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
Appellate Case No. 2015-002135

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.

PETITIONER'S REPLY TO RESPONDENT'S RETURN BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE CIRCUIT COURT'S 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 THE COURT OF APPEALS ERR IN AFFIRMING THE CIRCUIT COURT'S RULING 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?**

III. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE CIRCUIT COURT'S RULING THAT DENIED PLAINTIFF'S REQUEST FOR LEAVE TO AMEND THE COMPLAINT AND FOR THE AMENDED COMPLAINT TO RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT?**

IV. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE CIRCUIT COURT'S RULING THAT THE DEFENDANTS HAD NOT WAIVED THEIR RIGHT TO ARGUE PLAINTIFF CANNOT RECOVER PRE-MAJORITY TORT-RELATED MEDICAL EXPENSES?**

STATEMENT OF THE CASE

Petitioner hereby adopts and incorporates by reference the Statement of the Case as set forth in the Brief of Petitioner.

ARGUMENT

I. **THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S 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. The necessaries doctrine fails its original purpose and harms those it was intended to protect.

Respondents make the noticeably unsupported contention that Petitioner has not demonstrated any need to change necessaries doctrine. In response, Petitioner craves reference to pages 8 to 16 of the Brief of Petitioner. Instead of showing why the law should not be changed, Respondents argue three points. Petitioner responds to each in turn.

First, Respondents argue this Court has "never seen fit" to change the common law with respect to the necessaries doctrine and a minor's ability to recover pre-majority, tort-related medical expenses in her own name. This is a true statement made clear by Petitioner having to file this very brief requesting the Court make this change. Respondents next contend the Court could have addressed this very issue in a previous case, but declined to do. Again, this is also a true statement. However, this Court did grant a writ *in this case*. Presumably, someone saw fit to review the issues Petitioner presented. Therefore, Respondents argument, while appropriate in response to Petitioner's initial request that a writ be granted, now seems somewhat out of place.

Second, Respondents focus on the phrase "unable to pay," found *Greenville Hosp. Sys. v. Smith*, 269 S.C. 653, 239 S.E.2d 657 (1977). *Greenville Hosp. Sys* clearly states even in the language quoted by Respondents that a minor may be liable for medical bills. Stating that a minor is not liable unless the parents are unable to pay the bill means that a minor may be liable for the medical bill. Said differently, if the parents are unable to pay the bill, then the minor is responsible for the bill. Quoting the phrase "unable to pay," Respondents attempt to shift the focus to frequency of occurrence instead of permissibility of occurrence.

Purported minimal frequency of occurrence, however, provides no support for an unfair and archaic rule's continued existence. It is a losing position to argue common law should not be changed because the harm it causes is probably imposed upon only a small number of minors. It certainly does not address whether the law is fair to those against whom the doctrine does apply. This is especially so when it harms the very class it was to protect *and* provides zero corresponding benefit. Moreover, Respondents have presented no evidence that the situation contemplated in *Greenville Hosp. Sys.* does not occur often. Given the continued rise in health care costs, it is not

hard to imagine that parents may find themselves unable to pay their child's medical bills, despite their best intentions.

Third, Respondents note that Petitioner's foreign jurisdictional citations are not binding upon this Court. Petitioner agrees. Hopefully it is clear that Petitioner sought only to point out the modern trend of nearly every other state that has addressed this issue in the past fifty years either abolishing or curtailing the necessaries doctrine. For this purpose, the citations are relevant.

B. A change in the common law should apply to this case.

Respondents contend that if this Court changes the common law, the change should apply prospectively only. This argument is premised upon the notion that the change for which Petitioner advocates would create new tort liability where none existed before, thereby creating a new substantive right. The very first case cited by Respondents belies their own argument, making clear the change in common law in this case would only create a new remedy vindicating an existing right, and therefore the change would apply retroactively.

In *Toth v. Square D. Co.,* 298 S.C. 6, 377 S.E.2d 584 (1989), this Court had to determine whether a change in law allowing handbook provisions to be introduced as evidence of breach of contract would apply retroactively. *Id.* at 8, 377 S.E.2d at 585. The Court explained:

> [T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Prospective application is required when liability is created where formerly none existed.
>
> *Id.* (citations omitted).

The Court then referenced cases where prospective application was appropriate. The Court noted the tort for retaliatory discharge should apply prospectively from the date of the opinion which first created this tort. *Id.* The Court noted the same for negligent inflection of emotional distress.

In contrast, the Court in *Toth* explained the question before it did not involve recognition of any new cause of action. *Id.* at 9, 377 S.E.2d at 586. The question before it concerned an action for breach of contract, and the Court noted breach of contract is obviously not a new one. *Id.* The Court reasoned that, unlike the cases previously cited by the Court, there would be nothing "unfair and inappropriate" about allowing retroactive application of the change in law at issue in *Toth*. *Id.*

The current issue before this Court does not involve creation of a new cause of action. Petitioner's claim is for medical malpractice; a claim that is longstanding and well-established. *See Osborne v. Adams,* 346 S.C. 4, 12, 550 S.E.2d 319, 323 (2001) ("Osborne's claims sound in negligence--hardly a novel cause of action."). Instead, the change Petitioner requests would merely allow the minor assert her right to recover pre-majority medical expenses in her own name. Thus, the only aspect of medical malpractice or negligence, generally, that would be affected by this ruling is the allowance of the minor to seek as damages pre-majority medicals. As such, no new cause of action will be created. There would only be recognition of a new remedy to vindicate an existing right. As such, if this Court modifies or abrogates the necessaries doctrine, the change should apply retroactively to other cases.

Importantly, even if this Court were to determine the change should apply prospectively, any change should still apply *this case*. Supreme Court opinions that clearly created new causes of action, such as *Kinard v. Augusta Sash & Door Co.,* 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985), creating the tort of negligent inflection of emotional distress, did not preclude the party who fought for the change in law from receiving the benefit of the very change they argued for. Moreover, other cases where the Court specifically stated the change in law would apply prospectively allowed the Petitioner the benefit of the change. *See Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225-26, 337 S.E.2d 213, 216 (1985) ("Our modification of the

termination at-will doctrine, as set forth in this opinion, applies only to this case and to those causes of action arising after the filing of this opinion."). Accordingly, Petitioner in this case should receive the benefit of any change in common law irrespective of whether the change would apply prospectively or retroactively to other cases.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S RULING 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. Implied waiver applies to the facts of this case.

Respondents acknowledge the existence of this doctrine. However, Respondents incorrectly believe that simply because the specific factual scenario of this case has not been addressed by published opinion in South Carolina, this implies it does not apply to the facts of this case. There cannot be a published opinion for every conceivable factual scenario for all legal doctrines. The absence of a published opinion of a similar fact pattern is not evidence that the Courts do not recognize the doctrine's application to those facts. No litigant can expect to have published case law specific to every fathomable factual scenario. What is important is that the doctrine exists in this State, and based upon its use and purpose, would be applicable to the facts of this case.

Moreover, 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.[1]

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

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

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

B. Petitioner does not use the doctrine offensively.

First, it is important to note there is no need for an affirmative defense to be asserted because there is no dispute between Angela and Alexia regarding the existence of an implied waiver or intent to impliedly waive the right to recover tort-related pre-majority medical costs from Angela to the benefit of Alexia. 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

[1] 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."

the waiver and transfer between Angela Patton and her daughter Alexia. Accordingly, the conduct to assess in determining whether an implied waiver has in fact occurred is Angela's conduct, not Respondents'.

Nevertheless, the doctrine was not used offensively. Only after Respondents challenged Petitioner's ownership of this right by attempting to preclude her recovery did she explain she had possession of her mother's right to pre-majority tort-related expenses through implied waiver. By Respondents' logic, every time one sought to show ownership or possession by implied waiver, another could challenge her effort by arguing the person asserting ownership was seeking gain or profit. Petitioner did not bring suit asserting a right to an asset possessed by another through implied waiver. Therefore, Petitioner did is not invoking implied waiver offensively.

C. There has been a valid transference through equitable assignment.

As with implied waiver, Respondents improperly seek to challenge the validity of an assignment to which they were not a party. The assignment occurred from Angela to Alexia, and Angela is the party to challenge its validity, not a tort defendant who lacks privity. "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). Respondents cannot seek to undo an agreement reached between two parties who have no interest in undoing the agreement. Accordingly, they have no standing to challenge the validity of the equitable assignment between Angela and Alexia.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S RULING THAT DENIED 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. Petitioner is not seeking to add a new Party.

Despite Respondents' assertions to the contrary, 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. 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. Like in this case, in *Twelfth RMA Partners* the defendants cited to *Valentine v. Davis* for the proposition that one cannot change the plaintiff through an amendment to the complaint. The Court disagreed. In distinguishing the case before it from *Valentine v. Davis*, the Court stated, "In this case, however, no new *claims* are being added. The court is only changing the name of the plaintiff. The *subject of the claim*, the underlying note on which the Smiths defaulted, is still the same." *Id.* at 641, 518 S.E.2d at 47 (emphasis added). To the Court, the significant factor was whether new claims were being brought.

As with *Twelfth RMA Partners* no new claims were asserted in the Amended Complaint. The original Complaint already sought the pre-majority tort-related medical expenses. There is no new person seeking recovery for additional causes of action for which defendant was not on notice.

Thomas v. Grayson by analogy also shows that the amendment in this case was permissible. The Court in *Thomas* 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." *Thomas v. Grayson* 318 S.C. 82, 88-89, 456 S.E.2d 377, 380 (1995). *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.

Valentine v. James Davis Valentine v. Davis, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995) 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. *Id*, 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.

IV. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S RULING THAT THE DEFENDANTS HAD NOT WAIVED THEIR RIGHT TO ARGUE PLAINTIFF CANNOT RECOVER PRE-MAJORITY TORT-RELATED MEDICAL EXPENSES.

A. Petitioner did not waive this argument.

The trial court's order denying Petitioner's motion to alter or amend denied Petitioner's "statute of limitations" affirmative defense. Petitioner never argued Respondent failed to raise the statute of limitations as an affirmative defense. Petitioner set out in detail the argument that a minor could not recover tort-related pre-majority medical expenses was an affirmative defense and that Respondents never pled this affirmative defense. The court never entered any ruling as to the argument actually made by Petitioner. There is no requirement that a party file a second motion for reconsideration if the trial court does not address an issue brought before it in the first motion for reconsideration. In *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006), after noting that an issue must be raised and ruled upon to be preserved, the Court explained, "However, an exception to this rule exists where an issue *is raised* but *not ruled upon* at a Rule 59(e) hearing. *Id.* at 565, 633 S.E.2d at 510. Therefore, Petitioner did not abandon this issue.

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

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

> There is no affirmative defense required. If you deny that somebody is entitled to damages at all based on the allegations in the complaint, I think you covered it. Beside which, what is the affirmative defense? Affirmative defense generally related to the conduct of the party. The only party in that lawsuit was this child through her mother. So there was no affirmative defense to assert. It was just a denial."
>
> . . .
>
> I know of no case holding otherwise. They denied she was entitled to damages. You alleged damages for medical expenses, which are the pre-majority expenses in part, and they denied it. I can't say where they have to bring to anybody's attention the fact that the minor -- they just denied it. If you have a reason to deny it, you deny it.
>
> (R. pp. 185, line 21 to 186, line 14).

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

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

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

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

Finally, the question to answer when determining if an issue has been preserved is whether it has "been raised to and ruled upon by the circuit court." *RRR, Inc. v. Toggas*, 378 S.C. 174, 185,662 S.E.2d 438, 443 (Ct. App.2008) (*citing Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006)). Although the written order was silent on Petitioner's actual affirmative defense, the judge placed on the record his above-quoted reasoning for its denial. Thus, the issue was raised and ruled upon, on its merits, by the circuit court. As *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724. (2000) explained, "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Petitioner presented this argument, Respondent addressed the argument in their response, both parties addressed this affirmative defense argument on its merits at oral argument, and the trial judge reached his decision on the merits of the issue. (R. p. 92; R. pp. 104, line 21 to 106, line 20; R. pp 173, line 22 to 174, line 9; R. pp. 178, line 3 to 184, line 17; R. pp. 184, line 23 to 185, line 7; R. pp. 185, line 21 to186, line 14).

C. Assuming arguendo that Petitioner did not preserve her affirmative defense argument, the Court should nevertheless consider the issue.

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

requires consideration of this issue. The parties fully briefed this issue and then had opportunity to argue the issue on its merits at a hearing. Moreover, the judge provided detailed analysis for his rejection of Petitioner's position and did so based upon the merits of the issue before the Court.

"The reasoning adopted by the court below is not binding upon the Supreme Court if the record discloses a correct result." *Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App.1987). Moreover, when appropriate, courts in this State regularly give consideration to the aim of substantial justice. *See e.g. Smith v. Smith*, 386 S.C. 251, 261, 687 S.E.2d 720, 726, (Ct. App.2009) "To ensure substantial justice to the parties, the pleadings must be liberally construed." *See also Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008) "South Carolina courts have long observed that equity looks beneath rigid rules of law to seek substantial justice." The reviewing Court looks to the record and the merits to determine if issues have been fairly determined and give consideration to whether substantial justice has been done. *See e.g. Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App.1987). Therefore, even if deemed waived, (which Petitioner disputes) this Court should consider Petitioner's argument that the trial court erred in failing to find that Respondents waived their right to assert the affirmative defense that Alexia could not seek tort-related pre-majority medical expenses in her own name.[2]

CONCLUSION

"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." *McCall v. Batson*, 285 S.C. 243, 256, 329

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

S.E.2d 741, 748 (1985). Any of the purported reasons given in support of the necessaries doctrine as a bar to a minor's recovery of pre-majority tort-related medical expenses in the minor's own name are simply not justified in the twenty-first century. Even if this Court should decline to abrogate the outdated common law bar to minors' recovery of their own pre-majority medical expenses, sound reasons exist to allow the minor to recover her own pre-majority medical expenses in this case, including waiver, equitable or implied assignment, motion for leave to amend, and failure of the defense to plead the doctrine as an affirmative defense. Therefore, for the reasons stated, Petitioner respectfully requests this Court reverse the decision reached by the Court of Appeals and hold that Alexia, a minor, is permitted in this action to recover her tort-related pre-majority medical expenses in her own name.

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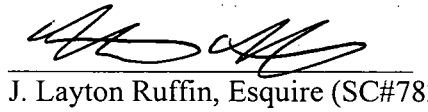
BY: 

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Petitioner, certifies that I have this 1st day of November, 2016 served copies of the Petitioner's Reply to Respondent's Return Brief on counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

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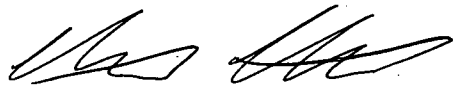

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