the other issues, Patton is really only requesting that this Court serve an error-correction role.

Granted, the elements listed in Rule 242(b) are not the exclusive bases for granting a writ of certiorari, but no other reasons exist for this Court to review the Court of Appeals' decision. Patton wants to abrogate an established common law rule, but she has not presented any compelling reasons why the Court should enact such a change. Although Patton identifies other jurisdictions that have abandoned the necessities doctrine, the cases in which those states did so are scattered over the past thirty years. There is no indication of a powerful or recent trend against the common law rule based on some new legal theory or societal change. In short, this is not a burning local or national issue that requires an answer from this Court.

It is also important to note that this Court received – and denied – a certiorari petition on this exact same issue roughly three-and-a-half years ago. *Cue-McNeil v. Watt*, 2012 S.C. LEXIS 6 (S.C., Feb. 8, 2012). The Petitioner has not demonstrated any significant change during that short timespan, either in South Carolina or elsewhere, that would warrant a different result at this point. Simply put, there was no basis for the Court granting a writ of certiorari on this issue in 2012, and there is still no basis for doing so now. Therefore, the Court of Appeals' decision should stand, and this Court should deny the petition.

II. The Court of Appeals correctly applied the “necessaries doctrine,” which remains the established law of South Carolina.

Any right to recover a minor's medical expenses in a legal action belongs solely to the minor's parents. *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907). South Carolina's courts have consistently applied this rule since this Court decided *Tucker* more than one hundred years ago. See, e.g., *Hughey v. Ausborn*, 249 S.C. 470, 475, 154 S.E.2d 839, 841 (1967) (“[T]he amount paid for medical care and treatment by the parent is not an element of damage [for the minor] and the parent has a cause of action for the recovery of the medical expenses which he has incurred for the care and treatment of such minor.”); *Trident Reg. Med.*

Ctr. v. Evans, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App. 1995) (“Under the common law, a parent is responsible for the support of his or her minor child.”).

Patton has never denied that this rule, sometimes called the “necessaries doctrine,” is the current law of South Carolina. Indeed, Patton has devoted considerable effort to arguing that this is an aspect of South Carolina’s common law that should change. The Court of Appeals declined that invitation and opted to follow and apply the common law rule. Patton’s current petition merely repeats the request to change the common law to a higher court. Therefore, the only real question on this issue is whether Patton has provided a compelling reason to change a rule that has been part of South Carolina’s common law for more than a century. As discussed below, the answer to that single and dispositive question is no.

Patton has not demonstrated any need or basis for changing the common law rule recognized in the *Tucker* line of cases. Contrary to Patton’s assertions, the underlying rationale for the rule still exists. Parents remain responsible for providing medical care to their minor children and for paying the expenses related to such care. This is still an expense that the parents incur, not the minors themselves. Although much has obviously changed in the century since *Tucker*, and even in the years since *Hughey*, this one basic fact remains the same. Medical providers still send bills to parents, not minor children, and parents must pay those bills. For purposes of the rule’s continuing validity, this is all that matters.

Patton argues that the law has changed with regard to a parent’s responsibility for a minor child’s medical expenses, but her position rests upon a misreading of a single case. In *Greenville Hosp. Sys. v. Smith*, this Court addressed the issue of “the liability of a minor’s estate for emergency hospital services when the minor is living with and being supported by his parents.” 269 S.C. 653, 654, 239 S.E.2d 657, 658 (1977). The Court held that “the minor is not liable

unless the parents are unable to pay the reasonable value of the hospital services rendered”
Id. Because the record did not demonstrate whether the minor’s parents were unable, or just unwilling, to pay the hospital bills, the Court remanded for an answer to that question. The Court concluded that unless there was a showing of an inability to pay (as opposed to other reasons for not paying), the judgment of the lower court awarding the hospital a recovery against the minor’s estate would be reversed. *Id.* at 657, 239 S.E.2d at 658.

In reaching its decision, the Court relied upon a longstanding rule that permitted a recovery against a minor for medical expenses when the evidence showed the parents were unable to pay. The Court did not suddenly make all minors responsible or liable for their own medical bills. Indeed, the Court reiterated that minors are not responsible for those expenses except in one very limited scenario (*i.e.* the parents’ inability to pay). Thus, *Greenville Hosp.* did not change anything about the common law, and it certainly did not do anything to alter the rule stated in *Tucker*.

In fact, the Court actually reaffirmed the *Tucker* rule in its *Greenville Hosp.* opinion. Although the Court did not cite or discuss that rule directly,⁵ it made an implicit reference to the rule in describing the background facts. The Court noted that the minor’s parents “ha[d] not pursued their right of action to seek recovery of the expenses they incurred for [the minor’s] medical and hospital treatment.” 269 S.C. at 658-59, 239 S.E.2d at 655-56 (emphasis added). This language demonstrates that the Court believed the legal right to seek recovery of the minor’s medical expenses belonged to the parents, not the minor. In other words, the Court followed the common law rule stated in *Tucker*.

⁵ The absence of any such citation or discussion is, in itself, evidence that the Court did not intend its decision in *Greenville Hosp.* to change the common law as stated in *Tucker*.

As this discussion demonstrates, *Greenville Hosp.* did not signal any departure from the established common law. Patton apparently believes the case created a new rule that suddenly made minors liable for their medical expenses as of 1977. But the Court in *Greenville Hosp.* merely applied a rule that had been in existence since at least 1854 – more than fifty years before the Court issued its opinion in *Tucker*. Consequently, *Greenville Hosp.* was not a new development in the law, and it does not provide any justification for changing the common law rule that parents have the right of action to recover the medical expenses of their minor children.

Although Patton cites other cases to support her argument for changing the law, none of those authorities are binding on this Court. Thus, those cases are irrelevant for present purposes. This is not a situation in which South Carolina's courts have never dealt with the issue and must therefore look to other jurisdictions for guidance. Rather, South Carolina has an established common law rule that our courts have cited and applied for more than a century. This Court has never even hinted at changing this rule, even though many of the out-of-state decisions cited by Patton have been in place for twenty-five years or more. Thus, those cases are not relevant, and the Court need not consider them.

Patton also cites a decision by a South Carolina federal district court judge, but that case fails to support her argument for changing the law. In *McNeill v. United States*, 519 F. Supp. 283 (D.S.C. 1981), the federal judge allowed a minor to recover medical expenses when his parents had not filed an action seeking those damages. However, there are three important facts to consider when evaluating *McNeill*.

First, that case has no greater impact than any of the other cited authorities from foreign jurisdictions, as decisions of the United States District Court for South Carolina are not binding on South Carolina's appellate courts. See *Blyth v. Marcus*, 375 S.C. 363, 517 S.E.2d 433 (1999).

Second, the federal judge in *McNeill* did not cite or rely upon any South Carolina authorities to support his conclusion, which indicates the judge's decision did not represent South Carolina law. Third, *McNeill* was decided more than thirty years ago, and this Court has never cited it for the proposition that a minor can recover his or her own pre-majority medical expenses. All of these points indicate that *McNeill* is a non-binding anomaly that is not in accord with South Carolina's established common law rule.

Again, despite the fact that many of Patton's cited authorities have existed for decades, this Court has never seen fit to change the common law on this issue. Nor can Patton argue that the Court simply has not had the opportunity to do so. Although the Court has not published a decision on this issue in many years, it recently denied a petition for a writ of certiorari in a case that involved the exact same argument to change the common law rule.⁶ That denial kept in place a decision by the Court of Appeals that followed and applied the established rule.⁷ Thus, the Court has clearly had the chance to address arguments against the current common law; it has just chosen not to do it. This lack of action by the Court is significant.

In addition, Patton's arguments for changing the common law are unconvincing. Patton calls the rule a "creditor's remedy" that imposes an undue hardship on injured minors and their parents. But Patton's position commits the fallacy of assuming every situation is a "worst case scenario," when in reality, most cases involve no hardships at all. Barring some extraordinary circumstances not present in this case, it is neither unfair nor unduly burdensome to hold plaintiffs accountable for following (or, as in this case, not following) the common law rule. This is especially true when one considers the rule is both well-established and easy to satisfy.

⁶ *Cue-McNeil v. Watt*, 2012 S.C. LEXIS 6 (S.C., Feb. 8, 2012)

⁷ *Cue-McNeil v. Watt*, 2010 S.C. App. Lexis 596 (Ct. App. 2010)

For example, in the present case Patton has never explained why she failed to assert a claim for her daughter's pre-majority medical expenses and related necessities.⁸ Nor has she claimed there was any reason she could not have brought such an action. In other words, Patton has argued it is unfair that she should be required to pursue that remedy herself, but she has not demonstrated why it was unfair under the circumstances of this case. Lost in all of Patton's arguments about fairness and an "archaic" rule is the fact that she has presented no reason whatsoever to explain why she could not have followed that rule.

As previously discussed, the *Tucker* rule has been part of South Carolina's common law for more than a century. Our courts have consistently applied the rule in published decisions. Thus, the rule is neither a lost relic of history, nor some hidden trap for the unwary. The rule is established law, and Patton is charged with knowledge of it. *See Ahrens v. State*, 392 S.C. 340, 355, 709 S.E.2d 54, 61 (2011) ("citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests"). Accordingly, it was incumbent upon her to file and pursue an action to recover her daughter's pre-majority medical expenses within the governing statutes of repose and/or limitations. For whatever reason, Patton did not take advantage of her full opportunity to comply with the law and protect her financial interests. This failure has resulted in negative consequences for Patton, but that fact does not make the rule "unfair" or following it a "hardship."

This Court has recently rejected an invitation to abrogate the necessities doctrine, and it should do so again now. The rule still serves its intended purpose in South Carolina, and there is no evidence that it has led to any widespread problems or harsh results. Certainly no such

⁸ To the extent it can be considered an explanation for her failure to bring a claim for pre-majority medical expenses or necessities in her own name, Patton confusingly asserts that it was "a mistake concerning the identity of the proper party." [Final App. Brief, pp. 26-27.]

difficult circumstances exist in the present case, where Patton merely failed to follow the rule. Therefore, this Court should deny the current petition and allow the longstanding rule to remain in place.

III. The Court of Appeals properly held that the Minor may not rely upon the doctrines of implied waiver and equitable assignment to assert her parents' claim for her pre-majority medical expenses and related necessities.

As her second issue, Patton argues the Court of Appeals erred in finding that the Minor cannot rely on the doctrines of implied waiver and equitable assignment to salvage her claims for pre-majority medical expenses and related necessities. Contrary to Patton's assertions, the Court of Appeals properly held the doctrines are inapplicable in this context.

Initially, Patton argues she impliedly waived or equitably assigned her right to bring a claim for pre-majority medical expenses and related necessities in favor of the Minor by choosing not to seek recovery in her own name and instead filing suit as the Minor's next friend. Patton cites non-binding case law in support of her arguments.⁹ Although South Carolina recognizes the doctrine of implied waiver, no South Carolina appellate court has ever invoked that doctrine to find that a named plaintiff holds a cause of action which properly belongs to a non-party. The Court of Appeals correctly concluded that South Carolina law is clear on the following point: while waiver "may be invoked as [an] affirmative defense[] to counterclaims," it "may not be asserted in a complaint as [an] offensive weapon[]." *Janasik v. Fairway Oaks Villas*

⁹ Patton relies heavily on two South Carolina federal district court opinions, *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960) and *McNeill v. United States*, 519 F. Supp. 283 (D.S.C. 1981), in support of her arguments. Those opinions are not controlling because (1) decisions of the United States District Court for South Carolina are not binding on South Carolina's appellate courts; (2) neither *McNeill* nor *Sox* interpreted, cited to, or otherwise referenced South Carolina law in noting that a parent may waive a claim for pre-majority medical expenses in favor of a minor child; and (3) no decisional court of this State has ever cited to *Sox* or *McNeill* for the proposition that a minor can recover his or her own pre-majority medical expenses or related necessities.

Horizontal Property Regime, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992).

Patton claims she is not invoking the doctrine of implied waiver offensively because she only raised it after the Respondents challenged the Minor's right to recover pre-majority medical expenses and related necessities in her own name. Semantics aside, Patton is attempting to use the doctrine of implied waiver to allow the Minor to pursue a claim for medical expenses against the Respondents, which the Minor otherwise has no right to assert. The doctrine of implied waiver, however, may not be used as an "instrument[] of gain or profit." *Janasik*, 307 S.C. at 345, 415 S.E.2d at 388. Therefore, the Court of Appeals correctly held that the Minor cannot rely on the doctrine of implied waiver to salvage a claim for pre-majority medical expenses and related necessities. Patton's petition has not demonstrated any error in that conclusion.

The Court of Appeals also properly held that Patton has not established appropriate grounds for applying the doctrine of equitable assignment to this case. To establish an equitable assignment under South Carolina law, Patton must prove (1) "words or transactions which show an intention on the one side to assign," (2) words or transactions which show "an intention on the other [side] to receive," and (3) "valuable consideration" for the assignment. *Player v. Player*, 240 S.C. 274, 278, 125 S.E.2d 636, 638 (1962). In the absence of an express agreement, Patton must have pled facts sufficient to demonstrate the existence of an equitable assignment. *Georgia-Carolina Gravel Co. v. Blassingame*, 129 S.C. 18, 123 S.E. 324, 326 (1924).

Because she cannot establish that the elements of an equitable assignment are present in this case, Patton falls back on the specious assertion that the Respondents do not have standing to challenge the alleged equitable assignment. The Respondents explained the illogical nature of that argument in their Final Respondents' Brief below, and they will not repeat that analysis here. For present purposes, it is enough to say that the Court of Appeals properly rejected

Patton's argument on this point, and the current petition does not demonstrate otherwise.

Instead of attempting to establish consideration in the trial court, Patton cited to non-binding secondary sources for the dubious proposition that consideration is not required in this situation. [R. p. 138, lines 8-11]. However, as set forth in the trial court's August 2, 2013 Order [R. p. 8], the record is devoid of any evidence showing Patton's intent to assign her claim for pre-majority expenses to Minor, or the Minor's intent to accept an assignment. Given that Patton concedes there was no express agreement supporting the alleged equitable assignment [R. p. 153, line 25 – p. 154, line 5], she was required to plead facts sufficient to evidence an equitable assignment. Patton still has not explained her failure to do so.

Applying binding South Carolina law, the Court of Appeals properly held that the doctrines of implied waiver and equitable assignment do not apply to salvage Patton's claims for pre-majority medical expenses and related necessities.¹⁰ Patton's petition repeats her arguments on this issue to the Court of Appeals, but those arguments do not establish any error by that court. Nor do Patton's arguments explain (or even attempt to explain) why this issue is sufficiently significant to warrant review by this Court pursuant to an extraordinary writ. Consequently, the petition does not demonstrate any basis for this Court's involvement, and it should be denied.

¹⁰ The Respondent Amisub incorporates and does not waive its argument that even if Patton established the necessary elements of implied waiver or equitable estoppel and South Carolina law recognized those doctrines as allowing a minor to pursue a claim for pre-majority expenses which her parents abandoned, the claim as to Amisub would be time-barred pursuant to S.C. Code Ann. § 15-3-545(A). See Final Respondents' Brief, pp. 20-21. Patton admits that any alleged waiver or assignment did not happen until she instituted her action as Next Friend against the Respondents. See Petition for a Writ of Certiorari, p. 13. Patton also admits that by waiting until September 23, 2011 to commence her action against Amisub, "suit was filed in this matter outside the three-year statute of limitations on Amisub" [R. p. 170, lines 2-5.]

IV. **Patton has not established any basis for further review of the denial of her motion to amend.**

Patton's petition provides no reason, let alone a compelling one, why the denial of her motion to amend, and the Court of Appeals' affirmance of that decision, mandates review by this Court. The Respondents respectfully assert that the Court of Appeals' decision on this issue was a simple matter of applying the established law to the facts of this case, and it is not the kind of ruling that requires this Court's involvement.

The Court of Appeals concluded that the trial court correctly denied the motion to amend because it would have added a new plaintiff to the case. As the Court of Appeals has previously explained:

Rule 15, SCRPC, does not allow an existing plaintiff to add a new plaintiff to the case to assert a claim against the defendant. Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an existing defendant. Rule 15(b) addresses amendments to conform to the evidence presented at trial. Rule 15(c) deals with relation back of amendments. None of these subsections addresses a motion to add a plaintiff as contemplated in this case.

Valentine v. Davis, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995) (emphasis added).

This language is straightforward and does not require any substantial analysis. Under *Valentine*, an existing plaintiff cannot use Rule 15 to add a new plaintiff to the case. This is the law of South Carolina, and the Court of Appeals correctly applied it to this case.

Patton attempted to do exactly what this Court rejected in *Valentine*. Patton is not a party to this case. She is only the "Next Friend" for Minor, which means she is operating in a representative capacity. Patton did not assert any personal claims or causes of action in either of the Complaints, nor could she. Her name appeared in the caption as the person who was asserting claims on behalf of the minor, who was the sole actual plaintiff. Thus, by seeking to

include a personal claim by Patton, the proposed amendment was necessarily an attempt to add a new plaintiff to the case. *Valentine* forbids this.

Patton tries to circumvent *Valentine* by claiming the amendment would only change her “capacity” and would not add her as a plaintiff. But in the present case, those two phrases mean the same thing. Patton is not a plaintiff and has asserted no claims against the Respondents. Under the proposed amendment, Patton would become a named plaintiff and would be asserting a claim against the Respondents. Regardless of the semantics used, this change would amount to adding a new plaintiff. As the Court of Appeals recognized in *Valentine*, Rule 15 simply does not allow for such additions. *See also Gause v. Smithers*, 384 S.C. 130, 681 S.E.2d 607 (Ct. App. 2009) (the addition of a party is not the same as the substitution of a party, and Rule 15(c), SCRCP, applies only to the latter).

Patton has not presented any South Carolina authority for the proposition that Rule 15 permits amendments that add new plaintiffs. Although Patton cites *Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995), that case is distinguishable. The plaintiff in *Thomas*, a resident of Michigan, was the widow of a man who died shortly after receiving medical treatments in South Carolina. The plaintiff obtained an appointment as the personal representative of the husband’s estate from a probate court in Michigan. She later commenced a South Carolina wrongful death action against the medical care providers. Her original Complaint did not allege that she was duly authorized as the personal representative of the estate in South Carolina. Eventually, but not until after the statute of limitations expired, the plaintiff discovered this deficiency, obtained an appointment as the personal representative from a South Carolina probate court, and moved to amend the Complaint. The proposed amendment demonstrated that the plaintiff was now the duly authorized personal representative under South Carolina law. Faced with this motion to

amend, the federal district court judge presiding over the case certified questions to this Court.

The Court answered the relevant question by concluding the plaintiff's proposed amendment would relate back to the filing of the original Complaint under Rule 15(c), SCRPC. During its discussion of that issue, the Court stated that "[t]he purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." 318 S.C. at 88, 456 S.E.2d at 380.

Patton takes the quoted statement out of context. Although the "relation back" provision of Rule 15(c) does salvage otherwise time-barred claims in some situations, that benefit applies only to new claims by a current party. Rule 15 says nothing about preserving time-barred claims by non-parties, and the *Thomas* Court did not read that broadened scope into the rule. Indeed, the Court did not even consider that argument, as the facts in *Thomas* made it irrelevant. *Thomas* involved an attempt by the existing plaintiff to use an amendment under Rule 15(c) to preserve her own claim that was technically time-barred. There was no effort to bring in a new plaintiff. The amendment was simply a clarification that the current plaintiff was duly authorized to pursue the wrongful death action under South Carolina law. In other words, the plaintiff went from unauthorized to authorized, but her actual identity remained the same. The Court concluded that type of amendment was proper, but went no further than that.

Patton's proposed amendment was different than the one in *Thomas* because it sought to add her as a new plaintiff. Unlike the plaintiff in *Thomas*, Patton was not one person changing hats; she was a new party throwing a second hat into the ring along with the first. *Thomas* does not suggest Rule 15 allows such an amendment, and as previously noted, Patton has not cited any other South Carolina authorities to that effect.

Patton also erroneously relies on language from the Advisory Committee Notes for the

federal version of Rule 15. In relevant part, those Notes state: “the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs” (emphasis added). Patton overlooks the significance of the word “changing” in this sentence. The Notes do not say, or even imply, that the federal version of Rule 15 allows the addition of a new plaintiff. Rather, they suggest the rule permits a court to change the plaintiff – *i.e.* remove the original plaintiff and include a new one in its place. Stated another way, Rule 15(c) envisions substitution of a plaintiff as a zero sum scenario: For a new one to come in, the old one must leave.

*Twelfth RMA Partners, L.P. v. National Safe Corp.*¹¹ illustrates this point. In that case, the defendant borrowers opposed a proposed amendment to change the name of the plaintiff so that the caption would reflect the correct corporate name of the creditor.¹² The trial court allowed the amendment, and the Court of Appeals affirmed. Significantly, though, the Court approved an amendment that changed the plaintiff from one corporate entity to another. The Court did not discuss and certainly did not validate any amendment to include a new corporate entity in addition to the old one. The amendment was a straight substitution.

Patton’s proposed amendment, on the other hand, would have brought a second plaintiff into the case without removing the first one. The case would have changed from “Minor vs. the Respondents” to “Minor and Angela Patton vs. the Respondents.” That would have constituted an addition, not a substitution. For that reason, Rule 15 is not applicable.

Furthermore, Patton would not have simply stepped into the shoes of her minor daughter to “take over” a cause of action. Under the proposed amendment, Patton would have asserted a

¹¹ 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999)

¹² The amendment changed the name of the plaintiff from RMA Partners, L.P. to Twelfth RMA Partners, L.P.

claim for her daughter's pre-majority medical expenses. That claim always belonged exclusively to Patton. This means Patton could not have "taken over" for Minor in pursuing that claim because Minor never possessed or asserted that claim in the first place. Any such claim by Minor was a nullity under South Carolina law, and it could not have existed until Patton herself brought it. That is precisely why the circuit court granted partial summary judgment, and it demonstrates the flaw in Patton's argument.

The law on this issue as stated in *Valentine* and *Gause* is straightforward and well established. The Court of Appeals did not break any new legal ground in reaching its decision, nor did the Court depart from the controlling precedent. To the contrary, the Court of Appeals followed the applicable case law and ruled accordingly. As a result, there is no reason for this Court to review the Court of Appeals' decision, and Patton's petition should be denied as to this issue.

V. **The Respondents did not waive their defenses to the Minor's claim for pre-majority expenses, as Patton first argued in her Rule 59(e) motion.**

As the last issue, Patton argues the Respondents waived their right to contest the Minor's recovery of pre-majority expenses and related necessities because the Respondents failed to raise this issue as an affirmative defense. The Court of Appeals correctly rejected that argument and affirmed the trial court by finding that (1) Patton did not properly preserve this issue for appellate review, and (2) even if she had, the trial court correctly ruled this was not an affirmative defense that the Respondents were required to plead.

As a threshold matter, the record on appeal is devoid of any evidence that Patton raised her concern with the Respondents' responsive pleadings prior to the trial court's decision to grant partial summary judgment. Instead, Patton raised the issue for the first time as part of her Motion to Alter or Amend pursuant to Rule 59(e), SCRPC. It is well-established that a Rule

59(e) motion cannot be used as a vehicle for raising new arguments. *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). This was certainly a “new argument,” as it related to the issues involved in the original summary judgment hearing, but was not raised at that time. Thus, Patton’s argument on this issue was never properly before the trial court, and it could not have been properly preserved for appellate review. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.”).

Although the trial court rejected Patton’s argument as untimely pursuant to *Hickman*, *supra*,¹³ Patton failed to challenge or even mention the trial court’s ruling in her Appellant’s Brief in the Court of Appeals. *See First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (“Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance.”). Because Patton raised her concern with the Respondents’ pleadings for the first time as part of her Rule 59(e) Motion to Alter or Amend and did not challenge the trial court’s ruling on this point in her Final Appellant’s Brief, the Court of Appeals correctly affirmed the result below pursuant to the rule set forth in *Hickman*, as well as Patton’s failure to challenge the trial court’s ruling and the two-issue rule.¹⁴

The Court of Appeals also correctly recognized that the end result would be the same even if Patton’s challenges to the Respondents’ responsive pleadings were properly before the Court. The Respondents assert that the Minor cannot claim or recover any damages based on her

¹³ *See R.* p. 8.

¹⁴ *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (“Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.”).

pre-majority medical expenses and related necessities. As the trial court concluded, this is not an affirmative defense that must be pled to prevent waiver. “An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action.” *FMI, Inc. v. RMAX, Inc.*, 286 S.C. 343, 347, 333 S.E.2d 360, 363 (Ct. App. 1985). The Respondents do not admit that the Minor is entitled to recover pre-majority medical expenses and necessities. Instead, the Respondents unequivocally deny the Minor’s allegation that she can recover those damages. Because the Minor cannot possibly seek pre-majority medical expenses and necessities, she has failed to state a claim for recovery of those expenses. Thus, the Respondents’ general denials were sufficient.¹⁵

Furthermore, the Respondents were free to raise the Minor’s failure to state a claim by motion for summary judgment. *See* Rule 12(b)(6), (h)(2), SCRC. *See also* James G. Flanagan, *South Carolina Civil Procedure* 3rd (2010) (“Rule 12(h)(2) lists two non-waivable defenses: the failure to state a claim or defense;....”). This is precisely what all of the Respondents did. After clearly denying the Minor’s entitlement to seek or recover pre-majority medical expenses or related necessities in their Answers, the Respondents sought a ruling to that effect through motions for partial summary judgment. The Respondents were not required to do anything else to present this issue to the trial court for a decision, and Patton has failed to present any applicable authorities to the contrary. Therefore, the Court of Appeals correctly decided this issue in its opinion, and Patton has not demonstrated any reason why further review by this Court

¹⁵ In fact, Amisub specifically raised the defense of failure to state a claim in its April 24, 2012 Answer. [*See* R. p. 34, ¶ 11 (“In answer to paragraph 21, it is admitted that Plaintiff has complied with statutory requirements to commence an action, but it is denied Plaintiffs [sic] have a valid cause of action.”).]

is necessary or warranted.¹⁶

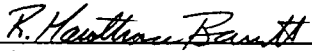
CONCLUSION

For all practical purposes, Patton's petition boils down to a request for this Court to change a common law rule that South Carolina has followed for more than a hundred years. This Court has recently denied the same invitation under practically identical circumstances, and nothing has happened in the three-and-a-half years since that time to require a different outcome. For this reason, and based on the arguments presented above, the Court should deny the petition and allow the Court of Appeals' decision to stand.

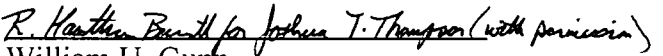
Respectfully submitted,

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¹⁶ Amisub does not waive its argument that Patton was not prejudiced by Amisub's alleged failure to raise the Minor's inability to recover pre-majority medical expenses and related necessities because Patton did not commence suit against Amisub until after the three-year statute of limitations on the parents' claim for pre-majority expenses expired. No amount of notice in Amisub's responsive pleading could have given Patton time within the limitations period to amend and properly plead recovery of pre-majority medical expenses against Amisub.

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,.....Petitioner,

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 Respondents, certifies that I have this
13th day of November, 2015, served a copy of the **Return to Petition for Writ of Certiorari**
upon counsel of record for the Petitioner by causing it to be deposited in the United States mail
with sufficient postage attached, addressed to: Edward L. Graham, Esq., and J. Layton Ruffin,
Esq.; Graham Law Firm; 383 W. Cheves St.; Florence, SC 29501.

(Signatures on next page.)

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November 13, 2015