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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.

RESPONDENTS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Court of Appeals properly affirm partial summary judgment for the Respondents on any claims by the minor plaintiff for her pre-majority medical expenses and related necessities, where that decision complies with longstanding South Carolina precedent that is directly on point?
- II. Did the Court of Appeals properly affirm the trial court's refusal to apply the doctrines of implied waiver and equitable assignment in this case, where South Carolina law does not recognize those doctrines in this context?
- III. Did the Court of Appeals properly affirm the trial court's denial of the Appellant's request for leave to amend her Complaint, where the proposed amendment would have added a new party plaintiff to the case and the request was made after the expiration of the statute of limitations?
- IV. Did the Court of Appeals properly affirm the trial court's decision that the Respondents did not waive their defenses to the claims for medical bills and related necessities asserted by the minor plaintiff, where the Appellant raised that issue for the first time in her Rule 59(e) motion?

STATEMENT OF THE CASE

In this appeal, the Appellant for a third time asks a court 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. The Appellant 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 the Appellant now seeks to change.

On November 25, 2009, Alexia L. (“Minor”), through her “Next Friend” Angela Patton,¹ 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 Angela 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, only in Minor’s name. [R. p. 11.] Dr. Miller and RHGO filed and served a timely Answer that denied the plaintiff’s entitlement to any relief.

In April 2012, Minor, again through her “Next Friend” Angela Patton, filed a substantially similar Summons and Complaint against the Respondent Amisub of South Carolina d/b/a Piedmont Medical Center.² [R. p. 22.] Amisub filed and served a timely Answer which, like the other defendants’ responsive pleading, denied the plaintiff’s ability to obtain any of the relief requested in the Complaint. [R. p. 33.] All 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 Minor was not entitled to claim any damages for her pre-majority medical expenses, as that right belonged solely to her parents. [R. p. 50.] Amisub further argued the applicable statutes of repose and limitations had expired, 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.]

¹ Patton is Minor’s mother.

² 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.

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 Minor was not a party to the case and could not assert any claims on her own behalf. [R. pp. 3-6.] This left Minor as the only real 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.]

On August 16, 2013, the Appellant filed a Rule 59(e) Motion to Alter or Amend, along 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, the Appellant’s attorney withdrew her 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 denying both of the Appellant’s motions and leaving his original decision intact. [R. pp. 7-10.]

The Appellant filed and served a Notice of Appeal following Judge Kimball’s second Order. The Court of Appeals held oral arguments on May 12, 2015, at which time the Appellant’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). The Appellant responded by filing a Petition for Rehearing, which the Court of Appeals denied in an Order filed on September 17, 2015. The Appellant then filed a petition for a writ of certiorari, which this Court granted in an Order filed on August 4, 2016.

STATEMENT OF THE FACTS

The Respondents do not believe a factual statement is necessary for the issues on appeal. However, the absence of a factual statement in this brief should not be construed as agreement with the Appellant's Statement of the Facts.

STANDARD OF REVIEW

When an appellate court reviews a decision to grant summary judgment, it applies the same standards that governed the trial court under Rule 56, SCRPC. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003). Under Rule 56, summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the conclusions and inferences to be drawn from the facts are undisputed. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990).

When a court rules on a motion for summary judgment, it must view the evidence, and the inferences reasonably to be drawn from that evidence, in the light most favorable to the nonmoving party. *Id.* However, a party bearing the burden of proof on a particular claim must factually support each element of that claim, and a "complete failure of proof concerning an essential element [of that claim] necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

On those issues where the nonmoving party has the burden of proof, it is that party's obligation to confront the motion for summary judgment with specific facts demonstrating all elements of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The plain language of Rule 56(c), SCRPC, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Baughman v. AT&T*, 306 S.C. 101, 410 S.E.2d 537 (1991). In such a situation, the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. *Id.*

ARGUMENT

I. The Court of Appeals properly followed controlling precedent in affirming partial summary judgment on the issue of the minor plaintiff's claims for medical expenses and related necessities.

It is the well-established law of South Carolina that any right to recover a minor's medical expenses in a legal action belongs not to the minor, but rather 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 reiterated and applied this rule since *Tucker* was decided. *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.”).

In the present case, it is undisputed that Minor is asserting a claim for the expenses incurred as a result of, and related to, her pre-majority medical care. Although Minor's mother (Angela Patton) appears in the case caption, she is listed only as Minor's "Next Friend." According to the Supreme Court of the United States, "[t]he next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan v. Potter*, 157 U.S. 195, 198 (1895). Similarly, the term "next friend" means "[one] who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian." *Black's Law Dictionary* (9th ed. 2009) (emphasis added). Thus, under the law, Angela Patton is not a party and cannot be asserting any claims of her own in this case.

In addition, Patton has admitted she has not asserted any claims in her own right. Patton has conceded, both in the circuit court and in the Court of Appeals, that she is only acting in a representative capacity for Minor, who is the one actually seeking to recover the medical expenses and related necessities. As a result, this Court need not determine what the phrase "next friend" means. Patton³ has agreed that the term's definition for purposes of this case is consistent with those definitions quoted above.

Patton also does not challenge or dispute the current state of the law in South Carolina regarding a minor's ability to recover pre-majority medical expenses. She

³ Although Patton is not an actual party, the Respondents will use the name "Patton" in the Argument sections of this brief in place of the more generic "Appellant." This usage will prevent any confusion that might arise from using the names "Patton," "Minor" and "Appellant" at different times. However, the use of "Patton" should not be construed as any admission or agreement that Patton is actually a party. As discussed above, she clearly is not.

admits that *Tucker* and its progeny remain the law of this State. Indeed, the central theme of her appeal is an attempt to change that law. 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, and which this Court has never shown any inclination to abandon. As discussed below, the answer to that single and dispositive question is no.

(A) Patton has not demonstrated any need to change the common law rule.

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 current rule still exists. Parents remain responsible for providing medical care to their minor children and for paying the expenses related to that 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 current rule's validity, this is all that matters.

Patton attempts to argue 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 to pay the hospital bills, or just unwilling to do so, the Court remanded for a determination of that issue. 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 permitting 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 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 *Greenville Hosp.* Although the Court did not cite or discuss that rule directly,⁴ it made an implicit reference to the rule in describing the background facts. The Court noted 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 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*.

As this discussion demonstrates, *Greenville Hosp.* did not signal any departure from the established common law. Patton apparently believes that case created a new

⁴ 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*.

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 decided *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 several other cases to support her argument for changing the law, none of those authorities are binding. 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 decisions from other states cited by Patton have been in place for twenty-five years or more. Thus, the out-of-state cases upon which Patton relies 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* for purposes of this appeal.

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 or follow 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, it is telling that 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, or even to suggest a change was warranted. 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.⁵ That denial kept in place a decision by this Court that followed and applied the established rule.⁶ Thus, it is clear the Court has had the chance to address arguments against the current common law; the Court has simply chosen not to do it.

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. Yet, Patton's position commits the fallacy of assuming every situation is a "worst case scenario," when in reality, most cases involve no hardships at

⁵ *Cue-McNeil v. Watt*, 2012 S.C. LEXIS 6 (S.C., Feb. 8, 2012)

⁶ *Cue-McNeil v. Watt*, 2010 S.C. App. LEXIS 596 (Ct. App. 2010)

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, as here, the rule is well-established and easy to satisfy.

For example, in the present case Patton has offered no explanation why she failed to assert a claim for her daughter's pre-majority medical expenses and related necessities. 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 Patton's arguments about fairness and an "archaic" rule is the fact that she has presented no reasons whatsoever to explain why she could not have followed the 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 itself “unfair.”

In affirming the partial summary judgment, the Court of Appeals did not allow itself to be distracted by history lessons or general and inapplicable arguments about fairness. The Court of Appeals followed the well-established common law, which permitted no other result. Significantly, Patton has not argued that the decisions below were erroneous under the current law; she merely claims the law should change because some other jurisdictions have different rules. Again, though, the Court of Appeals properly applied the law as it actually exists, and Patton has failed to demonstrate otherwise. Therefore, this Court should affirm the result below pursuant to the *Tucker* line of cases.

(B) Any change to the common law should only apply prospectively.

Patton advocates a change in the law that would create tort liability where none existed before. Under the change Patton seeks, defendants would be potentially liable to minors for their medical expenses and related necessities. No such liability currently exists in South Carolina. Stated another way, Patton’s proposed alteration of the law would give minor plaintiffs a new substantive right (i.e. the ability to claim and recover medical expenses for care provided to them). This is significant because it means any change in the common law should not apply to the present case.

As this Court has stated, “the general rule regarding retroactive applications of judicial decisions that decisions creating new substantive rights have prospective effect only.” *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) (emphasis added). This is the situation in the present case. The Respondents, of course, assert that

the Court should leave the current common law rule in place, but even if the Court were to change that rule, the partial summary judgment in the Respondents' favor should nonetheless be affirmed.

This Court addressed the issue of prospective application of a change in the law in *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007). *Marcum* involved appeals in two separate matters as to whether social hosts could be liable to guests aged eighteen to twenty and/or third parties for injuries caused by people who consumed alcohol on the hosts' premises. As the Court noted, prior to *Marcum*, "a South Carolina social host incur[red] no liability to either first or third parties injured by an intoxicated adult guest." *Id.* at 462, 643 S.E.2d at 90. *Marcum* changed that common law rule and established a basis for a recovery in tort by the injured third party. *Id.*

Having made that decision, the Court next addressed the issue of whether the new rule would apply to the cases at bar, or whether it would have prospective effect only. Despite a dissenting opinion to the contrary, the Court decided to apply the new rule prospectively. As the Court explained, "[b]ecause our decision today creates tort liability where formerly there was none, a social host will be liable only for claims arising after the effective date of the decision." *Id.* at 455, 643 S.E.2d at 87. The Court further noted that "[i]t would offend notions of fairness ... to retroactively impose tort liability where previously there had been none" *Id.* at 458, 643 S.E.2d at 88.

The Court also addressed, and rejected, the points raised in the dissent. The Court noted that most of the South Carolina cases cited in the dissenting opinion involved the abolition of affirmative defenses, rather than the creation of new tort liability. *Marcum*, 372 S.C. at 458, 643 S.E.2d at 88, n. 2. The Court also explained that in the two cases

that had allowed retroactive application of a new rule, previous opinions had foreshadowed a coming change. That was not the situation in *Marcum*, and, thus, retroactive application was not warranted.

For the same reasons, the present case would not be suitable for retroactive application if the Court were to change the common law rule. First, the “necessaries doctrine” is not an affirmative defense. “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). Here, the Respondents never admitted that Minor is entitled to recover for pre-majority expenses because, under the common law, she is not. In other words, the common rule does not provide an exception to liability. Rather, the rule states there is no liability at all to a minor for his or her pre-majority medical expenses. Consequently, the cases cited in the *Marcum* dissent are distinguishable.

Second, there has never been any foreshadowing of an intention on this Court’s part to change the common law rule. As previously discussed, the rule has been in place for more than a century, and our state appellate courts have not once questioned or criticized the rule. The only “authority” that declined to follow the rule was a decision by a federal district court judge that our courts have never cited or discussed with approval. Indeed, the Court of Appeals applied the common law rule and this Court denied a certiorari petition in an almost identical case less than five years ago. Therefore, no one can credibly argue that our courts have even hinted at, let alone foreshadowed, changing in the common law rule.

In addition, the notion of fairness, which this Court considered in *Marcum*, does not support applying any change of the common law to the present case. The “necessaries doctrine” has been in place for more than one hundred years, and it is not complicated or difficult to understand. It remained the law of this State when Patton commenced the current action, but she simply failed to comply with it. Throughout the numerous oral arguments and written submissions on the common law rule, Patton has never offered any explanation as to why she did not comply with the rule. She certainly has never demonstrated – or even claimed – that compliance with the rule was impossible or imposed any kind of undue burden. For all the record shows, Patton just did not follow the rule, and now she seeks to abolish it in an attempt to rectify that error. Allowing her effort to succeed would merely be rewarding Patton for her failure to follow the law. Such a result would not be fair to the Respondents, who relied on the long-established common law rule in their evaluation and defense of this case.

Furthermore, a prospective-only application of a change to the common law rule would not unduly harsh or unfair to Patton. This was not a trap for the unwary, and it was not a situation where a plaintiff was punished or suffered a hardship due to events beyond her control. Patton always had the ability to follow the law, but for whatever reason (intentional or otherwise), she did not do it. Forcing Patton to face the consequences of her failure to comply with the established law is hardly draconian.

(C) Conclusion

For the reasons discussed above, this Court should leave the “necessaries doctrine” in place and affirm the Court of Appeals’ decision. Yet, even if the Court decides to change the common law rule, the Court should still affirm on this issue

because any new rule should only have prospective application. Either way, therefore, this Court should affirm the Court of Appeals' decision and allow the partial summary judgment in the Respondents' favor to stand.

II. The Court of Appeals properly concluded that Minor could 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.

Patton concedes the settled law of this State holds that parents have the sole right to recover medical expenses incurred by their minor children. She, therefore, vaguely argues that Minor is entitled to seek recovery of her pre-majority medical expenses and related necessities because Patton impliedly waived⁷ or equitably assigned⁸ her right to seek those expenses in Minor's favor. The Court of Appeals, however, properly affirmed the trial court's conclusion that both doctrines are inapplicable and may not be used to salvage Patton's claims for pre-majority expenses related to Minor's care and treatment.

(A) The doctrine of implied waiver is strictly an affirmative defense which Patton may not invoke offensively to salvage a claim belonging to a non-party.

Under South Carolina law, an implied waiver arises "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, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987), *citing Pitts v. New York Life Insurance Company*, 247 S.C. 545, 148

⁷ Patton initially refers to the doctrine of implied waiver as "waiver and estoppel" but briefs the doctrine as "implied waiver." The Respondents, therefore, brief the doctrine as "implied waiver." To the extent Patton intends to argue some theory of estoppel, she has waived that argument by presenting it as a conclusory statement with no supporting authority. *See Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285, n. 3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

⁸ The Respondents will refer to equitable assignment and implied assignment simply as the doctrine of equitable assignment.

S.E.2d 369 (1966) (emphasis added). Because implied waiver hinges on the acts and conduct of the party against whom it is invoked, the doctrine may not be used offensively. See *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992).

In *Janasik*, the plaintiff property owners brought an action against their property regime after it demanded the plaintiffs bring their landscaping into compliance with the regime's restrictive covenants. *Id.* at 341 – 42, 415 S.E.2d at 386. As part of their action, the plaintiffs offensively asserted the doctrine of waiver. *Id.* This Court modified the trial court's ruling to the extent it found in favor of the plaintiffs on their affirmative assertion of waiver. *Id.* at 345, 415 S.E.2d at 388. The Court made it clear that the doctrine of waiver only may be invoked as a shield, holding that while waiver “may be invoked as [an] affirmative defense[] to counterclaims,” it “may not be asserted in a complaint as [an] offensive weapon[.]” *Id.* Simply put, the Court concluded waiver may not be used as an “instrument[] of gain or profit.” *Id.*

Though 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 affirmed the trial court's ruling that “nothing in the record, directly or by inference, supports any claim of an implied waiver ... of the claim to the minor Plaintiff.” [R. p. 4.] Patton cites to the mere fact that she brought the action in Minor's name as evidence of an intentional relinquishment of a known right. Patton, however, fails to address the fact that there is absolutely no hint in her Complaints that she intentionally waived her exclusive right to seek the pre-majority expenses. In fact, Patton's Motion for

Leave to Amend the Complaint to assert a claim for pre-majority medical expenses in her own name evidences that she did not intentionally and unequivocally relinquish her right to seek those expenses. Had she relinquished that right, she certainly could not try to assert it in an amended pleading; the right would no longer be hers to pursue in that scenario.

More importantly, contrary to the established law of this State, Patton attempts to invoke the affirmative defense of implied waiver as an offensive weapon for gain. As discussed above, South Carolina law bases the doctrine of implied waiver exclusively upon the acts and conduct of the party against whom the doctrine is invoked. Because the doctrine of waiver hinges upon the conduct of a party asserting an action or claim, the well-established law of this State recognizes that waiver only may be invoked as an affirmative defense.

Patton's attempt to invoke the doctrine of implied waiver, therefore, is misguided. She does not claim waiver based upon the conduct of the Respondents. She does not even attempt to use the doctrine against a party to this action. Rather, she claims a non-party waived the non-party's right to pursue an action through the actions and conduct of the non-party. South Carolina law has never applied the doctrine of implied waiver to that kind of situation, nor should it.

Patton's implied waiver argument improperly attempts to assert a defensive shield as a sword. She does not simply ask this Court to apply an existing doctrine in a new manner; rather, she argues for this Court to change the doctrine altogether. For that reason, both lower courts properly ruled that well-established South Carolina law does

not entitle Patton to invoke the doctrine of implied waiver to salvage the claim of a non-party in favor of a party-plaintiff.

(B) The doctrine of equitable assignment does not save Patton's claim for pre-majority expenses and related necessities because Patton fails to set forth the elements necessary for application of that doctrine.

To establish an equitable assignment under South Carolina law, a party must show (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, a party attempting to argue equitable assignment must plead 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).

Considering this common law, Patton fails to put forth a plausible argument in favor of applying the doctrine of equitable assignment to the facts of her case. Primarily, Patton does not argue that Minor paid consideration for the purported assignment of Patton's claim for pre-majority medical expenses. The following colloquy from the trial court demonstrates this point:

THE COURT: Doesn't an assignment requiring [sic] some consideration[?]

MR. GRAHAM:⁹ Not under *C.J.S.* and *Am. Jur.* in this situation.

[R. p. 138, lines 8-11.] Patton does not argue that she satisfies the elements for establishing an equitable assignment in this State. Instead, she attempts to deflect

⁹ Mr. Graham represented Appellant at the July 18, 2013 hearing.

attention from her inability to establish an equitable assignment under South Carolina law by citing to contradictory, non-binding secondary sources.

Even if Patton could establish that Minor provided consideration to her mother for assignment of the claim for pre-majority expenses, her argument still would fail. As set forth in the trial court's August 2, 2013 Order and in Section II(A) above, the record is devoid of any evidence of words or transaction which show Patton's intent to assign her claim for pre-majority expenses to Minor or which show Minor's intent to accept an assignment.

Likewise, Patton freely admits that there is no express agreement supporting the alleged equitable assignment:

THE JUDGE: And nobody contends [the implied waiver or equitable assignment] was done expressly, right?

MR. RUFFIN:¹⁰ Nobody contends it was done expressly. It was either done impliedly or not at all. There was no written document evidencing a transfer.

[R. p. 153, line 25 – p. 154, line 5.] Absent evidence of an express agreement, Patton was required to plead facts sufficient to evidence an equitable assignment. As with all other evidence in the record on appeal, Patton's Complaints against the Respondents do not in any way set forth facts supporting the existence of an equitable assignment.

Patton admits she cannot show the elements required to establish an equitable assignment. Even if she could demonstrate the necessary elements of the doctrine, Patton has failed to set forth evidence of an express agreement or to plead facts sufficient to demonstrate the existence of an equitable assignment. Thus, the lower courts properly

¹⁰ Mr. Ruffin represented Appellant at the October 17, 2013 hearing.

ruled that South Carolina law does not recognize a claim of equitable assignment on the facts of this case.

(C) Patton cites outlying South Carolina federal district courts cases which do not discuss, interpret or apply South Carolina law.

Patton inaccurately asserts that South Carolina federal district courts “interpreting South Carolina law” have recognized the doctrines of implied waiver or equitable assignment as mechanisms by which a non-party may waive her right to bring a cause of action in favor of a party. [App. Brief, pp. 19-20, fn. 12.] Patton cites *McNeill, supra*, and *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960), in support of her assertion.

In *Sox*, a South Carolina federal district court noted, in dicta, that a minor’s parents waived their claim to recover for the minor’s medical expenses by failing to assert a claim for medical expenses within the parents’ two year statute of limitations. 187 F. Supp. at 469. The *Sox* Court, however, did not cite to any legal authority – South Carolina or otherwise – in support of its ruling. *Id.* at 469-470.

The South Carolina federal district court in *McNeill*, likewise, relied upon no South Carolina law in determining that a minor’s parents had waived their right to seek pre-majority expenses incurred for the minor’s medical treatments. 519 F. Supp. at 290. Instead, the district court cited to only one legal opinion in support of its ruling: the previous federal court decision in *Sox*. *Id.*

The Respondents incorporate their arguments against reliance on *McNeill* – and *Sox* – set forth above in Section I of this brief. Decisions of the United States District Court for South Carolina are not binding on South Carolina’s appellate courts. Also, directly contrary to Patton’s assertion, 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. Third, *Sox* and *McNeill* were released 54 years ago and 33 years ago, respectively. Yet, not one 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.

Finally, Patton argues that the reasoning employed in *Sox* and *McNeill* reflects the ultimate policy consideration at issue: prevention of double recovery of medical expenses. Patton asserts that so long as a parent's claim is waived in favor of, or assigned to, the minor, then there is no double recovery and all policy goals are met. The Respondents, however, submit that the *Tucker* line of cases upholds a foundational principle of tort law: "The purpose of actual or compensatory damages is to compensate a party for injuries suffered or losses sustained." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Only parents are responsible for payment of a minor's medical expenses, barring extraordinary circumstances not present in this case. Because Minor is not responsible for her own pre-majority medical expenses and necessities, she has not suffered any loss for which she is entitled to recover.

Contrary to Patton's argument, *Sox* and *McNeill* do not interpret the law of South Carolina (or any other jurisdiction). In fact, those non-binding opinions directly contradict South Carolina's established common law rule that parents hold the exclusive right to recover for their minor child's pre-majority medical expenses. Therefore, the Court should decline to apply those cases here.

(D) Patton's claim for pre-majority medical expenses was time-barred and invalid by the time that she purportedly transferred the claim to Minor.

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, Patton's "transferred" claim for the recovery of her pre-majority expenses would still be invalid as to Amisub. A plaintiff must commence an action for medical negligence within three years from the date of the alleged negligent treatment. S.C. Code Ann. § 15-3-545(A). Thus, Patton's right to seek recovery for Minor's pre-majority medical expenses expired no later than the spring of 2010, three years from the date of delivery.

Patton admits that any alleged waiver or assignment of her claim for pre-majority expenses did not occur until she instituted her actions as Next Friend against the Respondents. [App. Brief, pp. 18-19.] 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.]

As a purported transferee of her parents' exclusive right to recover pre-majority medical expenses, Minor's claim would be subject to all defenses available to Amisub against her parents. *See, e.g., Rosemond v. Campbell*, 288 S.C. 516, 522 - 23, 343 S.E.2d 641, 645 (Ct. App. 1986) ("[A]n assignee's rights can be no greater than those of his assignor. Consequently, the assignee of debt takes the obligation subject to all claims and defenses that the obligor may have against the assignor."). By the time of the purported transfer of the right to seek pre-majority medical expenses, the parents' claim for pre-majority expenses and related necessities against Amisub was time-barred. Minor, thus, would have received nothing more than an invalid and procedurally-barred cause of action.

Therefore, this Court should affirm the result in the Court of Appeals and the trial court on this issue.

III. The Court of Appeals properly affirmed the denial of the motion to amend because the proposed amendment would have added a new party plaintiff and the request was made after the expiration of the statute of limitations.

After the trial court granted partial summary judgment to the Respondents, Patton filed both a Rule 59(e) motion and a motion to amend the Complaint. The motion to amend sought to add Patton as a plaintiff so that she could assert a claim for Minor's pre-majority medical expenses. Patton argued that such an amendment would relate back to the date of the original Complaint against Dr. Miller and RHGO, thereby avoiding any problems posed by the statute of limitations.¹¹ The trial court denied the motion to amend, based primarily on a finding that Rule 15, SCRCF, could not be used to add a new plaintiff to the case. In reaching that decision, the trial court properly applied the governing law, and this Court should affirm that result, as did the Court of Appeals.

As a threshold matter, Patton cannot assert any arguments on this issue against Amisub because she abandoned her attempts to amend the Complaint against Amisub in the trial court. The following exchange occurred during the hearing on the Rule 59(e) motion and the motion to amend:

MR. RUFFIN: That's our argument against the defendant obstetrician OB practice, suit was filed in this matter outside the three-year statute of limitations on Amisub so that is applicable to one party and not the other.

THE JUDGE: So what you are saying is as to Amisub even if the motion were granted, it would be an exercise in futility because the statute would run when they brought the lawsuit. It would only relate back to 2012?

MR. RUFFIN: To Amisub, yes, that's my position with that case.

¹¹ Patton has conceded that without the "relation back" provision of Rule 15(c), SCRCF, the claim to be asserted in the proposed amendment would be time-barred.

[R. p. 170, lines 1-12.] Based on that answer, the judge noted in his Order: “At the hearing on the motion, Plaintiff withdrew the motion as it pertained to Defendant Amisub” [R. p. 9.] Patton has not challenged, or even mentioned, that ruling on appeal, which means she has abandoned it. *See Fields, supra*.¹²

Regardless of whether or not Patton abandoned any arguments on this issue, the trial court’s decision was correct on the merits and should be affirmed. Patton sought to amend the Complaint, in which her daughter was the only actual plaintiff, to add a claim asserted on her own behalf for the daughter’s pre-majority medical expenses. As discussed above in Section I, Patton was not a plaintiff in either of the original Complaints. Thus, the proposed amendment was necessarily an attempt to add a new plaintiff to the case, and Rule 15, SCRCF, does not allow such an amendment.

The Court of Appeals squarely addressed the concept of adding new plaintiffs via Rule 15, SCRCF, in *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995). *Valentine* involved two lawsuits filed by different plaintiffs against the same defendant for substantially similar damages. The first lawsuit was filed in federal court, and the second was filed in state court. After a federal judge dismissed a RICO claim (thus eliminating the basis for federal jurisdiction), the plaintiffs in the state court action sought to amend their Complaint to include the former federal plaintiffs (“the Valentines”) as parties. The circuit court denied the motion to amend, and the Valentines appealed.

The Court of Appeals affirmed the denial of the motion, explaining:

¹² The failure to address that ruling also triggers the two issue rule. *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.”).

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.

Id. at 172, 460 S.E.2d at 219 (emphasis added). For that reason, the Court found the circuit court had not erred in refusing to allow the state court plaintiffs to bring the Valentines into the case as additional plaintiffs. *Id.*

In the present case, Patton attempted to do exactly what this Court rejected in *Valentine*. As previously discussed, 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 attempts to escape from the principle stated in *Valentine* by claiming the amendment would only change her “capacity” and would not add her as a plaintiff. What Patton fails to acknowledge is that in the present case, those two phrases mean the same thing. Currently, 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 to the case. And as this Court recognized in *Valentine*, Rule 15 simply does not allow for such additions.

Significantly, 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 does not support Patton's position. 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. After doing so, she commenced a wrongful death action against the medical care providers in South Carolina. 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 that 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 quotes this statement as support for her arguments, but she takes it 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 people who are not already 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, in fact, 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 was always the same. The Court held that type of amendment was proper, but it went no further than that. Thus, citing *Thomas* for any other proposition is inaccurate.

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 further relies on language from the Advisory Committee Notes for the federal version of Rule 15, but the passage she cites also fails to support her position. 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.

The Court of Appeals’ decision in *Twelfth RMA Partners, L.P. v. National Safe Corp.*¹³ illustrates this point. In that collection action the defendant borrowers opposed a proposed amendment to change the name of the plaintiff so that the name in the caption would be the correct corporate name of the creditor.¹⁴ 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. Again, 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 clearly would have constituted an addition, not a substitution. For that reason, Rule 15 is not applicable, and the denial of the motion to amend was proper.

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

¹⁴ The amendment changed the name of the plaintiff from RMA Partners, L.P. to Twelfth RMA Partners, L.P.

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 claim for her daughter’s pre-majority medical expenses. Significantly, that is a claim that always belonged exclusively to Patton. This means Patton could not have “taken over” for Minor in pursuing that claim because Minor never properly possessed or asserted that claim in the first place. The claim was essentially a nullity under South Carolina law, and it could not have existed with any legitimacy 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.

In summation, Patton has admitted that she is not a party to this action, and the proposed amendment would have made her a new plaintiff. Patton has not cited any South Carolina authority for the proposition that Rule 15 allows for the addition of a new plaintiff (as opposed to a change or substitution of plaintiffs), and the Respondents are not aware of any such authority. Therefore, the circuit court properly denied the motion to amend, and this Court should affirm the Court of Appeals’ decision.

IV. The Court of Appeals properly ruled that the Respondents did not waive their defenses to Minor’s claim for pre-majority expenses as Patton first argued in her Rule 59(e) motion.

Patton argues the Respondents waived their right to contest Minor’s recovery of pre-majority expenses and related necessities because the Respondents failed to raise this issue by affirmative defense. According to Patton, “[t]he affirmative defense is that under South Carolina Law [sic] the mother must bring [sic] cause of action for [a minor’s pre-majority expenses].” [R. p. 184, lines 4-6.] Patton, however, has abandoned this issue for purposes of appellate review. Nevertheless, Patton’s argument is procedurally and

substantively flawed because South Carolina law does not impose any such requirement on the Respondents.

(A) Patton has abandoned her argument that the Respondents waived their defense to Minor's claim for pre-majority expenses by failing to challenge the trial court's ruling on that issue.

Patton improperly argued for the first time by way of her Rule 59(e), SCRPC, motion to alter or amend that the Respondents waived their right to contest Minor's recovery of pre-majority expenses because the Respondents failed to raise this issue by affirmative defense. The trial court rejected that untimely argument, concluding:

Plaintiff also argues that Defendants failed in their Answers to plead the statute of limitations as an affirmative defense, and that the Court did not address that argument in it. I find and conclude that Plaintiff attempts to raise this argument for the first time in her current motion, and thus, that issue is not properly before the Court. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not).

[R. p. 8.]

Patton has neither challenged nor mentioned this ruling on appeal. Thus, Patton has abandoned this issue, and the trial court's ruling, along with the Court of Appeals' affirmance, has become the law of the case. *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.").

Likewise, Patton's failure to challenge the trial court's ruling implicates the "two-issue rule." *See Jones, supra* ("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.”). Patton, therefore, has failed to preserve her argument that the Respondents waived their right to contest Minor’s recovery of pre-majority expenses and necessities.

(B) Patton’s argument that the Respondents waived their defense to Minor’s claim for pre-majority expenses is not preserved for appeal because Patton first raised the argument by way of a Rule 59(e) motion.

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). In *Hickman*, a family court ordered division of certain of the divorcing parties’ personal property. By supplemental motion to alter or amend pursuant to Rule 59(e), SCRPC, the ex-wife sought to have the family court grant her an interest in her ex-husband’s civil service retirement fund. *Id.* at 456, 392 S.E.2d at 482. The ex-wife first raised the issue of the civil service retirement fund in her motion to alter or amend. *Id.* The Court of Appeals affirmed the trial court’s denial of the appellant’s Rule 59(e) motion, holding: “A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”¹⁵

Patton cannot deny that she could have raised her concern with the Respondents’ responsive pleadings prior to the grant of summary judgment. Patton also cannot deny that she failed to raise the issue in legal memoranda or at the July 18, 2013 hearing. The trial court, therefore, correctly concluded that Patton improperly raised the issue for the first time by way of a Rule 59(e) motion, and this Court cannot consider the issue on appeal.

¹⁵ This Court later adopted this holding by reference. *See C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993) (citing *Hickman*).

(C) The Respondents properly set forth general denials of Minor’s right to seek pre-majority medical expenses because Minor is not entitled to recover for those expenses.

Even if Patton had timely raised and properly preserved her argument that the Respondents had a duty to plead Minor’s inability to recover pre-majority expenses as an affirmative defense, the argument would still fail. The Respondents’ position on this issue is not the kind of “affirmative defense” that has to be included and specifically delineated in a responsive pleading. Therefore, Patton’s assertion is erroneous.

As Patton points out, “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). But this is not the situation in the present case. The Respondents do not admit that Minor is entitled to recover for pre-majority expenses, but for some legal bar on recovery. Instead, the Respondents unequivocally deny Minor’s allegation that she is entitled to recover pre-majority expenses. Because Minor cannot possibly seek the pre-majority medical expenses and necessities, she has failed to state a claim for recovery of those expenses. Thus, it was sufficient that the Respondents all pled general denials of Minor’s allegation that she is entitled to claim pre-majority expenses and necessities.¹⁶ Nothing more was required of the Respondents in their initial pleadings.

The Respondents were free to raise Minor’s failure to state a claim for pre-majority medical expenses and necessities by way of a subsequent pleading, motion, or even at trial. *See* SCRCR P. 12(b)(6), (h)(2). *See also* James G. Flanagan, *South Carolina*

¹⁶ 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.”).]

Civil Procedure 3rd (2010) (“Rule 12(h)(2) lists two non-waivable defenses: the failure to state a claim or defense;....”). The Respondents did just this, raising the issue by summary judgment motions. As a result, the trial court correctly ruled that the Respondents properly and timely raised Minor’s inability to recover pre-majority medical expenses and related necessities both by general denials and by motions.

(D) No amount of notice would have allowed Patton to commence a timely action for Minor’s pre-majority medical expenses and necessities against Amisub.

Even if Patton were correct that the Respondents had a duty to raise Minor’s inability to recover pre-majority expenses by way of an affirmative defense, Patton still would not be able to salvage her claim for Minor’s pre-majority expenses and necessities. The requirement that affirmative defenses must be pled aims to “avoid the ‘surprise’ defenses permissible under the old general denial answer” Rule 8, SCRCPC, Editor’s Notes. Patton, however, has not suffered any prejudice as a result of her feigned “surprise” at Amisub’s defenses to Minor’s attempt to recover pre-majority expenses. Instead, Patton 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 2-4.] As such, no amount of notice could have given Patton time within the limitations period to amend and properly plead recovery of pre-majority medical expenses against Amisub. Therefore, Patton’s arguments on this issue must fail, and the result below should be affirmed.

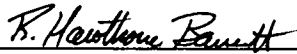
CONCLUSION

This appeal amounts to nothing more than an attempt to change multiple established tenets of South Carolina law. The Appellant cannot win based on the existing law, and so she asks this Court to abrogate those rules. Yet, she has failed to explain why she could not have followed the law, and she has not demonstrated any compelling reasons for this Court to alter the law. Furthermore, even if the Court were to accept the Appellant's invitation to change the common law rule, the result would be the creation of new tort liability, which should only apply prospectively. Therefore, this Court should affirm both lower courts' decisions to follow the existing law and grant partial summary judgment to the Respondents.

Respectfully submitted,

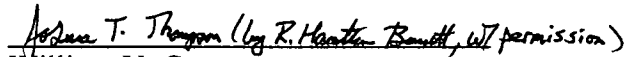
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YOUR 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, attorneys in this matter for the Respondents, certifies that we have this **30th day of September, 2016**, served a copy of the **Respondents' Brief** 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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September 30, 2016