

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM YORK COUNTY
Court of Common Pleas

AUG 28 2017

S. Jackson Kimball, Circuit Court Judge

S.C. SUPREME COURT

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.

REPLY TO RESPONDENT'S RETURN TO MOTION FOR RECONSIDERATION

Edward L. Graham
GRAHAM LAW FIRM, P.A.
PO Box 550
Florence, South Carolina 29503
Phone: 843/662-3281
E-Fax: 800/859-7028
ATTORNEY FOR PETITIONERS

Table of Contents

Table of Authorities ii

Questions Presented 1

Statement of the Case..... 2

Argument 2

I. The Court overlooked, misapprehended or failed to clarify specifically that Petitioner’s concession about her claim against the hospital for pre-majority medical expenses applied only to her motion for leave to amend her pleading and did not relate to any representative claim on behalf of the minor.....2

II. The Court overlooked or misapprehended that its decision implicitly deems certain of Petitioner’s representative claims against the hospital to be timely, or potentially timely, in light of its recognition that the minor may be a real party in interest.6

A. The minor’s statute of limitations applies to representative claims on behalf of a minor for pre-majority medical expenses, where, as here, the minor is a real party in interest.6

B. Representative claims on behalf of a minor for pre-majority medical expenses should be allowed to go forward, when timely commenced under the minor’s statute of limitations, and where, as here, the minor is a real party in interest, or there is a genuine issue of material fact as to a minor’s status as a real party in interest.....6

Conclusion 9

Table of Authorities

Cases

Patton v. Amerisub of South Carolina, d/b/a Piedmont Medical Center, et al.,
Op. 27730, (S.C. Sup. Ct. filed July 26, 2017).....5, 7, 8, 9

Porter v. S.C. Pub. Serv. Com'n,
333 S.C. 12, 507 S.E.2d 328 (1998)8

Sox v. United States,
187 F. Supp. 465, 469-70 (E.D. S.C. 1960).....7

Rule

Rule 15, SCRCP.....2, 4, 5

Rule 17, SCRCP.....7

Questions Presented

- I. **Did the Court overlook, misapprehend or fail to clarify specifically that Petitioner's concession about the claim for pre-majority medical expenses against the hospital applied only to her motion for leave to amend her pleading to assert an individual claim and not to any representative claim on behalf of the minor?**

- II. **Did the Court overlook or misapprehend that its decision implicitly deems certain of Petitioner's representative claims against the hospital for pre-majority medical expenses to be timely, or potentially timely, in light of its recognition that the minor may be a real party in interest?**
 - A. **Did the Court overlook, misapprehend or fail to make an express finding that the minor's statute of limitations applies to representative claims on behalf of the minor for pre-majority medical expenses, where the minor is a real party in interest?**
 - B. **Did the Court overlook or misapprehend that representative claims on behalf of a minor for pre-majority medical expenses should be allowed to go forward, when such claims were timely commenced under the minor's statute of limitations, and where, as here, the minor is a real party in interest, or there is a genuine issue of material fact as to a minor's status as a real party in interest?**

Statement of the Case

In the interest of brevity, Petitioner adopts by reference the Statement of the Case set forth in Petitioner's Motion for Reconsideration¹ filed with this Court on August 9, 2017.

Argument

- I. **The Court overlooked, misapprehended or failed to clarify specifically that Petitioner's concession about her claim against the hospital for pre-majority medical expenses applied only to her motion for leave to amend her pleading and did not relate to any representative claim on behalf of the minor.**

Petitioner Angela Patton (hereinafter, "Patton") never conceded and certainly never intended to concede that her *representative* claim on behalf of her minor daughter against the hospital was untimely in any respect. Patton did concede that her *individual* claim for pre-majority medical expenses would not become timely simply by virtue of the "relation back" provision of Rule 15, SCRPC. That is of course because any permitted new claim would relate back to the initial pleading Patton brought against Respondent Amisub of South Carolina, d/b/a Piedmont Medical Center (hereinafter, "Amisub"), which was after the three-year statute of limitations for *individual* parental claims had expired.

In certain parts of its Return, Amisub conflates the *individual* and *representative* claims. (Return, 3: fn 4; 4:16-20; 7:14-20) For example, Amisub addresses Patton's concession regarding her *individual* claim on page seven of its Return to Motion for Reconsideration (hereinafter, "Return") (Return, 7: 14-20). In consecutive sentences, Amisub refers to Patton's concession about her *individual* claim as though that limited concession also included a concession of her *representative* claim. However, Patton made no such concession as to her *representative* claims.

¹ Amisub points out in its Return, 2: fn 1, that Patton's Petition for Rehearing was erroneously entitled Motion for Reconsideration. That is correct, and Patton hereby confirms her intent for her filings to be treated as a Petition for Rehearing.

The concession that her *individual* claim may be untimely does not in any way signify concession that her previously filed *representative* claim may be untimely, which it was not.

Amisub also misinterpreted the limited nature of the concession made by Patton at oral argument, by taking the question and answer out of context.² (Return, 2: 15-22) The complete question and answer, in context, is as follows:

THE COURT: ... Assume for the sake of argument that we buy your *relation back argument*, how can that help you with Amisub since the suit was brought late and *even if you relate it back, the statute of limitation problems*.

PETITIONER'S COUNSEL: If Your Honor please, it depends on whether our waiver argument was effective. If the waiver was effective when the first pleading was filed, then the mom waived her claim, and the *mom no longer had a legal interest of her own* to assert against the hospital, so we believe that waiver and that equitable assignment would have relinquished any right on the part of the mom to bring *an individual claim* against the hospital.

THE COURT: So in order to keep Amisub in this suit, we have to buy your waiver argument.

PETITIONER'S COUNSEL: To keep [Amisub] in the suit as to the pre-majority medical expenses, unless - - unless you choose to abrogate the common law, I think that's a fair interpretation. (Emphasis added.)

(<http://media.sccourts.org/videos/2015-002135.mp4>, 37:02-38:24)

The first question above addressed untimeliness and futility of the *relation back* of any newly asserted claim in the proposed amended complaint, if Patton's motion for leave to amend

² Amisub took other quotes out of context as well. (Return 3:3-5; 3: fn 4; 4:18-21; 7:13-15)

her complaint against Amisub had been granted. That motion for leave sought to assert a new *individual* claim (R. 72-75), subject to the three-year time limit for an *individual* parental claim, not a *representative* claim, which had already been timely commenced. (R. 22-32)

Because the *representative* claim had already been timely commenced, the *relation back* question under Rule 15 (c), SCRCPP, related only to the *individual* claim, or at least that was how Patton's counsel interpreted it. For reasons explained in more detail below, the quoted questions and answers demonstrate that Patton's counsel understood the question about *relation back* as being limited to the *individual* claim only, and having no relevance at all to the *representative* claim. The *representative* claim did not need to *relate back* to anything, because it had already been timely commenced under the statute of limitations for both the three-year limit for parental claims and the longer limit for minors.

Counsel's word choices in answering the *relation back* question reflect his understanding that the first question related only to Patton's *individual* claims. For example, he stated that "the mom no longer had a legal interest *of her own* to assert against the hospital." (Emphasis added.) A legal interest *of her own* clearly references Patton's *individual* claim. Later in counsel's answer, he again referred to relinquishment of Patton's *individual* claim.

Counsel interpreted the second question set forth above as also referring to the *individual* claim addressed in the prior question. Given the context of the prior question and answer, it is respectfully submitted that it was reasonable for counsel to believe that the follow-up question also addressed the *individual* claim. There was no express transition in the colloquy from (1) the initial subject, ineffective *relation back* and non-timeliness of a newly asserted *individual* claim against Amisub, to (2) any new subject, such as timeliness and validity of the previously asserted *representative* claim. If counsel did, in fact, misunderstand the Court's question, that

misunderstanding is clear from his word choices (“legal interest of her own”; “individual” claim); and his answer should not be interpreted as a concession regarding the *representative* claims. After all, it would be illogical for Patton to have conceded untimeliness of her *representative* claim against Amisub, as a primary purpose of the appeal was to have that claim held to be timely.

The Court distinguished Patton’s *individual* and *representative* claims in all or substantially all parts of its decision. One important example is contained in section IV B of the Court’s decision, which addressed the relation back provisions of Rule 15 (c). The Court had ruled that the *individual* claim set forth in the amended pleading against Dr. Miller and Rock Hill Obstetrical would relate back to the initial pleading against them, and was thus timely. The Court then stated: “Patton’s *individual* claim against Amisub must, however, be treated differently.” *Patton v. Amerisub of South Carolina, d/b/a Piedmont Medical Center, et al., Op. No. 27730 (S.C. Sup. Ct. filed July 26, 2017) (Shearhouse Adv. Sh. No. 28 at 108: 4-5)*. (Emphasis added.) Patton agrees, as she had previously made that concession.

The Court’s next sentence states that Patton had “essentially conceded that she may not pursue a claim for pre-majority medical expenses against Amisub.” *Id.*, at 108: 5-6. If that sentence applies to Patton’s *individual* claim, Patton agrees, for she did make that concession. However, if the sentence applies to Patton’s *representative* claims, Patton respectfully disagrees, as she did not make that concession and certainly did not intend to do so. The Court addressed this purported concession in section IV B of the decision, which applies the relation back provisions of Rule 15 (c). The relation back provisions relate to Patton’s motion for leave to assert an *individual* claim, but not her *representative* claim. The *representative* claim had been timely filed, if the minors’ statute of limitations applies to such claims, as asserted in Argument II B below.

For the reasons stated, Patton respectfully requests the Court to find that her concession was limited to her *individual* claim only, not her *representative* claims, which had been timely filed from the beginning.

II. The Court overlooked or misapprehended that its decision implicitly deems certain of Petitioner's representative claims against the hospital to be timely, or potentially timely, in light of its recognition that the minor may be a real party in interest.

A. The minor's statute of limitations applies to representative claims on behalf of a minor for pre-majority medical expenses, where, as here, the minor is a real party in interest.

Amisub made no effort to argue against Patton's assertion that the minor's statute of limitations applies to representative claims for the benefit of a minor as a real party in interest. Patton previously set forth that interpretation of the Court's decision, and Amisub's silence on the point represents tacit agreement.

Patton remains concerned, however, that the implicit ruling may not be completely clear to all members of the bench and bar. To avoid unnecessary re-litigation of the issue in other cases, Patton respectfully requests the Court to make that implicit ruling explicit.

For the reasons stated, the minor's statute of limitations applies to representative claims for pre-majority medical expenses on behalf of a minor, to the extent that the minor is a real party in interest. Patton respectfully requests the Court to make that an express holding, and to recognize and find that her *representative* claims in this case were timely.

B. Representative claims on behalf of a minor for pre-majority medical expenses should be allowed to go forward, when timely commenced under the minor's statute of limitations, and where, as here, the minor is a real party in interest, or there is a genuine issue of material fact as to a minor's status as a real party in interest.

A topic that arose in oral argument and in the Court's decision was the fact that Patton did not address in her brief the applicability of Rule 17, SCRCF to her claims against Amisub. The majority highlighted that fact, *Patton, supra*, at 108:8-11; and it was the basis for the concurring opinion in this case. *Id.*, at 109.

There is a good reason why Patton did not previously argue that the minor, through her representative, was a real party in interest. As to the claims against Amisub, the minor's status as a real party in interest was never in controversy.

Patton commenced all her claims in a *representative* capacity. She asserted no *individual* claims at that time. In her *representative* claim, she sought to recover, *inter alia*, pre-majority medical expenses. She sought that recovery for the minor's benefit, through her *representative* capacity. Her counsel was well-aware of the requirement of Rule 17 that an action be brought in the name of a real party in interest. Patton commenced the case in her own name as *representative* of the minor, believing the minor, through her *representative*, to be a real party in interest.

Patton had the right to bring an individual claim, but she elected, initially, not to do so. Patton attempted to relinquish her *individual* claim in favor of her daughter by bringing only the *representative* claim. She did that consistent with the holding in *Sox v. United States*, 187 F.Supp. 465 (E.D.S.C. 1960), cited favorably by this Court. *Patton, supra*, at 96:25-97:2. In doing so, she recognized and, in compliance with Rule 17, at least implicitly asserted that the minor was a real party in interest. That was never challenged and was in fact affirmed by Amisub.

In its Memorandum of Authorities in Support of Motion for Partial Summary Judgment, Amisub affirmatively asserted that the minor was not just "a" real party in interest, but "*the*" real party in interest. *Id.* Its memorandum identified the minor as "Plaintiff" (R. 50), then stated: "Ms. Patton has not attempted to set out claims for her own alleged injuries, losses and damages.

Accordingly, *Plaintiff is the real party in interest* and is the only Plaintiff in this action.” (R. 52:5-7) (Emphasis added.) Those assertions and representations are binding on Amisub as stipulations and judicial admissions. *See, e.g., Porter v. S.C. Pub. Serv. Com’n*, 333 S.C. 12, 507 S.E.2d 328 (1998). Subsequent assertions at oral argument or in its Return cannot alter the legal significance of such prior arguments, stipulations and judicial admissions.

Amisub now argues in its Return that Patton cannot be a real party in interest as to her *representative* claims because she had not been appointed as a conservator at the time of filing. (Return, 5:18-20) In addition to ignoring its stipulations and admissions, that argument ignores a key portion of the Court’s ruling. After acknowledging that a conservator must be appointed to receive any funds recovered by the minor, the Court held that “... the conservator’s legal obligation to pay the expenses renders the representative who brought the action a real party in interest.” *Patton, supra*, at 93:19-21.

Amisub also argues that Patton cannot avoid partial summary judgment because she did not produce, in response to its motion for partial summary judgment, any evidence of medical expenses paid by Medicaid or other evidence of the minor’s status as a real party in interest. (Return, 5-6, 8) That argument again ignores that Amisub had already stipulated to the minor’s real party in interest status, eliminating any need for Patton to submit evidence of payments by Medicaid or other evidence of that status. Even more telling, Amisub failed to acknowledge that it had previously admitted and stipulated to its receipt of satisfactory proof that Medicaid was paying for the minor’s care and treatment. In its memorandum in support of its motion for partial summary judgment, Amisub admitted: “Defense Counsel has received a May 17, 2013 Medicaid lien letter which states that Medicaid has been charged \$172,791.86 and has paid \$61,715.12 for medical services provided to Plaintiff.” (R. 53: 18-20) There was no requirement for Patton to

prove, confirm or update the amount of the Medicaid lien, as Amisub had admitted significant involvement of Medicaid as a payor of the child's medical expenses. The payment of medical bills by Medicaid serves as additional confirmation of the representative's real party in interest status. *See, e.g., Patton, supra*, at 94:24-95:3.

Because of Amisub's prior arguments, admissions and stipulations, Patton submits that her *representative* claims on behalf of the minor represent timely claims as a real party in interest *as a matter of law*. The stipulations and judicial admissions by Amisub support that conclusion. In the alternative, if the Court should find that there is an insufficient record to make that ruling at this time as a matter of law, it is plain that there exist, at the very least, genuine disputes of material fact precluding partial summary judgment.

Conclusion

For the reasons stated, Patton respectfully requests the Court to grant the relief set forth in her Motion for Reconsideration.

Respectfully submitted,

By:



Edward L. Graham
GRAHAM LAW FIRM, P.A.
PO Box 550
Florence, South Carolina 29503
Phone: 843/662-3281
E-Fax: 800/859-7028
ATTORNEY FOR PETITIONER

August 28, 2017

~~August 25, 2017~~

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

AUG 28 2017

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Petitioner, certifies that I have this 25th day of August, 2017 served copies of the Reply to Respondent's Return to Petition for Reconsideration upon counsel for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

Thomas C. Salane, Esq.
R. Hawthorne Barrett, Esq.
Turner Padgett Graham & Laney, PA
PO Box 1473
Columbia, SC 29202
803/254-2200
*Attorneys for the Respondents Dr. Gregory
A. Miller and Rock Hill Gynecological &
Obstetrical Associates, P.A.*

Ashby W Davis, Esq.
Davis & Snyder, PA
5 Hawthorne Park CT

28/

Greenville, SC 29615
864/335-3500
Attorney for Dr. Gregory A. Miller

William U. Gunn, Esq.
Joshua T. Thompson, Esq.
Holcombe Bomar, PA
PO Drawer 1897
Spartanburg, SC 29304
864/594-5300
*Attorneys for Respondent Amisub of
South Carolina, Inc. d/b/a Piedmont
Medical Center*

By: _____



Edward L. Graham
GRAHAM LAW FIRM, P.A.
PO Box 550
Florence, South Carolina 29503
Phone: 843/662-3281
E-Fax: 800/859-7028
egraham@grahamlawfirm.net
ATTORNEY FOR PETITIONERS
GRAHAM LAW FIRM

~~28~~
August 28, 2017