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SC Court of Appeals

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...Petitioner,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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

II. DID THE TRIAL COURT ERR 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?

III. DID THE TRIAL COURT ERR BY FAILING TO HOLD THAT THE SUBJECT 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?

IV. DO RESPONDENT'S ADDITIONAL SUSTAINING GROUNDS LACK MERIT?

STATEMENT OF THE CASE

Appellant adopts the Statement of the Case as set forth in Appellant's prior Brief.

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.

In holding that "Plaintiff's claim need not be addressed under the discovery rule," the lower court committed plain error. Well-established precedent provides: "The discovery rule is applicable to actions brought under the Tort Claims Act." (hereinafter, "TCA"). *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)). See also *Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 571, 608 S.E.2d 459, 462 (Ct. App. 2005). Respondent has not even tried to defend the lower court's erroneous ruling that "Plaintiff's claim need not be addressed under the discovery rule." Case precedent and Respondent's own admissions make clear the discovery rule applies.

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

Discovery of a cause of action or invasion of rights triggers the statute of limitations, not knowledge of an injury. Despite its explicit admissions in memoranda and oral argument that the statute of limitations does not begin to run until a *cause of action* or *invasion of rights* was discovered, Respondent now contends for the first time it is discovery of a *loss* or an *injury* which starts the running of time.

In support, Respondent cites *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 129, 542 S.E.2d 736, 743 (Ct. App. 2001). *Bayle* has never been cited to or relied upon by any other South Carolina appellate court opinion for the proposition that the date of the loss triggers the running of the statute of limitations. However, many cases have cited *Bayle* for the proposition that the time allotted for suit begins to run on the "date the injured party either knows or should have

known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct," which is the primary focus of the *Bayle* court's reasoning.[1] Indeed, the *loss* sentences relied upon by Respondent from the conclusion of *Bayle* are inconsistent with the primary reasoning set forth in the decision. If literally applied, those sentences would drastically alter well-established case law precedents regarding the discovery rule, including the precedents cited favorably in *Bayle*. Therefore, they should be confined to the unusual facts present in *Bayle*.

Bayle is distinguishable from the case at hand. Patricia Bayle was killed when she lost control of her vehicle driving through standing water. *Id.* at 120, 542 S.E.2d at 737. Two years later, Patricia's husband learned another driver lost control of his vehicle driving into standing water at the same location. After learning this, the husband filed suit. *Id.* First, the court in *Bayle* reiterated the undisputed rule that (a) the discovery rule applies to the TCA and (b) under the discovery rule "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Id.* at 123, 542 S.E.2d at 740. Ultimately, the court determined the husband "had knowledge of the circumstances of the accident," "knew it was raining," and knew his wife's car "struck water on the road." *Id.* The court stated further that "the defect was evident when it rains" and that "the lack of a barrier on that portion of the interstate highway is immediately apparent." *Id.* at 127, 542 S.E.2d at 742. The court reasoned that discovery does not depend upon the date one learns of a possible latent defect, when such defect would have been observable with common knowledge. *Id.* at 122, 543 S.E.2d at 739. Accordingly, the court held there was no genuine issue of material fact that one would not have known a "possible cause of action existed on the date of Patricia's tragic death." *Id.*

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[1] *See Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 576, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting *Bayle* for the proposition that the statute of limitations begins to run on the "date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."); *Kimmer v. Wright*, 396 S.C. 53, 58, 719 S.E.2d 265, 268, (Ct. App. 2011) (same); *Graham v. Welch*, 404 S.C. 235, 239, 743 S.E.2d 860, 863 (Ct. App. 2013) (same); *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 618, 698 S.E.2d 879, 883, (Ct. App. 2010) (quoting *Bayle* for the proposition that the statute of limitations begins to run "from the date the injury resulting from the wrongful conduct either is discovered or may have been discovered" and that "if there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury."); *Hedgepath v. AT&T*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001); (citing *Bayle* for the proposition that under the discovery rule, "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered."); *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187(Ct. App. 2004) (citing *Bayle* for the proposition that "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered.").

The facts in the instant case are quite different. Obstetrical and neurological matters are not within the ambit of common knowledge, as are inferences to be drawn from a one vehicle wreck off of a rainy highway. Mykelvion's injuries were attributed by the delivering obstetrician to the baby's large size. The injuries were asserted to be temporary. Temporary brachial plexus birth injuries can and do occur without medical negligence. The passage of time revealed the error of the delivering obstetrician's assertions, but not until at least eighteen to twenty-four months after the birth.

Although not binding upon this court, a federal magistrate court judge analyzed *Bayle* in a manner consistent with Appellant's position in *Laudman v. Padula* 2013 U.S. Dist. LEXIS 142594 (D.S.C. Aug. 23, 2013). In *Padula*, Jerome died from severe abuse and neglect while incarcerated. A statute of limitations question under the TCA arose in connection with this litigation. Defendants contended the statute of limitations ran from the date Plaintiff was notified of Jerome's death, while Plaintiff contended the claim did not accrue until notified of a SLED report. Defendants cited *Bayle* in an attempt to argue the statute of limitations begins to run on the date the death was or should have been discovered. However, the district court determined *Bayle* merely explained that the cause of a loss was not an issue of material fact where "the defect was evident when it rained, the evidence showed it was raining at the time of the accident, and the lack of a barrier on that portion of the highway was immediately apparent." *Id.* Ultimately, *Padula* determined the cause of Jerome's death "was not readily apparent at the time of his death or even at the time Plaintiff received a copy of the death certificate." *Id.* The judge relied on the well-established South Carolina doctrine that the statute of limitations begins to run "when a cause of action reasonably ought to have been discovered." *Id.*[2]

"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,

[2] In reviewing the magistrate court judge's Report and Recommendation, the district court judge determined that the plaintiff's state court claims were precluded by Eleventh Amendment immunity. *Laudman v. Padula*, 2013 U.S. Dist. LEXIS 142872 (Sept. 30, 2013). Accordingly, the district court determined it "need not consider the issue of whether the statute of limitations bars the Plaintiff's state law claims against SCDC." *Id.* While issues remained concerning accrual of a cause of action under federal law in connection with a federal cause of action, this analysis is irrelevant to the facts of this case.

616 (1997).[3] Cases cited by Respondent before the lower Court support Appellant's position, as does Respondent's own memorandum, which 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).[4]

The loss sentences in *Bayle* relied upon by Respondent should be limited to the unique facts in *Bayle*. Based upon the weight of virtually all case law, the applicable statutes, and Respondent's own admission, it is readily apparent that what triggers the running of the statute of limitations is not awareness of a loss or an injury, but when a reasonable person knew or should have known that a cause of action existed based on harm caused by wrongful conduct of another.

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 DISCOVERY DATE IS A QUESTION OF FACT FOR THE JURY.

A. Respondent has Failed to Focus on Discovery by the Minor

As an initial matter, Respondent has made no effort to refute Appellant's argument that "discovery" of a cause of action sufficient to trigger the running of time is discovery by the injured party; and that discovery by a parent is not to be imputed to an injured minor. Section 15-3-545(A) extends the running of time for commencing medical negligence actions for "injury to the person" until the time when the cause of action "reasonably ought to have been discovered." The statute does not explicitly state who must discover the cause of action to trigger the running of time, but the only reasonable inference is that discovery must be made by the injured person. Discovery by a third party has no meaningful bearing on the time for commencement of suit, absent an express legislative provision imputing knowledge of another to the injured person.

[3] As explained in Appellant's Brief, 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.")

[4] Respondent noted further, "At issue in this case is when did the Plaintiffs discover *the existence of a claim* . . . ." (R. 26). Finally, 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).

Unquestionably, Mykelvion Thurmond, the injured infant, did not receive notice of any loss, cause of action or invasion of his rights until years after his birth.

The South Carolina legislature elected to omit any statutory imputation of knowledge from the parent to the child when it drafted the applicable statutes. Had the General Assembly intended parental knowledge to be imputed to the minor, it could have easily so provided. The semantic canons of statutory construction dictate that nothing is to be added to what the text states (*casus omissus pro omisso habendus est*).[5] Other states have done so, where that was their intent. For example, the word choice of the legislative body in the state of Washington exhibits an intent to create an imputation provision in its statute. Rev. Code Wash. (ARCW) § 4.16.350 explains that a medical malpractice suit must be brought within three years from the act or omission or one year from discovery. Importantly, the statute then explicitly states, "[T]he knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section."

No such provision is found anywhere in South Carolina's statutory scheme. Accordingly, the courts have no basis to infer such legislative intent. When a statute intends to safeguard a class of persons who cannot protect themselves, minors, courts should be especially cautious to read into the statute an implied imputation provision, which would curtail the rights of this protected class. Thus, the minor's claim was timely asserted as a matter of law.

B. The Mother Timely Asserted Her Child's Claim As a Matter of Law or There is a Question of Fact Regarding When Tanya Knew or Should Have Known Her Child Had a Claim for Medical Malpractice Resulting from Wrongful Conduct.

Even if the parent's knowledge could be imputed to a minor, the mother did not know and had no way of knowing a medical negligence cause of action existed from the date of her child's delivery. Dr. Augustine told Tanya that Mykelvion's arm was hurt because of his large size and that the injury would be temporary. (R. 112:4-8; 166:2-22; 168:4-5). There is no reason why

[5] *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012)("[W]hen a statute is clear on its face, it is improvident to judicially engraft extra requirements to legislation just because doing so may further the intent behind the statute."); *Consumer Advocate v. South Carolina Dept. of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct.App. 2012)("The court has no right to add words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy.")

Tanya, a person with medical knowledge no greater than an ordinary person, should have doubted the explanation provided by her physician. He was a professional upon whom she had the right to rely. His proffered explanations seemed plausible and foreseeably influenced Tanya to believe that the injury was not the result of negligence. Moreover, Tanya was told the injury was temporary, further influencing the mother to believe any injury was not due to malpractice. Indeed, there was no indication that the injury might be permanent until the child was at least eighteen months of age. (R. 214). Only at this time could it have become known to a reasonable person that the injury may be the result of malpractice.

Seeking an orthopedic referral establishes nothing more than that Tanya was aware of some type of injury. Awareness of an injury alone is insufficient to trigger the running of the statute of limitations. Similarly, attending the orthopedic referral establishes nothing more than awareness of an injury and a desire to obtain treatment for her son. Finally, Dr. Augustine's statement (which he denies making), "Oops, I hurt his arm," again, only goes to the issue of the timing of when the mother knew of *an injury*. It does not speak to the issue of whether there was a breach in the obstetric standard of care, nor whether said injury was the result of medical negligence. Any argument that this was an admission of liability is dispatched by Dr. Augustine's statements to the mother that the injury was because of the baby's large size, the injury was temporary, and it would heal on its own.

Respondent argues Tanya knew her child's injury was permanent on October 29, 2001, when an electromyogram (hereinafter, "EMG") was performed on her son. The significance of her son's visit to the orthopedist on this date is, at most, a question of fact for the jury to determine. Respondent cites deposition testimony by Tanya regarding the EMG doctor telling her about the permanency of her son's injury as evidence she knew her child's injury was permanent at age three months. However, the only thing she said in her deposition regarding the timing of her acquired knowledge was that she learned about the location of the nerve damage being at C-5 and C-6 after the EMG. She was not specifically asked when she learned the injury would be permanent. Rather, she was asked if the EMG doctor told her it was a permanent injury:

Q. At three months of age, according to what we looked at earlier, he was in Midlands and had EMG studies done—
A. Yes, sir.
Q. --to test his nerve function, correct?
A. Yes, sir. That's correct.
Q. And that doctor, after testing the nerves, told you that C5 and C6 area in the neck was what was involved?
A. Yes, sir.
Q. Okay. And he told you that, in essence, it was a permanent injury, that he would never use the arm?
A. That's correct.

(R. 173:21 – 174:9)

If one perceives from the context that Tanya was implying she learned of the permanency of her son's injury immediately after the EMG, she did not state that expressly, and it must be conceded that that is not the only plausible interpretation of her testimony. Subsequent to Tanya's deposition, Dr. Redmond signed an affidavit noting, "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." (R. 214). He noted further, "a determination of permanence would not have been possible until the child was at least approximately eighteen to twenty-four months old." *Id.* Finally, he stated, "I did not tell anyone that the injury was permanent, as that determination would not have been possible at that time." *Id.* In light of the Redmond affidavit, the Mother clarified and explained in her own affidavit that she did not know when she first learned the injury was permanent, but believed it could not have been until the time at which Dr. Redmond stated the permanency could first be determined, no earlier than eighteen to twenty-four months of age of her child. (R. 215). That Affidavit clarified her earlier deposition testimony about learning her son's injuries were permanent. It is likely that a jury will determine that there is no discrepancy between Tanya's deposition testimony and her Affidavit; or that if a discrepancy is perceived, it is understandable that the mother would have had trouble remembering exactly when that was said to her seven to ten years ago. Nevertheless, Respondent implies that Tanya lied under oath and perjured herself at the request of counsel. The most likely explanation of any asserted discrepancy is the simplest; either there is none, or if one is

perceived, it is understandable in terms of Tanya's difficulty remembering timing facts during a grueling multi-hour deposition, and her memory was later enlightened by Dr. Redmond's Affidavit.

To the extent Respondent has implied Tanya's affidavit was a "sham affidavit," Appellant cites to *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). In *Cothran*, the Court set forth the factors for consideration when differentiating a "sham affidavit" from a correcting or clarifying affidavit.[6] Upon review of these considerations, Appellant first notes a credible explanation was provided to explain any purported inconsistency between Tanya's deposition and her affidavit. Defense counsel asked Tanya a series of leading questions, one of which addressed a time after the EMG, but the question about acquiring knowledge of permanency did not expressly do so. The only question about learning of the permanency confirmed that the EMG doctor told her it was a permanent injury, without specifically addressing the issue of timing in that question and answer. Tanya was never asked at her deposition how much time passed between the EMG and the time when she learned the injury was permanent. After Tanya reviewed Dr. Redmond's Affidavit, Tanya clarified she was uncertain of when she first learned that Mykelvion's injuries were permanent, but it could not have been before her son's doctors could determine permanency, thus not before her son was at least eighteen to twenty-four months of age. As to the third consideration, at the time of her deposition, Tanya did not have access to Dr. Redmond's Affidavit explaining when he could have first determined permanency. The Affidavit did not even yet exist. As to the fourth consideration, there is no significant variation, if any, between Tanya's deposition testimony and Affidavit. As discussed previously, she was asked in her deposition about the source of information about permanency, and not specifically asked about the timing thereof. As to the

[6] In distinguishing the two, *Cothran* noted the following considerations provide guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted. Id. at 218, 592 S.E.2d at 632. (citing Pittman v. Atlantic Realty Co., 359 Md. 513, 754 A.2d 1030, 1042 (Md. 2000).The Court also noted, "The competing affidavit rule is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact." *Id.* at 218, 592 S.E.2d at 633.

fifth consideration, asking a witness to recall timing of statements made to her from seven to ten years prior frequently involves a certain amount of confusion. A two-word agreement to a leading question asked by an attorney during a heated deposition does not prohibit the deponent from later clarifying her answer. Therefore, based upon the questions asked, the answers provided, and the clarification given in her affidavit, Tanya's affidavit does not constitute a "sham affidavit."

Respondent also contends the date when Tanya knew her child's injury was permanent is irrelevant because "Appellant understood her attending physician to have acknowledged responsibility for a birth injury on the date of birth." For reasons previously stated, this statement is inaccurate, as the obstetrician never accepted responsibility for any misconduct, but offered an exculpatory explanation of the cause of the injury.

Appellant's visit to attorney David B. Betts fails to eliminate a question of fact of when Tanya knew or should have known she had a cause of action for medical negligence. There remains a question of fact as to (a) why Tanya went to see David Betts, (b) what Tanya knew or should have known up to her actual meeting with attorney Betts, and (c) what a reasonable person knew or should have known after meeting with Attorney Betts. All that is known is that a medical authorization was signed, that Tanya said she went to see Betts to learn what could be done about her son's injury, and that Tanya never spoke with this attorney again after their initial consultation. Tanya could have gone to attorney Betts for a number of reasons which do not evidence awareness of a potential claim for malpractice. Tanya could have sought assistance procuring (1) more extensive medical treatment; (2) financial assistance from Medicaid, Baby Net, or other resources with the cost of medical treatment; or (3) disability benefits, through Social Security or otherwise. Respondent has failed to put forth any evidence of what impact this one meeting had on Tanya's understanding of whether or not she had a medical negligence cause of action. Her actions suggest she had no awareness of a potential claim, as she did not return to see Attorney Betts, did not then commence suit, and did not seek additional counsel for years.

Respondent cites *Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987) to support its position that the statute of limitations began to run on the date Tanya visited attorney Betts.

However, the facts in *Smith* paint a markedly different picture from those present in this case. *Smith* involved delivery of a stillborn child. First, the court in *Smith* noted "two problems occurred which *were of concern* to Mr. and Ms. Smith. First, Mrs. Smith experienced weight loss. Second, Mrs. Smith carried her child a full month beyond the estimated due date . . . ." *Id.* at 423, 354 S.E.2d at 38 (emphasis added). These were concerns known to and voiced by the Smiths. Second, while still hospitalized, "Mr. and Mrs. Smith began to have questions as to whether Doctor Smith had rendered Mrs. Smith proper medical care." *Id.* Finally, "one of the reasons the Smiths consulted the Charlotte attorney was to determine if they were entitled to assert a legal claim against Doctor Smith arising out of his care and treatment of Mrs. Smith and the birth of their stillborn child." *Id.* Moreover, the Smiths continued to have questions regarding the treatment received, sought additional legal counsel for the purpose of investigating whether they had a claim for medical malpractice, and ultimately retained the counsel of the second attorney with whom she consulted. *Id.*

In this case, there is no evidence regarding what Tanya knew or suspected prior to her consultation with attorney Betts; there is no indication of the precise reason for her consultation with attorney Betts; and there is no indication of what she knew or suspected after her consultation with attorney Betts. The explanation offered at deposition, to "see if something" could "be done" is broad and non-specific. No follow-up questions seeking clarity were asked. This is vastly different from *Smith*, where the parents of the stillborn child immediately suspected malpractice even while the mother was still hospitalized, asked questions regarding the care provided, sought legal counsel specifically for the purpose of determining if they had a cause of action for medical malpractice, and ultimately retained the second attorney with whom she consulted to bring suit for medical malpractice. The facts are that Tanya did not know, did not suspect, and had no evidence of malpractice for many years; and that she accepted for years her physician's exculpatory statements that this type of injury sometimes happens during the delivery of a large baby and is only temporary. Such facts cannot be overcome merely because she visited an attorney for a non-specific purpose. Accordingly, the degree to which *Smith* differs from this case supports a finding opposite from that reached in *Smith.*

Respondent also attributes significance to the fact that the injury did not heal within the short time period during which her physician said many such injuries would heal. This argument is also incorrect in light of Dr. Redmond's clarification that temporary injuries to the brachial plexus at birth may persist for up to two years before there is full healing.

Respondent cites *Knox v. Greenville Hospital System*, 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005) in support of its position, but *Knox* is distinguishable. On May 2, 2000, Knox sought treatment that required an intravenous injection. *Id.* at 568, 608 S.E.2d at 460-61. Upon insertion of the needle into his wrist "Knox 'screamed,' 'squealed and hollered,' and his 'whole hand jumped up . . . in [his] fingers.'" *Id.* His nurse said "she 'hit the wrong thing in there' and 'apologized.'" *Id.* Moreover, Knox himself stated he had "received 'plenty of I.V.s before,' he knew something was 'different,' about this one because of the pain, reaction of his hand, and the nurse's admission to 'hitting the wrong thing.'" *Id.* Furthermore Knox stated that it was his belief that "the doctor hit a nerve in there." *Id.* Finally, Knox told his nurses he was still experiencing pain upon discharge, and he returned to the hospital seven days later. *Id.* On July 12, 2000, Knox sought treatment from an orthopedic surgeon who informed him he suffered a permanent injury to his radial nerve. *Id.*

This Court affirmed the circuit court's decision dismissing suit as barred by TCA statute of limitations. *Id.* at 569, 608 S.E.2d at 461. The Court noted the statute of limitations did not begin to run until the cause of action reasonably ought to have been discovered. *Id.* at 570, 608 S.E.2d at 462. Moreover, the court reiterated that Knox, through his own admission, knew from the pain experienced and his immediate bodily reactions, along with statements made by medical personnel, that there was a strong likelihood that negligence had occurred.

The Court in *Knox* further explained, "We, of course, recognize that varying degrees of pain and discomfort are frequently associated with certain medical procedures, especially invasive ones. The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations." *Id.* Therefore, the presence of pain or injury alone will not trigger the statute of limitations. However, because Knox explicitly stated that he had received multiple I.V.'s before and that he "*knew*" something was

different and that a nurse admitted she hit the wrong thing, he should have been on notice that some right of his had been invaded. In light of Knox's own testimony, the court stated it was "immaterial that Knox did not know the extent of his injury . . . ." *Id.* Given the facts in *Knox*, this makes sense. He knew he had experienced excruciating pain he had never felt before from an I.V., he knew the pain was caused by a nurse, he still had pain at discharge, he told family members the nurse hit the wrong thing, and the nurse had admitted her wrong.

The facts in *Knox* are markedly different from this case. Tanya did not experience any immediate bodily reaction. If her son did, it went unexpressed or undetected, due to his neonatal status. Tanya did not have reason to suspect medical negligence from statements of medical personnel. To the contrary, Tanya testified that 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; 166:2-22; 168:4-5).[7] The assertion that the injury would be temporary has material significance, for temporary injuries to the brachial plexus can be caused without medical negligence.

Respondent also cites *Young v. S.C. Dept. of Corr.*, 333 S.C. 714, 511 S.E.2d 513 (Ct. App. 1999). Young was an inmate who reported having vision problems in January 1993. *Id.* at 16, 511 S.E.2d at 514. He was referred to an ophthalmologist in May 1993 and was diagnosed with a detached retina. On May 5, 1993, Dr. McLane informed Young that "there's a lot of scar tissue built up there" because "they waited too long." *Id.* Surgery was performed on May 11, 1993, and his surgeon asked why he waited so long to get help. *Id.* Young stated that July 1994, when his cataracts were removed, was when realized his sight would not get better. *Id.* at 717, 511 S.E.2d at 415

The court held Young was put on notice of a cause of action sometime in May 1993, after being told by two doctors that his injury was related to a delay in medical treatment. *Id.* at 720, at 511 S.E.2d at 417. The court stated, "On May 11, 1993, the date of his retinal surgery, Young was aware he had suffered a delay in treatment, that the delay concerned doctors, and that he had scar tissue built up in his eye." *Id.*

[7] Additionally, any screaming, squealing, or hollering during the birth process and delivery, from mother or child, is expected and in no way indicates that there has been a harm caused by negligence.

The instant case is different from *Young* in several critical ways. No health care provider ever told or even intimated to Tanya that her injury was caused by negligence. A statement, "Oops, I hurt his arm," does not imply medical negligence as "they waited too long" does, especially when the same doctor who made the "oops" statement offered the exculpatory explanation that the injury was caused by the child's large size. Informing Young of the material, causally significant delay in treatment provided him notice of a negligent act. There was no such notice in the instant case. Moreover, no one told Tanya her son's injury was permanent until he was well over one year of age, unlike the *Young* case where the treating surgeons told Young at and before the time of surgery that the delay in treatment had caused permanent scarring around the area of the retinal detachment, which would adversely affect treatment options. Finally, the defendant in this case affirmatively represented that the injury would be temporary; and others confirmed that healing could occur even well after a year. Therefore, the key facts in *Young* which triggered the running of the statute of limitations are absent from this case.

Respondent seeks to apply to this case certain language from *Young* related to severity of injury. However, the language applied out of context is misleading. The court in *Young* found that *after* Young had been told by two physicians that delay in diagnosis and treatment caused him injury, it was immaterial that Young did not know the extent of his injury. This makes sense. It was not the injury, or its severity, that put Young on notice of wrongful conduct. His knowledge came from statements made to Young by eye doctors concerning the build-up of scar tissue in the eye caused by a delay in treatment of his eye. In light of the fact that Young had been informed by physicians of damage from a delay, suggesting negligence, the extent of injury caused by said delay is immaterial to whether he knew he had a cause of action. This differs greatly from Tanya's situation, where no one had even hinted to her that her child's injury was caused by some act of negligence; a physician employee of the Defendant Hospital had proffered a plausible, non-negligent explanation; and temporary injuries can occur without negligence. Indeed, only because her child's injury persisted after two years, in light of a physician's statement that these types of injuries can heal in eighteen to twenty-four months, did Tanya

ultimately come to realize the injury may be permanent and something abnormal must have transpired during the delivery of her child.

Ultimately, the court must assess whether "the facts and circumstances of an injury" would "place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). It is under this framework that "the fact that the injured party may not comprehend the full extent of the damage [may be] immaterial." *Id.* But in the case at bar there had yet to be any facts and circumstances that would put a person of common knowledge on notice that a claim might exist. In this case Tanya knew only that her child had suffered an injury; that the physician informed the patient this type of injury sometimes just happens with a large baby; and that the physician assured her the injury would be only temporary. It is an undisputed medical fact that temporary brachial plexus birth injuries can occur without medical negligence. It is an undisputed medical fact that temporary brachial plexus birth injuries can persist for up to two years. Those facts and circumstances make the reasoning of the court in *Grillo* applicable and compelling.

In a footnote, Respondent argues that *Young, supra.* a case decided by this Court in 1999, rejected the applicability of *Grillo v. Speedrite Products, Inc*, 340 S.C. 498, 532 S.E.2d 1 (Ct. App. 2000) to medical malpractice cases. However, *Young* predates *Grillo*, decided in 2000; so *Young* could not have restricted *Grillo.* Not only is Respondent's argument anachronistic, nothing in *Grillo* indicated its holding should be inapplicable to medical malpractice suits.

Many cases cited in *Grillo* involved occupational disease. However, Respondent overlooks that *Grillo* was *not* an occupational disease case. Rather, the claims asserted in *Grillo* were negligence and products liability. The court gave no indication it intended its analysis to exclude other negligence cases such as claims for medical malpractice. Indeed, the questions answered by this Court in *Grillo* are relevant to any case where the significance of the injury is not readily known, the injury either fails to improve or worsens, the victim seeks treatment for the injury, and in the course of seeking treatment, the victim becomes aware of the fact that his injury might have been caused by another's wrongful conduct.

In *Grillo*, the plaintiff "experienced temporary symptoms or discomfort almost immediately upon exposure." *Id.* at 504, 532 S.E.2d at 4. After acknowledging that some exposure cases can be different from latent occupational disease cases, this Court in *Grillo* found the latter cases instructive in evaluating time-bar issues regarding an injury first thought by the plaintiff to involve temporary symptoms and without an indication these symptoms were caused by another's wrongdoing. *Id.* at 505, 532 S.E.2d at 4.

Grillo cited *Hildebrandt v. Allied Corp.*, 839 F.2d 396 (8th Cir. 1987) favorably, and found the following quote from that case to be sufficiently important to set forth verbatim:

> There is a substantial difference between knowledge of injury and the cause of that injury and mere suspicion. . . . The evidence shows that [the plaintiffs'] suspicions regarding their symptoms about TDI were either unconfirmed or denied at the time of their early employment with Whirlpool. If they had filed an action when they were employed at Whirlpool and complained of their symptoms, their claim may well have been dismissed as frivolous. A jury, like the plaintiffs' physicians, may have concluded that the plaintiffs' manifestations were unrelated to TDI exposure. Thus, if the plaintiffs had filed, a later cause of action could have been barred. *We do not believe Minnesota's applicable statutes of limitation were intended to provoke the premature commencement of claims for temporary sickness or discomfort. Rather, the plaintiffs are entitled to wait until the cause has been rationally identified.*

Id. at 506-507, 532 S.E.2d at 5 (quoting *Hildebrandt* at 399. (Emphasis added by *Grillo*).

The Court in *Grillo* also cited *Schiele v. Hobart Corp.*, 284 Ore. 483, 587 P.2d 1010 (Or. 1978) favorably, again finding sufficient importance to quote it at length:

> *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.

Id. at 507, 532 S.E.2d at 6, (quoting *Schiele* at 1014) (Emphasis added by the Court in *Grillo*).

Ultimately, the Court in *Grillo* held that more than one inference could be drawn "as to when a reasonable person would have been on notice that he might have a cause of action." *Id.* at 508, 532 S.E.2d at 6. The Court noted further, "Institution of an action based upon those temporary symptoms would likely have been premature and possibly frivolous." *Id.*

This analysis is critically important to the case at hand. Tanya had knowledge only of some injury to her child, which her obstetrician plausibly blamed on the child's large size at

birth. *Grillo* affirms that suspicions that go unconfirmed or denied are insufficient to put a person on notice. More importantly, there is no evidence that during her son's first few years, Tanya even suspected her child's injury was caused by medical negligence.

This Court in *Grillo* twice quoted, and added its own emphasis, to cases which stood for the proposition that the legislature could not have intended to "provoke the premature commencement of claims for temporary sickness or discomfort," "or risk the loss of a right of action for permanent injury." *Id.* at 506-507- 532 S.E.2d at 5. Indeed, "the plaintiffs are entitled to wait until the cause has been rationally identified." *Id. Grillo* further quoted language from these cases noting that if the claim had been immediately filed, it "may well have been dismissed as frivolous." *Id.*

Requiring Tanya to have filed suit from the date she became aware of some form of injury to her child during pregnancy, labor or delivery, without indication of cause or permanency, would not only encourage, but necessitate premature commencement of claims to avoid a time-bar. It would require parents of children who exhibit what could be only modest and temporary symptoms to file suit or risk loss of a right of action for a permanent injury. It would be bad policy to require every parent of a child who suffers any discomfort or injury during delivery to suspect negligence and run to the courthouse to file suit, or risk being time-barred. Many children delivered vaginally experience swelling, bruising, changes in muscle tone, problems breathing or the similar during the birth process. If every parent had to file suit soon after their child presented anything less than a flawless appearance at delivery, the courts would soon find themselves overrun with lawsuits of questionable merit.

In light of South Carolina's physician affidavit requirement when instituting an action for medical malpractice, filing some medical negligence birth injury cases in the first two years is a near impossibility. Cerebral palsy and failure to meet developmental milestones are often first diagnosed years after birth. In the context of a brachial plexus case, it would be impossible or exceptionally difficult to secure an affidavit during the child's first year or two of life substantiating medical malpractice when the injury may ultimately prove to be temporary, since temporary injuries can occur without medical negligence. Permanency of injury is often a critical

to determining that there had been negligent application of forceful traction on the baby's head and neck or twisting thereof.

Despite Respondent's assertion in the "Conclusion" section of its brief, S.C. Code Ann. § 15-3-545 is not to be liberally construed in favor of limiting the liability of the state. S.C. Code Ann. § 15-78-20(f) explains that "the provisions *of this chapter*" are to be "liberally construed in favor of limiting the liability of the state."(emphasis added). Thus, this section applies only to those statutes found under chapter 78, titled "South Carolina Tort Claims Act." Section 15-3-545 is not located under chapter 78. It is located under chapter 3. Therefore, Section 15-78-20(f) has no applicability or bearing upon the interpretation of Section 15-3-545.

Reading Section 15-3-545 to affect claims against governmental entities differently from claims against private entities would violate equal protection guarantees. In *Green v. Lewis Truck Lines*, 315 S.C. 253, 256, 433 S.E.2d 844, 845 (1993), the court explained, "We find no justification to deny tolling of a minor's claim merely because the minor is suing a governmental, rather than a private, entity." *Id.* Thus, such a reading as suggested by Respondent would be unconstitutional.

IV. RESPONDENT'S ADDITIONAL SUSTAINING GROUNDS LACK MERIT

A. By Its Own Language, S.C. Code Ann. § 15-3-545 Does Not Bar a Minor's Claim After Six Years From the Date of Occurrence; Rather It Tolls the Statue of Repose For Up to Seven Years For Minority.

As an additional ground, Respondent argues the six-year statute of repose bars any claims for birth injuries commenced after the child's sixth birthday. This is untrue. S.C. Code Ann. § 15-3-545(D) explains that if a minor has a medical malpractice cause of action, "the time period or periods limiting filing of the action are not tolled for a period of more than *seven years* on account of minority . . . ." How could section 15-3-545 limit a minor's claim to six years from an occurrence when subsection (D) tolls "the time period or periods" limiting filing of the action for up to *seven* years on account of minority? Respondent's argument would render subsection (D) meaningless. The seven year tolling provision for minority would never have any effect if a minor's claim was barred six years after the date of the occurrence. As our Supreme Court has stated, "This Court will not construe a statute in a way which leads to an absurd result or renders

it meaningless." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). Accordingly, the legislature could not have intended this statute to be construed as Respondent argues.

Respondent's argument would not only render subsection (D) a nullity, it would require a re-writing of subsection (A). Respondent argues subsection (A) sets alternate limits either of three years from treatment, unless tolled by (D) or three years from discovery, unless tolled by (D), but in no event is the time limit longer than six years from the date of occurrence. Respondent's argument overlooks that Section 15-3-545(A) does not end with "not to exceed six years from the date of occurrence;" it ends with "or as tolled by this section." Thus, "as tolled by this section" is intended to be an exception to, and tolling of, the period or periods limiting filing of actions, as provided for under Subsection (D) *See Poole v. Saxon Mills*, 192 S.C. 339, 6 S.E.2d 761, 764 (1940) ("[P]hrases and sentences are to be construed according to the rules of grammar . . . ."). Syntactical canons dictate this sentence be given its ordinary meaning in accordance with the rules of grammar. Therefore, this sentence must be understood as tolling both the statute of limitations and the statue of repose in accordance with "this section."

Respondent argues subsection (D) does not toll a minor's claim because a statue of repose is "is not tolled for any reason.[8]" This is clearly contradicted by the very statute at issue, which expressly provides for tolling for minority, as well as South Carolina case law. In *O'Tuel v. Villani*, 318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995) (reversed on other grounds), a minor child was injured at his birth. The Court affirmed the decision barring the parent's claim under the statute of repose, but allowed the minor's suit to go forward. *Id.* at 26, 455 S.E.2d at 700.[9]

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[8] Interestingly, *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the case Respondent cites to for this proposition, indicates that Section 15-3-545(D) *would* toll the statute of repose for minority in a claim for medical malpractice. *Langley* held Section 15-5-30 would not toll "the ultimate repose provision contained in § 15-3-545" for a defendant's continual absence from South Carolina. *Id.* In the Opinion, the Court underlined the language found in subsection (A) which stated, "or as tolled by this section." *Id.* at 402, 438 S.E.2d at 243. The court then held, "Subsection D of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion of the phrase '<u>or as tolled by this section</u>' in subsection (A) clearly indicates that the <u>only</u> tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D). *Id.* Importantly, the question the district court certified to the South Carolina Supreme Court asked whether the *statute of repose* was tolled by the defendant's absence from the state. Therefore, the South Carolina Supreme Court's discussion of tolling subsection (A) by subsection (D) must have been referring to tolling of repose in addition to the statute of limitation.

[9] A second additional sustaining ground was asserted but not considered by this Court because the trial court did not rule upon the arguments. *Id.* at 31, 455 S.E.2d at 702 n. 1. This footnote refusing to consider additional sustaining grounds not ruled upon by the trial court was explicitly overruled in *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 423, 526 S.E.2d 716, 725 (2000).

The prior version of section 15-3-545 then applicable stated suit must be commenced "not more than six years from the date of occurrence." *Id.* at 27, 455 S.E.2d at 700. However, the Court held the minority tolling statute "clearly applies to a medical malpractice claim . . . ." *Id.* at 32, 455 S.E.2d at 703. Thus, South Carolina Courts held the six year statute of repose was subject to tolling on account of minority through the operation of Section 15-3-40, even before Section 15-3-545 explicitly referenced minority tolling. Subsection (D) begins by stating "Notwithstanding the provisions of Section 15-3-40. . ." As noted in *O'Tuel*, this indicates that the Legislature intended for medical malpractice claims to be subject to tolling, but that it "limit[ed] the period of tolling which would otherwise be applicable, and demonstrates that, while the legislature was concerned with increased exposure to claims created by the tolling statute, the legislature was not willing to completely abandon the protection given to minors by the tolling statute." *Id.* at 31, 455 S.E.2d at 702. Thus, although tolling for minority was limited to seven years, the legislature did not intend to modify the operation of the tolling provision from the mechanics of Section 15-3-40. If the Legislature had so intended, it would have written the statute in a manner that indicated such intent.

Further, subsection (D) explains that for minors, "the time period *or periods*" are not tolled for more than seven years. (Emphasis added.) The language, "or periods" makes clear the Legislature's intent that *both* the statute of limitations *and* the statute of repose be tolled for a period of not more than seven years. The statute of repose is a time period which limits filing of actions. If the Legislature intended otherwise, it would have said "statute of limitations;" it certainly would not have said "the time period *or periods*."[10] Accordingly, the statute tolls both the statute of limitations and the statute of repose.

Illinois has a statutory scheme comparable to South Carolina. In *DeLuna v. Burciaga*, 223 Ill. 2d 49, 857 N.E.2d 229 (2006), four plaintiffs filed a legal malpractice action for mishandling of a medical malpractice cause of action. Defendants argued suit was barred by the

[10] Moreover, Respondent cannot argue that "or periods" means that it applies to multiple or all potential actions a minor could bring. Subsection (D) discusses a person entitled to bring "an action," in the singular. Moreover, it discusses the treatment giving rise to "the cause of action." Thus, "or periods" refers to those period which apply to a singular action, and not multiple actions a minor might have. It also explains that the time period or periods limiting filing of "the action" are tolled for seven years.

applicable statute of repose. *Id.* at 53, 857 N.E.2d at 232. The applicable statute provided a two year statute of limitation under subsection (b), a six year statute of repose under subsection (c), and tolling of "the period of limitations" for those entitled to bring the action who are under the age of majority under (e). *Id.*

The trial court held in error that the tolling provision in (e) did not toll the statute of repose found in (c). *Id.* at 56, 857 N.E.2d at 234. Upon review, the Illinois Supreme Court noted, "the crux of the parties' disagreement . . . concerns the construction of the phrase 'period of limitations,' as employed in subsection (e)." *Id.* at 60-61, 857 N.E.2d at 236-237. After acknowledging the difference between a statute of limitations and repose, the court noted that both were included under "article XIII," which is entitled "Limitations." *Id.* Therefore, the court explained "'period of limitations,' as used in subsection (e) of section 13-214.3, could refer to a 'statute of limitations,' a 'statute of repose,' or [both]." *Id.* Accordingly, the court found the "period of limitations" to be ambiguous.

The court in *DeLuna* noted the legislature placed the tolling provision "in a separate subsection *following*" the subsections containing the statute of limitations and repose. *Id.* at 63, 857 N.E.2d at 238. The court explained that if the legislature intended minority to toll only the statute of limitations, it would have placed the "tolling provision "in, or immediately following" the provision that contained the statute of limitations and therefore, since it instead placed the tolling provision after (b) and (c), it is reasonable to infer that tolling was meant to apply to both. *Id.* at 64, 857 N.E.2d at 238. Applying this rule to the four plaintiffs, the court found the action was timely filed for one plaintiff who filed within six years after she reached majority and for another who filed before she reached majority. *Id.* However, because the action was filed more than six years after the other two attained majority, their claims would be barred if no other exception applied.[11]

[11] For a medical malpractice case under Illinois law, see *Bruso by Bruso v. Alexian Bros. Hosp.*, 178 Ill. 2d 445, 687 N.E.2d 1014 (1997). In this birth injury malpractice suit, plaintiff's alleged she was disabled from birth, and therefore received the benefit the longer statute of repose tolling provisions for disability, and not just the provisions which tolled the statute of repose for minority. *Id.* at 449-450, 687 N.E.2d at 1015. The Illinois Supreme Court agreed, noting this was indicated by the language of the statute as well as the placement of the subsections. *Id.* at 453, 687 N.E.2d at 1017.

Unlike in Illinois, Section 15-3-545 is clearly written and not ambiguous. 735 ILCS 5/13-214.3 stated that "the period of *limitations*" did not run until majority is attained. Our statute noted "the time period or periods limiting filing of the action" are not tolled for more than seven years for minority. Stating "period or periods" makes clear that the Legislature intended for both to be tolled. The plurality of "periods," especially by noting "period or periods" evinces the legislative intent that all applicable limitations be tolled for up to seven years for minority. Thus, this court need not analyze S.C. Code Ann. § 15-3-545 as an ambiguous statute, as the plain language of the statute makes clear that the tolling provision found in subsection (D) applies to toll the statute of repose and the statute of limitations for seven years.[12]

Nevertheless, even if 15-3-545 were deemed ambiguous, a positional analysis of the statute, as undertaken by the court in *DeLuna*, makes clear that Subsection (D) was intended to toll both the statute of limitations and the statute of repose for seven years. The location of subsection (D) within the structure of Section 15-3-545 indicates the Legislature's intent that the statute of repose and statute of limitations be tolled for seven years. Subsection (D) followed the subsection which contained the statute of repose and the statute of limitations. Had the South Carolina legislature intended for minority to be an exception to the statute of limitations only, it would have placed the minority tolling provision after the statute of limitations, rather than after both the statute of limitations and the statute of repose. Moreover, the legislature certainly would not have set forth both the statute of limitations *and* the statute of repose, then followed up with the language, "or as tolled by this section." Similar to Illinois, the applicable statute of repose in this case is found under Chapter 3, titled, "Limitation of Civil Actions." Thus, it may be inferred that when the Legislature speaks of "time period or periods limiting filing of the action," it is addressing *both* statutes of limitations and statutes of repose, as both are listed in Chapter 3.

The cases cited by Respondent to argue minority does not toll the statute of repose speak volumes on the merits of their argument. First, *Budler v. GMC*, 689 N.W.2d 847 (Neb. 2004) is inapposite because the relevant statutory language is widely different from South Carolina's.

[12] Had the statute been written as Respondent wishes, there would have been ambiguity. How could minority toll a statute for seven years when the statute of repose would not allow a claim to exist six years after its occurrence?

Although plaintiffs in *Budler* claimed minority tolled the statute of repose until twenty-one years of age, the applicable statute stated, "Notwithstanding . . . any other statutory provision to the contrary," a product liability action must be commenced within ten years from the product's sale. *Id.* at 851. Accordingly, the court held Nebraska's legislature made clear its intent to override the infancy tolling provision provided for in a different statute. *Id.*

There has been no explicit overriding of the minority tolling provision by our legislature. There has only been a reduction in minority tolling from a year beyond the end of minority to seven years on account of minority. This is explicitly provided for by the Section 15-3-545. Accordingly, *Budler* is inapposite.

Respondent next cites *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509 (Tenn. 2005). Again, the applicable statutory language is distinguishable from South Carolina's. The applicable Tennessee statute of repose stated, "in no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred . . . ." *Id.* at 516. The court held "the medical malpractice statute of repose imposes an absolute three-year bar on such actions, with the exception of the exemptions in the statute itself, and that "the medical malpractice statute of repose contains no express exception for minors." *Id.* at 516.

Unlike Tennessee, South Carolina's medical malpractice statute contains an express tolling provision for minors which is found in subsection (D). Accordingly, Tennessee's statutory regime is inapposite. Moreover, the appellate court in *Crespo v. McCullough* recognized that the *Calaway* decision was such a drastic change in well-established precedent that it would be unconstitutional to apply the decision retroactively and would deprive plaintiff's due process equal protection rights. *Crespo v. McCullough*, 2008 Tenn. App. LEXIS 673 * 2 (Tenn. Ct. App. Oct. 29, 2008).

Finally, the case of *Albrecht v. GMC*, 648 N.W.2d 87 (Iowa 2002) is also inapposite. *Albrecht* was a products liability suit which involved the applicability of the Iowa statute of repose found at Iowa Code section 614.1(2A) and minority tolling pursuant to Iowa Code section 614.8(2). *Id.* at 89. Those statutes bear no resemblance to the South Carolina statutes at issue. The court distinguished the express exception to section 614.8(2) found for medical malpractice

actions brought by minors, found at section 614.1(9)(b), from section 614.1(2A), which addressed products liability claims. *Id.* at 95.[13]

South Carolina's statutory regime for minority tolling of medical negligence cases and repose differs materially from Iowa's scheme for minority tolling and repose of products liability cases, seen in *Albrecht*. Unlike Iowa's statutes of limitations and repose for products liability, South Carolina's statutes of limitation and repose limiting claims for medical malpractice explicitly include a special minority tolling provision. *See* S.C. Code Ann. § 15-3-545(D).

Section 15-3-545(A) ends by stating the time period for filing an action is "not to exceed six years from date of occurrence, or as tolled by this section." Iowa's statutes do not contain similar language. Moreover, Section 15-3-545(D) explained where a person is under the age of majority at the date of treatment, omission, or operation" then the "time period *or periods limiting*" filing of "*the action*," are not tolled for more than seven years on account of minority. Again, this language differs from Iowa's statutes and is significant for reasons discussed *supra*.

Finally, it makes more sense to review Iowa cases discerning its own exception to the statute of repose for medical malpractice actions brought by minors. In reference to the statute of limitations and statute of repose, Iowa Court of Appeals noted:

> The only exception to these limitations is found in subsection (9)(b) which makes clear that if a medical malpractice action is brought on behalf of a minor who was under the age of eight when the alleged negligent act occurred, the suit must be filed no later than the minor's tenth birthday or within two years after the date the claimant first became aware of the injury, but in no event no later than six years after the date of the alleged negligent act, whichever is later.
>
> *Seamans v. MacMillan* 2002 Iowa App. LEXIS 1040, 3, 2002 WL 31307257 (Iowa Ct. App. Oct. 16, 2002)

Accordingly, the court in *Seamans* acknowledged that both the statute of limitations and the statute of repose were tolled by subsection (9)(b) for minors who brought suit arising out of

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[13] Appellant takes this opportunity to point out an artifice and obvious inconsistency in the Iowa court's analysis. The court in *Albrecht* noted that section 614.8(2) extends "the times limited for actions" and then argues that use of the word "actions" indicates referral to the statute of limitations only, and not the statute of repose, which the court asserted bars "claims" not "actions.". *Id.* at 93. However, the same court, in its summary of a statute of repose, stated, "The second statute of repose . . . at issue here . . . provides in relevant part . . . Those **[actions]** . . . against the manufacturer . . . of a product . . .shall not be commenced more than fifteen years after the product was first purchased...." *Albrecht's* own use of the word "actions" in connection with a statute of repose refutes the court's argument that "actions" is used only in reference to statutes of limitations. Moreover, the court in *Albrecht* blatantly ignored a legislative effort to limit minority tolling under 614.8(2) and to impose alternative statutes of repose for medical malpractice actions brought by minors in its determination that 614.8(2) did not apply to 614.1(2A).

medical malpractice. Respondent's citation to an Iowa case interpreting Iowa's products liability statute of repose instead of an Iowa case interpreting Iowa's medical negligence statute of repose is perhaps telling of the strength of their position, especially where the Iowa medical negligence statute more closely approximates the statute at issue in this case than does the Iowa products liability statute.

B. Tolling the Statute of Repose For Seven Years Does Not Affect Any Substantive Rights Legislatively Granted to Respondent

Respondent argues that extending the statute of repose to allow claims brought beyond a child's seventh birthday would deprive Respondent their "right to be free from liability *after a certain period of time*." This argument is non-sequitur. So long as there is *any* period of time after which Respondent is free from liability, then Respondent has been afforded this right. Respondent has cited no authority or law which stands for the proposition that only fixed periods of time seven years or shorter are permitted, and claims brought after the fixed period of seven years would deprive healthcare providers of a substantive right. Seven years is a fixed period of time, as is ten years, or thirteen years. There is no magic in the number seven, except that the General Assembly decided to toll the statute of limitation and statute of repose for medical negligence cases for up to seven years based on minority.

Respondent also notes that the legislature "attempted to balance the rights of injured persons against the exposure of health care providers to liability for endless periods of time . . . ." *Kush v. Lloyd*, 616 So.2d 415, 421-422 (Fla. 1992). This case citation, however, provides no indication as to *what* period of time to provide, for adults or minors. It merely stands for the proposition that one should not be exposed to liability for *"endless periods of time."*

Sections 15-3-545 and 15-78-110, applied in a manner set forth by Appellant, provides health care providers with a time period after which they are free from liability. For minors, it is not the truncated period argued for by Respondent, a time period which would contravene the clear language of Section 15-3-545. For minors, it is a maximum of thirteen years, seven years

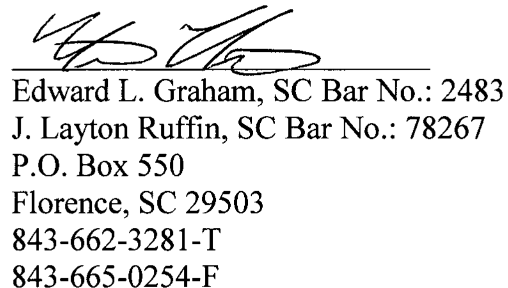
tolling plus six years statute of repose. The intent of the legislature and the balance struck is best indicated by the statutory language itself. If the legislature intended the balance to be as Respondent purports, they would have written the statutes in a manner consistent with Respondent's positions.

Respondent now argues not for a balance, but that the scales be tipped in their favor, and that a minor's claim be inappropriately curtailed through a strained reading of Section 15-3-545. In light of the unambiguous statutory language, it is Respondent's position that would upset the economic balance struck by the General Assembly.

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.

GRAHAM LAW FIRM, P.A.



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May 29, 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

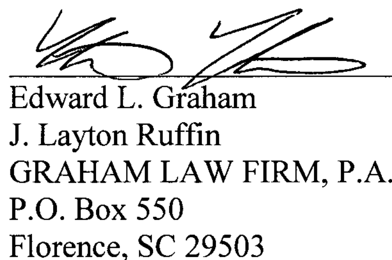
Tanya Bennett, as Next Friend of
Mykelvion T., a minor — Appellant,

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 Reply 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 Reply Brief upon counsel for the Respondent by depositing them in the United States Mail, first-class postage prepaid, addressed to:

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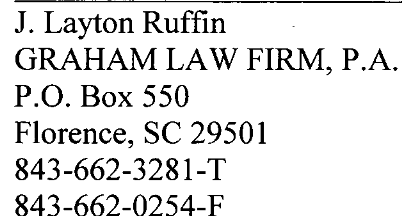

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