# EXHIBIT 1

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

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Case No. 2009-CP-46-5195

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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.

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# PETITION FOR A WRIT OF CERTIORARI

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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Appellant, certifies that I have this 16th day of October, 2015 served copies of a Petition for Writ of Certiorari upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

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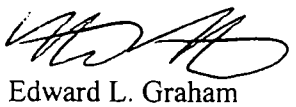

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October 16, 2015

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals in an Order dated September 17, 2015.

## QUESTIONS PRESENTED

I. **DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY RULING 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?**

II. **DID COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION 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?**

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## STATEMENT OF THE CASE

Petitioner, Angela Patton (hereinafter "Angela" or "Petitioner") brought this action as Next Friend on behalf of her daughter, Alexia L. (hereinafter "Alexia" or "Petitioner"), alleging medical malpractice committed by certain healthcare providers during Angela's delivery of her daughter Alexia. The case concerns a permanent injury to the nerves of Alexia's arm she sustained at the time of her birth on April 5, 2007. The Mother alleges that Dr. Gregory A. Miller (hereinafter "Dr. Miller") and/or employees of Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter "P.A.") and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center (hereinafter

"Hospital") improperly managed the resolution of shoulder dystocia, a complication of head-first vaginal delivery where the baby's top shoulder gets stuck behind the mother's pubic bone; and that such mismanagement caused permanent injury to Alexia's left-sided brachial plexus nerves.

The Mother as Next Friend of her Daughter filed the Summons and Complaint on November 25, 2009, designated as Civil Action Number 09-CP-46-05195, against original Defendants Dr. Miller and the P.A. (R. p. 11-18). The Defendants' Answer asserted a general denial, and no affirmative defenses.

After discovery proceeded in the first case, the Mother as Next Friend filed a second Summons and Complaint on April 2, 2012, designated as Civil Action Number 2012-CP-46-1214, naming the Hospital as a defendant because of its role as employer of the nurses, whose negligence Petitioner alleged to have been a concurrent cause of the child's injury, and for whose torts the Hospital had *respondeat* superior liability, (R. p. 22-32). The Hospital's Answer asserted a general denial and one affirmative defense, the statutory cap on non-economic damage. An Order Consolidating Cases under the initial Civil Action Number was filed on July 12, 2012. (R. p. 1-2).

On April 29, 2013, Respondent Hospital filed a motion for partial summary judgment. (R. p. 48-49). Respondents Dr. Miller and P.A. filed the same on May 24, 2013. (R. p. 46-47). The Court heard the motions on July 18, 2013. At the hearing, Hospital filed a memorandum in support of its motion for partial summary judgment, arguing that the claim for pre-majority medical expenses could be asserted only by a parent individually, but the claim had been asserted by the child only, through her Next Friend, and could not be asserted now by the parent individually because it was time-barred. (R. p. 50-56). Petitioner filed a memorandum of law in opposition to Defendants' motions for partial summary judgment on July 22, 2013. (R. p. 57-71).

The trial court signed an order granting partial summary judgment on July 24, 2013. (R. p. 3-6). The stated basis for granting partial summary judgment was that the claim for pre-majority medical expenses could be asserted only by a parent individually, but the claim had been asserted by the child only, through her Next Friend, and could not be asserted now by the parent individually because it was time-barred. The trial judge's Order granting partial summary judgment was entered of record on August 2, 2013 (R. p. 3-6). Petitioner received written notice of the Order on August 7, 2013.

On August 16, 2013, Petitioner's Rule 59(e) Motion to Alter or Amend and a Motion for Leave to Amend the Complaint were filed. (R. p. 72-75). On October 15, 2013, Respondents emailed their responses to Petitioner's motions, and these responses were filed on October 18, 2013. (R. p. 100-117). The hearing was held on October 17, 2013. Judge Kimball's order denying Petitioner's motions was entered on November 4, 2013 (R. p. 7-10).

Petitioner timely filed her Notice of Appeal on December 9, 2013. The amount involved in this appeal is not determinable at this time, but represents the value of Alexia's pre-majority tort-related medical expenses, past and future estimated currently to be in the range of approximately Five Hundred Thousand to Eight Hundred Thousand Dollars ($500,000-$800,000).

Oral argument was heard May 12, 2015. The Court of appeals affirmed the trial court's decision by unpublished opinion filed July 22, 2015. Petitioner filed her Petition for Rehearing on August 5, 2015, which was denied by Order dated September 17, 2015.

## STATEMENT OF THE FACTS

On April 4, 2007, Angela, Alexia's mother, was admitted to the Hospital for labor and delivery. Dr. Miller was Angela's attending obstetrician. Dr. Miller's plan was to deliver Alexia by head-first vaginal delivery. However, after delayed progress and signs of fetal distress, he ordered an emergency Caesarian Section. Before making an incision, however, he changed his

mind and reverted to vaginal delivery. He then encountered a complication known as shoulder dystocia, whereby Alexia's top shoulder got stuck behind her mother's pubic bone. When Alexia was born, she did not have the ability to move her left arm normally.

Angela asserts in this action that Dr. Miller failed to perform properly certain maneuvers to safely resolve the shoulder dystocia, and instead used force or torsion on Alexia's head and neck to try to pry the top shoulder out, thereby negligently over-stretching the brachial plexus nerves and causing permanent brachial plexus injury. (R. p. 11-18). Angela further asserts that the Hospital nurses were also negligent in their supporting role, which was a concurring cause of the injury. Defendants deny any negligence. (R. p. 19-21)

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

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

## ARGUMENTS

### I. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY RULING 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. Introduction

This case presents a fundamental unfairness imposed upon children and created by modern society's outgrowth of a common law doctrine paradoxically mislabeled as the "necessaries doctrine." This doctrine holds that a parent has a duty to provide for a child's medical care during

her minority. The corollary is that only the parent may recover in a tort case for medical expenses incurred by the minor due to actions of a tort-feasor. Today, this legal anachronism has been perpetuated by a shift in its purported purpose, from that of protecting minors to one of protecting creditors. In truth, it protects neither.

Since *Greenville Hosp. Sys. v. Smith* 269 S.C. 653, 654, 239 S.E.2d 657, 658 (1977), minors may now be held personally responsible for their own medical bills, despite being unable to seek recovery for the same. If the parent does not pay the child's bills, then the child is responsible. If the parent fails to timely file suit for pre-majority medical bills and cannot afford to pay through other means, the creditor may seek recovery directly from the minor.

*Worse*, if the parent does recover for these expenses through suit, but squanders the money, the creditor may still seek recovery from the minor. In this situation, the child would have to past creditors with funds awarded for either (a) future medical treatment beyond age eighteen or (b) suffering and lost future wages. Additionally, the parents receive money awarded not just for past expenses but also for the child's future medical needs before the child turns eighteen. There is no guarantee this money will be preserved for this purpose. There is no oversight to the management of these funds as this award goes directly to the parents and is not part of a trust or conservatorship for the child's benefit. Therefore, the child is not made whole for her injury, the tort-feasor evades full payment for wrongdoing, and the basic tenets of South Carolina tort law are contravened. *See e.g. Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 49, 533 S.E.2d 312, 321 (2000). *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.").

Thus, this Court should grant certiorari to correct a hardship imposed upon minors through continued existence of the archaic "necessaries doctrine," which today only hurts a class viewed

as vulnerable and worthy of protection. Children should not be forced to bear a greater burden, not be made whole when harmed by a wrongdoer, and forced to pay past medical bills from money awarded for either their future treatment or awarded for their suffering and disfigurement. Not only is this fundamentally unfair, it runs afoul of this state's basic tenets of tort law. *See e.g. Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 641, 532 S.E.2d 856, 863-864, (2000) (Toal, C.J., dissenting) (noting "a trend of abolishing well-established tort doctrines which inhibit the proper apportioning of liability based on fault.")

**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.**

When parents are unable to pay for medical care rendered to a minor, the minor is now liable for the bills. Although medical bills may still be sent to the parents[1], hospitals now seek collection from the child when the parent does not pay. This is a drastic change from the days of *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907), the first case to set forth the general common law rule that the right to recover pre-majority medical expenses belongs only to the minor's parents.[2] *Greenville Hosp. Sys. v. Smith* 269 S.C. 653, 654, 239 S.E.2d 657, 658 (1977), held, "the minor is not liable unless the parents are unable to pay the reasonable value of the hospital services rendered . . . ."

[1] 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.

[2] The Court in *Tucker* derived its analysis from nineteenth century opinions, including *Newbury v. Getchell & Martin Lumber & Mfg*, 100 Iowa 441, 69 N.W. 743 (1896), *Tompkins v. West*, 56 Conn. 478, 16 A. 237 (1888), and *Fuller v. Naugatuck*, 21 Conn. 557 (1852). *Naugatuck* stated that expenses for the care of one's wife accrue to the husband alone. *Fuller* 21 Conn. at 571. In the case *Tompkins v. West*, which cited to *Fuller*, the court reminded us that while an unmarried, feme sole may recover damages arising from expenses incurred attending her sickness, a married woman has no right of action for these expenses because, in coverture, the claim rests with the husband alone. *Tompkins* at 486. Thus, in South Carolina, the necessaries doctrine appears to have its roots in the doctrine of coverture, as a means of protecting women and children and ensuring their basic needs were met.

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 now the same minor may be held responsible for paying the same. 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. Money will be taken from recovery the child's recovery for future post-majority medical care to pay past bills or even to pay for the care she requires yet to be incurred but required before she turns eighteen. Money will be taken from any award provided to her for her suffering and disfigurement. Therefore, the child is not made whole, and the tortfeasor escapes liability for the full extent of the damage caused by wrongful conduct. This is far from the scenario contemplated by *Tucker*, which was published over a century ago.

**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)).

South Carolina Courts now call 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 . . . ." The problem is 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 a creditor's likelihood of recovery for any medical bills the parents are unable to pay. 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.

Additionally, 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, Petitioner certainly does not argue 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. However, 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 its current state, 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. 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, Courts disdain permitting the defendant tortfeasor to enjoy a windfall to the victim's detriment. *See Id.*

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

Precluding a minor's right to recover directly from the tortfeasor for pre-majority tort-related medical expenses represents a direct conflict with South Carolina jurisprudence on the collateral source rule. The collateral source rule does not exist to protect the tortfeasor in any fashion: it was created and intended to hold tortfeasors fully accountable for all harm their tort causes, even where the injured plaintiff receives help from another source (parents, health

insurance, government programs, "Good Samaritans") or is forced to do without needed medical treatment for financial reasons.

Thus, there is conflict between the trial court's ruling in this case and South Carolina law on collateral source rule as expressed in *Haseldon v. Davis*, *supra*. Petitioner respectfully requests this Court resolve that conflict by abrogating the corollary to the necessaries doctrine which limits recovery of tort-related pre-majority medical expenses to the minor's parents.

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

The modern trend of jurisprudence is to allow either child or parent to recover as tort damages the medical expenses incurred during minority, as long as there is only one recovery therefor. *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (W. Va. 2007); *Villa v. Roberts*, 80 F. Supp. 2d 1229 (D. Kan. 2000); *Johns Hopkins Hosp. v. Pepper,* 346 Md. 679, 697 A.2d 1358 (1997); *Boley v. Knowles*, 905 S.W.2d 86, (Mo. 1995) (the right to maintain an action to recover medical expense in relation to a child's treatment is vested jointly in the child and the parents; either the parents or the minor may maintain an action, although under no circumstances will a double recovery be allowed); *Myer v. Dyer,* 643 A. 2d 1382 (Del. Super. 1983); *Davis v. Drackett Prods. Co.,* 536 F. Supp. 694 (S.D. Ohio 1982).

Indeed, at this point, a majority of jurisdictions have either abrogated this rule, modified it, or read exceptions into it in the form of waiver or assignment from parent to child in an effort to remedy the inequity of the common law rule.[3]

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[3] *Cabaniss v. Cook*, 353 So. 2d 784 (Al., 1977); *Blue Cross and Blue Shield of Alabama v. Bolding*, 465 So.2d 409, 412 (Ala. Civ. App. 1984); *Alaskan Village Inc. v. Smalley*, 720 P.2d 945 (Alaska, 1986); ."); *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1, supra; White v. Moreno Valley Unified School Dist.*, 181 Cal App. 3d 1024, 226 Cal. Rptr. 742 (Cal. App. 4 Dist., 1986); *Palacios v. Children's Place Retail Stores, Inc.*, 2004 WL 2943634 (Conn. Super., 2004); *Myer v. Dyer, supra*; *Lasselle v. Special Products Co.*, 106 Idaho 170, 677 P.2d 483 (1983); *Scott County School Dist. v. Asher,* 263 Ind. 47, 324 N.E.2d 496 (1975); *Villa v. Roberts*, 80 F. Supp.2d 1229 (D. Kan. 2000); *Betz v. Farm Bureau Mut. Ins.*, 269 Kan. 554, 8 P.3d 756 (2000); *Smith v. Geoghegan and Mathis,* 333 S.W.2d 254, 256 (Ky. 1960); *Aucoin v. State ex rel Dep't of Transp. & Dev't ex rel. Dep't of Transp. & Dev't, supra*;

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

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

*Johns Hopkins Hospital v. Pepper, supra.*

The Arizona Supreme Court recently overruled prior case precedent and held that both the minor and her parent were entitled to recover pre-majority medical expenses, so long as there was no double recovery. *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1,* 226 Ariz. 387, 249 P.3d 767, (2011). The court in *DeSela* determined that the policy rationale for prohibiting a minor from recovering premajority medical expenses was antiquated and had been eroded by the development of Arizona's common law. *Id.* at 389, 249 P.3d at 769. Moreover, the Court noted the rule promoted piecemeal litigation, posed as a "potential trap for the unwary that can insulate defendants from liability for the child's medical expenses for reasons unrelated to the defendant's fault," and conflicted with legislative policy which provided minors with a limitations period much longer than that afforded to adults. *Id.* at 390, 249 P.3d at 770. Ultimately, the Court held, "Because

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*Woodbury v. Hammond Lumber Co.*, 2003 WL 1665251 (Me. Super., 2003); *Johns Hopkins Hospital v. Pepper, supra*; *Lane v. Webb*, 220 So.2d 281 (Miss., 1969); *Boley v. Knowles, supra*; *Lopez v. Southwest Cmty. Health Servs.*, 114 N.M. 2, 1992-NMCA-040, 833 P.2d 1183 (Ct. App. 1992) *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Davis v. Drackett Prods. Co.*, 536 F. Supp. 694 (S.D. Ohio 1982); *West v. Miami Valley Hospital*, 99 Ohio Misc. 2d 1, 714 N.E.2d 469 (Ohio com. Pl., 1998); *Palmore v. Kirkman Laboratories, Inc.*, 527 P.2d 391 (Oregon 1974); *Smith v. King*, No. Civ. A. 958, 1984 WL 586817 (Tenn. Ct. App. 1984); *Moses v. Akers,* 203 Va. 130, 122 S.E.2d 864 (1961); *Packard v. Perry*, supra; *Korth v. American Family Insurance Co.*, 340 N.W. 2d 494 (Wisc. 1983); *Shaffer-Doan v. Commonwealth, 960 A.2d 500,* (Pa. Commw. Ct. 2008).

the common law should adapt when circumstances make it no longer just or consistent with sound policy, we hold that the right to recover pre-majority medical expenses belongs to both the injured minor and the parents, but double recovery is not permitted." *Id.* (citation omitted).

## II. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION 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. Petitioner properly set forth facts sufficient to show a transference of the parent's claim to the child through implied waiver

Plaintiff respectfully submits this Court overlooked or misapprehended that the trial court erred by not holding that Angela Patton assigned and waived her right to recover tort related pre-majority medical expenses in favor of her child. "A parent can waive his or her right to recover for damages properly belonging to the parent, [for example] medical expenses, if these damages are awarded in the child's action." *Betz v. Farm Bureau Mut. Ins. Agency of Kansa*, *supra* (*citing* 59 *Am. Jur. 2d Parent and Child* § 109 (1987). Additionally, while a child's medical expenses are usually part of the parent's cause of action, "this general rule is not an absolute bar, as when the parents do not assert a claim, or have waived a claim for these expenses." *McNeil v. United States*, *supra* (*citing* 67A *C.J.S. Parent and Child* § 142) (*see also* 67A *C.J.S. Parent and Child* § 331 (2007)). The South Carolina district court in *McNeill* noted that the primary concern is "that two claims cannot be asserted for the same item of damages." *McNeill* at 290. However, *McNeil*, quoting *Sox v. United States*, also explained it was well settled that a parent's right to recover for cost of medical care of an injured infant "may be waived in favor of a recovery by the infant. The underlying reason for these rules is to prevent double recoveries. It is not to excuse liability." *Id.* (*quoting Sox v. United States,* 187 F. Supp. 465, 469-70 (1960)). Finally, *McNeill* noted, "[N]o

reason has been suggested why a parent may not [] release to the child his right to items of damage." *Id.* (quoting 32 A.L.R.2d 1060, 1083).

"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). In this case, Angela Patton has waived her right to recover Alexia's pre-majority medical expenses to the benefit of Alexia. Thus, Angela Patton, by seeking recovery as Next Friend of Alexia, and choosing not to seek any recovery in her own capacity, waived her right to recover pre-majority medical expenses in favor of her daughter. 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 and her daughter. Accordingly, the conduct to assess in determining whether an implied waiver has in fact occurred is Angela's conduct, not Respondents. There is no dispute between Angela and Alexia regarding the existence or intent to impliedly waive the right to recover tort-related pre-majority medical costs from Angela to the benefit of Alexia. Nevertheless, Petitioner notes the doctrine has not been used offensively in this case. Only after Respondents challenged Petitioner's right to recover pre-majority medical expenses did Petitioner explain the implied waiver.

In other jurisdictions, 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 ~~In~~ *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.

*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.

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

South Carolina recognizes the doctrine of equitable assignment, or implied assignment.[4] "An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, will be recognized and protected in equity." *Player v. Player*, 240 S.C. 274, 278, 125 S.E.2d 636, 638 (1962). Therefore, a parent may impliedly assign his or her claim for tort-related pre-majority medical expenses by acting as the child's "Next Friend" in a suit in which the child demands pre-majority medical expenses caused by the defendant's tortious conduct. Because both parent and child cannot not each recover pre-majority medical expenses, when the parent as Next Friend brings suit on the child's behalf but does not seek pre-majority medical expenses in her own name, the parent has assigned her rights to the child.

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.

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

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

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, this Court misapprehended or overlooked that the trial court erred when it failed to find Angela did not waive or assign her right to recover to Alexia.

## III. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY 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) was Created with the Purpose of Allowing an Amended Pleading to Relate Back to the Date of the Original Pleading and Avoidance of Being Time Barred by the Statute of Limitations.

The very purpose of Rule 15(c) is to provide for a change in party outside the statute of limitations without the plaintiff being barred by it. The South Carolina Supreme Court has held, "The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." *Thomas v. Grayson*, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995). This language of the South Carolina Supreme Court directly contradicts the decision reached by the trial court. For this reason alone, the trial court's ruling should be reversed on this issue.

Rule 15(c) explicitly sets forth the circumstances under which a claim or defense or a change in party may relate back to the filing of the original pleading, and thereby avoid bar by the statute of limitations. The trial court quoted Rule 15(c) as stating "the amendment '. . . relates back

[only if the amendment is made] within the period provided by law for commencing the action . . . ." This is an inaccurate representation of the rule's language. What the rule actually states is:

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

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

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

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

The case of *Thomas v. Grayson,* supra, although perhaps not directly on point, is somewhat instructive. In this case the South Carolina Supreme Court agreed to answer certain questions certified by a United States District Court where a widow commenced a wrongful death action

within the statute of limitation period, but "failed to allege her qualification and/or appointment as personal representative in South Carolina." *Id.* at 85, 456 S.E.2d at 378. Thereafter, plaintiff filed an authenticated copy of her appointment as personal representative, but did so after the statute of limitations had expired. *Id.* The plaintiff subsequently moved to amend her complaint to include her appointment as personal representative.

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

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

While this case does not involve a change in the plaintiff's capacity to sue for damages involving wrongful death, it does involve a change in the plaintiff's capacity to sue for damages involving a minor's pre-majority medical expenses. The Court in *Grayson* changed prior law which held, "The rationale of the older cases was based on the idea that a change in plaintiff's

capacity to sue was tantamount to bringing a new cause of action." *Id.* Accordingly, the Court in *Grayson* allowed for a change in plaintiff's capacity under Rule 15(c), SCRCP.

In support of its ruling, the trial court cited language from Rule 15(c), SCRCP which stated, "[a]n amendment changing the party against whom a claim is asserted." The trial court interpreted this as a limit on which party could be substituted. Based on this interpretation, the trial court concluded that Rule 15(c) only allowed for an amendment changing a defendant. However, the problem with this interpretation is that it misperceives a limit on when a new defendant may be substituted as limiting amendments to the changing of *only* Defendants. This is incorrect. The second paragraph of Rule 15(c) was not intended to limit amendments changing the party to only defendants. It was intended to place additional restraints on the substitution of a new defendant. These additional restraints include a requirement that the "party to be brought in by amendment" (1) have received notice of the institution of the action "within the period provided by law for commencing the action" and (2) knew or should have known "that, but for a mistake" concerning the identity of the defendant to be brought in, the action would have been brought against this Defendant from the outset. It is clear that these two limitations have no applicability when a new plaintiff is to be brought in. This is because if there is no change in defendant, then (1) the already named defendants clearly would have received such notice of institution of the action within the statute of limitations, and (2) the action would already have been brought against the proper defendant. These additional requirements for substituting a defendant exists to protect the defendant from the unfairness that might result if a new defendant is sued without the new defendant having had notice that it was susceptible to litigation during the relevant periods of limitation. Therefore, the trial court's interpretation of Rule 15(c) was in error.

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

Petitioner has not sought to add a new party. Petitioner'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.

*Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct. App.1999) illustrates the distinction. In *Twelfth RMA Partners* the defendants cited to *Valentine v. James Davis Valentine v. Davis,* 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995) 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 remains 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*. *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.

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

The claim for tort-related pre-majority medical expenses clearly arises out of the same conduct, transaction, and occurrence set forth in the original pleadings. The only change is the capacity in which Angela Patton seeks recovery for these damages. While Angela initially made a claim for these damages as Next Friend of Alexia, she now seeks recovery for these damages in her individual capacity. (Compare R. p. 36 to R. p. 76). All damages asserted in the amended pleading arose out of the same allegations of malpractice found in the original pleading.

Secondly, all Defendants remain the same in amended pleading; therefore, Respondents cannot credibly argue that they did not have notice of the institution of the action or that they had not received notice these damages were being sought. Therefore, Respondents cannot argue that they would suffer prejudice in defending against these allegations. Similarly, they cannot argue that they did not know that but for a mistake concerning the identity of the proper party, the action would have been brought against them, since the action was in fact brought against them.[5]

No harm befalls Respondents by permitting the complaint to be amended at this stage. Respondents were on notice that Plaintiff sought pre-majority medical expenses. Respondents' ability to defend this claim on the merits has not been diminished. Therefore, Petitioner contends this Court misapprehended or overlooked the fact that the trial court erred in failing to grant

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

Petitioner's request to amend the complaint and have the amended complaint relate back to the filing of the original pleading.

## IV. DID THE COURT OVERLOOK OR MISAPPREHEND THAT THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY HOLDING THAT THE DEFENDANTS HAD NOT WAIVED THEIR RIGHT TO ARGUE PLAINTIFF CANNOT RECOVER PRE-MAJORITY TORT-RELATED MEDICAL EXPENSES?

The trial court's Order incorrectly addressed Petitioner's contention that Respondents failed to assert an affirmative defense as the failure to plead statute of limitations as an affirmative defense. (R. p. 7) In fact, Petitioner's position was that Respondents failed to allege as an affirmative defense Petitioner's inability to recover pre-majority medical expenses. Neither Dr. Miller and his practice nor Amisub of South Carolina pleaded Petitioner's inability to recover pre-majority tort-related medical expenses as an affirmative defense. Respondents' failure to plead this affirmative defense has prejudiced Petitioner, and Petitioner respectfully submits the trial court erred in not finding this affirmative defense was waived.

Rule 8(c) states, "Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses . . . and other matter constituting an avoidance or affirmative defense." South Carolina's rule conforms to the comparable federal rule. *See* SCRCP Rule 8(c) Note to 1995 Amendment. The purpose of Rule 8(c) is "to avoid the 'surprise' defenses permissible under the old general denial answer . . . ." *Id.* at Notes to 1986 Amendment. While the rule enumerates several affirmative defenses, the list is not exhaustive, as the rule itself indicates.

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

> In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the

> defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.
>
> *Id.*

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

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

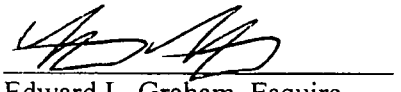
In this case, argument that a child may not recover pre-majority tort-related medical expenses in her own name is an affirmative defense. Respondents argue that, even if all Petitioner's allegations are true, Petitioner could not recover tort-related pre-majority medical expenses. The fact that Respondents'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

Petitioner was prejudiced by Respondents' failure to plead this affirmative defense. Time remained on the statute of limitations for the mother to recover tort-related pre-majority medical expenses incurred by her child in her own name. Had Respondents properly pled this affirmative defense, Petitioner could have amended the complaint to change the capacity through which Angela sought pre-majority medical expenses from her acting as Next Friend, to her individual capacity. Only after the statute of limitations had run did Respondents seek to preclude Petitioner from recovery of pre-majority tort-related medical expenses. Respondents denied Ms. Patton the ability to bring suit in her own name by acquiescing to the child's demands for pre-majority medical expenses, only to move for summary judgment on this very basis after the parent's statute of limitations had run. Accordingly, Petitioner respectfully submits it was error for the court to grant Defendants' motions for partial summary judgment.

## CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court grant a writ of certiorari.

GRAHAM LAW FIRM, P.A.

BY: 

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October 15, 2015

# EXHIBIT 2

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|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | IN THE COURT OF COMMON PLEAS<br>FIFTH JUDICIAL CIRCUIT |
| Jessica Wright,<br><br>Plaintiff,<br><br>vs.<br><br>Moore Orthopedic Clinic, P.A. and Mark D. Locke, M.D.,<br><br>Defendants. | CASE NO. 2012-CP-40-7765<br><br>**ORDER GRANTING PARTIAL SUMMARY JUDGMENT** |



This matter came before the Court on August 13, 2014 at a hearing on Defendants' Motion for Partial Summary Judgment on Plaintiff's claim for damages for medical expenses. Present at the hearing were S. Randall Hood, Esquire, counsel for Plaintiff; and Kelli L. Sullivan, Esquire, counsel for Defendant. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Defendants' Motion for Partial Summary Judgment on Plaintiff's claim for damages for medical expenses is **GRANTED**.

## FACTS

This medical malpractice case arises from treatment of Plaintiff Jessica Wright while she was still a minor. Plaintiff was treated for back pain by Defendant Dr. Mark D. Locke, M.D. in July 2009 when she was sixteen years old. Plaintiff alleges medical malpractice against Defendant as a result of these treatments. In September 2009, Plaintiff underwent surgery due to her worsening condition. The surgeon informed Plaintiff and her father that her condition "could have been avoided if [her initial back pain was] treated quickly and properly," thus putting them on notice of a claim for medical malpractice. Plaintiff filed this action in Richland County Circuit Court on November 21, 2012, after she reached the age of majority. Plaintiff is currently twenty years old.

In this action Plaintiff seeks damages, including "past and future life care expenses" and "past and future medical and health care expenses." Defendants filed their Motion for Partial Summary Judgment on June 16, 2014, seeking to dismiss Plaintiff's claim for recovery of past medical expenses.

## STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact." Rule 56(c), SCRCP. In determining whether a triable issue of material fact exists, the Court must construe all facts and inferences in the light most favorable to the non-movant. *Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008). "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

## DISCUSSION

Defendants argue that Plaintiff has no right to recover for medical expenses incurred while she was a minor. Under South Carolina law, a parent is obligated to furnish his or her minor child with "necessary medical service and hospitalization." *Hughey v. Ausborn*, 249 S.C. 470, 476, 154 S.E.2d 839, 841 (1967); *Trident Reg. Med. Ctr. v. Evans*, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App. 1995). Therefore, any right of action by an adult to recover medical expenses incurred while the person was a minor is barred. This cause of action is reserved for the parents of the minor, not the minor himself. *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907). South Carolina courts have upheld the ruling in *Tucker*. *See Kapuschinsky v. U.S.*, 259 F. Supp. 1, *7 (D.S.C. 1966).

Plaintiff argues that *McNeill v. U.S.*, 519 F. Supp. 283 (D.S.C. 1981), allows a child to recover medical expenses incurred while he was a minor under certain circumstances. In *McNeill*, the court said there was "not an absolute bar" to a child's claims for medical expenses. Rather, the purpose of the "general rule" is to limit medical expense claims by parents to keep from allowing a double recovery. *Id.* at 290. In the present case, it is true that Plaintiff's parents did not already recover her medical expenses; therefore, there would be no double recovery. However, Plaintiff did not incur the financial burden of paying the expenses either. By seeking to recover those expenses, Plaintiff would be receiving money damages incurred by her parents.

Plaintiff argues that if parents waive the right to pursue the medical expenses, the child should have the opportunity to do so. Plaintiff's parents states in an affidavit that they waived all rights to collect medical expenses in the hope that Plaintiff could recover them on her own. However, as previously stated, regardless of whether there was a conscious waiver of rights, parents are responsible for the medical bills of their children because it is the duty of the parent



ad #2

to care for the child. *See Hughey, supra*. Waiving these rights does not place this duty upon the child.

Additionally, allowing Plaintiff to recover on these claims would essentially extend the statute of limitations. The statute of limitations is three years, which is plenty of time for the parents to pursue their claim. SC. Code Ann. § 15-3-545 (2006). Plaintiff's parents acknowledge that they could have filed a claim and chose not to do so. *See Affidavit of Benjamin Wright*. Therefore, they have lost the right to collect on the past medical expenses. Instead of pursuing the matter in a timely manner, they allowed the clock to run out and have missed their opportunity to recover for these damages under the statute.

**ORDER**

For the reasons stated above, it is therefore **ORDERED** that Defendant's Motion for Partial Summary Judgment on Plaintiff's claim for damages for medical expenses is **GRANTED**; Plaintiff's claims for past medical expenses incurred until she reached her majority are banned.

**AND IT IS SO ORDERED.**

ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
January 29, 2015