STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

Alison Renee Lee, Circuit Court Judge

CASE NO.: 2011-CP-32-02282

Tanya Bennett, as Next Friend of
Mykelvion T., a minor.....Appellant,

v.

Lexington County Health Services District, Inc.
d/b/a Lexington Medical Center.....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is a medical negligence case involving a brachial plexus birth injury sustained by Mykelvion Thurmond (hereinafter, "Mykelvion" or "Son"), son of Appellant Tanya Bennett (hereinafter "Appellant," "Tanya" or "Mother"), at the time of his birth on July 23, 2001. The Mother alleges that employees of Respondent Lexington County Health Services District, Inc. d/b/a Lexington Medical Center (hereinafter, "Hospital") improperly managed the resolution of shoulder dystocia, a complication of vaginal delivery where the baby's top shoulder gets stuck behind the mother's pubic bone; and that such mismanagement caused permanent injury to Mykelvion's left-sided brachial plexus nerves.

The Mother as Next Friend of her Son filed the Summons and Complaint on June 17, 2011, designated as Civil Action Number 11-CP-32-02282, against original Defendants Scott Augustine, M.D. (hereinafter "Dr. Augustine") and the Hospital. (R. 11-14) The Complaint alleges negligence and other wrongdoing on the part of Dr. Augustine, the delivering obstetrician, and nurse employees of the Hospital. (R. 10) The Mother named the Hospital as a defendant because of its role as employer of the nurses, for whose torts it had *respondeat*

superior liability. (R. 11-14) The Defendants' Answer asserted a general denial and certain affirmative defenses, including an alleged statute of limitations defense. (R. 16-18). By Order dated January 12, 2012, Dr. Augustine was stricken as a separately named Defendant by consent, and without prejudice, after Appellant's counsel learned he was an employee of the Defendant Hospital, a government agency. (R. 1). The Defendant Hospital has *respondeat superior* liability for torts of Dr. Augustine, as he was a hospital employee at relevant times.

On December 17, 2012, Respondent filed a motion for summary judgment. (R. 19). On March 6, 2013, Respondent filed a memorandum in support of its motion for summary judgment, arguing that the claim was time-barred. (R. 21). The Court heard the Motion for Summary Judgment on March 11, 2013, at which time Respondent submitted a supplemental memorandum. (R. 29). Appellant presented two affidavits at the hearing, one from the Mother and one from Dr. Redmond, and directed the Court's attention to controlling case law in her favor. (R. 53-59; 214-216)

After the hearing, on March 13, 2013, Respondent submitted a letter to the trial judge, setting forth additional argument. (R. 217). Appellant sent the judge a responsive letter that same day. (R. 224).

The trial court signed an order granting summary judgment on May 13, 2013. (R. 3). The stated basis for granting summary judgment was that Plaintiff's Complaint was time-barred by the application of S.C. Code Ann. § 15-3-40 and S.C. Code 15-3-545(D), and that Plaintiff's claim did not have to be addressed under the discovery rule. (R. 5) The Order alternatively held that if the discovery rule would have applied, it would not have benefited Appellant because there was sufficient evidence to establish the Mother was on notice of "an injury at birth during the first six months of [her Son's] life." (Id.).

The trial judge's Order granting summary judgment was entered of record on June 7, 2013. Appellant received written notice of the Order on June 11, 2013. Appellant filed her Notice of Appeal on June 12, 2013. (R. 212). The amount involved in this appeal is One Million, Two Hundred Thousand Dollars ($1,200.000.00), because Appellant seeks the right to proceed with a jury trial of her Son's medical negligence birth injury claim, the value of which is capped at One Million, Two Hundred Thousand Dollars ($1,200.000.00) under the South Carolina Tort Claims Act (hereinafter "Tort Claims Act").

STATEMENT OF THE FACTS

On July 23, 2001, Tanya, Mykelvion's mother, was admitted to the Hospital for labor and delivery. Dr. Augustine was Tanya's attending obstetrician. Dr. Augustine's plan was to deliver Mykelvion by head-first vaginal delivery. However, he encountered a complication known as shoulder dystocia, whereby Mykelvion's top shoulder got stuck behind his mother's pubic bone. The manner by which Dr. Augustine resolved that shoulder dystocia complication is in dispute. However, when Mykelvion was born, he did not have the ability to move his left arm normally.

Tanya asserts in this action that Dr. Augustine failed to perform properly certain safety maneuvers for resolving the shoulder dystocia, and instead used greater than gentle downward traction on Mykelvion's head and neck to try to pry the top shoulder out, thereby negligently over-stretching the brachial plexus nerves and causing permanent brachial plexus injury. (R. 11-12). Dr. Augustine denies using excessive traction and contends that the child's injury occurred without any negligence on his part. (R. 16).

According to the Mother, when her Son was born, Dr. Augustine said, "[o]ops, I hurt his arm." (R. 111:7-23). However, Dr. Augustine testified at his deposition that he has never made any such statement, acknowledging that he may have said that there was a noticeable problem

with Mykelvion's arm when he was born. Neither Tanya nor Dr. Augustine contended that Dr. Augustine voiced an acceptance of responsibility for negligently injuring Mykelvion. At that time, Tanya had no reason to believe that Dr. Augustine had acted in violation of generally accepted standards of obstetrical practice. Indeed, Dr. Augustine informed Tanya that her Son's injury was because of his large size. (R. 166:17-22; 168:4-5) Mykelvion weighed 10 pounds, 4 ounces at birth. Dr. Augustine also told Tanya that the injury was temporary and would heal on its own. (R. 112:4-8; 166:4-14).

On August 21, 2001, Tanya called the Hospital for an orthopedic referral. (P. 198-199). Following a referral to Midlands Orthopaedics, P.A., on October 29, 2001, an EMG study was performed by Dr. David Redmond at that facility. (R. 214; 215). Dr. Redmond confirmed he conducted tests on Mykelvion's brachial plexus nerves on this date. (R. 214). With regard to these tests, Dr. Redmond stated, "I can state with certainty that at the time I tested and evaluated this child's brachial plexus nerves in October 2001, when the child was three months old, I would not have been able to determine whether or not this child's injury was permanent." Id. He stated further that "A determination of permanence would not have been possible until the child was at least approximately eighteen to twenty-four months old." Finally, Dr. Redmond stated, "At the time I met with this child . . . I did not tell anyone that the injury was permanent, as that determination would not have been possible at that time." Id.

Obstetrical and neurological literature reveals that up to ninety to ninety-five percent of brachial plexus birth injuries are temporary, completely resolving within eighteen to twenty-four months of age. See, e.g., American College of Obstetricians & Gynecologists, *Precis: Obstetrics,* 2d ed., p.128 (2000)(Persistence rate of only 5%); Larry C. Gilstrap, III, et al., *Operative Obstetrics,* 2d Ed., p.217 (2002)(Cites various studies with recovery rates of 73%,

92%, 96%, and 91%); Kenneth F. Swaiman, et al., *Pediatric Neurology: Principles & Practice,* 4th ed., Vol. 1, p.341 (2006)(Residual weakness in 5-25% of children with brachial plexus birth injury); Joseph J. Volpe, *Neurology of the Newborn*, 5th Ed., p.974-975 (2008)(Cited various reported rates of full recovery ranging from 65% to 90%); Redmond Affidavit. (R. 214). When a brachial plexus birth injury is temporary, the existence of the injury itself ordinarily provides no information about the cause of the injury, or about whether the obstetrician or other birth attendant was negligent in applying greater than gentle lateral traction to the baby's head and neck. See, e.g., Robert H. Allen, et al., "Temporary Erb-Duchenne Palsy Without Shoulder Dystocia or Traction to the Fetal Head," *Obstetrics & Gynecology*, Vol. 105, No. 5, Part 2, pp. 1210-1212, May 2005 ("...this case report demonstrates prospectively and objectively that temporary Erb-Duchenne palsy can occur without shoulder dystocia or traction to the fetal head."); Edith D. Gurewitsch, et al., "Risk factors for brachial plexus injuries with and without shoulder dystocia," *American Journal of Obstetrics & Gynecology* (2006) 194, 486-492 ("The current investigation supports that intrauterine and intrapartum phenomena can contribute to the mechanism of birth-related BPP [Brachial Plexus Palsies]. Fortunately for the affected children, temporary BPP...are clinically benign."); Edith Diamente Gurewitsch, "Optimizing Shoulder Dystocia Management to Prevent Birth Injury," *Clinical Obstetrics & Gynecology*, Vol. 50, No. 3, pp. 592-606, September 2007) ("However, when temporary injury is teased from permanent injury, clinician-defined shoulder dystocia is distinguished from researcher-defined shoulder dystocia, and when the occurrence of shoulder dystocia is separated from its management, it is readily apparent that the clinically (and legally) relevant permanent obstetric brachial plexus injuries remain the near exclusive domain of shoulder dystocia-complicated births.").

Only when an injury is permanent does Appellant contend an inference may be made that the injury was caused by greater than gentle lateral traction or torsion (twisting of the head) applied by the obstetrician or midwife. (Id.) However, even in the context of a permanent injury, Appellant does not contend the use of greater than gentle traction or torsion is necessarily negligent. Ordinarily, a determination of negligence can be made only if the injury is permanent and the clinical situation at birth reveals no need to facilitate the delivery by using greater than gentle traction. Respondent, of course, denies negligence even where, as here, the injury turned out to be permanent. (R. 16).

On December 5, 2001, Mykelvion had a follow-up appointment with Dr. Gilpin at Midlands Orthopaedics, PA. (R. 207-209). Dr. Gilpin's report noted the child had difficulty flexing the left elbow but had reasonable finger flexion and extension. Id. The note described the patient's conditions as "*questionable* brachial plexus palsy left arm" but with findings consistent with an Erb's palsy. Id. (Emphasis added.) Dr. Gilpin also noted that the injury occurred during the latter stages of pregnancy, which could be reasonably construed as prior to labor and delivery. Id. Dr. Gilpin further stated in one part of his report that there was no obvious impairment upon gross examination of the upper extremity and no pain. Id.[1]

On January 11, 2002, Tanya signed a medical records release authorization to allow Attorney David B. Betts to receive medical information for treatment she and Mykelvion had received. (R. 200-201). Respondent introduced this authorization at the motion hearing without any evidence of the purpose for which the medical authorization was signed. Certainly Attorney Betts did not commence a medical negligence action on Mykelvion's behalf, and there is no showing he even evaluated whether there was merit for such a claim. Had he done so, it would have been premature to determine whether such a claim had merit, because temporary injuries

[1] In another part of his report, Dr. Gilpin documented obvious impairment of the right arm. (Id.)

can occur without medical negligence. Robert H. Allen, et al., "Temporary Erb-Duchenne Palsy Without Shoulder Dystocia or Traction to the Fetal Head," *Obstetrics & Gynecology*, Vol. 105, No. 5, Part 2, pp. 1210-1212, May 2005; Edith D. Gurewitsch, et al., "Risk factors for brachial plexus injuries with and without shoulder dystocia," *American Journal of Obstetrics & Gynecology* (2006) 194, 486-492; Edith Diamente Gurewitsch, "Optimizing Shoulder Dystocia Management to Prevent Birth Injury," *Clinical Obstetrics & Gynecology*, Vol. 50, No. 3, pp. 592-606, September 2007. Whether the injury was temporary or permanent could not be determined until the child was age eighteen to twenty-four months. Joseph J. Volpe, *Neurology of the Newborn*, 5th Ed., p.974-975 (2008); Larry C. Gilstrap, III, et al., *Operative Obstetrics,* 2d Ed., p.217 (2002); American College of Obstetricians & Gynecologists, *Precis: Obstetrics,* 2d ed., p.128 (2000); Kenneth F. Swaiman, et al., *Pediatric Neurology: Principles & Practice,* 4th ed., Vol. 1, p.341 (2006); Redmond Affidavit. No earlier than as Myklevion approached his fifth birthday, his Mother became increasingly concerned that there had been no further improvement and that his injury may be permanent. She became suspicious at that time that obstetrical negligence may have caused her Son's injury. (R. 216).

On January 25, 2006, Tanya signed a second medical records release authorizing H. Patterson McWhirter to obtain her medical records. (R. 202-204). Attorney McWhirter did not commence a medical negligence action on Mykelvion's behalf.

On February 6, 2008, Dr. Robert Bruce, Jr., of The Emory Orthopaedics Center in South Atlanta, made the following entry in his medical records: "Mykelvion has a history of a left brachial plexus injury at birth. According to his mother, at 3 months of age, it sounds like he had an EMG and the Mother thought that there would be no nerve regeneration at this time." (R. 210-211). Respondent relied on this medical note, which was recorded some six and a half years

after the child's birth, as evidence that the Mother had notice at three months of age that Mykelvion's injury was permanent. Tanya's Affidavit clarifies that she in fact did not learn that her Son's injury was permanent until he was at least eighteen to twenty-four months old, and that she did not have reason to believe she had a cause of action against any healthcare provider until Mykelvion was around five or six years old. (R. 215-216). Moreover, the doctor who performed the EMG was Dr. Redmond, whose Affidavit explained that he would not have been able to evaluate permanency of Mykelvion's injury until the child was at least approximately eighteen to twenty-four months old; and that he did not tell anyone that Mykelvion's injury was permanent at any earlier time, as that determination would not have been possible any earlier than eighteen to twenty-four months after birth. (R. 214).

On November 18, 2010, the Graham Law Firm requested medical records for treatment rendered to Mykelvion Thurmond pursuant to a medical authorization form signed by Tanya. (R. 205-206). Following a review by an obstetrical expert of the records that were eventually produced, the Graham Law Firm commenced suit on behalf of Mykelvion on June 17, 2011. (R. 7)

STANDARD OF REVIEW

In reviewing a trial court's decision granting summary judgment, this Court applies the same standard as the trial court applies under Rule 56(c) SCRCP. *Brockbank v. Best Capitol Corp.*, 341 S.C. 372, 378-379, 534 S.E.2d 688, 692 (2000). To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The scintilla of evidence standard is met if there is any material evidence that if true would tend to establish the issue in the mind of a

reasonable juror. *Taylor v. Atl. Coast Line R.R. Co.,* 78 S.C. 552, 556, 59 S.E. 641, 1907 S.C. LEXIS 260 (1907). "Scintilla" means "a gleam," "a glimmer," "a spark," "the least particle," "the smallest trace." *Bethea v. Floyd*, 177 S.C. 521, 529, 181 S.E. 721 (1935). According to Black's Law Dictionary, a scintilla of evidence is "any evidence at all in a case . . . tending to support a material issue . . . ." Henry C. Black, Black's Law Dictionary 1207 (5th ed. 1979).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). "To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008).

Moreover, "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). *See also Youmans v. S.C. DOT*, 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) ("The defendant asserting an affirmative defense bears the burden of its proof."). "[W]hen conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide." *Graham v. Welch*, 404 S.C. 235, 239, 743 S.E.2d 860, 863 (Ct. App. 2013).

ARGUMENT

I. THE TRIAL COURT ERRED BY HOLDING THAT THE DISCOVERY RULE DOES NOT APPLY IN DETERMINING THE TIMELINESS OF MINORS' CLAIMS BROUGHT UNDER THE TORT CLAIMS ACT.

The trial court concluded in error that "Plaintiff's claim need not be addressed under the discovery rule." (R. 5). That conclusion is erroneous because the discovery rule unquestionably applies to actions brought under the Tort Claims Act. This Court has expressly held, "The discovery rule is applicable to actions brought under the Tort Claims Act." *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999) (citing *Barr v. City of Rock Hill*, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998)).

Respondent cited cases that reveal its own recognition and agreement that the discovery rule applies to suits brought under the Tort Claims Act. Respondent cites *Knox v. Greenville Hosp. Sys.*, which holds, "Actions brought under the [Tort Claims Act] are subject to the discovery rule." *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 571, 608 S.E.2d 459, 462 (Ct. App. 2005). (R. 24; 34) Moreover, Respondent explicitly quotes *Knox* for the proposition that "[u]nder the discovery rule, the statute of limitations begins to run when a cause of action was discovered or reasonably ought to have been discovered "by the exercise of reasonable diligence." Id. Respondent also stated, "At issue in this case is when did the Plaintiffs discover the existence of a claim or when should the Plaintiffs have discovered the existence of a claim...by reasonable diligence..." (Id.). At the hearing, counsel for Respondent acknowledged that "the statute of limitations is a discovery statute of limitations; it does not begin to run when the person knew of a claim, but when exercising reasonable diligence, a person of ordinary intelligence would know that they had some right violated or they had a claim." (R. 43:7-11). Therefore, in light of the

clear case law and Respondent's own admissions, it was plain error for the trial court to hold that "Plaintiff's claim need not be addressed under the discovery rule."

The time limits in this case should be calculated first by determining the discovery date and then applying the seven years of tolling for minority plus the two year statute of limitations under the Tort Claims Act. Any confusion regarding the interplay of the discovery rule, the minority tolling provision found in Section 15-3-545(D) and the Tort Claims Act statute of limitations is elucidated by footnote 5 in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003).

Harrison involved the confinement of a schizophrenic, who brought suit against a governmental entity for psychiatric negligence with respect to his confinement many years after his initial confinement. One issue in *Harrison* related to the application of the five year tolling provision for insanity, and how that related to the discovery rule and the underlying two year statute of limitations under the Tort Claims Act. Although the primary issue addressed in *Harrison* (whether the continuous treatment rule applies in South Carolina) is not relevant to this case, the language set forth in footnote 5 of the opinion regarding tolling for insanity is analogous. In footnote 5, the Court held that this Court had incorrectly determined that Section 15-3-40 limited the time to bring a claim involving disability other than infancy to a maximum of five years. Id. at 140, 580 S.E.2d at 115 n.5. The Court specifically held,

> The express language of the statute allows the time for commencement of an action to be 'extended' by a maximum of five years. Thus, an insane plaintiff would apparently have seven years from discovery to bring a negligence claim under the Tort Claims Act.

Id. (*Emphasis added*). In that case, the Supreme Court determined that the time limit would be seven years from discovery by first recognizing that the time limit does not begin to run until the date of discovery and then adding five years of tolling plus two years for the underlying Tort

Claims Act statute of limitations. By analogy, Appellant in this case has discovery plus nine years to bring her negligence claim; consisting of discovery plus seven years tolling for minority plus the two year Tort Claims Act time limit.[2]

Because South Carolina case law has clearly established that the discovery rule applies to suits brought under the Tort Claims Act, the circuit court committed plain error in holding that the discovery rule is immaterial to determining the timeliness of minors' claims under the Tort Claims Act. Suit in this case was commenced on June 17, 2011. Nine years prior to this commencement date is June 17, 2002. Thus, the claim is time-barred as a matter of law if and only if the disputed facts construed in Appellant's favor give rise to only one conclusion: that the Mother should have discovered her Son's cause of action prior to June 17, 2002. If a person of reasonable diligence would not have discovered a cause of action or invasion of rights before June 17, 2002, then the claim was timely commenced as a matter of law. If there is a question of fact regarding whether or not discovery should have occurred with reasonable diligence before June 17, 2002, then the discovery date is a question of fact for the jury. As discussed in Arguments II and III *infra*, application of the discovery rule to the facts and circumstances of this case signify that the subject claim was timely commenced or that, at a minimum, a jury question is presented, thus precluding summary adjudication.

II. THE TRIAL COURT ERRED BY HOLDING THAT IF THE DISCOVERY RULE WERE TO APPLY, WHAT WOULD TRIGGER THE RUNNING OF TIME IS DISCOVERY OF AN INJURY, RATHER THAN DISCOVERY OF A CAUSE OF ACTION OR INVASION OF RIGHTS.

[2] If the trial court believed the statute of repose set forth in South Carolina Code §15-3-545(A) alters the calculation of time under *Harrison*, she did not expressly so state. Moreover, that statute of repose does not alter the calculation of time because the statute itself creates an explicit exception to the statute of repose for minors' claims: "Not to exceed six years from date of occurrence, *or as tolled by this section*." (Emphasis added.) §15-3-545(D). Provides for up to seven years tolling on account of minority.

The trial court granted summary judgment based upon its erroneous belief that timeliness of the subject claim should be determined without reference to the discovery rule. However, the court also asserted that if the discovery rule were to apply, the running of time would be triggered by discovery of an injury; and alternatively held that the subject claim would be time-barred because the Mother discovered her Son's injury at or soon after birth. That alternative holding is also erroneous, because what triggers the running of time is not knowledge of an injury, but knowledge of a cause of action or invasion of rights.

South Carolina appellate courts have explained on many occasions what must be discovered to trigger the running of time. In *True v. Monteith*, the South Carolina Supreme Court held, "Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that *a cause of action exists for the wrongful conduct. True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) (Emphasis added). Similarly, other cases have stated, "[C]ourts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that *some right of his had been invaded, or that some claim against another party might exist.*" *Hackworth v. Greenville County*, 371 S.C. 99, 103, 637 S.E.2d 320, 322 (Ct. App. 2006) (citing *Young v. South Carolina Dep't of Corrections*, 333 S.C. at 719, 511 S.E.2d at 416) (Emphasis added).

A number of other cases stand for the same proposition. See *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994) ("...the statute of limitations is triggered not merely by knowledge of an injury, but by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a cause of action against another. This is an objective, not a subjective, determination.") (Internal citations omitted.); *Kreutner v. David,* 320 S.C. 283, 285,

465 S.E.2d 88, 90 (1995) ("The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party (discovery rule)."); *South Carolina Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 237, 547 S.E.2d 871, 874 (Ct. App. 2001); *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (Ct. App. 2000) ("Institution of an action based upon those temporary symptoms would likely have been premature and possibly frivolous. Moreover, the permanent injuries for which Grillo now seeks recovery would not have been compensable at that time. Accordingly, a jury issue is presented as to the application of the statute of limitations in this case.")

Grillo cited with approval *Schiele v. Hobart Corp.*, 284 Ore. 483, 587 P.2d 1010 (Or. 1978) as follows:

> We do not believe the legislature intended that the statute be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury. The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition.

Grillo further cited with approval *Martinez v. Humble Sand & Gravel, Inc.*, 940 S.W. 2d 139, 144 (Tex. Ct. App. 1996) aff'd, 974 S.W.2d 31 (Tex. 1998) as follows:

> The court noted that the discovery rule should not be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury. The court further noted, as an example, the absurdity of requiring a sandblaster, who might know that silicosis can be related to sandblasting, to file a lawsuit at the first sign of a cough in order to protect his rights in the case that he might suffer from the disease.

The cases cited by counsel for Respondent also support the principle that what triggers the running of time is discovery of a cause of action or an invasion of rights. Respondent's memorandum stated, "Under the discovery rule, the statute of limitations begins to run *when a*

cause of action was discovered or reasonably ought to have been discovered 'by the exercise of reasonable diligence.'" (R. 24) (emphasis added) quoting *Knox v. Greenville Hosp. Sys., supra.* Respondent further stated that to determine whether a party has exercised reasonable diligence, the court should look to determine if "the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Id. Even more to the point, Respondent noted, "At issue in this case is when did the Plaintiffs discover *the existence of a claim* . . . ." (R. 26). At oral argument, counsel for Respondent noted that what triggers the running of time is when "exercising reasonable diligence, a person of ordinary intelligence would know that they had some right violated or they had a claim." (R. 43:9-11).

Knowledge of an injury alone does not start the running of time to assert a claim. The Court of Appeals has stated, "Knowledge of the injury alone does not, a fortiori, give rise to suspicion of impropriety by an attorney. Rather, the limitations period is triggered by knowledge of facts, diligently acquired, sufficient to put an injured person on notice that a cause of action may exist against another." *Peterson v. Richland County*, 335 S.C. 135, 139, 515 S.E.2d 553, 555 (Ct. App. 1999). See also *True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

There is no reason the analysis in *Peterson* would not be applicable to medical malpractice cases. In such cases, the injured party typically has an injury, disease, flareup or other health condition which gives rise to the need for medical care in the first instance. Although an injury, disease, flareup or other condition may worsen, and the worsening may be well known to the patient, what is often unclear is whether the worsening of the injury, disease, flareup or condition was a natural process or was caused by medical negligence or other wrongful conduct. Similarly, treatment for one condition may lead to recognition of another

condition, but it is often unclear whether that newly recognized condition was part of a natural process or was caused by medical negligence or other wrongful conduct. Indeed, the newly recognized condition may have been long present, before treatment, or may have been otherwise unrelated to the treatment. It may remain unclear for years to the patient receiving medical care that some right of his may have been invaded or that a cause of action might exist for the injury suffered.

On certain occasions, knowledge that a right has been invaded could be readily apparent. One example is wrong-side surgeries. But absent the obvious example, a reasonable patient would not and should not always conclude that he has a cause of action simply because he has suffered an unfavorable outcome or injury temporally related to medical treatment.

No reasonable patient would suspect medical negligence every time there is injury, flareup, or worsening. In fact, our case law makes clear that the mere presence of an injury or unfavorable outcome does not prove malpractice. See, e.g., *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 307-308, 457 S.E.2d 603 (1995); *Ardis v. Sessions*, 370 S.C. 229, 633 S.E.2d 905 (Ct. App. 2006). Therefore, in light of the case law and Respondent's own admissions, it was plain error for the Court to rule that the pertinent date for discovery is the date when knowledge of an injury was or should have been acquired.

III. THE TRIAL COURT ERRED IN FAILING TO HOLD THAT THE CLAIM WAS TIMELY COMMENCED AS A MATTER OF LAW, OR IN THE ALTERNATIVE, THAT THE PROPER DISCOVERY DATE IS A QUESTION OF FACT FOR JURY DETERMINATION.

Had the Court properly analyzed the application of the discovery rule based on when a reasonable person would have known a cause of action existed for wrongful conduct, or that some right had been invaded, it follows that the Motion for Summary Judgment should have

been denied. Either the claim was timely commenced as a matter of law or there is a question of fact regarding the discovery date.

The injured party is Tanya's minor Son, Mykelvion. There is no showing that Mykelvion had any notice of a cause of action or invasion of rights. Respondent has cited no legal authority that Tanya's knowledge should be imputed to her Son. Therefore, if the focus is to be on knowledge of the minor, the complete absence of evidence that the minor had any notice of a cause of action or invasion of rights should be dispositive.

Even if the parent's knowledge should be imputed to the minor, Tanya did not know and had no way of knowing that a medical negligence cause of action existed from the date of Mykelvion's birth. She knew her Son's arm was not functioning normally soon after his birth, but Dr. Augustine told her Mykelvion's arm was hurt because of his large size, and that the injury would be temporary. (R. 112:4-8; 166:4-14; 168:4-5). Dr. Augustine's assertion that the injury was caused by Mykelvion's large size was plausible to an objective non-medical person such as Tanya, and foreseeably influenced her to believe at that time that the injury was not caused by medical negligence. Moreover, Dr. Augustine told Tanya the injury was only temporary. Temporary brachial plexus birth injuries do not support a cause of action because there is insufficient evidence to support an inference of either negligence or causation. Most brachial plexus birth injuries are temporary, and temporary brachial plexus injuries can occur without medical negligence. Only permanent brachial plexus birth injuries can be fairly attributable to medical negligence, and even then the clinical situation may signify an absence of negligence. There was no reason to suspect the injury might be permanent until Mykelvion was at least eighteen to twenty-four months of age. (R. 214). Neither Tanya nor any reasonable person could have known her Son's injury was permanent until he was at least eighteen to

twenty-four months old. (Id.) Not until then could negligence and causation be fairly recognized. If eighteen or twenty-four months after birth is the correct objective discovery date to trigger the running of time, then the subject claim was timely commenced as a matter of law, because it was filed less than nine years thereafter (seven years of tolling, plus two years for the statute of limitations under the Tort Claims Act).

Respondent cherry-picks facts in an effort to argue that a reasonable person would have been on notice of a cause of action or invasion of rights soon after Mykelvion's birth. Respondent argues the fact that Tanya sought an orthopedic referral for Mykelvion's arm is evidence that she was "aware of an existing problem or injury." (R. 35). Appellant has never contested that Tanya was aware of the existence of some form of a problem or injury since birth, but knowledge of an injury is not the triggering event. See Argument II, supra. Requesting an orthopedic referral in no way supports the argument that Tanya was or should have been aware at that time that a cause of action existed for another's wrongful conduct or that her Son's rights had been invaded. A request for an orthopedic referral merely confirms that the Mother wishes for a physician to evaluate her Son's arm problem and provide information about any available treatment options.

Respondent also contends that the Mother had actual knowledge of a cause of action when Mykelvion was three months old. Respondent references Tanya's deposition testimony that when Mykelvion was three months old, a physician told her after an EMG study that the injury was permanent. However, the affidavits of Dr. Redmond and Tanya explain that the accurate dates when permanency was determinable was no earlier than eighteen to twenty-four months after birth. Dr. Redmond performed the EMG study on October 29, 2001, when Mykelvion was approximately three months old. (R. 214). Dr. Redmond explained, "A

determination of permanence would not have been possible until the child was at least approximately 18 to 24 months old." (Id.). Dr. Redmond never told anyone the injury was permanent at three months of age, "as that determination would not have been possible at that time." Id. Tanya explained that in light of Dr. Redmond's statement, she did not know when she first learned Mykelvion's injury was permanent, but believed it could not have been until Mykelvion was eighteen to twenty-four months old. (R. 215).

Respondent also references the fact that Tanya consulted an attorney on January 11, 2002. Respondent offered no evidence for the reason Tanya went to see attorney David Betts. The fact that Tanya signed a medical release authorization is not sufficient to determine she was on notice she might have a cause of action against the attending physician. It is evidence only that Tanya had in fact seen an attorney by that date for some purpose and authorized him to get medical records. As the party with the burden of proof, Respondent had responsibility to establish that the meeting was for a purpose which indicated Tanya was aware that her child had a cause of action for medical negligence, or that through her interaction with this attorney, she became aware thereof. The record contains no such information. Respondent asks this Court to make a leap of logic, but that is not the proper role of a Court at the summary adjudication stage. Respondent has failed to connect the dots to show that a legal consultation for an unknown purpose somehow created knowledge of a medical negligence cause of action or an invasion of rights. Even if consultation with a lawyer for an unknown purpose were construed to reflect suspicion on Tanya's part about potential medical negligence, suspicion alone is insufficient to trigger the running of time. (*Grillo, supra.*) Moreover, even if Tanya had asked Attorney Betts to evaluate a potential medical negligence claim, it would have been premature for such an evaluation in light of the fact that there was not yet any evidence of a permanent injury,

necessary to lend credibility to allegations of both negligence and causation. Filing this claim before eighteen to twenty-four months of age would most often represent a frivolous filing.

Finally, Respondent cites to Tanya's testimony that Dr. Augustine said, "Oops, I hurt his arm," as evidence that a reasonable person would have known at delivery that she had a cause of action or that her rights had been invaded. However, again, this statement proves only that the Mother was aware of an injury that was present at birth. Dr. Augustine's comment is hardly an admission of liability, and no evidence was presented to suggest that Tanya interpreted his comment as an admission of negligence. Dr. Augustine asserted in his deposition that he did not state, "I hurt his arm," but did perhaps acknowledge the presence of an injury. Deposition testimony shows he denied responsibility for causing the injury and attributed the injury to Mykelvion's large size. (R. 168:4-5).

Most every delivery, well visit or treatment visit includes some hurt to a child. Vaccinations hurt, but they are necessary to obtain immunization. Hurt from a needle stick to a child would hardly put the parent on notice that the nurse had caused nerve damage by injecting too deeply, even if the nurse said in warning, "This is gonna hurt." Most every child delivered vaginally experiences some degree of hurt from going through the tight, bony birth canal. Such injuries may involve swelling, bruising, head molding, caput (deformed head shape), changes in muscle tone, problems breathing, reduced range of motion of an arm, etc. However, an injury apparent at birth is not evidence of negligence. If every parent had to file suit when their child experienced a hurt, to avoid the statute of limitations, our courts could become quickly overrun by frivolous lawsuits alleging temporary injuries without a sufficient factual predicate to support either negligence or causation. No one can equitably be required to file a medical negligence suit before there is an objective basis upon which to discover both that a persistent

injury has occurred, and that it occurred because of a breach of duty. Indeed, to do so would implicate ethical concerns and would represent a violation of the South Carolina Frivolous Civil Proceedings Sanctions Act S.C. Code Ann. §15-36-10 et. seq. (See also *Grillo*, supra.).

Knowledge of the presence of an injury is not what begins the running of the statute of limitations. Time for a claim does not commence until the date a person knew or should have known that a cause of action existed or that a right had been invaded, neither of which follows from the quote Tanya attributed to Dr. Augustine.

At most, this statement creates a question of fact as to whether the Mother knew or should have known a cause of action existed for medical malpractice at birth. Temporary injuries to a child during delivery are not all that uncommon. The majority of brachial plexus birth injuries resolve in a matter of days, weeks or months. Up to ninety to ninety-five percent of brachial plexus birth injuries resolve by eighteen to twenty-four months. Before eighteen months of age, such injuries cannot be said to put a parent on notice that the physician has committed medical negligence which caused the injury, especially when the principal healthcare provider informs the parent that the injury (1) occurred because of the child's size and (2) will heal. Awareness at birth of a brachial plexus birth injury provides no information to the parent to suggest that medical negligence was involved with the birth, that excessive traction by the obstetrician caused the injury, or that this injury will be anything other than temporary.

Knox v. Greenville Hosp. Sys., 362 S.C. 566, 571, 608 S.E.2d 459, 462 (Ct. App. 2005) supports Respondent's position that mere awareness of an injury which may be temporary is insufficient to put a reasonable person on notice that a claim might exist. The court in *Knox* held, "The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations." *Knox*, 362 S.C. at, 571, 608 S.E.2d at,

462. The provision of medical treatment that causes temporary symptoms like discomfort or pain cannot be said to put a person on notice that a cause of action for malpractice exists. Id. By analogy, limited range of motion of a baby's arm, statistically likely to be temporary, should not be deemed sufficient to put a reasonable parent on notice of a cause of action for medical negligence, particularly where the obstetrician represented that the baby's large size caused the problem. Moreover, *Grillo* recognized that it is inappropriate to require commencement of an action based upon temporary symptoms, which would have the effect of requiring premature and possibly frivolous claims to be filed.

This Court could determine the claim was timely commenced as a matter of law, based on the undisputed facts that (1) temporary brachial plexus birth injuries do not implicate medical negligence; and (2) permanency cannot be determined until the child is at least eighteen to twenty-four months of age.

To reverse the summary judgment, however, it is not necessary to find timeliness of the claim as matter of law, as the existence of a question of fact is sufficient to preclude summary judgment. A jury could reasonably find discovery of a cause of action did not occur and should not have occurred for several years after Mykelvion's birth, as evidenced by Tanya's affidavit. A reasonable jury could find discovery did not occur and should not have occurred until at least eighteen to twenty-four months after the child's birth, when the Mother could have first become aware that the injury would be permanent. It is theoretically possible that another jury might find a reasonable person would have been on notice of a claim around the time of the child's birth. Although Appellant asserts such a finding would not be reasonable, it is abundantly clear that the evidence is at least sufficient to create a jury question. As our case law states, "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and

when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). *See also Youmans v. S.C. DOT*, 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008) ("The defendant asserting an affirmative defense bears the burden of its proof."). "[W]hen conflicting evidence exists on the issue of when a claimant knew or should have known that a cause of action existed, the issue becomes one for a jury to decide." *Graham v. Welch*, 404 S.C. 235, 239, 743 S.E.2d 860, 863 (Ct. App. 2013).

Finally, Appellant emphasizes that this is a minor's claim. There is absolutely no evidence that the minor child was ever on notice of a cause of action or an invasion of his rights. If there is to be any imputation of knowledge by the parent to the minor child concerning a cause of action or invasion of rights, such should be applied with great caution. Justice would be served by allowing the claim to be adjudicated on its merits.

CONCLUSION

For the reasons stated, the Appellant respectfully requests this Court to reverse the trial court's order granting summary judgment and remand for further proceedings. Further, Appellant requests this Court to hold that the claim was timely commenced as a matter of law. In the alternative, Appellant requests that the Court find that the date a reasonable person knew or should have known that a claim for medical negligence existed or a right had been invaded is a question of fact for the jury to determine.

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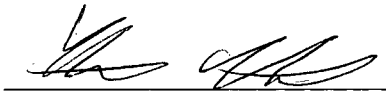
BY: 

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May 30, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

C/A No. 2011-CP-32-02282

Tanya Bennett, as Next Friend of
Mykelvion T., a minor — Appellant,

v.

Lexington County Health Services
District, Inc. d/b/a Lexington Medical Center,
Medical Center, — Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that this Final Brief of Appellant complies with Rule 208(a)(3), SCACR.

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 2nd day of June, 2014 served a copy of the Appellant's Final Brief upon counsel for the Respondent by depositing them in the United States Mail, first-class postage prepaid, addressed to:

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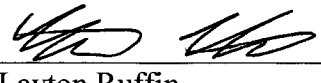

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