

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Circuit Court

The Honorable S. Jackson Kimball, Circuit Court Judge

Case No.: 2009-CP-46-5195

Angela Patton, as Next Friend of
Alexia L., a minor,

Appellant,

v.

Dr. Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P. A.
and Amisub of South Carolina, d/b/a Piedmont Medical Center,

Respondents.

RECORD ON APPEAL

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SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Angela Patton, as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Dr. Gregory A. Miller and Rock Hill
Gynecological & Obstetrical Associates,
P.A.,

Defendants.

C/A NO.: 2009-CP-46-05195

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

Angela Patton, as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Amisub of South Carolina, Inc. d/b/a,
Piedmont Medical Center,

Defendant.

C/A NO.: 2012-CP-46-1214

ORDER CONSOLIDATING CASES

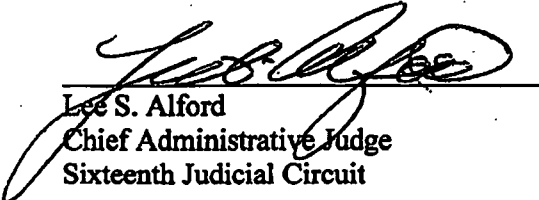
This matter comes before the Court by Motion of the Plaintiff, with consent of the Defendants in both matters, C/A No. 2009-CP-46-05195 and C/A No. 2012-CP-46-1214, seeking an Order to Consolidate the above-referenced matters into one, under the initial C/A number: 2009-CP-46-05195. The basis for consolidation is that both of the lawsuits arise from the same or similar events, facts and/or circumstances and share the same witnesses. Specifically, the above-referenced cases set forth allegations of medical negligence by Defendants Dr. Gregory A. Miller and Piedmont Medical Center employees in managing

Plaintiff's labor and subsequent delivery of her daughter, Alexia Lumpkin, resulting in severe and permanent injury to the child.

A copy of the proposed Amended Pleading consolidating the two previously filed Complaints is attached hereto.

IT IS HEREBY ORDERED, with the consent of all parties, that the above-referenced lawsuits are hereby consolidated for all pretrial and trial purposes and will proceed under the caption *Angela Patton, as Next Friend of Alexia Lumpkin, a minor v. Dr. Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina d/b/a Piedmont Medical Center*, Case No.: 2009-CP-46-05195.

IT IS SO ORDERED.



Lee S. Alford
Chief Administrative Judge
Sixteenth Judicial Circuit

July 10, 2012
York, S.C.

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STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina,
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

Case No. 2009-CP-46-05195

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YORK COUNTY, SC

This matter came before me on July 18, 2013, upon motions for partial summary judgment filed by Defendants. Plaintiff was represented by Edward L. Graham. Defendant Amisub of South Carolina, d/b/a Piedmont Medical Center ("Amisub") was represented by William U. Gunn, and Defendants Dr. Gregory A. Miller ("Dr. Miller") and Rock Hill Gynecological & Obstetrical Associates, P.A., ("RHOB") were represented by Ashby W. Davis.

BACKGROUND

The action is one for medical malpractice. Plaintiff originally filed suit against Defendants Dr. Miller and RHOB, seeking damages arising out of her delivery which took place on April 5, 2007 at Piedmont Medical Center. Subsequent to the filing of that suit, Plaintiff filed a Notice of Intent to File Suit against Amisub arising out of the same delivery. The action against Amisub, known as Civil Action No. 2012-CP-1214, after the Summons and Complaint was filed, was consolidated into the present action by Consent Order of the parties.

In her suit, the minor Plaintiff sues through her next friend Angela Patton, who is her mother.

In their motions, Defendants seek an order granting partial summary judgment as to all claims made by Plaintiff for medical expenses incurred to date, and any future medical expenses to be incurred prior to the time the Plaintiff reaches the age of majority. The motion is made pursuant to Rule 56 of the SCRCF, and upon the grounds that there is no genuine issue as to any material fact, and that movants are entitled to judgment as a matter of law. In support of the motions, Defendants



rely upon the entire record in the case to date.

SUMMARY JUDGMENT STANDARD

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 judgment as a matter of law. Rule 56(c), SCRPC; *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

SUIT ON BEHALF OF THE MINOR PLAINTIFF ONLY

In this action, the only Plaintiff is "Angela Patton, as Next Friend of Alexia Lumpkin, a minor." A "Next Friend" is one "who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit, and is not appointed as guardian." *Black's Law Dictionary*, "next friend." (9th ed. 2009); *see, also*, Rule 17c, SCRPC.

The United States Supreme Court has held: "The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." *Morgan v. Potter*, 157 U.S. 195, 198 (1895) (emphasis supplied). *See, also, Lowe v. City of Shelton*, 851 A.2d 1183, 1189 (Conn. App. 2004). Thus, the present action is not brought in the name of the parent or parents of the minor, but purely for the benefit of the minor Plaintiff, who is alleged to have been injured by the negligence of Defendants.

Plaintiff's parents have not commenced a separate action for medical or other related expenses incurred as a result of Plaintiff's injuries. At the hearing on the motions, Plaintiff's counsel did not dispute that the action is brought by the next friend on behalf of the minor Plaintiff. Counsel also acknowledged that he was asking the court to abrogate the common law rule and to modify existing law in South Carolina to conform to the holdings of more recent cases in other jurisdictions in order to permit recovery of medical expenses by the minor Plaintiff in her own right.

MINOR PLAINTIFF'S CLAIM FOR MEDICAL EXPENSES

Under South Carolina law, a parent is obligated to furnish his or her minor child with "necessary medical service and hospitalization." *Hughey v. Ausborn*, 249 S.C. 470, 476, 154 S.E.2d 839, 841 (1967); *Trident Reg. Med. Ctr. v. Evans*, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App.

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1995). Based on this principle of law, South Carolina law recognizes that any right of action to recover a minor's medical expenses belongs to a minor's parents, and not to the minor. *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907).

In *Tucker*, the Court held that the admission of testimony concerning medical bills paid by the father of a minor was erroneous because the suit was brought on "... behalf of the infant alone, and the father suing merely as guardian ad litem for injuries to his infant child cannot recover for expenses incurred for which the father himself is personally liable." 76 S.C. at ____, 57 S.E. at 627.

Later holdings applying South Carolina law are consistent with *Tucker*. See, e.g., *Kapuschinsky v. U.S.*, 259 F.Supp. 1, *7 (D.S.C. 1966), citing *Tucker* ("The parent, *not the child*, can recover for treatment had, or necessary, and expenses incidental thereto *until majority*.... This court cannot, does not assess for expenses for which the father is liable. . . ."); *Hughey*, 249 S.C. at 475, 154 S.E.2d at 841, citing *Tucker*; *Bridges v. Joanna Cotton Mill*, 214 S.C. 319, 52 S.E.2d 406 (1949) ("[T]he amount paid for medical care and treatment by the parent is not an element of damage and the parent has a cause of action for the recovery of the medical expenses which he has incurred for the care and treatment of such minor."); *Trident Reg. Med. Ctr.*, *supra*, 317 S.C. at 352, 454 S.E.2d at 346 (holding that both parents were liable for a minor child's medical expenses because, under the common law, "a parent is responsible for the support of his or her minor child.").

As was the case in *Tucker*, Plaintiff seeks recovery of medical bills incurred for the care and treatment of Plaintiff, a minor. Also similar to *Tucker*, Plaintiff's parent has sued merely as Plaintiff's next friend, and not also in the parent's individual capacity as well. Thus, pursuant to *Tucker*, *Hughey*, and *Kapuschinsky*, Plaintiff's cause of action on behalf of the minor Plaintiff for damages representing her medical expenses must fail because her medical expenses incurred until she reaches the age of majority are her parents' obligation. Neither of her parents have sued individually to recover such expenses, and the minor Plaintiff may not maintain a cause of action for those expenses in her own right.

PARENTS' CLAIM FOR MEDICAL EXPENSES

This is a medical malpractice action. S.C. Ann. § 15-3-545(A) (1976, as amended) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment, or within three years from when the same is discovered or reasonably should have been discovered. Further, § 15-3-545(A) provides a statute of repose on medical negligence actions of six years from the date of the occurrence. Ms. Patton delivered Plaintiff on

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April 5, 2007, and Defendants' conduct during the delivery forms the basis of the alleged medical negligence in this action.

Based on these facts, Defendants have also sought a ruling by this court that the parents may not now maintain an action for Plaintiff's medical expenses already incurred, and for expenses incurred for the duration of Plaintiff's minority. They assert that the statute of limitations and statute of repose cited herein bar any such claims by the parents.

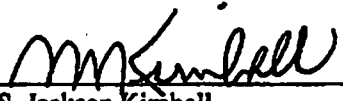
I find and conclude that such a ruling cannot be made in this case, as the parents are not parties to this action. Defendants assert, and have argued in support of their motions, and Plaintiff's counsel acknowledges, that this action is brought by the minor Plaintiff only, through her next friend.

CONCLUSION

Based on the discussion herein, the Motions for Partial Summary Judgment of Defendants are hereby granted, and Plaintiff's claims for her own medical or injury-related expenses incurred to date, and to be incurred during her minority, are dismissed with prejudice. No ruling is made on the question of any action by Plaintiff's parents for medical expenses, past or future.

AND IT IS SO ORDERED.

July 24, 2013


S. Jackson Kimball
Special Circuit Court Judge
York County

#4

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina,
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND AND
FOR LEAVE TO AMEND COMPLAINT

Case No. 2009CP4605195

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YORK COUNTY, SC

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SC Court of Appeals

This matter came before me on October 17, 2013, upon motions of the Plaintiff to alter or amend my prior order filed August 2, 2013, or in the alternative for leave to amend her Complaint. The two Motions have been separately stated and filed simultaneously. Representing Plaintiff was J. Layton Ruffin. Representing Defendants were Ashby W. Davis for Defendants Miller and Rock Hill Gynecological & Obstetrical Associates, and William U. Gunn for Defendant Amisub.

BACKGROUND

In this action, Angela Patton, as Next Friend of Alexia Lumpkin, a minor ("Alexia"), who is her daughter, seeks damages against Gregory A. Miller, M.D., his practice group, Rock Hill Gynecological & Obstetrical Associates, P.A., and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, all arising out of the delivery of Alexia which took place on April 5, 2007. By Order dated July 24, 2013, and filed August 2, 2013, I granted partial summary judgment to all Defendants, as discussed in the Order. The Order held that the minor Plaintiff may not prove or recover medical expenses or other expenses incurred during her minority in this case. Specifically, any claim for medical expenses on behalf of the minor, during her minority, would need to be made by Plaintiff's parents as the parties responsible for the minor's expenses under current South Carolina law.

In the present motions, Plaintiff asks essentially that the Court reverse the ruling of the prior Order, and permit the minor Plaintiff to assert a claim for medical and other expenses incurred on her behalf during her minority. Alternatively, Plaintiff asks the Court for leave to

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amend the Complaint to add her mother, Angela Patton, as an individual party plaintiff, in order that the mother can make a claim for the medical expenses, as now provided by current law.

MOTION TO ALTER OR AMEND JUDGMENT

A. Implied waiver – equitable assignment.

Plaintiff moves to alter or amend the prior Order granting partial summary judgment pursuant to Rule 59(e), SCRCF. She contends that the Court failed to address her argument that failure of the mother to assert a claim for medical expenses of the minor constitutes an implied waiver or assignment of the claim to the minor Plaintiff. She argues that by virtue of this implied waiver, the minor Plaintiff may claim such expenses in her own right in this action.

In reviewing the record in this case, I find and conclude that nothing in the record, directly or by inference, supports any claim of an implied waiver, or equitable assignment, of the claim to the minor Plaintiff within or without the limitations period applicable to the parents' claim. I further conclude that even if there was evidence of an implied waiver or equitable assignment, South Carolina does not recognize currently such a claim or doctrine. South Carolina cases are uniform in holding that the parent has the right to recover for medical and other expenses incurred by the minor child, and that the parent must exercise that right within the applicable limitations period. *See Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907); *Hughey v. Ausborn*, 249 S.C. 470, 476, 154 S.E.2d 839, 841 (1967); *Bridges v. Joanna Cotton Mill*, 214 S.C. 319, 52 S.E.2d 406 (1949); *Trident Reg. Med. Ctr. v. Evans*, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct.App. 1995).

B. Statute of limitations.

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

Even if the issue was properly presented, I find and conclude that there was no requirement that Defendants plead the statute of limitations. The only claims asserted by Plaintiff were in her representative capacity for the minor Plaintiff, and a claim by the minor for medical expenses was



among those claims. If recovery of medical expenses by the minor was permitted under applicable law, the statute of limitations would not be a defense, as the minor Plaintiff's claim was made within the three-year limitation period. Defendants filed answers denying any liability or damages claimed by the minor Plaintiff, which necessarily included the minor's claim for expenses. That issue became a question of law for the Court in ruling on Defendants' motions for partial summary judgment, and such ruling was unrelated to the statute of limitations. As there was no Plaintiff against whom the statute of limitations had run, Defendants had no reason or obligation to plead the statute of limitations.

The issue of a time-barred claim became relevant only when such claim was sought to be asserted by the Plaintiff's mother. Only then would Defendants have been required to plead the statute of limitations as an affirmative defense to defeat the parental claim.

In keeping with the general denials in their answers, Defendants filed their motions for partial summary judgment in May, 2013. The nature and substance of the Defendants' motions are not related to any affirmative defense required to be set forth in their answers. Further, there is no set time period within which Defendants were required to file motions for summary judgment. Under Rule 56(b), SCRPC, "[a] party against whom a claim . . . is asserted . . . may, at any time, move . . . for a summary judgment in his favor as to all or any part thereof." Accordingly, I find and conclude that Defendants timely filed their motions for partial summary judgment.

Upon reviewing the record presented, and considering the memoranda and arguments of counsel, I find no other matter presented that was not addressed expressly or by clear implication in the prior order. I further find no basis for reconsideration or amendment of the court's ruling in the prior order.

MOTION FOR TO AMEND COMPLAINT

Subsequent to the Order of July 24, 2013, Plaintiff moved to amend her Complaint, pursuant to Rule 15(c), SCRPC, to add Angela Patton as an additional Plaintiff in her individual capacity. At the hearing on the motion, Plaintiff withdrew the motion as it pertained to Defendant Amisub, but pursued the motion as to Defendants Gregory A. Miller, M.D., and Rock Hill Gynecological & Obstetrical Associates, P.A.

I conclude that Rule 15(c) does not apply to the case at hand. Rule 15(c) only allows "[a]n amendment changing the party *against whom a claim is asserted* . . .", which are Defendants herein, not the plaintiff. (Emphasis added). Additionally, this Rule only addresses the changing, not the addition, of a party. Because Plaintiff is attempting to add a plaintiff, rather than change a defendant, Rule 15(c) is inapplicable. Thus, Plaintiff is not entitled to the amendment sought.

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Even if Rule 15(c) allowed the addition of another plaintiff, Plaintiff would still not be entitled to the relief, because amendment has not been sought within the statute of limitations. Rule 15(c) states that the amendment "... relates back [only if the amendment is made] within the period provided by law for commencing the action"

S.C. Code Ann. § 15-3-545(A) (1976, as amended) provides that action for medical malpractice must be commenced within three years from the date of the alleged negligent treatment, or within three years from when the same is discovered or reasonably should have been discovered. § 15-3-545(A) also provides a statute of repose on medical negligence actions of six years from the date of occurrence. In this case, Plaintiff has alleged that Defendants' negligent conduct occurred at the time of her delivery on April 5, 2007. Plaintiff did not file her Motion for Leave to Amend until August 15, 2013, over six years later. Thus, since Plaintiff failed to seek leave to amend her Complaint within the statute of limitations, or within the statute of repose, her motion must be denied.

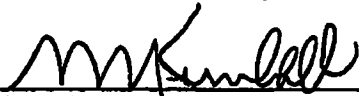
ORDER

Based on the discussion herein, it is ordered as follows:

1. Plaintiff's Motion to Alter or Amend Judgment is denied.
2. Plaintiff's Motion for Leave to Amend Complaint is denied.

AND IT IS SO ORDERED.

November 4, 2013


S. Jackson Kimball
Special Circuit Court Judge
York County

#4

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Dr. Gregory A. Miller and Rock Hill
Gynecological & Obstetrical Associates,
P.A.,

Defendants.

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.:

COMPLAINT
(Jury Trial Requested)

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DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

COMES NOW the Plaintiff complaining of Defendants above named and would show
unto the Court as follows:

1. Plaintiff Angela Patton is a citizen and resident of York County, South Carolina, and brings her action as Next Friend of her daughter, Alexia Lumpkin, (hereinafter, "Alexia ")
2. Defendant Gregory A. Miller (hereinafter, "Dr. Miller") is, upon information and belief, a citizen and resident of York County, South Carolina, who was, upon information and belief, at all times relevant to her action, a physician duly licensed to practice medicine within the State of South Carolina.
3. Defendant Dr. Miller held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.
4. Defendant Dr. Miller maintained an office in York County, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Dr. Miller was a shareholder, employee and/or agent of a professional association known as "Rock Hill Gynecological & Obstetrical Associates, P.A." (hereinafter, "Rock Hill Gynecology") and had an ownership, employment and/or contractual relationship with Defendant Rock Hill Gynecology.

6. Defendant Rock Hill Gynecology, and its predecessor(s) and/or successor(s), if any, was at all times relevant hereto, a professional association, which held itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical and gynecological care.

7. Defendant Rock Hill Gynecology is named as a party to this action by virtue of the acts and/or omissions of its shareholder(s), employee(s) and agent(s), within the course and scope of that respective ownership, employment and agency, for which it is liable to Plaintiff under the doctrine respondeat superior.

8. Prior to April 5, 2007, Angela Patton, mother of Alexia Lumpkin, became pregnant and submitted herself to the care and attention of Dr. Miller of Rock Hill Gynecological & Obstetrical Associates, P.A., for pre-natal and obstetrical care.

9. On April 5, 2007, Defendant Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton (hereinafter, "Angela") at the Piedmont Medical Center (hereinafter, "Hospital") in York County, S.C.

10. Alexia Lumpkin was a healthy baby prior to April 5, 2007, when her mother, Angela Patton, was admitted to the Hospital.

11. Dr. Miller took charge of the health care of Angela and her baby upon Angela's admittance to the Hospital.

12. The Defendant, Dr. Miller owed Angela Patton and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

13. Defendant Rock Hill Gynecology owed Plaintiff and her daughter a duty of providing obstetrical, nursing and support care consistent with generally accepted standards of obstetrical offices under similar situations.

14. Defendants breached their duties of care to Angela Patton and her daughter Alexia, and were negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Alexia sustained severe bodily injuries, losses and damages.

15. Defendant Dr. Miller was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of

shoulder dystocia;

- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia ;
 - (f) in using improper delivery technique;
 - (g) in using improper and excessive force, traction and/or torsion;
 - (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
 - (i) in mismanagement of labor and delivery;
 - (j) in mismanagement of shoulder dystocia;
 - (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;
 - (l) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
 - (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
 - (n) such other failures and refusals as may be identified during discovery and the trial of her case.
16. Defendant Rock Hill Gynecology, its predecessor(s) and/or successor(s), if any, and the shareholder(s), agent(s), and employee(s) thereof, were negligent,

reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its shareholder(s), employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin.
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;
- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;

- (g) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in using improper delivery technique;
- (i) in using improper and excessive force, traction and/or torsion;
- (j) in allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;
- (n) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (o) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (p) such other failures and refusals as may be identified during discovery and trial of this case.

17. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, and Rock Hill Gynecological & Obstetrical Associates, P.A., Alexia

Lumpkin has sustained certain injuries, losses and damages, stated with particularity as follows:

- (a) Direct violent and traumatic injuries to various bodily shareholders of Alexia Lumpkin, including, but not limited to, permanent traumatic injury to the nerves which innervate her left shoulder and arm, commonly known as Erb's palsy;
- (b) Adverse effects on various other bodily shareholders and/or functions, such as gait, balance and skeletal and muscular symmetry;
- (c) Past and future medical expenses;
- (d) Life care management plan expense;
- (e) Permanent impairments and disabilities;
- (f) Disfigurement;
- (g) Physical pain and suffering;
- (h) Mental, emotional and psychological harm;
- (i) Adverse effect on the future employability, earnings and earning capacity;
- (j) Loss of enjoyment of life; and
- (k) such further injuries, losses and damages as may be revealed through discovery and trial of her case.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages

against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of her action; and for such other and further relief as her Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
Mary H. Watters
Post Office Box 550
Florence, S.C. 29503
Attorney for Plaintiff

November 20, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Angela Patton, as Next Friend of)
Alexia Lumpkin, a minor,)
)
Plaintiff,)

C.A. No.: 2009-CP-46-5195

v.)

Gregory A. Miller, MD,)
Rock Hill Gynecological &)
Obstetrical Associates, P.A.)
)
Defendants.)

ANSWER OF DEFENDANTS
DR. GREGORY A. MILLER, MD
AND ROCK HILL GYNECOLOGICAL
& OBSTRETRICAL ASSOCIATES, P.A.

TO: EDWARD L. GRAHAM & MARY WATTERS, ATTORNEYS FOR PLAINTIFF:

NOW COME Defendants, answering the Complaint of the Plaintiff as follows:

1. These Defendants admit the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the Complaint.

2. Answering Paragraph 8 of the Complaint, these Defendants admit that Angela Patton was provided prenatal and obstetrical care by Dr. Miller and Rock Hill Gynecological and Obstetrical Associates, P.A. (RHGOA).

3. Answering Paragraph 9 of the Complaint, these Defendants admit that Dr. Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton at the Piedmont Medical Center in York County, South Carolina.

4. Answering Paragraph 10 of the Complaint, these Defendants admit, upon information and belief, that Alexia Lumpkin, as far as could be reasonably determined, was healthy at the time that her mother was admitted to the hospital on April 5, 2007.

5. Answering Paragraph 11 of the Complaint, these Defendants admit that Dr. Miller was primarily responsible for providing obstetrical care to Angela Patton upon admittance to the hospital on April 5, 2007.

6. Answering Paragraph 12 of the Complaint, these Defendants admit that Dr. Miller owed his patients a duty to provide reasonable obstetrical care consistent with the standard of care of obstetricians in the same or similar circumstances. Further, these Defendants admit that Dr. Miller provided reasonable and appropriate care to his patients both during the prenatal timeframe as well as on the day of delivery.

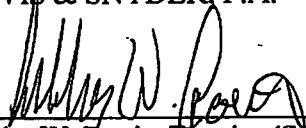
7. Answering Paragraph 13 of the Complaint, these Defendants admit that RHGOA, through its agents, servants and/or employees, owed the Plaintiff and her daughter a duty to provide reasonable and appropriate obstetrical care generally accepted under same or similar circumstances. Further, these Defendants admit that the agents, servants, and employees of RHGOA provided reasonable and appropriate care to the Plaintiff and her daughter both during the prenatal timeframe as well as the day of delivery.

8. These Defendants deny each and every allegation contained in Paragraphs 14, 15, 16, and 17 of the Complaint and demand strict proof thereof.

9. Any allegation contained in the Complaint which has not been specifically admitted is hereby denied and strict proof demanded thereof.

WHEREFORE, having fully answered the Complaint of the Plaintiff, these Defendants request that the action be dismissed and for any other relief deemed just and appropriate by this Honorable Court.

DAVIS & SNYDER, P.A.

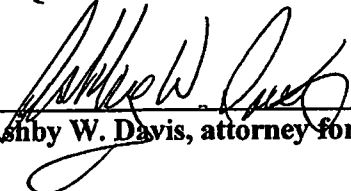

Ashby W. Davis, Esquire (SC Bar #1560)
Collie W. Lehn, Jr., Esquire (SC Bar #76582)
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500

ATTORNEYS FOR DEFENDANTS

Greenville, South Carolina

January 11, 2010.

**THESE DEFENDANTS RESPECTFULLY
REQUEST TRIAL BY JURY.**


Ashby W. Davis, attorney for Defendants

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

v.

Amisub of South Carolina, Inc. d/b/a
Piedmont Medical Center,

Defendant.

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.:

2012 CP 46 1214

COMPLAINT

DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

2012 APR -2 PM 2:42

FILED - RECEIVED

COMES NOW the Plaintiff complaining of Defendant above named and would show unto the Court as follows:

1. Plaintiff Angela Patton is a citizen and resident of York County, South Carolina, and brings her action as Next Friend of her daughter, Alexia Lumpkin, (hereinafter, "Alexia ")

2. Defendant Gregory A. Miller (hereinafter, "Dr. Miller") is, upon information and belief, a citizen and resident of York County, South Carolina, who was, upon information and belief, at all times relevant to her action, a physician duly licensed to practice medicine within the State of South Carolina.

3. Defendant Dr. Miller held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.

4. Defendant Dr. Miller maintained an office in York County, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Dr. Miller was a shareholder, employee and/or agent of a professional association known as "Rock Hill Gynecological & Obstetrical Associates, P.A." (hereinafter, "Rock Hill Gynecology") and had an ownership, employment and/or contractual relationship with Defendant Rock Hill Gynecology.

6. Defendant Rock Hill Gynecology, and its predecessor(s) and/or successor(s), if any, was at all times relevant hereto, a professional association, which held itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical and gynecological care.

7. Defendant Rock Hill Gynecology is named as a party to this action by virtue of the acts and/or omissions of its shareholder(s), employee(s) and agent(s), within the course and scope of that respective ownership, employment and agency, for which it is liable to Plaintiff under the doctrine respondeat superior.

8. Defendant Amisub of South Carolina d/b/a Piedmont Medical Center (hereinafter "Piedmont Medical Center") is named as a party to this action by virtue of its institutional acts and omissions as well as the acts and/or omissions of its employee(s), within the course and scope of that respective employment, for which it is liable to Plaintiff under the doctrine of respondeat superior.

9. Prior to April 5, 2007, Angela Patton, mother of Alexia Lumpkin, became pregnant and submitted herself to the care and attention of Dr. Miller of Rock Hill Gynecological & Obstetrical Associates, P.A., for pre-natal and obstetrical care.

10. On April 5, 2007, Defendant Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton (hereinafter, "Angela") at the Piedmont Medical Center (hereinafter, "Hospital") in York County, S.C.

11. Alexia Lumpkin was a healthy baby prior to April 5, 2007, when her mother, Angela Patton, was admitted to the Hospital.

12. Dr. Miller took charge of the health care of Angela and her baby upon Angela's admittance to the Hospital.

13. The Defendant, Dr. Miller owed Angela Patton and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

14. Defendant Rock Hill Gynecology owed Plaintiff and her daughter a duty of providing obstetrical, nursing and support care consistent with generally accepted standards of obstetrical offices under similar situations.

15. Defendant Piedmont Medical Center and its employees owed Plaintiff and her daughter a duty of providing hospital and nursing care and attention consistent with generally accepted standards of hospitals and nurses under similar situations.

16. Defendants breached their duties of care to Angela Patton and her daughter Alexia and were negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Alexia sustained severe bodily injuries, losses and damages.

17. Defendant Dr. Miller was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, traction and/or torsion;
- (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (i) in mismanagement of labor and delivery;
- (j) in mismanagement of shoulder dystocia;
- (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;

- (l) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
 - (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
 - (n) such other failures and refusals as may be identified during discovery and the trial of her case.
18. Defendant Rock Hill Gynecology, its predecessor(s) and/or successor(s), if any, and the shareholder(s), agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:
- (a) in failing and refusing to require its shareholder(s), employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin.
 - (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
 - (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia

complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in using improper delivery technique;
- (i) in using improper and excessive force, traction and/or torsion;
- (j) in allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;
- (n) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's

health;

- (o) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (p) such other failures and refusals as may be identified during discovery and trial of this case.

19. Defendant Piedmont Medical Center, its predecessor(s) and/or successor(s), if any, and the agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its physicians, employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about labor and delivery generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin;
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to require its medical staff physicians to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in acquiescing in its medical staff physicians' use of improper delivery technique;
- (i) in acquiescing in its medical staff physicians' use of improper and excessive force, traction and/or torsion and in the nurse's use of fundal pressure;
- (j) in failing to properly train its nurses to avoid use fundal pressure in the presence of shoulder dystocia;
- (k) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of labor and delivery;
- (l) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of shoulder dystocia;

- (m) improper use of fundal pressure by the labor and delivery nurse;
- (n) in acquiescing in its medical staff's failing and refusing to perform delivery by C-Section;
- (o) in acquiescing in its medical staff's and labor and delivery nursing staff's failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health; and in the nurses' failing to so communicate;
- (p) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (q) such other failures and refusals as may be identified during discovery and trial of this case.

20. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Piedmont Medical Center, Alexia Lumpkin has sustained certain injuries, losses and damages, stated with particularity as follows:

- (a) Direct violent and traumatic injuries to various bodily shareholders of Alexia Lumpkin, including, but not limited to, permanent traumatic injury to the nerves which innervate her left shoulder and arm, commonly known as Erb's palsy;
- (b) Adverse effects on various other bodily shareholders and/or functions, such as gait, balance and skeletal and muscular symmetry;

- (c) Past and future medical expenses;
- (d) Life care management plan expense;
- (e) Permanent impairments and disabilities;
- (f) Disfigurement;
- (g) Physical pain and suffering;
- (h) Mental, emotional and psychological harm;
- (i) Adverse effect on the future employability, earnings and earning capacity;
- (j) Loss of enjoyment of life; and
- (k) Such further injuries, losses and damages as may be revealed through discovery and trial of her case.

21. Plaintiffs have previously complied with all the statutory requirements for commencing action. A copy of an Affidavit of Yvonne Gomez-Carrion, M.D. is attached hereto in support of the liability allegations made herein.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of her action; and for such other and further relief as her Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham

Mary H. Watters

Post Office Box 550

Florence, S.C. 29503

Attorneys for Plaintiff

March 28, 2012

STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED RECEIVED
2012 APR 24 AM 9:13
DAVID HAMILTON
CLERK OF COURT
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,
Plaintiff,

ANSWER OF AMISUB OF SOUTH
CAROLINA, INC., d/b/a PIEDMONT
MEDICAL CENTER

vs.

Amisub of South Carolina, Inc., d/b/a
Piedmont Medical Center,
Defendant.

C. A. No. 2012-CP-46-1214

The Defendant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center,
answering the Complaint of Plaintiff, alleges:

FIRST DEFENSE

1. It denies each and every allegation of the Complaint not hereinafter admitted, qualified, or explained.
2. Paragraphs 1 through 4 of the Complaint are admitted.
3. Paragraphs 5 through 7 of the Complaint do not pertain to this Defendant, therefore the allegations are neither admitted nor denied.
4. In answer to paragraph 8, it is admitted that this Defendant is named as a party herein. All remaining allegations of paragraph 8 are denied.
5. Paragraphs 9 and 10 of the Complaint are admitted.
6. Paragraph 11 of the Complaint is admitted on information and belief.
7. Paragraph 12 of the Complaint is admitted.

8. Paragraphs 13 and 14 of the Complaint do not pertain to this Defendant, therefore the allegations are neither admitted nor denied.

9. Paragraph 15 alleges conclusions of law, therefore this Defendant neither admits nor denies same, but craves reference to rulings and instructions of the Court.

10. Paragraphs 16 through 20 of the Complaint are denied.

11. In answer to paragraph 21, it is admitted that Plaintiff has complied with statutory requirements to commence an action, but it is denied Plaintiffs have a valid cause of action. It is also admitted a copy of the affidavit of the physician referred to is attached, but the substance thereof is denied.

SECOND DEFENSE

1. Each and every allegation of the First Defense is realleged as if set forth fully herein, except for so much thereof as may be inconsistent with the allegations of this defense.

2. §15-32-220 of the Code of Laws of South Carolina (1976 as amended) is pled as a partial bar to this action, with regard to the limitations therein on the recovery of non-economic damages.

WHEREFORE, having fully answered, Defendant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center prays that the Complaint be dismissed and that it be awarded the costs of this action.

HOLCOMBE BOMAR, P.A.

By: 

William U. Gunn
P.O. Drawer 1897
Spartanburg, SC 29304
(864) 594-5300
bgunn@holcombebomar.com

Attorney for Defendant Amisub of
South Carolina, Inc., d/b/a Piedmont
Medical Center

Spartanburg, SC

April 20, 2012

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

v.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

AMENDED COMPLAINT

FILED-RECEIVED
2012 NOV 29 AM 10:59
DAVID HAMILTON
C.C.H.P. & G.S.
YORK COUNTY, SC

COMES NOW the Plaintiff complaining of Defendants above named and would show unto the Court as follows:

1. Plaintiff Angela Patton is a citizen and resident of York County, South Carolina, and brings her action as Next Friend of her daughter, Alexia Lumpkin, (hereinafter, "Alexia ")

2. Defendant Gregory A. Miller (hereinafter, "Dr. Miller") is, upon information and belief, a citizen and resident of York County, South Carolina, who was, upon information and belief, at all times relevant to her action, a physician duly licensed to practice medicine within the State of South Carolina.

3. Defendant Dr. Miller held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.

4. Defendant Dr. Miller maintained an office in York County, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Dr. Miller was a shareholder, employee and/or agent of a professional association known as "Rock Hill Gynecological & Obstetrical Associates, P.A." (hereinafter, "Rock Hill Gynecology") and had an ownership, employment and/or contractual relationship with Defendant Rock Hill Gynecology.

6. Defendant Rock Hill Gynecology, and its predecessor(s) and/or successor(s), if any, was at all times relevant hereto, a professional association, which held itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical and gynecological care.

7. Defendant Rock Hill Gynecology is named as a party to this action by virtue of the acts and/or omissions of its shareholder(s), employee(s) and agent(s), within the course and scope of that respective ownership, employment and agency, for which it is liable to Plaintiff under the doctrine respondeat superior.

8. Defendant Amisub of South Carolina d/b/a Piedmont Medical Center (hereinafter "Piedmont Medical Center") is named as a party to this action by virtue of its institutional acts and omissions as well as the acts and/or omissions of its employee(s), within the course and scope of that respective employment, for which it is liable to Plaintiff under the doctrine of respondeat superior.

9. Prior to April 5, 2007, Angela Patton, mother of Alexia Lumpkin, became pregnant and submitted herself to the care and attention of Dr. Miller of Rock Hill Gynecological & Obstetrical Associates, P.A., for pre-natal and obstetrical care.

10. On April 5, 2007, Defendant Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton (hereinafter, "Angela") at the Piedmont Medical Center (hereinafter, "Hospital") in York County, S.C.

11. Alexia Lumpkin was a healthy baby prior to April 5, 2007, when her mother, Angela Patton, was admitted to the Hospital.

12. Dr. Miller took charge of the health care of Angela and her baby upon Angela's admittance to the Hospital.

13. The Defendant, Dr. Miller owed Angela Patton and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

14. Defendant Rock Hill Gynecology owed Plaintiff and her daughter a duty of providing obstetrical, nursing and support care consistent with generally accepted standards of obstetrical offices under similar situations.

15. Defendant Piedmont Medical Center and its employees owed Plaintiff and her daughter a duty of providing hospital and nursing care and attention consistent with generally accepted standards of hospitals and nurses under similar situations.

16. Defendants breached their duties of care to Angela Patton and her daughter Alexia and were negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Alexia sustained severe bodily injuries, losses and damages.

17. Defendant Dr. Miller was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, traction and/or torsion;
- (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (i) in mismanagement of labor and delivery;
- (j) in mismanagement of shoulder dystocia;
- (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;

- (l) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and
- (n) such other failures and refusals as may be identified during discovery and the trial of her case.

18. Defendant Rock Hill Gynecology, its predecessor(s) and/or successor(s), if any, and the shareholder(s), agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its shareholder(s), employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin.
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia

complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in using improper delivery technique;
- (i) in using improper and excessive force, traction and/or torsion;
- (j) in allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;
- (n) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's

health;

- (o) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (p) such other failures and refusals as may be identified during discovery and trial of this case.

19. Defendant Piedmont Medical Center, its predecessor(s) and/or successor(s), if any, and the agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its physicians, employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about labor and delivery generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin;
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to require its medical staff physicians to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in acquiescing in its medical staff physicians' use of improper delivery technique;
- (i) in acquiescing in its medical staff physicians' use of improper and excessive force, traction and/or torsion and in the nurse's use of fundal pressure;
- (j) in failing to properly train its nurses to avoid use fundal pressure in the presence of shoulder dystocia;
- (k) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of labor and delivery;
- (l) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of shoulder dystocia;

- (m) improper use of fundal pressure by the labor and delivery nurse;
 - (n) in acquiescing in its medical staff's failing and refusing to perform delivery by C-Section;
 - (o) in acquiescing in its medical staff's and labor and delivery nursing staff's failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health; and in the nurses' failing to so communicate;
 - (p) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
 - (q) such other failures and refusals as may be identified during discovery and trial of this case.
20. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Piedmont Medical Center, Alexia Lumpkin has sustained certain injuries, losses and damages, stated with particularity as follows:
- (a) Direct violent and traumatic injuries to various bodily shareholders of Alexia Lumpkin, including, but not limited to, permanent traumatic injury to the nerves which innervate her left shoulder and arm, commonly known as Erb's palsy;
 - (b) Adverse effects on various other bodily shareholders and/or functions, such as gait, balance and skeletal and muscular symmetry;

- (c) Past and future medical expenses;
- (d) Life care management plan expense;
- (e) Permanent impairments and disabilities;
- (f) Disfigurement;
- (g) Physical pain and suffering;
- (h) Mental, emotional and psychological harm;
- (i) Adverse effect on the future employability, earnings and earning capacity;
- (j) Loss of enjoyment of life; and
- (k) Such further injuries, losses and damages as may be revealed through discovery and trial of her case.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of her action; and for such other and further relief as her Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward L. Graham

Mary H. Watters

Post Office Box 550

Florence, S.C. 29503

Attorneys for Plaintiff

July 3, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Angela Patton, as Next Friend of)
Alexia Lumpkin, a minor,)
)
Plaintiff,)

C.A. No.: 2009-CP-46-5195

v.)

Gregory A. Miller, MD,)
Rock Hill Gynecological &)
Obstetrical Associates, P.A. and)
Amisub of South Carolina, Inc.)
d/b/a Piedmont Medical Center,)
)
Defendants.)

**MOTION FOR PARTIAL SUMMARY
JUDGMENT OF DEFENDANTS
GREGORY A. MILLER, M.D. AND
ROCK HILL GYNECOLOGICAL &
OBSTETRICAL ASSOCIATES, P.A.**

**TO: PLAINTIFF AND HER ATTORNEYS EDWARD L. GRAHAM AND MARY H.
WATERS:**

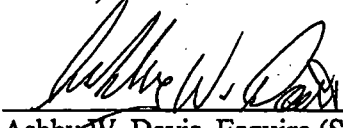
You will please take notice that the Defendants Gregory A. Miller, M.D. and Rock Hill Gynecological & Obstetrical Associates, P.A., through their attorneys, will move, on the tenth day after service hereof, or as soon thereafter as counsel can be heard, before the presiding judge of the Court of Common Pleas for York County, for an order granting partial summary judgment in favor of Dr. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A. The motion will be made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and on the grounds that there is no genuine issue as to any material fact, and that these Defendants are entitled to partial summary judgment as a matter of law. These Defendants will seek an order granting partial summary judgment as to all claims made by the Plaintiff for any medical expenses incurred to date, and for any future medical expenses to be incurred prior to the time Plaintiff reaches the age of majority, and for any other claim of damages asserted by the Plaintiff which are the legal responsibility of

Plaintiff's parents. This motion will be based upon the pleadings, depositions, Answers to Interrogatories, Affidavits, if any, and anything else contained in the record in this case.

This motion will be made on the following grounds:

1. No claim for damages in this case has been asserted by either parent and the applicable Statute of Limitations has expired; and
2. All medical expenses incurred for the care and treatment of Plaintiff Alexia Lumpkin to the present date and through the date she reaches majority are the legal obligation and responsibility of her parents; and
3. There is no genuine issue as to any material fact with regard to the issues raised in this motion and therefore these Defendants are entitled to partial summary judgment on these issues as a matter of law.

DAVIS, SNYDER & WILLIFORD, P.A.


Ashby W. Davis, Esquire (SC Bar #1560)
David L. Williford, Esquire (SC Bar #73129)
5 Hawthorne Park Court
Greenville, SC 29615
(864) 335-3500

**ATTORNEYS FOR
GREGORY A. MILLER, M.D. AND
GYNECOLOGICAL & OBSTETRICAL
ASSOCIATES, P.A.**

May 22, 2013

Greenville, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Gregory A. Miller, MD,
Rock Hill Gynecological &
Obstetrical Associates, P.A. and
Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

MOTION FOR PARTIAL SUMMARY
JUDGMENT OF DEFENDANT
AMISUB OF SOUTH CAROLINA, INC.
D/B/A PIEDMONT MEDICAL CENTER

C. A. No. 2009-CP-46-5195

TO: PLAINTIFF AND HER ATTORNEYS EDWARD L. GRAHAM and MARY H. WATTERS of Graham Law Firm, P.A.

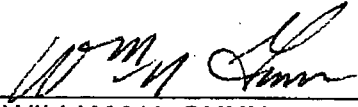
YOU WILL PLEASE TAKE NOTICE that Defendant Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Amisub"), through its undersigned attorney, will move, on the 10th day after service hereof, or as soon thereafter as counsel can be heard, before the Presiding Judge of the Court of Common Pleas for York County, for an Order granting partial summary judgment in favor of Amisub. The said Motion will be made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and on the grounds there is no genuine issue as to any material fact, and that this Defendant is entitled to partial judgment as a matter of law. More particularly, Amisub will seek an Order granting partial summary judgment as to all claims made by Plaintiff for any medical expenses incurred to date, and for any future medical expenses to be incurred prior to the time Plaintiff reaches the age of majority, and for any other claim of damages asserted by Plaintiff which are the legal

responsibility of Plaintiff's parents. The Motion will be based upon the pleadings, depositions, Answers to Interrogatories, affidavits, if any, and the entire record herein.

More particularly, the Motion will be made on the following grounds:

- (1) All medical expenses incurred for the care and treatment of Plaintiff Alexia Lumpkin to the present date and through the date she reaches majority are the legal obligation and responsibility of her parents;
- (2) No claim for damages in this matter has been asserted by either parent and the applicable statute of limitations thereon has expired; and
- (3) Because of the foregoing, there is no genuine issue as to any material fact with regard to the issues raised in the Motion and Amisub is entitled to partial summary judgment as a matter of law.

HOLCOMBE BOMAR, P.A.

By: 

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Spartanburg, SC

April 25, 2013

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Gregory A. Miller, MD,
Rock Hill Gynecological &
Obstetrical Associates, P.A. and
Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT OF DEFENDANT
AMISUB OF SOUTH CAROLINA, INC.
D/B/A PIEDMONT MEDICAL CENTER

C. A. No. 2009-CP-46-5195

Defendant Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Amisub") submits the following Memorandum in Support of its Motion for Partial Summary Judgment.

BACKGROUND

On April 5, 2007, Angela Patton gave birth to Alexia Lumpkin at Amisub. Dr. Miller attended the delivery. On September 23, 2011, Alexia Lumpkin ("Plaintiff"), through her "next friend" Angela Patton, filed a medical malpractice action against Amisub.¹ Plaintiff alleges, among other things, that Dr. Miller and Amisub used improper delivery techniques that resulted in Plaintiff's brachial plexus injury and development of Erb's palsy.

As part of her claim, Plaintiff seeks recovery of her past and future medical

¹ Plaintiff filed a Notice of Intent to File Suit ("NOI") against Amisub under C/A No. 2011-CP-4603614 on September 23, 2011. Plaintiff filed its Summons and Complaint against Amisub under C/A No. 2012-CP-1214 on April 17, 2012. Plaintiff's action against Amisub was consolidated into Plaintiff's action against Dr. Miller and his practice group, Rock Hill Gynecological & Obstetrical Associates, PA ("RHOB"), by Consent Order dated July 12, 2012.

expenses which she alleges have been incurred as a result of Defendants' negligence. See July 12, 2012 Complaint, ¶ 20(c).

However, Plaintiff's parents, and not Plaintiff, hold any right of action to recover Plaintiff's medical expenses until she reaches the age of majority. Plaintiff's parents have failed to commence such an action, and the applicable statutes of repose and limitation now bar such a claim. As such, Amisub is entitled to summary judgment on Plaintiff's claims for past medical expenses and future medical expenses which might reasonably be incurred until she reaches the age of majority.

ARGUMENT

I. "Next Friend" solely asserts a claim on behalf of the minor Plaintiff, and not Plaintiff's parents.

"Next friend" is one "who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian." Black's Law Dictionary, "next friend," (9th ed. 2009) (emphasis added).

The United States Supreme Court has held: "The next friend, by whom the suit is brought on behalf of the infant, is **neither technically nor substantially the party**, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." Morgan v. Potter, 157 U.S. 195, 198 (1895) (emphasis added). See, also, Lowe v. City of Shelton, 851 A.2d 1183, 1189 (Conn.App. 2004) ("The Plaintiff's parents brought this action solely in a representative capacity as next friends. As we have noted, they did not raise any claims of their own. Accordingly, the party in interest in the underlying action and the aggrieved party to this appeal is the plaintiff, not his parents.").

Plaintiff filed and captioned her action as "Angela Patton as Next Friend of Alexia



Lumpkin, a minor." See July 21, 2009 NOI; November 25, 2009 Complaint; September 21, 2011 NOI; July 12, 2012 Complaint. The captioning evidences that Angela Patton has not initiated any individual claims in this action. Plaintiff's pleadings confirm that Ms. Patton is not a party to the action. Paragraph 20 of her July 12, 2012 Complaint complains only of injuries, losses, and damages allegedly sustained by Plaintiff. Ms. Patton has not attempted to set out claims for her own alleged injuries, losses, and damages. Accordingly, Plaintiff is the real party in interest and is the only plaintiff in this action.

II. Claims for Medical Expenses Belong to Plaintiff's Parents, and Not Plaintiff.

Under South Carolina law, a parent is obligated to furnish his or her minor child with "necessary medical service and hospitalization." Hughey v. Ausborn, 249 S.C. 470, 476, 154 S.E.2d 839, 841 (1967). As a result of this obligation, South Carolina law recognizes that any right of action to recover a minor's medical expenses belongs to a minor's parent(s), and not to the minor. Tucker v. Buffalo Cotton Mills, 76 S.C. 539, 57 S.E. 626 (1907).

In Tucker, minor plaintiff, through his father as his guardian ad litem, brought a cause of action against the minor's employer arising out of a workplace injury. Id., 154 S.E.2d at 626-27. The jury awarded the minor \$1,000.00, and the defendant appealed. Id., 154 S.E.2d at 626. One ground for appeal was that the trial court erroneously allowed testimony regarding the amount of medical bills paid by the minor's father. Id., 154 S.E.2d at 627. The Court held that the admission of said testimony was erroneous because the suit was brought on "behalf of the infant alone, and the father suing merely as guardian ad litem for injuries to his infant child **cannot recover** for expenses incurred for which the

father himself is personally liable." Id. (internal citations omitted) (emphasis added). The Court ordered a new trial unless Plaintiff remitted the judgment amount attributable to medical expenses. Id.

Later holdings applying South Carolina law are consistent with Tucker. See, e.g., Kapuschinsky v. U.S., 259 F.Supp. 1, *7 (D.S.C. 1966), citing Tucker ("The parent, **not the child**, can recover for treatment had, or necessary, and expenses incidental thereto **until majority**....This court cannot, does not assess for expenses for which the father is liable....") (emphasis added); Hughey, 249 S.C. at 475, 154 S.E.2d at 841, citing Tucker; Bridges v. Joanna Cotton Mill, 214 S.C. 319, 52 S.E.2d 406 (1949) ("[T]he amount paid for medical care and treatment by the parent is **not an element of damage** and the parent has a cause of action for the recovery of the medical expenses which he has incurred for the care and treatment of such minor.") (emphasis added); Trident Reg. Med. Ctr. v. Evans, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct.App. 1995) (holding that both parents were liable for a minor child's medical expenses because, under the common law, "a parent is responsible for the support of his or her minor child.").

As stated above, Plaintiff sued for compensatory damages allegedly caused by the medical negligence of Defendants. See July 12, 2012 Complaint, ¶ 20(c). Plaintiff has not produced medical bills or an itemized statement of damages. Defense Counsel has received a May 17, 2013 Medicaid lien letter which states that Medicaid has been charged \$172,791.86 and has paid \$61,715.12 for medical services provided to Plaintiff.

As was the case in Tucker, Plaintiff seeks recovery of medical bills incurred for the care and treatment of Plaintiff, a minor. Also similar to Tucker, Plaintiff's parent has sued



merely as Plaintiff's next friend, and not individually. Pursuant to Tucker, Hughey, and Kapuschinsky, Plaintiff's cause of action for damages representing her medical expenses must fail because her medical expenses incurred until she reaches the age of majority are her parents' obligation, neither of her parents have sued individually to recover said expenses, and Plaintiff may not maintain a cause of action for said expenses of her own right.

III. Any Action by Plaintiff's Parents for the Recovery of Medical Expenses is Barred by the Statute of Limitations.

This is a medical malpractice action. Section 15-3-545(A) of the South Carolina Code of Laws provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when the same is discovered or reasonably ought to have been discovered. Further, Section 15-3-545(A) provides a statute of repose on medical negligence actions of six years from the date of the occurrence.

Ms. Patton delivered Plaintiff on April 5, 2007, and Defendants' conduct during the delivery forms the basis of alleged medical negligence in this action. Because the alleged "occurrence" in this case occurred more than six years ago, Plaintiff's parents' claim for Plaintiff's past and future medical expenses now is barred by Section 15-3-545(A)'s six-year statute of repose.

Even if the statute of repose did not bar Plaintiff's parents' claims for her medical expenses, her claims still would be barred by Section 15-3-545(A)'s three-year limitations period. Plaintiff's own filings in this case demonstrate that her parents discovered or should have discovered their claim for her medical expenses nearly four years ago. Within her July

21, 2009 NOI and November 25, 2009 Complaint filed against Dr. Miller and RHOB in this action, Plaintiff sought recovery of "past and future medical expenses." See July 21, 2009 NOI, ¶ 17(c); November 25, 2009 Complaint, ¶ 17(c).

Because Plaintiff brought this action through her mother as next friend and because Plaintiff's parents have been intimately involved with this action,² Plaintiff's parents discovered or should have discovered their cause of action for recovery of Plaintiff's medical expenses until she reaches the age of majority more than three years ago. Yet, Plaintiff's parents did not initiate an action against Amisub to recover said expenses within the three-year statute of limitations (or the six-year statute of repose). In fact, Plaintiff's parents have not filed an action against Amisub to seek recovery of Plaintiff's medical expenses, whether or not timely.

As such, Plaintiff's parents' claims for Plaintiff's medical expenses incurred until she reaches the age of majority are barred by the applicable statutes of repose and limitation, and Plaintiff's claims in this action for recovery of said medical expenses must be dismissed.

CONCLUSION

For the reasons set forth above, Defendant Amisub respectfully requests that this Court grant it summary judgment on Plaintiff's claims for Plaintiff's past medical expenses and future medical expenses which reasonably might be incurred during her minority.

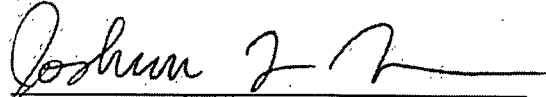
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² Angela Patton was deposed in this matter on February 22, 2011, and Plaintiff's father, Antwon Lumpkin, was deposed in this matter on May 6, 2011.



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Spartanburg, SC

July 15th, 2013

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

v.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

**MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

FILED-RECEIVED
2013 JUL 22 AM 9:15
DANIEL HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

The Defendants, Dr. Gregory A. Miller, (hereinafter, "Dr. Miller"), Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter "P.A."), and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center (hereinafter "Amisub") have moved for partial summary judgment on procedural grounds to preclude the recovery of pre-majority tort-related medical expenses incurred and to be incurred by the minor child tort victim. For the reasons hereafter stated, the Motions should be denied.

Introduction

Under common law, only the father could recover for a minor's tort-related medical expenses and loss of services.^[1] Many state and federal courts have abrogated or modified this aspect of the common law, while others adhere rigidly to its sometimes needlessly harsh results. This Memorandum will examine the historical perspective for the doctrine in South Carolina, then discuss financial responsibility for medical care in the modern era, current legal trends, exceptions to the common law rule, and how the doctrine should be applied to the case at bar.

History of the Necessaries Doctrine

Denying a child the right to recover for her own tort-related medical expenses arises as a corollary to the English common law known as the necessities doctrine. In South Carolina, a history of the necessities doctrine begins with the doctrine of coverture.^[ii] Coverture originated in English common law during the medieval period.^[iii] Pursuant to this doctrine, upon marriage, the husband and wife become one person, and “the very being of legal existence of the woman is suspended during the marriage.”^[iv] The wife becomes “feme-covert” or under the protection of her husband, “her *baron* or *lord*.”^[v] An unmarried woman remained “feme sole” and retained the right to contract in her own name. Accordingly, a married woman had no legal responsibility for her actions, except in instances of adultery, incest, homicide, or sorcery.^[vi]

South Carolina adhered to these principles throughout the nineteenth century, and to some extent, into the twentieth as well.^[vii] The Court in *Gwynn v. Gwynn* explained that limiting a married woman’s ability to contract protected her “from her own improvidence and weakness in yielding to her own generous and self-sacrificing impulses.”^[viii] In *Gwynn*, the Court addressed whether a woman could enter a partnership with her husband to “combine their labor and skill.”^[ix] The Court made clear she could not, “for the simple reason that her labor and skill already belonged to her husband.”^[x]

Several interesting legal principles have sprung forth from the doctrine of coverture. These include the impossibility of marital rape (one cannot rape himself), general interspousal tort immunity, marital privilege (one could not be forced to testify against himself), and of course, the necessities doctrine.

South Carolina utilized the necessities doctrine as a means to protect wives and children from abandonment. It provided that a husband became liable for debts incurred by his spouse and

children for their necessities.^[xi] The doctrine was required because of a wife's inability to contract for goods in her own name due to coverture, and the voidability of minors' contracts.^[xii] In theory, the rule gives "creditors incentive to provide necessary goods and services" to a wife and children to help "to ensure that a married woman could meet her basic needs and those of her family."^[xiii]

Because a creditor could historically collect debts incurred by a child only from the child's father, common law developed that only the father should have the right to sue for recovery of medical expenses caused by a tortfeasor. In *Tucker v. Buffalo Cotton Mills* an eight-year-old employed in a cotton mill lost a finger when ordered by his superior to work near "rapidly revolving gearing."^[xiv] The Court held it was error to admit testimony regarding the amount of medical bills paid because a child "cannot recover for expenses incurred for which the father himself is personally liable."^[xv] Next, in *Bridges v. Joanna Cotton Mill*, a child through his guardian ad litem sought one hundred dollars for injuries sustained from an attractive nuisance, "to wit, a horse drawn mowing machine . . . which was attractive to all small boys . . ."^[xvi] The Court noted that a physician's bill for services rendered to a child "vested in the parent and not in the guardian ad litem . . ."^[xvii]

In *Hughey v. Ausborn*, a father sought recovery for medical expenses incurred by him for his child and wife as well as loss of consortium of his wife.^[xviii] The Court held a father may recover the amount paid for medical care, but the cost of medical care is not an element of damage in the child's cause of action.^[xix] The following statement by the Court expresses the historical justification for the necessities doctrine and its limited tort recovery corollary:

A father and husband is bound to furnish the necessities of life to his minor child and wife and among such are necessary medical service and hospitalization. The father's and husband's right to recover from a tort-feasor for such items of expense is based on his obligation to furnish them.^[xx]

The constraints of coverture were loosened over time in South Carolina, and ultimately abolished.^[xxi] Now women can contract, and children can be held responsible for their own medical expenses.^[xxii] Ironically, and confusingly, requiring children to pay their own medical expenses is also referred to as the “necessaries” doctrine, representing an exception to the common law rule that contracts by minors are voidable.^[xxiii]

The Necessaries Doctrine Need Not Preclude a Child's Right to Recover Medical Expenses

The necessities doctrine has evolved, and now remains primarily as a creditor's remedy.^[xxiv] To avoid constitutional challenge, South Carolina applies the rule reciprocally to both husband and wife.^[xxv] Similar to the rationale initially expressed for the necessities doctrine, the South Carolina Court of Appeals more recently stated:

By allowing a creditor to look to both spouses for repayment, the necessities doctrine encourages health care facilities and other suppliers to provide products and services necessary for the well-being of a family, and recognizes that marriage involves shared wealth, rights, and duties.^[xxvi]

In modern times, those duties regarding medical care are shared with third parties outside of the family. Financial responsibility for most medical care today is spread among private health insurance or government programs, though certainly fraught with the burden of deductibles, copayments, uncovered products and services, various limitations on coverage, and limited choice of providers. Those who cannot afford the increasingly expensive cost of medical care may be forced to forego recommended care and treatment. The uninsured may pay out of pocket, but just as likely will forego treatment or get a “free ride.”

When today's child needs medical treatment, financial responsibility options likely include some combination of: private insurance; Medicare; Medicaid; a gratuitous provider; the

parent(s); and/or the child. The provider may be unpaid, in whole or in part, or the child may have to forego needed care because of parental inability to pay.

That parents have the legal and moral responsibility to provide for their children's necessities is beyond doubt, but that maxim does not necessarily result in provision of needed treatment nor actual payment of bills by the parents, particularly where an unexpected tort leads to catastrophic injury and extraordinary financial burden. The simple truth is that children may be forced to rely on taxpayer assistance, forego needed treatment, and/or required to pay medical bills out of their own resources, including a tort recovery. In this case, the child Alexia is covered by Medicaid, which has paid vast sums on her behalf for medical care. There is no evidence before the Court that her parents have paid any sum for her medical care.

Because parents are in fact no longer solely responsible for payment of their children's medical expenses, and have not made any such payment in the case at bar, what equity lies in giving them the sole right to recover such damages in tort? There remains no more reason to vest parents with the exclusive right to recover their child's tort-related medical expenses than to vest a husband with the exclusive right to recover his wife's tort-related medical expenses. Both are anachronisms from a long, long time ago. As stated in *Shaffer-Doan v. Commonwealth of Pennsylvania*, "[T]he prohibition against a minor receiving compensation for medical expenses during minority is a common law anachronism."^[xxvii]

The necessities doctrine need not, and should not be interpreted to preclude minors from suing to recover their own tort-related medical expenses. That limited tort recovery corollary to the necessities doctrine serves primarily as an undeserved liability shield for tortfeasors and adversely affects the deserving interests of minor children, family, taxpayers and health care creditors. The only protection tortfeasors deserve in this regard is avoidance of duplicative

liability. That can easily be done by decreeing that minors or parents can recover for a minor's tort-related medical expenses, as long as there is only one recovery.

The limited tort recovery rule harms the very interests the necessities doctrine was created to protect: child, family and creditors. If parental funds for medical care are lacking in the first instance, the child may be forced to forego needed medical care, further harming the child. If medical care is obtained from private insurance or the government, their subrogation and lien interests may be impaired.^[xiviii] If treatment is obtained on credit, to be paid out of the child's tort recovery, barring the child's recovery of medical expenses means that the health care creditors will seek payment not from the child's recovery for tort-related medical expenses, but from other tort damages, such as permanent injury, reduced earning capacity, physical pain, mental suffering or loss of enjoyment of life. In each such instance the tortfeasor escapes full responsibility for the harm he caused, the child is undercompensated, and the tort recovery may be insufficient to pay the health care creditors' bills.

By preventing a minor child from obtaining compensation for medical expenses from a responsible third party tortfeasor, injustice results whenever a parental claim for such medical expenses is time-barred by a shorter statute of limitation than exists for the child's tort claim. That a shorter parental statute of limitations was not met should be immaterial, whenever the minor child's claim was timely asserted. The reasons which justify tolling for minors' tort claims apply just as forcefully with respect to medical expenses as to other elements of the recoverable tort damages.

Our collateral source rule in South Carolina aspires for tortfeasors to be held fully accountable for all of the natural and probable consequences of the tort. That includes the reasonable value of needed medical care, whether or not the victim can otherwise afford such

care, and whether or not the tort victim pays for that care.^[xxix] The same reasons which justify our collateral source rule justify allowing minors to recover their tort-related medical expenses.

Various Approaches to Abrogate or Modify the Common Law Rule

The common law rule of disallowing direct tort recovery of tort-related medical expenses by a minor has been abrogated or materially curtailed by a striking majority of courts that have reconsidered the doctrine in the modern era. The modern trend of jurisprudence is to allow either child or parent to recover as tort damages the medical expenses incurred during minority, as long as there is only one recovery.

Courts have used varied rationales to avoid the harshness of the common law rule, including express or implied assignment; waiver of (or estoppel from asserting) the parental claim by filing the child's action; payment by the child; potential liability of the child; remedial legislation; and judicially imposed change to judicially created common law. Some courts acknowledge their departure from the common law, and others claim to follow common law exceptions to the doctrine. Whatever the rationale, it is the outcome that is important, i.e., tortfeasors should be held fully accountable for all the harms caused by their tort, and should not be allowed to curtail their liability based on whether a parent filed a timely independent action. State courts that have abrogated, modified, or otherwise provide an exception to the common law rule include Alabama, Alaska, Arizona, California, Connecticut, Delaware, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, New Mexico, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin^[xxx] as well as federal district courts in South Carolina.^[xxxi] It should be noted, however, that some of these courts have not strayed far from the common law, and have limited their holdings to implied assignment, waiver or estoppel principles.

That a parent's claim for medical expenses asserted as representative of the child creates an implied assignment of that claim to the child, or represents a waiver or estoppel, has long been recognized as an exception to the common law rule. See, e.g., 39 Am. Jur., Parent and Child § 83, p. 729 (1942); 67 C.J.S., Parent and Child § 43, p. 747, (1950). Cases and states which have followed those common law exceptions are included among those cited in footnotes xxx and xxxi. These include Smith v. Geoghegan & Mathis (Kentucky, 1960); Lane v. Webb (Mississippi, 1969); Palmore v. Kirkland (Oregon, 1974); Cabaniss v. Cook (Alabama, 1977); McNeill v. U.S. (U.S. District Court, South Carolina, 1981); Davis v. Drackett (U.S. District Court, Ohio, 1982); Lasselle v. Special Prods. Co. (Idaho, 1983); Myer ex. Rel. Myer v. Dyer (Delaware, 1993); West v. Miami Valley Hosp. (Ohio, 1998); Villa by and through Villa v. Roberts (U.S. District Court, Kansas, 2000); Betz v. Farm Bureau (Kansas, 2000).

States Which So Far Have Adhered to the Common Law Rule

State appellate courts which have adhered to the strict common law rule of precluding recovery of pre-majority tort-related medical expenses by the minor tort victim, as of the date of their last published decision on the issue, include Arkansas, Georgia, Illinois, Iowa, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, and the state courts of South Carolina.^[xxxii] Many of these state courts, including South Carolina's appellate courts, have not revisited the issue since abrogation of the strict common law rule became the majority rule in recent decades. Also, many have never addressed the common law exceptions to the general rule, including South Carolina's state appellate courts.

South Carolina Courts Should Abrogate the Strict Common Law Rule

The last time South Carolina's appellate courts have published their views on the issue was in 1967, in the Hughey case. In that case the Court adhered to the common law that only a

parent could recover for medical expenses paid by the father. That case is distinguishable from the case at bar, because there is no evidence the parents of Alexia paid any sums for her medical care. Moreover, that case was decided fourteen years before the U.S. District Courts of South Carolina helped develop the majority rule in the McNeill case, in 1981. That was also years before the majority of courts considering the issue began to abrogate or limit the harshness of the common law rule, following the decision of Sox and McNeill by the U.S. District Courts of South Carolina. That was thirty-six years before the Supreme Court of South Carolina issued its important policy statement in favor of the collateral source rule in the 2003 Haselden case.

The common law rule at issue has clearly outlived its usefulness. Archaic vestiges of the common law that no longer make sense should be put to rest. Our courts have the right to solve the problem without legislative involvement, for judicially created common law can be corrected by judicial decree. The interests of children, families and health care creditors would all be well served by abrogation or significant modification of the common law rule.

Those creditors include, of course, the taxpaying public. The United States Supreme Court decision in *Arkansas Dept. of Health and Human Serv. v. Ahlborn* limits a state's Medicaid lien recovery to that portion which represents compensation for past medical expenses.

^(xxxiii) Ordinarily a subrogee has no right greater than a subrogor. ^(xxxiv) Why should the interests of tortfeasors and their liability insurance carriers, seeking to avoid just liability for all damages caused by the tort, be elevated above the interests of minor children, their families, health care creditors and taxpayers, seeking to recover fair compensation for all harms and losses caused by the tort? Sound policy considerations undergird the modern trend of abrogating the common law rule.

How Should the Necessaries Doctrine Be Applied to the Case at Bar?

The Original Defendants

This case was commenced by Angela Patton, as Next Friend of Alexia Lumpkin, a minor on July 21, 2009, by filing of a Notice of Intent to Sue Dr. Gregory A. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A., accompanied by the statutory requirements including an affidavit of a qualified medical expert and a plain statement of facts. After pre-suit mediation was unsuccessful, a summons and complaint were filed against Dr. Gregory A. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A., who were then properly served. Thus, given that Alexia was born on April 5, 2007, the case against Dr. Gregory A. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A. was clearly commenced before the child's third birthday, well within the time allowed for tort claims by minor children, and also within the three year time limit for parental claims, as asserted by Defendants.

Defendants have cited no S. C. law regarding implied assignment, waiver or estoppel in this context. Plaintiff is unaware of any S.C. law on point. However, if the appellate courts of South Carolina do not abrogate the harsh common law rule in its entirety, as Plaintiff expects, they will surely follow the exceptions to the common law rule based on implied assignment, waiver and estoppel, particularly under the facts of this case.

Defendants' argument that the claim for tort-related pre-majority medical expenses must be filed by the parent(s), rather than by the child's representative, ignores the following: (1) the limited tort recovery corollary to the necessities doctrine is archaic and obsolete; (2) the limited tort recovery corollary to the necessities doctrine has been abrogated or severely limited by a majority of the state courts which have revisited the issue since the 1970s; (3) the 2003 South Carolina case of Haselden is consistent with the majority rule of holding tortfeasors accountable for all harms and losses caused by their torts, without regard to payment of some damages by an

unrelated third party, and provides strong indication that South Carolina will follow the majority rule whenever it next publishes a decision on the limited tort recovery issue; (4) the Plaintiff minor child's biological mother brought suit as Next Friend prior to the child's third birthday, providing timely notice to Defendants of all claims, including those for past and future medical expenses; (5) the Plaintiff minor child's biological mother brought suit as Next Friend prior to the child's third birthday, evidencing her intent to implicitly assign her claim for pre-majority medical expenses to the child on a timely basis within three years after the claim arose, if a three year statute of limitations is deemed applicable; (6) the Plaintiff minor child's biological mother brought suit as Next Friend, evidencing her intent to waive (or be estopped from asserting) her claim for pre-majority medical expenses in favor of her child on a timely basis within three years after the claim arose, if a three year statute of limitations is deemed applicable; (7) despite the admitted legal and moral responsibility of parents to provide for the necessities of their children, the parents in this case have not been financially able to do so, in light of the child's catastrophic injuries and expensive treatment needs; and Medicaid has paid all or substantially all of such medical bills.

There is no logical rationale under the facts of this case to allow the parents, and only the parents, to assert a claim for Alexia's medical expenses. Medicaid, which has paid the bills, faces the risk of losing its lien recovery rights if the common law limited tort recovery corollary to the necessities doctrine is harshly applied to preclude recovery of pre-majority medical expenses in this case.

For these reasons the Motion for Partial Summary Judgment should be denied as to the original Defendants. If this Court is not comfortable abrogating the common law rule in its entirety, which Plaintiff respectfully suggests should be done, the Court is respectfully requested

to deny the motions on the basis that common law exceptions apply here, based on implied assignment, waiver and estoppel.

As another alternative, if the Court deems it necessary, the Plaintiff can file a Motion for Leave to Amend the pleadings to assert the claim for pre-majority medical expenses by the Plaintiff, individually, and for said amendment to relate back to the original filing of the summons and complaint. That seems unnecessary and perfunctory, given the timely filing of all claims by the biological mother, timely even if there is a three year statute of limitations as to parental claims, her implied assignment to and waiver of the claim to Alexia.

The New Defendant

During discovery proceedings in the original case, it became clear that there were factual disputes which, if resolved in Plaintiffs' favor, could give rise to liability on the part of an additional defendant, the Defendant Hospital. The case against the Defendant Hospital was therefore commenced, by Angela Patton, as Next Friend of Alexia Lumpkin, a minor, on September 23, 2011, by filing of a Notice of Intent to Sue the Defendant Hospital, accompanied by the statutory requirements including an affidavit of a qualified medical expert and a plain statement of facts. After pre-suit mediation was unsuccessful, a summons and complaint were filed against the Defendant Hospital on April 2, 2012, and the Hospital was then properly served. The suit against the Hospital was consolidated with the original suit against Dr. Miller and his P.A. by Order Consolidating Cases dated July 12, 2012. An Amended Summons and Complaint was filed November 29, 2012 to assert all claims against all Defendants in a single action.

Under Rule 15(c), SCRCF, the amended complaint may be deemed to relate back to

the time a complaint was originally filed, because the claims arose out of the same "conduct, transaction or occurrence" set forth in the original complaint, and because there is no showing of surprise or prejudice. The original complaint in this case was filed within three years of the child's birth. Thus, the claim against the Hospital should be deemed to relate back to the filing of the original complaint prior to the child's third birthday. As of that date, all claims were timely, both the child's and any deemed to accrue to the parent(s) only, even with their shorter statute of limitations.

The Plaintiff asserts, as noted above, that the common law rule should be abrogated, such that the child's time limit is the one that should apply. It is not necessary to make that ruling to find in Plaintiff's favor against the Hospital on this point, however, if the Court deems the amended pleading to relate back to the original filing.

CONCLUSION

For the reasons stated, the Defendants' Motion for Partial Summary Judgment should be denied as to all Defendants. As an alternative, if the Court deems it necessary, the Plaintiff seeks leave to amend the pleadings to assert the claim for pre-majority medical expenses by the Plaintiff, individually, and for said amendment to relate back to the original filing of the summons and complaint.

Respectfully Submitted,

GRAHAM LAW FIRM, P.A.

By: 

Edward L. Graham
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Florence, S.C. 29501
Attorney for Plaintiff

July 17, 2013

- [i] Hughey v. Ausborn, 249 S.C. 470, 476, 841, 154 S.E.2d 839 (S.C. 1967)
- [ii] Other states have equated it to traditional notions of a master-servant relationship. See, e.g., Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936). ("The father may permanently lose his parental rights to the son's services and proceeds . . . by his failure to provide necessities for his son."); Estate of DeSela v. Prescott Unified Sch. Dist. No. 1, 249 P.3d 767 (Ariz. 2011). A few states have even traced its beginnings to the concept of "paterfamilias in Roman times." See, e.g., Shaffer-Doan v. Commonwealth, 960 A.2d 500, 511 (Pa. Commw. Ct. 2008).
- [iii] Basch, Norma, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," *Feminist Studies* 5 (1979): 346-66
- [iv] 1 W. Blackstone, Commentaries, Book 1, Ch. 15, p. 442, 443
- [v] Id.
- [vi] Rivers, Theodore John, "Widow's Rights in Anglo-Saxon Law," *American Journal of Legal History* 19 (1975): 208-15.
- [vii] Gwynn v. Gwynn, 4 S.E. 229, 27 S.C. 525 (S.C. 1887) ("At common law, as we have said, the civil existence of the wife being merged in that of her husband, her right to hold property separate from his was not recognized, and she had no power to make any contract at all")
- [viii] Id.
- [ix] Id.
- [x] Id.
- [xi] Richland Mem'l Hosp. v. Burton, 282 S.C. 159, 160, 318 S.E.2d 12, 13 (1984).
- [xii] Trident Reg'l Med. Ctr. v. Evans, 317 S.C. 346, 347, 454 S.E.2d 343, 344 (Ct. App. 1995).
- [xiii] Id.
- [xiv] Tucker v. Buff. Cotton Mills, 76 S.C. 539, 57 S.E. 626 (1907).
- [xv] Id.
- [xvi] Bridges v. Joanna Cotton Mill, 214 S.C. 319, 321, 52 S.E.2d 406, 407 (1949).
- [xvii] Id.
- [xviii] Hughey v. Ausborn, 249 S.C. 470, 474, 154 S.E.2d 839, 840 (1967)
- [xix] Id.
- [xx] Id. at 476, 841, 154 S.E.2d 839.
- [xxi] See, e.g., Burwell v. S.C. Tax Com., 130 S.C. 199, 126 S.E. 29 (1924); Gen. Stat. 2037 (1882); 20 Stat. 1121 (1891); Gen. Stat. 3761 (1912); S.C. Const. art. XVII, § 9 (1895); Sec. 400 Code of Civ. Proc. (1932). See also Bryant v. Smith, 198 S.E. 20, 187 S.C. 453 (S.C. 1938) (South Carolina "has already gone very far towards complete emancipation of a married woman from the common law disabilities of coverture.")
- [xxii] Greenville Hosp. Sys. v. Smith, 239 S.E.2d 657 (S.C. 1977); Cole v. Wagner, 150 S.E. 339 (N.C. 1929); Scott Cnty. Sch. Dist. v. Asher, 324 N.E.2d 496 (Ind. 1975).
- [xxiii] Yale Diagnostic Radiology v. Estate of Fountain, 838 A.2d 179 (Conn. 2004).
- [xxiv] Trident at 351, 346
- [xxv] Id. at 348, 344.
- [xxvi] Id. at 345, 349.
- [xxvii] Shaffer-Doan, 960 A.2d at 511.
- [xxviii] Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006); 83 C.J.S. "Subrogation," § 14.
- [xxix] Haselden v. Davis, 579 S.E.2d 293 (S.C. 2003); Aucoin v. State ex rel. Dep't of Transp. & Dev't ex rel. Dep't of Transp. & Dev't, 712 So. 2d 62 (La. 1998).
- [xxx] Cabaniss v. Cook, 353 So. 2d 784 (Ala., 1977); Blue Cross and Blue Shield of Alabama v. Bolding, 465 So.2d 409, 412 (Ala. Civ. App. 1984); Alaskan Village Inc. v. Smalley, 720 P.2d 945 (Alaska, 1986); Estate of DeSela v. Prescott Unified School District No. 1, *supra*; White v. Moreno Valley Unified School Dist., 181 Cal App. 3d 1024, 226 Cal. Rptr. 742 (Cal. App. 4 Dist., 1986); Palacios v. Children's Place Retail Stores, Inc., 2004 WL 2943634 (Conn. Super., 2004); Myer v. Dyer, 643 A.2d 1382 (Del. Super. Ct. 1993); Lasselle v. Special Products Co., 106 Idaho 170, 677 P.2d 483 (1983); Scott Cnty School Dist. v. Asher, 324 N.E. 2d 496 (Ind. 1975); Villa v. Roberts, 80 F. Supp.2d 1229 (D. Kan. 2000); Betz v. Farm Bureau Mut. Ins., 269 Kan. 554, 8 P.3d 756 (2000); Smith v. Geoghegan and Mathis, 333 S.W.2d 254, 256 (Ky. 1960); Aucoin v. State, *supra*; Woodbury v. Hammond Lumber Co., 2003 WL 1665251 (Me. Super., 2003); Johns Hopkins Hospital v. Pepper, 697 A.2d 1358 (Md. Ct. App. 1997) ("Despite Hopkins's implicit assertion to the contrary, the doctrine of necessities was never intended to be a

limitation on a child's right to recover medical expenses from the person(s) responsible for causing them. It is merely an acknowledgment that for certain services, a minor should not be heard to disavow a contract which by personal necessity required his or her participation. In a case of catastrophic medical injury, we can certainly conceive of a situation where the parents can afford some but not all of the injured child's past, present, and future medical expenses. Assuming limitations has barred parental claims for such, the doctrine of necessities protects an injured minor's right to recover from a tortfeasor medical expenses that his or her parents are ill-able to afford and for which he or she ultimately may be liable. Otherwise, the child would be twice victimized — once at the hands of the tortfeasor, and once by parents who, for whatever reason, failed to timely prosecute their claims for medical expenses. We cannot countenance a result that would leave the only innocent victim in such a transaction uncompensated for his or her injuries and potentially beholden to the compelled generosity of the taxpayer.”); Lane v. Webb, 220 So.2d 281 (Miss., 1969); Boley v. Knowles, 905 S.W.2d 86 (Mo. 1995). (the right to maintain an action to recover medical expense in relation to a child's treatment is vested jointly in the child and the parents; either the parents or the minor may maintain an action, although under no circumstance will a double recovery be allowed); Lopez v. Southwest Community Health Services, 114 N.M. 2, 833 P.2d 1183 (N.M. App., 1992) (We can think of no principled reason why the right to recover a minor's future medical expenses should lie exclusively with the parents as long as defendants are protected against double recovery); Procanik by Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984) (Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become a[n] instrument of injustice. Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a [tort-injured] child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the “wholly fortuitous circumstances of whether the parents are available to sue.”); Davis v. Drackett Prods. Co., 536 F. Supp. 694 (S.D. Ohio 1982); West v. Miami Valley Hospital, 99 Ohio Misc. 2d 1, 714 N.E.2d 469 (Ohio com. Pl., 1998); Palmore v. Kirkman Laboratories, Inc., 527 P.2d 391 (Oregon 1974); Smith v. King, No. Civ. A. 958, 1984 WL 586817 (Tenn. Ct. App. 1984); Moses v. Akers, 122 S.E.2d 864 (Va. 1961); Packard v. Perry, 221 W. Va. 526, 655 S.E.2d 548 (W. Va. 2007) (“it is frankly absurd that two separate actions for a child's medical expenses [pre- and post-majority] now arise from the same allegedly tortious conduct.”); Korth v. American Family Insurance Co., 340 N.W. 2d 494 (Wisc. 1983); Shaffer-Doan v. Commonwealth, 960 A.2d at 511.

[xxxii] McNeill v. United States, 519 F. Supp. 283 (D.S.C. 1981); Sox v. United States, *supra*.

[xxxiii] National Bank of Commerce v. Quirk, 323 Ark. 769, 918 S.W.2d 138, 151 (1996); Brent v. Hin, 254 Ga. App. 77, 561 S.E.2d 41 (1997); Primax Recoveries, Inc. v. Atherton, 365 Ill. App.3d 1007, 303 Ill. Dec. 452, 851 N.E.2d 639, 642 (2006); Gopkin v. Norris, 261 N.W. 2d 692 (Iowa, 1978); Walter v. City of Flint, 40 Mich. App. 613, 199 N.W.2d 264 (1972); Ostrander v. Cone Mills, Inc., 445 N.W.2d 240 (Minn. 1989); Macku v. Drackett Prods. Co., 216 Neb. 176, 343 N.W.2d 58 (1984); Yachon v. Halford, 125 N.H. 577, 484 A.2d 1127 (1984); D'Andria v. County of Suffolk, 112 A.D.2d 397, 492 N.Y.S.2d 621 (1985); Vaughn v. Moore, 366 S.E.2d 518, 520, (N.C. App. 1998); Brown v. Jimmerson, 862 P.2d 91 (Okla. Ct. App. 1993); Hughey v. Aushorn, 249 S.C. 470, 154 S.E.2d 839 (1967).

[xxxiv] Arkansas Dept. of Health and Human Serv. v. Ahlborn, 547 U.S. 268 (2006); E.M.A. v. Cansler, 2012 WL 956187 (4th Cir., 2012); Blue Cross and Blue Shield of Alabama v. Bolding, *supra*; E.D.B. ex rel. D.B. v. Clair, 987 A.2d 681 (Pa. 2009); Riley v. Herbes, 524 N.W.2d 523 (Minn. Ct. App. 1994).

[xxxv] 83 C.J.S. “Subrogation,” § 14.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

v.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

**MOTION FOR LEAVE TO
AMEND COMPLAINT**

FILED-RECEIVED
2013 AUG 16 AM 11:41
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

PLEASE TAKE NOTICE that the Plaintiff herein moves, in the alternative, before the Presiding Judge of the Sixteenth Judicial Court for an Order Granting Leave to Amend the Amended Summons and Complaint in the above-referenced action. A copy of the proposed Second Amended Summons and Complaint is attached hereto and incorporated herein by reference.

The amended pleading changes the capacity in which Angela Patton demands tort-related pre-majority medical expenses incurred for past or future care of Alexia Lumpkin, from Next Friend to her individual capacity. Plaintiff makes this alternative motion in the event the court should rule against her with respect to other elements of her Rule 59 (e) Motion filed herewith. Plaintiff should be granted leave to amend for the reasons stated below. Moreover, Plaintiff requests that the amendment relate back to the filing of the original complaint against Dr. Miller and Rock Hill Gynecological & Obstetrical Associates.

"The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." *Thomas v. Grayson*, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995). Rule 15(c)

states, "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." SCRCP. Rule 15(c).

Additionally SCRCP Rule 15(c) states:

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

*

Moreover, even though Rule 15(c) is silent on the issue of changing plaintiffs (or changing one's capacity as plaintiff) "the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." FRCP Rule 15 "Notes of Advisory Committee on 1966 amendments."

In this case, the claim for tort-related pre-majority medical expenses clearly arises out of the same conduct, transaction, and occurrence set forth in the original pleadings. The only change is the capacity in which Angela Patton seeks recovery for these damages. While Patton initially made a claim for these damages as Next Friend of Alexia Lumpkin, she now seeks to make a demand for these damages in her individual capacity. Thus no new party is being added to the case.¹ Second, Defendants were clearly on notice that Plaintiff sought pre-majority medical expenses, as these were specifically prayed for by Angela Patton as Next Friend of

¹ Case law exists in South Carolina which appears to question whether a new party may be added through Rule 15(c) SCRCP. See e.g., *Knuckles v. Fryatt*, 2011 S.C. App. Unpub. LEXIS 26 (Jan. 25, 2011) (citing *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567 (Ct. App. 2000)). These cases are inapposite to the case at hand because here, Plaintiff merely wishes to change the capacity in which Angela Patton brings suit. No new party is to be added. Moreover, Plaintiff argues these cases were wrongly decided and misinterpret the language and purpose of Rule 15(c) inasmuch as they content rule 15(c) does not permit a new party to be added. South Carolina case law stating that Rule 15 does not allow the addition of a new plaintiff to the case is equally inapposite for the same reason; no new plaintiff has been added in this case. However, as with *Knuckles*, Plaintiff believes this proposition to be in error and contrary to the language and purpose of the statute as well as the accompanying notes to the statutory amendments.

Alexia Lumpkin. Finally, Defendants knew or should have known that, but for the alleged mistake of requesting these damages as Next Friend of Alexia Lumpkin², these damages would have been sought by Angela Patton in her individual capacity.

There is no prejudice to Defendants by allowing Plaintiff to amend the complaint in the manner requested. Defendant certainly cannot claim surprise, as the exact same damages were prayed for in the initial complaint. No harm befalls the Defense by permitting the complaint to be amended at this stage. Defendants were on notice that Plaintiff sought pre-majority medical expenses. Defendants' ability to defend this claim on the merits has not been diminished. Therefore, Plaintiff requests that this court grant Plaintiff's request to amend the complaint and hold that the amendment relates back to the filing of the initial complaint.

Justice would be served in this action by granting leave to amend the Amended Complaint for the limited purpose stated which does not make substantive changes to the Amended Complaint against the current Defendants nor necessitate any delay in the trial. Rule 15, South Carolina Rules of Civil Procedure, contemplates that leave to amend should be freely granted where justice requires. For the reasons stated, Plaintiff is informed and believes that the Motion for Leave to Amend should be granted.

This Motion is made pursuant to Rule 15, South Carolina Rules of Civil Procedure; and is based upon the South Carolina Rules of Civil Procedure, statutory and case law governing such matters, and upon such other further materials as may be cited or presented to the Court at the hearing of this Motion.

² To be clear, Plaintiff's initial argument is that demanding pre-majority medical expenses as next friend of a minor was not in error. When Angela Patton made this demand as next friend of Alexia Lumpkin, she either waived or assigned her right to recover pre-majority medical expenses to the minor, Alexia Lumpkin. Alternatively, if this court disagrees with Plaintiff's position and concludes this was a mistake, then Defendants knew that but for the mistake, these damages would have been sought by Angela Patton in her individual capacity.

The undersigned hereby affirms, in accordance with Rule 11, South Carolina Rules of Civil Procedure, that the movants' counsel prior to filing this Motion has communicated orally or in writing with opposing counsel and has attempted in good faith to resolve the matter contained in the Motion, but without success; or affirms it would serve no useful purpose to consult.

GRAHAM LAW FIRM, P.A.



Edward L. Graham
Post Office Box 550
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Attorney for Plaintiff

August 15, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

Angela Patton, in Her Individual Capacity,)
and as Next Friend of Alexia Lumpkin, a)
minor,)

Plaintiff,)

v.)

SECOND AMENDED COMPLAINT

Dr. Gregory A. Miller, Rock Hill)
Gynecological & Obstetrical Associates,)
P.A. and Amisub of South Carolina, Inc.)
d/b/a Piedmont Medical Center,)

Defendants.)

COMES NOW the Plaintiff complaining of Defendants above named and would show unto the Court as follows:

1. Plaintiff Angela Patton is a citizen and resident of York County, South Carolina, and brings her action in her individual capacity and as Next Friend of her daughter, Alexia Lumpkin, (hereinafter, "Alexia")

2. Defendant Gregory A. Miller (hereinafter, "Dr. Miller") is, upon information and belief, a citizen and resident of York County, South Carolina, who was, upon information and belief, at all times relevant to her action, a physician duly licensed to practice medicine within the State of South Carolina.

3. Defendant Dr. Miller held himself out to the public as having specialized knowledge, training and experience for the provision of high quality obstetrical and gynecological care.

4. Defendant Dr. Miller maintained an office in York County, South Carolina, for practice of obstetrics and gynecology.

5. Upon information and belief, Dr. Miller was a shareholder, employee and/or agent of a professional association known as "Rock Hill Gynecological & Obstetrical Associates, P.A." (hereinafter, "Rock Hill Gynecology") and had an ownership, employment and/or contractual relationship with Defendant Rock Hill Gynecology.

6. Defendant Rock Hill Gynecology, and its predecessor(s) and/or successor(s), if any, was at all times relevant hereto, a professional association, which held itself out to the public as having specialized facilities, equipment and staff for the provision of high quality obstetrical and gynecological care.

7. Defendant Rock Hill Gynecology is named as a party to this action by virtue of the acts and/or omissions of its shareholder(s), employee(s) and agent(s), within the course and scope of that respective ownership, employment and agency, for which it is liable to Plaintiff under the doctrine respondeat superior.

8. Defendant Amisub of South Carolina d/b/a Piedmont Medical Center (hereinafter "Piedmont Medical Center") is named as a party to this action by virtue of its institutional acts and omissions as well as the acts and/or omissions of its employee(s), within the course and scope of that respective employment, for which it is liable to Plaintiff under the doctrine of respondeat superior.

9. Prior to April 5, 2007, Angela Patton, mother of Alexia Lumpkin, became pregnant and submitted herself to the care and attention of Dr. Miller of Rock Hill Gynecological & Obstetrical Associates, P.A., for pre-natal and obstetrical care.

10. On April 5, 2007, Defendant Miller attended the delivery of Alexia Lumpkin, daughter of Angela Patton (hereinafter, "Angela") at the Piedmont Medical Center (hereinafter, "Hospital") in York County, S.C.

11. Alexia Lumpkin was a healthy baby prior to April 5, 2007, when her mother, Angela Patton, was admitted to the Hospital.

12. Dr. Miller took charge of the health care of Angela and her baby upon Angela's admittance to the Hospital.

13. The Defendant, Dr. Miller owed Angela Patton and her daughter a duty of providing obstetrical care and attention consistent with generally accepted standards of obstetricians acting under similar situations.

14. Defendant Rock Hill Gynecology owed Plaintiff and her daughter a duty of providing obstetrical, nursing and support care consistent with generally accepted standards of obstetrical offices under similar situations.

15. Defendant Piedmont Medical Center and its employees owed Plaintiff and her daughter a duty of providing hospital and nursing care and attention consistent with generally accepted standards of hospitals and nurses under similar situations.

16. Defendants breached their duties of care to Angela Patton and her daughter Alexia and were negligent, reckless, willful, wanton, and/or otherwise wrongful in their care of them and attention to them, as a direct and proximate result of which Alexia sustained severe bodily injuries, losses and damages.

17. Defendant Dr. Miller was negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

(a) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training

about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;

- (b) in choosing not to appreciate the heightened risk of shoulder dystocia in her delivery;
- (c) in failing and refusing to timely recognize the signs and symptoms of shoulder dystocia;
- (d) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (e) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (f) in using improper delivery technique;
- (g) in using improper and excessive force, traction and/or torsion;
- (h) in directing and/or allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (i) in mismanagement of labor and delivery;
- (j) in mismanagement of shoulder dystocia;
- (k) in failing and refusing to perform delivery by C-Section, or convert to a C-Section;
- (l) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (m) in failing to timely and properly monitor, observe, record and/or transcribe vital information about the patient's status and condition; and

- (n) such other failures and refusals as may be identified during discovery and the trial of her case.

18. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, Angela has sustained certain losses and damages, including but not limited to:

- (a) Past and future medical expenses;
- (b) Life Care Management expenses;
- (c) Economic losses; and
- (d) Such further injuries, losses and damages as may be revealed through discovery and trial of this case.

19. Defendant Rock Hill Gynecology, its predecessor(s) and/or successor(s), if any, and the shareholder(s), agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its shareholder(s), employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin.
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper

management of shoulder dystocia;

- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;
- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in using improper delivery technique;
- (i) in using improper and excessive force, traction and/or torsion;
- (j) in allowing the nurses to use fundal pressure in the presence of shoulder dystocia;
- (k) in mismanagement of labor and delivery;
- (l) in mismanagement of shoulder dystocia;
- (m) in failing and refusing to perform delivery by C-Section;

- (n) in failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health;
- (o) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (p) such other failures and refusals as may be identified during discovery and trial of this case.

20. Defendant Piedmont Medical Center, its predecessor(s) and/or successor(s), if any, and the agent(s), and employee(s) thereof, were negligent, reckless, willful, wanton and/or otherwise wrongful in one, more or all of, and including, but not limited to, the following particulars:

- (a) in failing and refusing to require its physicians, employee(s), and agent(s) to acquire a reasonably safe level of knowledge, skill and training about labor and delivery generally, and recognition and management of shoulder dystocia in particular, before attempting to attend, manage or provide support for the birthing process of Alexia Lumpkin;
- (b) in failing to provide and/or require sufficient training to its obstetricians and labor and delivery staff about anticipation of a heightened risk of, and proper management of shoulder dystocia;
- (c) in failing to require its obstetricians and labor and delivery staff to demonstrate current competency in the management of labor and delivery, including recognition and management of shoulder dystocia complications;

- (d) in failing and refusing to recognize the foreseeability of shoulder dystocia;
- (e) in failing and refusing to acquire a reasonably safe level of knowledge, skill and training about obstetrics generally, and the recognition and management of shoulder dystocia in particular, before attempting to manage the birthing process of Alexia Lumpkin;
- (f) in failing to respond properly and appropriately to the signs and symptoms of shoulder dystocia;
- (g) in failing and refusing to require its medical staff physicians to use the proper maneuvers to resolve shoulder dystocia without injury to Alexia;
- (h) in acquiescing in its medical staff physicians' use of improper delivery technique;
- (i) in acquiescing in its medical staff physicians' use of improper and excessive force, traction and/or torsion and in the nurse's use of fundal pressure;
- (j) in failing to properly train its nurses to avoid use fundal pressure in the presence of shoulder dystocia;
- (k) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of labor and delivery;
- (l) in acquiescing in its medical staff's and labor and delivery nursing staff's mismanagement of shoulder dystocia;
- (m) improper use of fundal pressure by the labor and delivery nurse;
- (n) in acquiescing in its medical staff's failing and refusing to perform delivery by C-

Section;

- (o) in acquiescing in its medical staff's and labor and delivery nursing staff's failing to communicate with fellow health care team workers on a timely and accurate basis about matters of critical importance to the patient's health; and in the nurses' failing to so communicate;
- (p) in failing to timely and properly monitor; observe, record and/or transcribe vital information about the patient's status and condition; and
- (q) such other failures and refusals as may be identified during discovery and trial of this case.

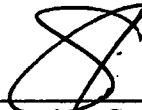
21. As a direct and proximate result of the negligence and other wrongful conduct on the part of Dr. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Piedmont Medical Center, Alexia Lumpkin has sustained certain injuries, losses and damages, stated with particularity as follows:

- (a) Direct violent and traumatic injuries to various bodily shareholders of Alexia Lumpkin, including, but not limited to, permanent traumatic injury to the nerves which innervate her left shoulder and arm, commonly known as Erb's palsy;
- (b) Adverse effects on various other bodily shareholders and/or functions, such as gait, balance and skeletal and muscular symmetry;
- (c) Past and future medical expenses;
- (d) Life care management plan expense;

- (e) Permanent impairments and disabilities;
- (f) Disfigurement;
- (g) Physical pain and suffering;
- (h) Mental, emotional and psychological harm;
- (i) Adverse effect on the future employability, earnings and earning capacity;
- (j) Loss of enjoyment of life; and
- (k) Such further injuries, losses and damages as may be revealed through discovery and trial of her case.

WHEREFORE, Plaintiff prays for judgment against Defendants, jointly and severally, for an award of actual damages; for an additional award of punitive damages against one or more of the said Defendant(s) in an amount to be determined by the jury in accordance with the facts and circumstances presented at trial; for costs of her action; and for such other and further relief as her Court may deem just and proper.

GRAHAM LAW FIRM, P.A.



Edward C. Graham
Post Office Box 550
Florence, S.C. 29503
Attorney for Plaintiff

August 15, 2013

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor;

Plaintiff,

v.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

NOTICE OF MOTION

FILED - RECEIVED
2013 AUG 16 PM 12:22
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, S.C.

**TO: ASHBY W. DAVIS, COUNSEL FOR DEFENDANTS DR. GREGORY A. MILLER
AND ROCK HILL GYNECOLOGICAL & OBSTETRICAL ASSOCIATES, P.A.
AND WILLIAM U. GUNN, COUNSEL FOR AMISUB OF SOUTH CAROLINA,
INC. D/B/A PIEDMONT MEDICAL CENTER:**

PLEASE TAKE NOTICE that ten (10) days from the date of this Notice, or at such other time as the Court may schedule, the undersigned counsel for Plaintiff will move before the Honorable S. Jackson Kimball, special circuit court judge of the sixteenth judicial circuit, for an Order to Alter or Amend the Order of the Honorable S. Jackson Kimball signed July 24, 2013.

This Motion is made pursuant to Rule 59(e), South Carolina Rules of Civil Procedure and is based upon the South Carolina Rules of Civil Procedure, statutory and case law governing such matters, as reflected in the accompanying memorandum, and upon such other and further materials as may be cited or presented to the Court at the hearing of this Motion.

The undersigned hereby affirms in accordance with Rule 11, South Carolina Rules of Civil Procedure, that the movants' counsel prior to filing the Motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter

contained in the Motion, but without success; or affirms it would serve no useful purpose to consult.

Respectfully Submitted,

GRAHAM LAW FIRM, P.A.

By: 

Edward L. Graham
Post Office Box 550
Florence, S.C. 29501
Attorney for Plaintiff

August 15, 2013

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

v.

Dr. Gregory A. Miller, Rock Hill
Gynecological & Obstetrical Associates,
P.A. and Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C/A NO.: 2009-CP-46-5195

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF'S
MOTION TO ALTER OR AMEND**

FILED-RECEIVED
2013 AUG 16 PM 12:22
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY.

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff Angela Patton as Next Friend of Alexia Lumpkin, a minor, (hereinafter "Plaintiff") asks this Court to reconsider its order signed July 24, 2013, granting Defendants' motions for partial summary judgment, based on procedural arguments, to preclude the recovery of pre-majority tort-related medical expenses incurred and to be incurred by the minor child tort victim during her minority years. Plaintiff respectfully submits that the court misapprehended the dispositive legal principles, incorrectly ruled, or did not rule, in that that South Carolina recognizes the doctrines of waiver, assignment, and estoppel; Defendants waived their right to argue Plaintiff cannot recover pre-majority tort-related medical expenses; application of the limited tort recovery corollary to the necessities doctrine imposes manifest injustice upon Plaintiff; and Plaintiff should have been granted leave to amend the complaint changing the capacity under which Angela Patton sought pre-majority medical expenses.

LAW

Rule 59(e) of the South Carolina Rules of Civil Procedure permits a party to request the court to reconsider its holdings. *Elam v. S.C. DOT*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004). A party may file a Rule 59(e) motion when she “believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it,” and a party must file a Rule 59(e) motion “when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Id.* at 24, 602 S.E.2d at 780. South Carolina’s rule 59(e) is “practically identical” to the Federal Rules of Civil Procedure. *Id.* at 22, 602 S.E.2d at 779. Federal courts will consider a Rule 59(e) motion when a party asserts review is “necessary to correct a clear error of law or prevent manifest injustice.” *Hutchinson v. Staton*, 994 F.2d. 1076, 1081 (4th Cir. 1993).

ANALYSIS

I. The Doctrines of Implied or Equitable Assignment and Waiver and Estoppel are Valid Means of Transference of the Right to Recover Tort Damages

Plaintiff respectfully submits this court should have held that Angela Patton assigned and waived her right to recover tort related pre-majority medical expenses in favor of her child, Alexia Lumpkin. Numerous jurisdictions that have not wholly abrogated the common law rule disallowing direct tort recovery of pre-majority medical expenses by a minor have acknowledged their state’s recognition of the doctrine of implied or equitable assignment or recognized one’s ability to waive her right in a cause of action in favor of another, as means to avoid the inequity

of this archaic common law rule.¹ Federal district courts of South Carolina, interpreting South Carolina law, have done the same.²

“A parent can waive his or her right to recover for damages properly belonging to the parent, [for example] medical expenses, if these damages are awarded in the child’s action.” *Betz v. Farm Bureau Mut. Ins. Agency of Kansa*, 269 Kan. 554, 556, 8 P.3d 756, 758 (2000) (citing 59 Am. Jur. 2d Parent and Child § 109 (1987)). Additionally, while a child’s medical expenses are usually part of the parent’s cause of action, “this general rule is not an absolute bar, as when the parents do not assert a claim, or have waived a claim for these expenses.” *McNeil v. United States*, 519 F. Supp. 283, 290 (D.S.C. 1981) (citing 67A C.J.S. Parent and Child § 142) (see also 67A C.J.S. Parent and Child § 331 (2007)). The South Carolina district court in *McNeill* noted that the primary concern is “that two claims cannot be asserted for the same item of damages.” *McNeill* at 290. However, *McNeil*, quoting *Sox v. United States*, also explained it was well settled that a parent’s right to recover for cost of medical care of an injured infant “may be waived in favor of a recovery by the infant. The underlying reason for these rules is to prevent double recoveries. It is not to excuse liability.” *Id.* (quoting *Sox v. United States*, 187 F. Supp. 465, 469-70 (1960)). Finally, *McNeill* noted, “[N]o reason has been suggested why a parent may not [] release to the child his right to items of damage.” *Id.* (quoting 32 A.L.R.2d 1060, 1083).

¹ See *Smith v. Geoghegan & Mathis* 333 S.W.2d 254 (Ky. Ct. App. 1960); *Lane v. Webb*, 220 So.2d 281 (Miss. 1969); *Palmore v. Kirkman Laboratories, Inc.*, 527 P.2d 391 (Or. 1974); *Cabaniss v. Cook*, 353 So. 2d 784 (Al. 1977); *West v. Miami Valley Hospital*, 99 Ohio Misc.2d 1, 714 N.E.2d 469 (Ohio Com. Pl. 1998); *Lasselle v. Special Prods. Co.*, 106 Idaho 170, 677 P.2d 483 (Idaho 1983); *Myer v. Dyer*, 643 A.2d 1382 (Del. 1993); *Villa v. Roberts*, 80 F. Supp. 2d 1229 (Dist. Kan. 2000); *Betz v. Farm Bureau Mut. Ins. Agency of Kansas*, 269 Kan. 554, 8 P.3d 756 (Kan. 2000); *John Hopkins Hospital v. Pepper*, 697 A.2d 1358 (Md. Ct. App. 1997); *Lopez v. Southwest Community Health Services*, 114 N.M. 2, 833 P.2d 1183 (N.M. App. Ct. 1992); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Davis v. Drackett Prods. Co.*, 536 F. Supp. 694 (S.D. Ohio 1982); *Smith v. King*, No Civ. A. 958, 1984 WL 586817 (Tenn. Ct. App. 1984); *Moses v. Akers*, 122 S.E.2d 864 (Va. 1961); *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (W. Va. 2007); *Korth v. American Family Ins. Co.*, 340 N.W. 2d 494 (Wisc. 1983); *Shaffer-Doan v. Commonwealth*, 960 A.2d 500 (Pa. Commw. Ct. 2008); *Garrison v. Ryno*, 328 S.W.2d 557 (Mo. 1959).

² See *McNeill v. United States*, 519 F. Supp. 283 (D.S.C. 1981); *Sox v. United States*, 187 F. Supp. 465 (D.S.C. 1960).

South Carolina recognizes the doctrine of implied waiver. *See Lyles v. BMI Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987). ("A waiver is an intentional relinquishment of a known right. It may be either express or implied." (citations omitted)). In determining whether there has been an implied waiver, the court looks at "the acts and conduct of the party against whom the doctrine is invoked" to determine whether "intentional relinquishment of a right is reasonable inferable." *Id.* (citing *Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 148 S.E. (2d) 369 (1966)). Additionally, "Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive." *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981). In this case, Angela Patton, by acting as Alexia Lumpkin's next friend, sought pre-majority medical expenses in Alexia Lumpkin's name that resulted from the Defendants' negligence. Angela Patton and Alexia Lumpkin cannot each recover tort-related pre-majority medical expenses because courts will not allow double recovery. Accordingly, when Angela Patton sought pre-majority medical expenses in her daughter's name, and did not do so in her own name, Angela Patton impliedly waived her right to recover to the benefit of her child.

Similarly, South Carolina recognizes the doctrine of equitable assignment, or implied assignment.³ "An equitable assignment is such an assignment as gives the assignee a title which, though not cognizable at law, will be recognized and protected in equity." *Player v. Player*, 240 S.C. 274, 278, 125 S.E.2d 636, 638 (1962). Therefore, a parent may impliedly assign his or her claim for tort-related pre-majority medical expenses by acting as the child's "Next Friend" in a suit in which the child demands pre-majority medical expenses caused by the defendant's tortious conduct. As both parent and child cannot not each recover pre-majority medical

³ "Implied assignment is sometimes called equitable assignment." *Grogan Chrysler-Plymouth, Inc. v. Gottfried*, 59 Ohio App. 2d 91, 96, 392 N.E.2d 1283, 1287 (Ct. App. 1978).

expenses, thus creating a double recovery, when the parent as Next Friend brings suit on the child's behalf, but does not seek pre-majority medical expenses in her own name, the parent has assigned her rights to the child.

Accordingly, Plaintiff respectfully submits this court failed to fully consider this issue in its order, failed to fully rule upon this argument, and implicitly committed an error of law by not applying well-settled South Carolina law that recognizes the doctrines of equitable assignment and implied waiver to the facts of this case. Following South Carolina law, the court should have concluded that Angela Patton transferred, waived, and assigned her rights to recover tort-related pre-majority medical expenses to Alexia Lumpkin. To hold otherwise imposes manifest injustice upon Plaintiff, as plaintiff is unable to fully recover losses sustained at the hands of her tortfeasor.

II. Defendants Waived their Right to Argue Plaintiff Cannot Recover Pre-Majority Tort-Related Medical Expenses

Defendants have dedicated so much time explaining why, due to a procedural technicality, Plaintiff may not recover pre-majority medical expenses that they have failed to recognize their own procedural non-compliances. Neither Dr. Miller and his practice nor Amisub of South Carolina pleaded Lumpkin's inability to recover pre-majority tort-related medical expenses as an affirmative defense. In fact, the Defendants did not even file an Answer to Plaintiff's Amended Complaint.⁴ Defendants' failure to plead this affirmative defense has prejudiced Plaintiff, and Plaintiff respectfully submits that this court should have deemed this affirmative defense as waived.

⁴ Defendants failed to allege this affirmative defense in their Answers to Plaintiff's initial complaint as well.

South Carolina Rules of Civil Procedure Rule 8(c) states, "Affirmative Defenses; Reply. In pleading to a preceding pleading, a party shall set forth affirmatively the defenses . . . and other matter constituting an avoidance or affirmative defense." South Carolina's rule conforms to the comparable federal rule. *See* SCRCP Rule 8(c) Note to 1995 Amendment. The purpose of Rule 8(c) is "to avoid the 'surprise' defenses permissible under the old general denial answer" *Id.* at Notes to 1986 Amendment. Thus, while the rule enumerates several affirmative defenses, as the rule itself states, the list is by no means exhaustive of all available affirmative defenses which must be pled.

In South Carolina, "An Affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action." *FMI, Inc. v. RMAX, Inc.* 286 S.C. 343, 346-47, 333 S.E.2d 360 (Ct. App. 1985). This court also stated,

In other words, it assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.

Id.

Affirmative defenses differ from evidentiary pleas or negative defenses, which need not be pleaded. *See e.g. O'Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776 (Ct. App. 1983). *See also Black's Law Dictionary* 482 (9th ed. 2009) (an affirmative defense is a "defendant's assertion of facts and arguments that, if true, will defeat plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.")

South Carolina courts will deem an affirmative defense not pled as waived, especially when the plaintiff has been prejudiced by the defendant's failure. In holding that a charitable

hospital had to plead the limitation on liability afforded to a charitable entity, the South Carolina Court of Appeals stated that the hospital's "failure to raise its charitable status as an affirmative defense affected both the parties to the action and the manner in which the case was tried to the jury, including what issues were or were not presented to them for resolution." *James v. Lister*, 331 S.C. 277, 282-83, 500 S.E.2d 198, 201 (Ct. App. 1998). Accordingly, the court held the defendant waived the argument that damages were limited by the state's charitable limitation on liability.

In this case, an argument that a child may not recover pre-majority tort-related medical expenses in her own name is an affirmative defense. Defendants argue that, even if all Plaintiff's allegations are true, Plaintiff could not recover tort-related pre-majority medical expenses. The fact that Defendants' arguments rest upon conditional admittance of Plaintiff's allegations makes it an affirmative defense. Defendants' position is that, even if the court assumes all elements of Plaintiff's case have been established, Plaintiff could not recover tort-related pre-majority medical expenses. Again, this necessarily makes Defendants' arguments an affirmative defense. Defendant is not arguing that a particular element of Plaintiff's cause of action has not been established.

Additionally, Plaintiff was clearly prejudiced by Defendants' failure to plead Plaintiff's inability to recover pre-majority tort-related medical expense as an affirmative defense. Time remained on the statute of limitations for the mother to recover tort-related pre-majority medical expenses incurred by her child in her own name. Had Defendants properly pled this affirmative defense, Plaintiff could have amended the complaint to change the capacity through which Angela Patton sought pre-majority medical expenses from her acting as Next Friend, to her individual capacity. From Plaintiff's perspective, there was no need for mother to bring suit in

her own name because Defendants did not object to the minor seeking these damages in the minor's own name. Instead, Defendants feigned acceptance of Plaintiff's demand, even if Defendants disputed elements of the cause of action (or disputed recovery through other listed affirmative defenses), waited for the mother's statute of limitations to run, and then sought to preclude Plaintiff from recovery of pre-majority tort-related medical expenses. Defendants denied Ms. Patton the ability to bring suit in her own name by acquiescing to the child's demands for pre-majority medical expenses only to move for summary judgment on this very basis after the parent's statute of limitations had run. Accordingly, Plaintiff respectfully submits it was error for the court to grant Defendants' motions for partial summary judgment.

III. Application of the Necessaries Doctrine to this Case Imposes a Manifest Injustice upon Plaintiff

Without rehashing arguments already made, Plaintiff wishes to draw the court's attention to the reasoning from the cases South Carolina courts relied upon to formulate its version of the necessities doctrine. As this court noted in its Order, the general common law rule that any right of action to recover pre-majority medical expenses belongs only to the minor's parents is found in *Tucker v. Buffalo Cotton Mills*, 76 S.C. 539, 57 S.E. 626 (1907). The court's analysis in *Tucker* is derived from several nineteenth century opinions, including *Newbury v. Getchell & Martin Lumber & Mfg*, 100 Iowa 441, 69 N.W. 743 (1896), *Tompkins v. West*, 56 Conn. 478, 16 A. 237 (1888), and *Fuller v. Naugatuck*, 21 Conn. 557 (1852).

Fuller v. Naugatuck, reminded us that expenses for the cure of one's wife accrue to the husband alone. *Fuller* 21 Conn. at 571. *Tompkins v. West*, which cited to *Fuller*, explained that while an unmarried, feme sole may recover damages arising from expenses incurred attending her sickness, a married woman has no right of action for these expenses because, in coverture,

the claim rests with the husband alone. *Tompkins* at 486.⁵ After citing to *Tompkins*, *Newbury v. Getchell* extended the rationale precluding a wife's recovery for tort-related medical expenses to a minor. The court in *Newbury* held a minor could not recover medical expenses incurred from another's tort because the father "was liable for the support and maintenance of his minor son." *Newbury*, 100 Iowa at 457, 69 N.W. at 748. Finally, the 1907 case of *Tucker v. Buffalo* established the common law in South Carolina that a minor may not "recover for expenses incurred for which the father himself is personally liable." *Tucker*, 76 S.C. at 542, 57 S.E. at 627.

To prevent Alexia Lumpkin from recovering tort related pre-majority medical expenses based on nineteenth century case law which restricted a woman's right to contract after marriage creates manifest injustice in this case and has no place in modern law. Accordingly, Plaintiff again requests this court to abrogate this anachronistic law and bring South Carolina common law in line with the majority of courts⁶, as well as South Carolina district courts⁷, and permit a minor to recover tort related pre-majority medical expenses in her own name.

⁵ *Griswold v. Penniman* noted that in coverture, choses in action "vest absolutely in the husband, on the principle that husband and wife are but one in law, and her existence, in legal consideration, is merged in his." *Griswold v. Penniman*, 2 Conn. 564 (1818).

⁶ *Cabaniss v. Cook*, 353 So. 2d 784 (Al., 1977); *Blue Cross and Blue Shield of Alabama v. Bolding*, 465 So.2d 409, 412 (Ala. Civ. App. 1984); *Alaskan Village Inc. v. Smalley*, 720 P.2d 945 (Alaska, 1986); *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, 249 P.3d 767 (Ariz. 2011); *White v. Moreno Valley Unified School Dist.*, 181 Cal App. 3d 1024, 226 Cal. Rptr. 742 (Cal. App. 4 Dist., 1986); *Palacios v. Children's Place Retail Stores, Inc.*, 2004 WL 2943634 (Conn. Super., 2004); *Myer v. Dyer*, 643 A.2d 1382 (Del. Super. Ct. 1993); *Lasselle v. Special Products Co.*, 106 Idaho 170, 677 P.2d 483 (1983); *Scott Cnty School Dist. v. Asher*, 324 N.E. 2d 496 (Ind. 1975); *Villa v. Roberts*, 80 F. Supp.2d 1229 (D. Kan. 2000); *Betz v. Farm Bureau Mut. Ins.*, 269 Kan. 554, 8 P.3d 756 (2000); *Smith v. Geoghegan and Mathis*, 333 S.W.2d 254, 256 (Ky. 1960); *Aucoin v. State ex rel Dep't of Transp. & Dev't ex rel. Dep't of Transp. & Dev't*, 712 So. 2d 62 (La. 1998); *Woodbury v. Hammond Lumber Co.*, 2003 WL 1665251 (Me. Super., 2003); *Johns Hopkins Hospital v. Pepper*, 697 A.2d 1358 (Md. Ct. App. 1997); *Lane v. Webb*, 220 So.2d 281 (Miss., 1969); *Boley v. Knowles*, 905 S.W.2d 86 (Mo. 1995); *Lopez v. Southwest Community Health Services*, 114 N.M. 2, 833 P.2d 1183 (N.M. App., 1992); *Procanik by Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Davis v. Drackett Prods. Co.*, 536 F. Supp. 694 (S.D. Ohio 1982); *West v. Miami Valley Hospital*, 99 Ohio Misc. 2d 1, 714 N.E.2d 469 (Ohio com. Pl., 1998); *Palmore v. Kirkman Laboratories, Inc.*, 527 P.2d 391 (Oregon 1974); *Smith v. King*, No. Civ. A. 958, 1984 WL 586817 (Tenn. Ct. App. 1984); *Moses v. Akers*, 122 S.E.2d 864 (Va. 1961); *Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548 (W. Va. 2007); *Korth v. American Family Insurance Co.*, 340 N.W. 2d 494 (Wisc. 1983); *Shaffer-Doan v. Commonwealth*, 960 A.2d 500, 511 (Pa. Commw. Ct. 2008).

⁷ *McNeill v. United States*, 519 F. Supp. 283 (D.S.C. 1981); *Sox v. United States*, 187 F. Supp. 465, (D.S.C. 1960).

IV. Plaintiff Requests Leave to Amend the Complaint and Have the Amendment Relate Back to the Filing of the Original Complaint.

Finally, Plaintiff requested the court, in the alternative, to allow Plaintiff to file a Motion for Leave to Amend the pleadings to assert the claim for pre-majority medical expenses in the mother's name and for the amendment to relate back to the original filing of the summons and complaint. Plaintiff respectfully submits the court failed to fully consider or failed to rule upon this issue in its order granting Defendants' motions for partial summary judgment, or to the extent it did rule on this issue, did so in error. Accordingly, Plaintiff asks that she be permitted to amend the complaint to change the capacity in which Angela Patton seeks tort-related pre-majority medical expenses from that of Next Friend to in her individual capacity. Moreover, Plaintiff requests that the amendment relate back to the filing of the original complaint against Dr. Miller and Rock Hill Gynecological & Obstetrical Associates.

"The purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations." *Thomas v. Grayson*, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (1995). Rule 15(c) states, "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." SCRCF. Rule 15(c). Additionally SCRCF Rule 15(c) states:

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Moreover, even though Rule 15(c) is silent on the issue of changing plaintiffs (or changing one's capacity as plaintiff) "the attitude taken in revised Rule 15(c) toward change of defendants

extends by analogy to amendments changing plaintiffs.” FRCP Rule 15 “Notes of Advisory Committee on 1966 amendments.”

This court should have permitted Plaintiff to amend the complaint and for the amendment to relate back to the initial filing date. First, the claim for tort-related pre-majority medical expenses clearly arises out of the same conduct, transaction, and occurrence set forth in the original pleadings. The only change is the capacity under which Angela Patton seeks recovery for these damages. While Patton initially made a claim for these damages as Next Friend of Alexia Lumpkin, she would now make a demand for these damages in her individual capacity. Thus no new party is being added to the case.⁸ Second, Defendants were clearly on notice that Plaintiff sought pre-majority medical expenses, as these were specifically prayed for by Angela Patton as Next Friend of Alexia Lumpkin. Finally, Defendants knew or should have known that, but for the mistake of requesting these damages as Next Friend of Alexia Lumpkin⁹, these damages would have been sought by Angela Patton in her individual capacity.

There is no prejudice to Defendants by allowing Plaintiff to amend the complaint in the manner requested. Defendant certainly cannot claim surprise, as the exact same damages were prayed for in the initial complaint. No harm befalls the Defense by permitting the complaint to

⁸ Case law exists in South Carolina which appears to question whether a new party may be added through Rule 15(c) SCRCF. See e.g., *Knuckles v. Fryatt*, 2011 S.C. App. Unpub. LEXIS 26 (Jan. 25, 2011) (citing *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567 (Ct. App. 2000)). These cases are inapposite to the case at hand because here, Plaintiff merely wishes to change the capacity in which Angela Patton brings suit. No new party is to be added. Moreover, Plaintiff argues these cases were wrongly decided and misinterpret the language and purpose of Rule 15(c) to the extent they argue the rule does not allow for a new party to be added. South Carolina case law stating that Rule 15 does not allow the addition of a new plaintiff to the case is equally inapposite for the same reason; no new plaintiff has been added in this case. However, as with *Knuckles*, Plaintiff believes this proposition to be in error and contrary to the language and purpose of the statute as well as the accompanying notes to the statutory amendments.

⁹ To be clear, Plaintiff’s initial argument is that demanding pre-majority medical expenses as next friend of a minor was not in error. When Angela Patton made this demand as next friend of Alexia Lumpkin, she either waived or assigned her right to recover pre-majority medical expenses to the minor, Alexia Lumpkin. Alternatively, if this court disagrees with Plaintiff’s position and concludes this was a mistake, then Defendants knew that but for the mistake, these damages would have been sought by Angela Patton in her individual capacity.

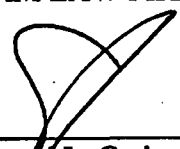
be amended at this stage. Defendants were on notice that Plaintiff sought pre-majority medical expenses. Defendants' ability to defend this claim on the merits has not been diminished. Therefore, Plaintiff requests that this court grant Plaintiff's request to amend the complaint and hold that the amendment relates back to the filing of the initial complaint.

Conclusion

For the reasons stated, Plaintiff requests this Court to reconsider its ruling reflected in the July 24, 2013 Order, and to find in Plaintiff's favor on those issues discussed *supra*. Accordingly, Plaintiff requests this court to rule that Angela Patton waived or assigned any claim she had for pre-majority medical expenses to Alexia Lumpkin, that Defendants waived their right to assert the affirmative defense that, even if Plaintiff proves all elements of her cause of action, a minor may not recover pre-majority medical expenses in her own name; or that the application of the necessities doctrine to this case imposes a manifest injustice upon Plaintiff. Alternatively, Plaintiff respectfully requests this court grant Plaintiff leave to amend the complaint to change the capacity through which Angela Patton demand pre-majority medical expenses from Next Friend to her individual capacity.

Respectfully Submitted,

GRAHAM LAW FIRM, P.A.

By: 

Edward L. Graham
Post Office Box 550
Florence, S.C. 29501
Attorney for Plaintiff

August 15, 2013

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Angela Patton as Next Friend of
Alexia Lumpkin, a minor,

Plaintiff,

vs.

Gregory A. Miller, MD,
Rock Hill Gynecological &
Obstetrical Associates, P.A. and
Amisub of South Carolina, Inc.
d/b/a Piedmont Medical Center,

Defendants.

AMISUB OF SOUTH CAROLINA, INC.
d/b/a PIEDMONT MEDICAL CENTER'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTIONS TO ALTER OR
AMEND AND FOR LEAVE TO AMEND
COMPLAINT

C. A. No. 2009-CP-46-5195

Defendant Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
("Amisub") submits the following Memorandum in Opposition to Plaintiff's August 15, 2013
Motion to Alter or Amend and Motion for Leave to Amend Complaint.¹

BACKGROUND

On April 5, 2007, Angela Patton gave birth to Alexia Lumpkin ("Plaintiff") at Amisub. Dr. Miller attended the delivery. Almost four and one-half years later, Plaintiff filed a medical negligence action against Amisub through her "next friend," Angela Patton.² Plaintiff alleges that Dr. Miller and Amisub applied improper delivery techniques during the April 2007 delivery. As part of her claim, Plaintiff seeks recovery of her past and future medical expenses allegedly related to birth injuries. See July 12, 2012 Complaint, ¶ 20(c).

On April 29, 2013, Amisub filed a Motion for Partial Summary Judgment on the

¹ Amisub will refer to Plaintiff's Motion to Alter or Amend as "Motion to Alter" and Plaintiff's Motion to Leave to Amend Complaint as "Motion for Leave."

² Plaintiff commenced its action against Amisub on September 23, 2011. Plaintiff's action against Amisub was consolidated into Plaintiff's action against Dr. Miller and Rock Hill Gynecological & Obstetrical Associates, PA (collectively, "Co-Defendants") by Consent Order dated July 12, 2012.

grounds that Plaintiff could not maintain an action for recovery of her past and present medical expenses incurred through the age of majority because those claims belonged to her parents. Following a July 18, 2013 hearing, this Court issued an Order granting Amisub partial summary judgment for the reasons set forth in the previous sentence. See August 2, 2013 Order Granting Partial Summary Judgment (the "Order").

It is the settled law of this State that a minor may not maintain an action for recovery of pre-majority medical expenses. Also, any amendment to Plaintiff's pleadings with respect to the pre-majority medical expenses would be barred by the applicable statute of limitations. As such, Amisub respectfully requests that this Court deny Plaintiff's Motion to Alter and Motion for Leave.

ARGUMENT

I. This Court lacks subject matter jurisdiction to consider Plaintiff's Motion to Alter because Plaintiff did not timely serve Judge Kimball with said motion.

A party filing a Rule 59(e) motion to alter or amend "shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Rule 59(g), SCRCP. A party's failure to comply with Rule 59(g) affects the Court's subject matter jurisdiction to hear the motion. See Gallagher v. Evert, 353 S.C. 59, 577 S.E.2d 217, Fn. 2 (Ct.App. 2002) (noting that failure to comply with Rule 59(g) "goes to the circuit court's subject matter jurisdiction to hear the motion"). Where a party fails to comply with Rule 59(g), the court may deny the motion "on this ground alone." See Id. at 63, 577 S.E.2d at 218. See also Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009) (noting that the circuit court dismissed the State's motion to reconsider for failure to comply with Rule 59(g) but disposing of the State's direct appeal on other grounds).



Plaintiff's counsel mailed her Motion to Alter to the Clerk of Court for York County for filing. See August 15, 2013 Cover Letter, attached as Exhibit A. Plaintiff did not include a certificate of service, but her cover letter indicates that she served counsel for Defendants with a copy of the Motion. See Ex. A. However, Amisub is not in possession of any evidence which indicates that Plaintiff served her Motion to Alter on Judge Kimball.

Because Plaintiff failed to serve Judge Kimball with a copy of her Motion to Alter within ten days of filing the same, this Court may and should deny Plaintiff's Motion to Alter for failure to comply with Rule 59(g), SCRPC and for lack of subject matter jurisdiction.

II. This Court properly granted Amisub partial summary judgment because Plaintiff's parents possess the sole right to seek recovery of pre-majority medical expenses.

Plaintiff concedes that by filing suit as next friend, Plaintiff's mother brought a claim for medical expenses solely on behalf of Plaintiff. See Plaintiff's August 15, 2013 Memorandum of Law in Support of Plaintiff's Motion to Alter ("Memo in Support"), p. 4 ("Angela Patton, by acting as Alexia Lumpkin's next friend, sought pre-majority medical expenses in Alexia Lumpkin's name...."). Plaintiff also concedes that existing South Carolina law holds that parents have the sole right to recover medical expenses incurred by their minor children. See excerpts from July 18, 2013 Hearing Transcript, attached as Exhibit B, 19:5 - 9; 20:2 - 6. However, Plaintiff argues that she is entitled to seek recovery of her pre-majority medical expenses because her mother impliedly waived or assigned her right to seek medical expenses in favor of Plaintiff. See Memo in Support, p. 2.

Plaintiff's argument is without merit. Primarily, this Court correctly ruled that South Carolina law recognizes that any right of action to recover a minor's medical expenses belongs to a minor's parent(s), and not to the minor. Tucker v. Buffalo Cotton Mills, 76 S.C.

539, 57 S.E. 626 (1907). This precedent is based upon the principles that parents of minor children are responsible for their children's pre-majority medical expenses and children are not entitled to recover damages based upon their parents' obligation. See Tucker; Hughey v. Ausborn, 249 S.C. 470, 476, 154 S.E.2d 839, 841 (1967); Bridges v. Joanna Cotton Mill, 214 S.C. 319, 52 S.E.2d 406 (1949); Trident Reg. Med. Ctr. v. Evans, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct.App. 1995). Faced with the above precedent, Plaintiff cannot cite to any binding authority supporting application of implied waiver or equitable estoppel in the context of a minor's attempt to recover pre-majority medical expenses. See Plaintiff's July 17, 2013 Memo in Opposition ("Memo in Opp."), p. 10.

Next, Plaintiff argues in favor of implied waiver and equitable estoppel because Tucker and its progeny allegedly are concerned with preventing double-recovery of pre-majority medical expenses. See Memo in Support, p. 3. However, Tucker and its progeny are premised on a more fundamental principle: actual damages "are awarded to a litigant in compensation for his actual loss or injury." Mellen v. Lane, 377 S.C. 261, 288, 659 S.E.2d 236, 250 (Ct.App. 2008). Plaintiff is not liable for her pre-majority medical expenses absent extraordinary circumstances not shown in this case. As such, she has not suffered a loss and is not entitled to compensatory damages for a loss that she has not sustained.

Finally, even if South Carolina law recognized the implied waiver or equitable assignment of a parent's claim for medical expenses in favor of a minor, Plaintiff's transferred claim for the recovery of her pre-majority medical expenses would be invalid. An action for medical negligence must be commenced within three years from the date of the alleged negligent treatment. S.C. Code Ann. § 15-3-545(A). Ms. Patton delivered Plaintiff on April 5, 2007, and Defendants' conduct during the delivery forms the basis of

alleged medical negligence in this action.

As a purported transferee of Ms. Patton's right to recover pre-majority medical expenses, Plaintiff's claim would be subject to all defenses available to Amisub against Ms. Patton. See, e.g., Rosemond v. Campbell, 288 S.C. 516, 522 - 23, 343 S.E.2d 641, 645 (Ct.App. 1986) ("[A]n assignee's rights can be no greater than those of his assignor. Consequently, the assignee of debt takes the obligation subject to all claims and defenses that the obligor may have against the assignor.") Plaintiff argues that Ms. Patton impliedly waived or assigned her right to recover pre-majority medical expenses when Plaintiff instituted suit and sought the recovery of pre-majority medical expenses in her own name. See Memo in Opp., p. 4 - 5. Plaintiff did not file suit against Amisub seeking the recovery of pre-majority medical expenses until over four years and five months after Plaintiff's delivery. By the time of the purported transfer of the right to seek pre-majority medical expenses, Ms. Patton's claim was time-barred. Thus, Plaintiff would have received no more than an invalid and procedurally-barred cause of action.

Plaintiff recognizes that a parent holds the right to recover pre-majority medical expenses but argues exceptions to this rule that have not been recognized in South Carolina. Even if they were, any cause of action transferred by Ms. Patton to Plaintiff at the time Plaintiff commenced suit against Amisub would be barred by the applicable statute of limitations. As such, this Court correctly granted Amisub summary judgment as to Plaintiff's claim for recovery of pre-majority medical expenses.

III. Plaintiff improperly uses a Rule 59(e), SCRPC Motion to attack Amisub's responsive pleading.

Plaintiff brings her Motion to Alter pursuant to Rule 59(e), SCRPC. See August 15,

2013 Notice of Motion. Within her Motion, Plaintiff argues, *for the first time*, that Amisub waived its right to contest Plaintiff's recovery of pre-majority medical expenses because Amisub failed to raise this issue by affirmative defense. See Memo in Support, p. 5.

Plaintiff's argument must not be considered because a Rule 59(e) motion cannot be used as a vehicle for raising new arguments. Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App. 1990). In Hickman, a family court ordered division of certain of the divorcing parties' personal property. By supplemental motion to alter or amend pursuant to Rule 59(e), SCRCP, the appellant sought to have the family court grant her an interest in her ex-husband's civil service retirement fund. Id. at 456, 392 S.E.2d at 482. The appellant first raised the issue of the civil service retirement fund in her motion to alter or amend. Id. The Court of Appeals affirmed the lower court's denial of the appellant's Rule 59(e) motion holding, "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."³

Like the appellant in C.A.H., Plaintiff attempts to raise a new argument for the first time in a Rule 59(e), SCRCP motion to alter or amend. Plaintiff cannot deny that it could have raised its concern with Amisub's responsive pleading prior to grant of summary judgment. Plaintiff also cannot deny that it failed to raise this issue in legal memoranda and at the July 18, 2013 hearing. As such, Plaintiff improperly raises this issue by way of a Rule 59(e) motion, and this Court should not rule on said issue.

Even if Plaintiff had raised this argument prior to or at the July 18, 2013 motion hearing, the argument would be misguided. Primarily, Amisub raised the defense of failure

³ The South Carolina Supreme Court has adopted this holding by reference. See C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993) (citing Hickman for the above proposition).

to state a claim in its April 24, 2012 Answer. See ¶ 11 ("In answer to paragraph 21, it is admitted that Plaintiff has complied with statutory requirements to commence an action, **but it is denied Plaintiffs [sic] have a valid cause of action.**" (emphasis added)).

Further, Plaintiff has not suffered any prejudice attributable to Amisub's alleged failure to raise defenses to Plaintiff's recovery of pre-majority medical expenses. Plaintiff argues that she has been prejudiced because "[t]ime remained on the statute of limitations for the mother to recover tort-related pre-majority medical expenses" and Plaintiff could have amended her pleading had Amisub raised the issue in its responsive pleading. See Memo in Support, p. 7. However, Plaintiff did not commence an action against Amisub seeking the recovery of pre-majority medical expenses until September 23, 2011, nearly a year and a half *after* expiration of the limitations period on Ms. Patton's claim for Plaintiff's pre-majority medical expenses pursuant to S.C. Code Ann. § 15-3-545(A). As such, no amount of notice could have given Plaintiff time within the limitations period to amend and properly plead recovery of pre-majority medical expenses.

Plaintiff improperly uses her Rule 59(e), SCRCF motion to argue for the first time that Amisub failed to plead Plaintiff's inability to recover pre-majority medical expenses as an affirmative defense. Even if Plaintiff had raised the argument prior to entry of summary judgment, the argument would be without merit because Amisub questioned the validity of Plaintiff's claim in its Answer and Ms. Patton's claim was time-barred before Plaintiff even commenced her action against Amisub.

IV. Plaintiff may not rely upon Rule 15(c), SCRCF to relate-back pleadings adding new or additional parties.

Finally, Plaintiff asks this Court for leave to file an amended complaint which will add

Ms. Patton as a party seeking recovery of the pre-majority medical expenses and relate back in time to the filing of Plaintiff's initial Complaint against Co-Defendants nearly two years prior to Plaintiff commencing suit against Amisub. See Motion to Alter, p. 10 - 12; Motion for Leave, p. 1 - 4.

Again, Plaintiff's arguments are contrary to South Carolina binding precedent because Rule 15, SCRCP applies exclusively to existing parties. See Valentine v. Davis, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct.App. 1995) ("Rules 15, 20 and 21 are applicable only to existing parties."). In Valentine, two plaintiffs filed suit against defendant contractors in federal court. Numerous other plaintiffs instituted a state court action against the same defendants. When the federal court dismissed the federal court complaint, the state court plaintiffs filed a motion to amend the pleadings to add the federal court Plaintiffs as plaintiffs to the state court action. Id. at 170 - 171, 460 S.E.2d at 219. The lower court denied the motion, and the federal court plaintiffs appealed. Id. The Court of Appeals denied the federal court plaintiffs' appeal holding, "Rule 15, SCRCP, does not allow an existing plaintiff to add a new plaintiff to the case to assert a claim against the defendant." Id. at 172, 460 S.E.2d at 219.

Faced with Valentine, Plaintiff takes the curious position that she does not propose to add a new party because "[t]he only change is in the capacity under Angela Patton seeks recovery of [pre-majority medical expenses.]" Motion to Alter, p. 11; Motion for Leave, p. 2. To be clear, Plaintiff does not seek to "change" the Plaintiff; she seeks to add Ms. Patton in her individual capacity *in addition to* Ms. Patton as next friend of Plaintiff. This Court correctly held that Ms. Patton currently is not a party in her individual capacity.

See Order, p. 2.⁴ In fact, Plaintiff appears to have conceded this point. See Plaintiff's Memo in Support, p. 4 ("Angela Patton, by acting as Alexia Lumpkin's next friend, sought pre-majority medical expenses in Alexia Lumpkin's name...."). Simply, Plaintiff proposes to add a plaintiff, and Rule 15(c) is inapplicable.

Even if Rule 15, SCRCP allowed the addition of a party-plaintiff, Ms. Patton's claim against Amisub would be time-barred because Rule 15(c)'s relation-back provision is inapplicable to additional defendants. See Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct.App. 2000). In Jackson, plaintiff filed suit against "John Doe" for injuries she received in a hit-and-run accident. Four and one-half years after the accident, plaintiff amended her complaint to add a second defendant who the plaintiff alleged may have been "John Doe." Id. at 554, 537 S.E.2d at 568. The lower court granted the second defendant summary judgment on the grounds that Rule 15(c) did not apply to "relate-back" the plaintiff's amended complaint and her suit against the second defendant was barred by the statute of limitations. Id. The Court of Appeals affirmed the lower court's grant of summary dismissal holding, "The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant." Id. at 558, 537 S.E.2d at 570.⁵

Plaintiff commenced her action against Co-Defendants on July 21, 2009. Plaintiff did not commence her action against Amisub until September 23, 2011 when she filed a

⁴ See Morgan v. Potter, 157 U.S. 195, 198 (1895) ("The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another.").

⁵ See also Gause v. Smithers, 384 S.C. 130, 681 S.E.2d 607 (Ct.App. 2009) (affirming dismissal of claims against an additional defendant added after the expiration of the statute of limitations because "the addition of a party is not contemplated by Rule 15(c)"); Cline v. J.E. Faulkner Homes, Inc., 359 S.C.367, 597 S.E.2d 27, Fn. 2 (Ct.App. 2004) ("[R]elation back applies only when an existing party is changed, not when a new party is added to a complaint.").

Notice of Intent under a different case number. Amisub became an additional party to this action on July 12, 2012 when Plaintiff's action against Amisub was consolidated into Plaintiff's action against Co-Defendants. Without analysis, Plaintiff claims that "no new party is being added to the case." See Motion to Alter, p. 10 - 12; Motion for Leave, p. 11. However, Plaintiff's claims against Amisub cannot relate back to Plaintiff's original complaint filed against Co-Defendants because Amisub is a new and additional party to this action. At most, Plaintiff's proposed second amended complaint could relate back to the time that she filed her action Amisub on September 23, 2011. By that time, Ms. Patton's cause of action for pre-majority medical expenses was time-barred as to Amisub.⁶

Plaintiff cannot be granted leave to file her proposed second amended complaint because Rule 15(c), SCRCP is inapplicable where amended pleadings add a new party, whether plaintiff or defendant. Granting Plaintiff leave to file her proposed second amended complaint would be futile because Ms. Patton's claim for pre-majority medical expenses still would be barred by the statute of limitations.

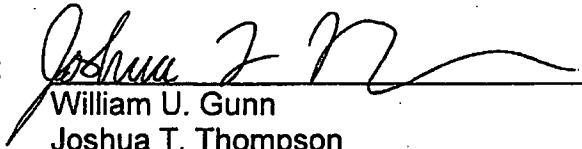
CONCLUSION

Plaintiff makes numerous arguments in an attempt to salvage a claim for recovery of pre-majority medical expenses. However, Plaintiff's arguments are unavailing because established precedent does not allow a minor to recover pre-majority medical expenses and any claim that Ms. Patton could assert for the same would be time-barred. This Court correctly granted Amisub summary judgment on Plaintiff's claims for pre-majority medical expenses, and Plaintiff's Motions to Alter and Motion for Leave must be denied.

⁶ In fact, Plaintiff's counsel noted this problem during the July 18, 2013 hearing: "Frankly it's a harder case as to the hospital because the claim against the hospital was not initiated until after three years." Ex. B, 23:14 - 16.

HOLCOMBE BOMAR, P.A.

By:



William U. Gunn

Joshua T. Thompson

P.O. Drawer 1897

Spartanburg, SC 29304

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Attorneys for Defendant Amisub of South
Carolina, Inc., d/b/a Piedmont Medical
Center

Spartanburg, SC

October 15th, 2013

EXHIBIT A



GRAHAM LAW

Shining a Light on Safety. Guiding the Way to Justice.

Edward L. Graham
Diane M. Rodriguez, RN-JD
Mary H. Watters
J. Layton Ruffin

August 15, 2013

Mr. David Hamilton
Clerk of Court for York County
Post Office Box 649
York, SC 29745-0649

**RE: Angela Patton, as Next Friend of Alexia Lumpkin, a minor v.
Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
C/A No.: 09-CP-46-5195**

Dear Mr. Hamilton,

Enclosed for filing, please find the original and two copies of Plaintiff's Motion to Alter or Amend Judgment and Memorandum of Law Supporting same regarding the above-referenced matter. Please file the original and return the clocked copies to me in the self-addressed, stamped envelope also enclosed for your convenience.

If you have any questions or concerns, please do not hesitate to contact me. With kind regards, I am

Sincerely yours,

KIMBERLY CARSON
Paralegal

/kc

Encl.

cc: Ashby W. Davis, Esq.
William U. Gunn, Esq.

GRAHAM LAW FIRM, P.A.
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Phone 843.662.3281 or 1.877.475.8877 • Fax 843.665.0254

EXHIBIT B

State of South Carolina.,)

In the Common Pleas
Court of York

Case No.: 2009-CP-46-05195

County of York.,)
_____)

Angela Patton.,)

Plaintiff.,)

-vs-)

Transcript Of Record

Gregory A. Miller.,)

Defendant.)
_____)

July 18, 2013
York, South Carolina

B E F O R E:

Honorable S. Jack Kimball, Judge.

A P P E A R A N C E S:

Mr. Edward L. Graham
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864-335-3500
Attorney for the Defendant

Wanda Nelson, CVR-M
Official Court Reporter

1 MR. GRAHAM: --- that precludes a child from
2 recovering her own medical expenses. However, ---

3 THE COURT: I understand.

4 MR. GRAHAM: --- however --

5 THE COURT: What you're asking me is to abrogate an
6 existing doctrine.

7 MR. GRAHAM: One that has not been challenged - Has
8 not been addressed in a published opinion by our Appellate
9 Courts since 1967. But if Your Honor please, think about
10 the developments in the collateral source rule since 1967;
11 particularly the Haselden case where the court made it
12 clear that the purpose of our tort system is for a tort

13 victim to recover from the tortfeasor all harms and losses
14 caused by the tort even if a third party suffers.

15 Even if a third party pays medical expenses like
16 Medicaid, or if a parent pays, or if a doctor provides
17 gratuitous care the child still gets to recover under the
18 collateral source, or the tort victim gets to recover under
19 the collateral source rule announced in Haselden in 2003.
20 That's what, thirty six years after the Hughey case and the
21 doctrine of those two cases stand in stark contrast to each
22 other.

23 For the tort principles announced in Haselden to have
24 vitality in the context that we're talking about here,
25 Hughey would need to be over ruled as many other states

1 have done in recent years. But, Your Honor, to rule in our
2 favor it's not necessary to do that. I understand that to
3 do that it may be more comfortable for trial judges to wait
4 for the Supreme Court to actually announce that it has
5 changed it's mind on some of those issues.

6 THE COURT: That's the usual practice.

7 MR. GRAHAM: I understand, Your Honor. But it's not
8 necessary to do that to rule in our favor because there
9 have been common law exceptions to the limited tort
10 recovery rule since the common law was created. And I've
11 cited --

12 THE COURT: I might add the Supreme Court has told me

13 that before.

14 MR. GRAHAM: Well - Yes, sir, I understand. I
15 understand very well. If Your Honor, please, the - on Page
16 8 of my brief ---

17 THE COURT: Yes, sir.

18 MR. GRAHAM: --- we cite several cases from other
19 jurisdictions. But we also cite 39 Am. Jur. Parent and
20 Child Section 83 and 67 C.J.S. Parent and Child Section 43.

21 I intentionally went back and got some older versions
22 of C.J.S. and Am. Jur. just to make the point that these
23 exceptions have been around for a long long time. Its
24 still valid in the current editions but I cited Am. Jur.
25 from '42; I cited C.J.S. for 1950. What those and other

1 issue up to the Supreme Court. The one thing that concerns
2 me is, Your Honor, if you rule against me now, I'm gonna
3 have to appeal that on an interlocutory basis cause it's
4 gonna affect the trial. If you could maybe rule and if
5 you're inclined to rule against me, if you could rule in
6 such a way where the trial court lets the determinations be
7 made as to all damages and then defer the decision about
8 which damages the plaintiff can recover so that we have a
9 clean record going up on appeal, that way we could avoid
10 having years wasted and have to come back for another trial
11 years from now.

12 But we believe that as to the doctor and his PA

13 there's so many reasons why Your Honor should deny the
14 motions. Frankly it's a harder case as to the hospital
15 because the claim against the hospital was not initiated
16 until after the three years. As to the hospital, we
17 believe the same arguments apply but it's a harder case
18 because that claim was not made until after that. But we
19 got - We've got the basic rule about amendments relating
20 back and we believe that that's an appropriate use of --

21 THE COURT: I'm not hearing that today, the
22 amendments.

23 What we're talking about today is maybe - are we going
24 to - essentially are we going to strike from the pleading
25 and the claim of the child's assertion of a right to be

State of South Carolina.,)
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) Case No.: 2009-CP-46-05195
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County of York.,)
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Angela Patton.,)
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Plaintiff.,)
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-vs-)
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Gregory A. Miller.,)
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)
Defendant.)
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)

Transcript Of Record

July 18, 2013
York, South Carolina

B E F O R E:

Honorable S. Jack Kimball, Judge.

A P P E A R A N C E S:

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Wanda Nelson, CVR-M
Official Court Reporter

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I N D E X

E X A M I N A T I O N

<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
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No witnesses were called.

I N D E XE X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits were received into the record.

1 (COURT IN SESSION THURSDAY, JULY 18, 2013 AT 09:00
2 A.M..)

3 THE COURT: This would be 09-5195, a couple of
4 motions. Is Mr. Davis still across the street?

5 MR. GUNN: Yes, sir. The only person that I - -

6 THE COURT: Is Mr. Davis still across the street?

7 MR. GUNN: Yes sir.

8 THE COURT: Okay.

9 MR. GUNN: He went - and I don't know if he wants to
10 be here.

11 THE COURT: For your motion? You got two of them.

12 MR. GUNN: I think he has joined in it.

13 THE COURT: Pardon?

14 MR. GUNN: I think he has joined in it or filed a
15 subsequent --

16 THE COURT: There are two separate motions filed but
17 they are identical.

18 MR. GUNN: Yes, sir.

19 THE COURT: Right. Lets wait on him. That's fine.

20 MR. GUNN: Okay.

21 THE COURT: It won't take but a minute.

22 (PAUSE.)

23 THE COURT: All right. I think we got a quorum now.

24 These are the defendant's motions for partial summary
25 judgment.

1 Mr. Gunn.

2 MR. GUNN: Yes, sir. If Your Honor please, we
3 submitted a memorandum electronically.

4 THE COURT: Yeah.

5 MR. GUNN: The action is one founded in medical
6 negligence or malpractice arising out of the delivery of a
7 child on April 5, 2007. The suit was originally filed
8 against Mr. Davis' client, Doctor Miller, and his OB group.

9 The hospital that I represent of course was brought in
10 in 2011 by way of a separate law suit which was - we went
11 through the steps now required, it was that that case was
12 then consolidated with the case against Doctor Miller and
13 his group so that they are all now one case.

14 The motion that is before Your Honor today is made
15 pursuant to Rule 56 of the South Carolina Rules of Civil
16 Procedure on the usual grounds there is no genuine issue as
17 to any material fact and that we are entitled to judgment
18 at least on this issue as a matter of law and it's
19 supported by the entire record in the case.

20 The suit is brought by the next friend of Alexia
21 Lumpkin, the minor. The motion, our motion seeks to strike
22 or in the alternative to actually to receive partial
23 summary judgment on the issue of medical expenses both past
24 and through the date she becomes sui juris. Her eighteenth
25 birthday I suspect of course would be that date.

1 The basis for --

2 THE COURT: She was born when, Mr. Gunn? '08, 2008
3 did you say?

4 MR. GUNN: 2007.

5 THE COURT: 2007.

6 MR. GUNN: April 5, 2007.

7 The basis of the motion, Your Honor, is really rather
8 simple. It's that under South Carolina law any claim for
9 medical expenses on a minor clearly belongs to the parent
10 or parents and not to the minor. This is brought by the
11 next friend which is in essence under Black's law
12 dictionary's definition at least the same as the guardian
13 ad litem or attorney. Not in the individual capacity --

14 THE COURT: Not individually or and as a GAL for the
15 minor.

16 MR. GUNN: Correct yes, sir.

17 The necessities doctrine was established long ago in
18 South Carolina, that is, that the parents are financially
19 obligated to pay medical expenses for the minor child. It
20 was established more than a hundred years ago, it's been
21 reaffirmed by the court in the 1967 Greenville County case
22 which went to the Supreme Court, Hughey against Ausborn.

23 Again in the case United States against Kapuschinsky a
24 case decided by Judge Hemphill in '66 I believe, the year
25 before. Same principle. It was enunciated as recently as

1 1995 in a case of Trident Medical Center against Evans that
2 the parent is responsible.

3 Upon that, Your Honor, an action has never been
4 commenced to this date by the parent or parents. It would
5 be time barred both by the - clearly by the statute of
6 limitations and arguably of course by the statute of
7 repose. The parents have been deposed, they've long since
8 have been on notice of a claim or ought to have discovered
9 it in such an action is time barred. Plaintiff makes in
10 her memo filed with the court a lot of social arguments,
11 things of that nature, practical arguments, so forth; but
12 the necessities doctrine is still the law of South
13 Carolina.

14 THE COURT: So basically what you're saying is that
15 the case must go forward based upon the child's injuries
16 alone. At least to this case must go forward based on the
17 child's injuries alone without reference to the medical
18 expenses.

19 MR. GUNN: That's correct if Your Honor please.

20 You know injuries in all attendant things do injuries
21 pain and suffering, future lost income, earning capacity,
22 any disfigurement, things of that nature. But not past or
23 medical - past or future medical expenses through her
24 eighteenth birthday.

25 THE COURT: Let me ask you this and in looking through

1 it and thinking about it.

2 I don't know the severity of this child's injuries,
3 but in a typical case with permanent injuries there would
4 be testimonies of an expert, as you well know, as to future
5 care. Is it your position that the plaintiff, child,
6 through her next friend could introduce evidence of life
7 care plan post eighteen?

8 MR. GUNN: Yes, sir.

9 THE COURT: Okay.

10 THE COURT: Yes, sir. Any medical expenses, future
11 care expenses, anything from her eighteenth birthday
12 forward yes, sir, no question about that.

13 THE COURT: So in some sense that evidence would have
14 to be tailored to fit that age.

15 MR. GUNN: Right. That would have to be cared out I
16 some fashion pretrial.

17 THE COURT: Okay.

18 MR. GUNN: And handled in that way.

19 THE COURT: Okay. Mr. Graham.

20 MR. GRAHAM: Thank you, Your Honor.

21 I'm happy to respond now or, I mean --

22 THE COURT: I guess - Let me ask Mr. Davis first.

23 Mr. Davis, do you have anything to add to that?

24 MR. DAVIS: I wish I knew how but I would like to
25 quote Justice Moss in the 1967 case of Hughey versus

1 Ausborn where he said "when a minor receives personal
2 injuries approximately caused by the actual negligence,
3 recklessness, willfulness of another, cause of action
4 arises in favor of the injured minor and such injury - such
5 minor can maintain a suit to recover the resulting damages
6 through the Guardian Ad Litem; however, in such an action
7 the amount paid for medical care and treatment by the
8 parent is not an element of damages and the parent has a
9 cause of action for the recovery of the medical expenses
10 which is occurred for the care and treatment of such
11 minor."

12 Clearly that's the law. Justice Moss stated it well;
13 that's still the law in South Carolina, the statute of
14 limitations has run. The child was born April 2007, April
15 2013, that six year statute has run. And I join my
16 colleague in the motions he made.

17 THE COURT: All right. Yes, sir.

18 MR. GRAHAM: Thank you, Your Honor. May it please the
19 court. I'd like to start off by reciting some basic facts
20 about the initial complaint against Mr. Davis' client, the
21 doctor and his PA.

22 That claim unquestionably was filed within three years
23 of the child's birthday. Nobody contends that that claim
24 by the next friend, the biological mother's next friend on
25 behalf of her daughter, was late in any way.

1 THE COURT: Nobody has claimed that in anything I've
2 read.

3 MR. GRAHAM: Exactly. And as to the original claim
4 against the doctor and his PA, there is no question that
5 the parents even though under ancient South Carolina law
6 the Supreme Court has never been published or the Court of
7 Appeals has never been published on that issue since 1967.

8 THE COURT: On which issue?

9 MR. GRAHAM: On the issue of whether - whether it is
10 only a parent that has the right to recover tort related
11 pre-majority medical expenses of a minor child tort victim.

12 THE COURT: All right.

13 MR. GRAHAM: The 2005 - I mean the 1995 Trident case
14 that Billy cited just supports the necessities doctrine as
15 a general proposition that parents have to take care of
16 their children. We accept that. We accept that.

17 The only issue here that's been modified by a
18 majority, an over whelming majority of case of states that
19 have considered the issue since 1967 is that it's an
20 acronymism and an anomaly to say that because parents have
21 the duty to support their children, that that some how
22 should preclude the child from recovering medical expenses
23 in her own tort action.

24 I don't want to go through the entire litany. Did you
25 get the brief that we sent?

1 THE COURT: I do not think I did.

2 MR. GRAHAM: I have a copy. I sent it yesterday, Your
3 Honor.

4 THE COURT: That's fine.

5 MR. GRAHAM: In response to the one we got. We
6 responded to the one that we got from counsel and we sent
7 it electronically yesterday. But if Your Honor please, the
8 equities clearly lie with this child. This is an innocent
9 child who was tortuously and as you indicated you didn't
10 know --

11 THE COURT: Well nobody's denying the child's right to
12 recover any and everything.

13 MR. GRAHAM: Yes, sir.

14 THE COURT: Fully recover for it's injuries. All
15 that's alleged here - all that's sought to be done here is
16 to prohibit the child from claiming damages for which it is
17 not responsible.

18 MR. GRAHAM: Okay. I understand, Your Honor.

19 Let me - Let me - My submission to Your Honor is that
20 the equities lie with the --

21 THE COURT: This is not a matter of equity.

22 MR. GRAHAM: I understand. I'm just saying that there
23 are four ways that those equitable principles in favor of
24 my client can be --

25 THE COURT: What equitable principles?

1 MR. GRAHAM: The one set forth in the brief, Your
2 Honor. But basically --

3 THE COURT: The brief that I just now got?

4 MR. GRAHAM: Well I apologize, Your Honor, we got one
5 from opposing counsel and did our reply as soon as we
6 could, less than twenty-four hours. But let me just go
7 through, if I may just go through the brief, Your Honor.

8 THE COURT: Yes, sir.

9 MR. GRAHAM: This is going to take some time.

10 But in the introduction starting on Page 1 that we go
11 through the historical basis of the necessities doctrine.
12 In South Carolina that starts with the doctrine of
13 coverture which this state doesn't follow any more. That
14 pretty much says that a man, a married man owns his wife
15 and children. He has the right to the produce of their
16 labor; he has the sole obligation to pay for all of their
17 needs, and because he is the only one that pays for their
18 medical expenses he's the only one that can recover it.

19 That law has been changed in numerous respects since
20 it was first adopted. South Carolina adhered to those
21 principles end of the twentieth century. I mean as late as
22 the Gwynn case which is cited in Footnote 8, the Court
23 addressed whether a woman could enter into a partnership
24 with her husband to combine their labor and skill. The
25 Court made clear she could not for the simple reason that

1 her labor and skill already belonged to the husband.

2 Obviously a lot has changed since those days.

3 The rule - The necessities doctrine in it's original
4 form doesn't say the child is precluded from recovering
5 medical expenses. What it says is, the parent - the father
6 has the sole obligation to pay those expenses and as a
7 result of the sole obligation to pay those expenses he's
8 the only one that can recover those expenses.

9 THE COURT: What about the case of Tucker versus
10 Buffalo Cotton Mills, 1907.

11 MR. GRAHAM: All right. At that time it was, as you
12 point out an early twentieth century case, a creditor could
13 historically collect debts incurred by a child only from
14 the child's father. That was an eight-year-old employed in
15 a cotton mill; he lost a finger when he was told to work
16 around some fast moving gearing and the court definitely
17 held that a child could not recover for expenses incurred
18 for which the father himself is personally liable.

19 The next case to address - the next South Carolina
20 case to address this --

21 THE COURT: Well isn't that contrary to what you're
22 telling me?

23 MR. GRAHAM: Yes, sir. Yes, sir, but it's 1907 if,
24 Your Honor, please. 1907 much has changed since then.
25 Women have rights now; children have rights now. Children

1 have obligations now. Children can --

2 THE COURT: A minor doesn't.

3 MR. GRAHAM: Yes, sir.

4 THE COURT: All right, let me - How about this?

5 A minor or his estate cannot be held liable for the
6 cost of necessities.

7 MR. GRAHAM: That's untrue, Your Honor. That is no
8 longer true.

9 THE COURT: In 1977 it was true.

10 MR. GRAHAM: Yes, sir, that is true. Let me find that
11 if I may, Your Honor.

12 (PAUSE.)

13 MR. GRAHAM: The - My brain is telling me it's the
14 Greenville County case.

15 THE COURT: Greenville Hospital System against Smith.

16 MR. GRAHAM: I believe that's the case that says a
17 child can be held responsible and that's actually another
18 version of the necessities doctrine. If you'll give me a
19 minute, Your Honor, and I'll be happy to find that. I'm
20 sorry that I don't have it at my fingertips.

21 THE COURT: What it says is a minor or his estate
22 cannot be held liable for the cost of necessities unless
23 his parents are unable to discharge their obligation of
24 support.

25 MR. GRAHAM: Excellent. That's correct, Your Honor.

1 And we've cited that at Footnote 22. And ironically and
2 confusingly that doctrine that children can be required to
3 pay for their necessities when the parents cannot, is now
4 also referred to as the necessities doctrine. The
5 necessities doctrine is a phrase that gets bantied about
6 meaning one thing in one context and something almost the
7 opposite in another context.

8 But if, Your Honor, please the necessities doctrine
9 has evolved. It now remains primarily as a creditor's
10 remedy as set forth in our Footnote 24, which --

11 THE COURT: Let me stop you one second.

12 MR. GRAHAM: Yes, sir.

13 THE COURT: Mr. Davis, I didn't run across the opinion
14 of Judge Moss that you cited. What is that case?

15 MR. DAVIS: Your Honor, I'd be glad to give you my
16 copy.

17 THE COURT: Of the case? If you've got a copy of it.

18 MR. DAVIS: Yes, sir, I've got it. You may have my
19 copy. I've got it highlighted and be glad to give it to
20 you. It's Hughey versus Ausborn, A-u-s-b-o-r-n, Supreme
21 Court of South Carolina May 26th, 1967. Glad to give you
22 my copy, sir.

23 THE COURT: Go ahead, Mr. Graham.

24 MR. GRAHAM: Thank you, Your Honor.

25 And I believe it's the Trident case recognizes that

1 the necessities doctrine in it's modern times exist
2 primarily as a creditor's remedy. The creditors can
3 collect from the parents if they are able to pay it. The
4 creditors can collect from the child if the parents are
5 unable to pay. But if Your Honor please, in modern times
6 so much has changed. Parents rarely pay out of their
7 pocket for medical expenses in a catastrophic injury
8 situation. More often private insurance pays; medicaid
9 pays, other government programs pay; sometimes the child is
10 required to pay out of the child's tort recovery and in a
11 case like this that's a real possibility. Sometimes the
12 parents pay especially for maybe copays or something like
13 that.

14 In this case if Your Honor please, the record shows
15 that medicaid has paid for all the bills. There's no
16 evidence that the parents have paid a dime for this child's
17 injuries. The child has received in excess of a Hundred
18 and Seventy Thousand Dollars worth of treatment at retail
19 according to Billy Gunn's brief. And Medicaid paid a
20 reduced amount of that. But in modern times this off shoot
21 of the necessities doctrine that says only the parents can
22 recover no longer makes sense. It was based on the
23 doctrine that parents alone have to pay and now in this
24 case --

25 THE COURT: Well the child's not going to recover it

1 either. Medicaid is gonna recover it.

2 MR. GRAHAM: Well that's another issue.

3 THE COURT: There's not gonna be charged - It's not
4 gonna be part of the child's recovery.

5 MR. GRAHAM: Under the Ahlborn case a Fourth - a US
6 Supreme Court case, the medicaid and medicare can only
7 recover that portion of a tort recovery that represents
8 prior medical expenses. So --

9 THE COURT: Represents what?

10 MR. GRAHAM: Reimbursement of medical expenses.

11 THE COURT: Here's the deal. Medicaid is going to be
12 entitled to recover anything it paid. Unless it
13 negotiates, negotiates a different repayment.

14 MR. GRAHAM: The ---

15 THE COURT: And that will be all that has been paid
16 for the child's medical expenses unless the parents paid
17 some. Right?

18 MR. GRAHAM: I disagree respectfully, Your Honor.

19 THE COURT: Well is that not true?

20 MR. GRAHAM: I don't believe it is true if, Your
21 Honor, please.

22 THE COURT: All right.

23 MR. GRAHAM: Okay. Under the Ahlborn case,
24 A-h-l-b-o-r-n, which we've cited; it's a US Supreme Court
25 case from some years, several years ago. Under that case

1 medicaid and medicare can only recover from a tort recovery
2 that portion of the tort recovery that represents
3 reimbursement of medical expenses.

4 THE COURT: I don't disagree with that.

5 MR. GRAHAM: Okay. So if in the child's case, the
6 child is precluded from recovering medical expenses, and
7 the parents claim is time barred then medicaid - the tax
8 payers loose out. Not only the child but the tax payer's
9 loose out. They don't get the --

10 THE COURT: Well the object of this case is not to
11 reimburse medicaid; it is a government provision for
12 medical care. The object of the case is to compensate this
13 child fully for it's injuries.

14 MR. GRAHAM: Yes, sir. And I'm just pointing out that
15 the --

16 THE COURT: And reimbursing the medical expenses in
17 this case is not compensation to the child by just what you
18 told me.

19 MR. GRAHAM: We believe - I don't want to get into a
20 long discussion. We've covered in the brief why we believe
21 South Carolina should follow the majority rule of other
22 states that have considered this issue since 1967 and
23 abrogate that portion of the historical necessities
24 doctrine ---

25 THE COURT: All right.

1 MR. GRAHAM: --- that precludes a child from
2 recovering her own medical expenses. However, ---

3 THE COURT: I understand.

4 MR. GRAHAM: --- however --

5 THE COURT: What you're asking me is to abrogate an
6 existing doctrine.

7 MR. GRAHAM: One that has not been challenged - Has
8 not been addressed in a published opinion by our Appellate
9 Courts since 1967. But if Your Honor please, think about
10 the developments in the collateral source rule since 1967;
11 particularly the Haselden case where the court made it
12 clear that the purpose of our tort system is for a tort
13 victim to recover from the tortfeasor all harms and losses
14 caused by the tort even if a third party suffers.

15 Even if a third party pays medical expenses like
16 Medicaid, or if a parent pays, or if a doctor provides
17 gratuitous care the child still gets to recover under the
18 collateral source, or the tort victim gets to recover under
19 the collateral source rule announced in Haselden in 2003.
20 That's what, thirty six years after the Hughey case and the
21 doctrine of those two cases stand in stark contrast to each
22 other.

23 For the tort principles announced in Haselden to have
24 vitality in the context that we're talking about here,
25 Hughey would need to be over ruled as many other states

1 have done in recent years. But, Your Honor, to rule in our
2 favor it's not necessary to do that. I understand that to
3 do that it may be more comfortable for trial judges to wait
4 for the Supreme Court to actually announce that it has
5 changed it's mind on some of those issues.

6 THE COURT: That's the usual practice.

7 MR. GRAHAM: I understand, Your Honor. But it's not
8 necessary to do that to rule in our favor because there
9 have been common law exceptions to the limited tort
10 recovery rule since the common law was created. And I've
11 cited --

12 THE COURT: I might add the Supreme Court has told me
13 that before.

14 MR. GRAHAM: Well - Yes, sir, I understand. I
15 understand very well. If Your Honor, please, the - on Page
16 8 of my brief ---

17 THE COURT: Yes, sir.

18 MR. GRAHAM: --- we cite several cases from other
19 jurisdictions. But we also cite 39 Am. Jur. Parent and
20 Child Section 83 and 67 C.J.S. Parent and Child Section 43.

21 I intentionally went back and got some older versions
22 of C.J.S. and Am. Jur. just to make the point that these
23 exceptions have been around for a long long time. Its
24 still valid in the current editions but I cited Am. Jur.
25 from '42; I cited C.J.S. for 1950. What those and other

1 cases that have addressed the issue have held is that when
2 a parent files a claim on the child's behalf in a
3 representative capacity, before the parents statute of
4 limitation is expired that constitutes an implied
5 assignment of the parent's right to recover medical
6 expenses to the child.

7 It also represents --

8 THE COURT: Doesn't an assignment requiring some
9 consideration.

10 MR. GRAHAM: Not under C.J.S. and Am. Jur. in this
11 situation. It's an implied assignment by operation of the
12 law. It's also a waiver and the parents are estopped to
13 assert the claim in their own behalf. That's well
14 established exceptions to the common law.

15 I cited a few cases here that have followed the
16 exception from Kentucky in 1960; Mississippi in '69;
17 Oregon '74; Alabama '77; McNeil versus U.S., a U.S.
18 District Court case from South Carolina, 1981. Davis
19 versus Drackett, Ohio, 1982. Idaho '83; Delaware '93;
20 Ohio '98; District Court in Kansas, 2000, Kansas Appellate
21 Court, 2000.

22 We believe, Your Honor, that in this situation it was
23 a valid claim for the child to assert medical expenses
24 within three years of the child's birth through the parent
25 as representative. It's an implied assignment, it's a

1 waiver, it's an estoppel. I've cited cases around the
2 country that have abrogated this what they call an
3 acronymism from the common law in recent years since 1967.
4 And what they say is, why are we asking for there to be two
5 separate claims here? You know why should we have a tort
6 claim for a child and an expense claim for the parent two
7 separate cases?

8 THE COURT: There's a simple answer to that and that
9 is that the parent paid it and is responsible to pay it.

10 MR. GRAHAM: Well that used to be true.

11 THE COURT: Not the child.

12 MR. GRAHAM: That used to be true. It doesn't --

13 THE COURT: It's still true in South Carolina.

14 MR. GRAHAM: Well it's one thing that is's a maxim
15 every body recognizes that parents have the responsibility
16 to pay for their children, but, if a parent is working
17 minimum wage and the child has millions of dollars in
18 medical bills it ain't gonna happen. Medicaid is gonna pay
19 it or medicare is gonna pay it or private health insurance
20 is gonna pay it or the care will not be received or there
21 will be gratuitous care.

22 The modern times - The common law needs to adjust to
23 changes in the reality of circumstances. That's why I went
24 through the history of this. Frankly it's an acronymism
25 that can no longer be justified. I'm happy to take that

1 issue up to the Supreme Court. The one thing that concerns
2 me is, Your Honor, if you rule against me now, I'm gonna
3 have to appeal that on an interlocutory basis cause it's
4 gonna affect the trial. If you could maybe rule and if
5 you're inclined to rule against me, if you could rule in
6 such a way where the trial court lets the determinations be
7 made as to all damages and then defer the decision about
8 which damages the plaintiff can recover so that we have a
9 clean record going up on appeal, that way we could avoid
10 having years wasted and have to come back for another trial
11 years from now.

12 But we believe that as to the doctor and his PA
13 there's so many reasons why Your Honor should deny the
14 motions. Frankly it's a harder case as to the hospital
15 because the claim against the hospital was not initiated
16 until after the three years. As to the hospital, we
17 believe the same arguments apply but it's a harder case
18 because that claim was not made until after that. But we
19 got - We've got the basic rule about amendments relating
20 back and we believe that that's an appropriate use of --

21 THE COURT: I'm not hearing that today, the
22 amendments.

23 What we're talking about today is maybe - are we going
24 to - essentially are we going to strike from the pleading
25 and the claim of the child's assertion of a right to be

1 reimbursed for medical expenses.

2 MR. GRAHAM: Yes, sir. I raised the relation, that
3 point just, there has been an amended complaint that
4 consolidates all claims to the extent that adding the
5 hospital with that amendment is construed to relate back to
6 the original complaint before three years ---

7 THE COURT: Its not my concern.

8 MR. GRAHAM: --- and I think it's relevant to this
9 issue.

10 THE COURT: I do not think so. We're here to hear the
11 motions. Anything else?

12 MR. GRAHAM: We rely on the brief. If Your Honor
13 please I'll --

14 THE COURT: The brief is a matter of the record.

15 MR. GRAHAM: Okay. Thank you, Your Honor.

16 THE COURT: All right. I find that it seems to me
17 that all parties agree that what we're dealing with is the
18 abrogation of an existing settled doctrine. I do not
19 believe it's my place to do that. I believe current law is
20 that - and certainly the plaintiff is entitled to have the
21 Supreme Court correct it - I find that the defendant's,
22 both sets of defendants, are entitled to partial summary
23 judgment on the claim for medical expenses of the child
24 from their beginning until the child reaches the age of
25 majority.

1 Mr. Gunn, if you will email me - maybe you and Mr.
2 Davis can collaborate on an order and email me that in Word
3 format.

4 MR. GUNN: Word?

5 THE COURT: Word would be fine.. Or Word Perfect if
6 that's what you got.

7 MR. GUNN: Word Perfect be okay?

8 THE COURT: Yes, sir. Until my version becomes
9 obsolete.

10 Yes. And obviously send a copy of that to Mr. Graham.

11 MR. GUNN: Yes, sir.

12 MR. GRAHAM: Your Honor, may I just ask for
13 clarification on one point?

14 THE COURT: Yes, sir..

15 MR. GRAHAM: I understand your ruling very well but to
16 keep me from having to file a 59(e) motion, I assume Your
17 Honor --

18 THE COURT: I'm not going to keep you from filing --
19 You've got to make that decision.

20 MR. GRAHAM: Yes, sir. But if you would go on and I
21 assume that your ruling against me on the assignment, the
22 implied assignment, the waiver and the estoppel, but if you
23 could make that clear in the order that way I would only
24 have to --

25 THE COURT: I'm ruling based on what I understand to

1 be the current law of the State of South Carolina.

2 MR. GRAHAM: All right, sir. So does that mean you're
3 ruling against me on assignment and waiver and estoppel?

4 THE COURT: It means that I am ruling on the current
5 law of South Carolina. I do not - Those doctrines that you
6 - those exceptions, doctrines or modifications, of what
7 would be the current law of South Carolina do not currently
8 in my - presently hold any water in South Carolina.

9 MR. GRAHAM: So I'm not arguing with you.

10 THE COURT: If you think you got the - That's it. If
11 you think you got to make a Rule 59 Motion, that's fine. I
12 hear those all the time. I have sustained the defendant's
13 position with respect to what I believe to be the existing
14 law of South Carolina. You've indicated that what you've
15 asserted is not the existing law of South Carolina and you
16 want me to abrogate that doctrine so make your appeal
17 accordingly. That's all.

18 Thank you, gentlemen.

19 MR. GUNN: Thank you, Your Honor.

20 MR. GRAHAM: Thank you.

21 (END OF TRANSCRIPT OF RECORD.)
22
23
24
25

CERTIFICATE OF REPORTER

State of South Carolina)
)
 County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 18th day of July, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson
 Wanda Nelson, CVR
 Certified Verbatim Reporter,
 Official Court Reporter,
 Notary Public, in and for
 The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 8-13 / 2013

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Angela Patton, as Next
Friend of Alexia Lumpkin,
a minor,

Plaintiffs,

Gregory A. Miller, M.D.,
et al

Date: October 17, 2013

BEFORE: The Honorable Jackson Kimball, III,

APPEARANCES:

Layton Ruffin, Esq.,
Attorney for the Plaintiff

Phyllis M. Campo, RPR
Court Reporter

1 THE JUDGE: There are two motions I have,
2 one is Rule 59(e) on the prior order. The other
3 is a motion to amend the complaint. Am I
4 correct.

5 MR. RUFFIN: Yes, your Honor.

6 THE JUDGE: Let's do the 59(e) first.

7 MR. RUFFIN: Thank you, your Honor. May
8 it please the Court.

9 THE JUDGE: Yes, sir. You need to state
10 your name for the record, please.

11 MR. RUFFIN: Layton Ruffin on behalf of
12 the Plaintiff.

13 THE JUDGE: Spell your first name, please.

14 MR. RUFFIN: L-A-Y-T-O-N.

15 THE JUDGE: Last name.

16 MR. RUFFIN: Ruffin, R-U-F-F-I-N.

17 THE JUDGE: Thank you. Go ahead.

18 MR. RUFFIN: This case involved a brachial
19 plexus injury to an infant that occurred during
20 delivery. Afterwards, the effects of injury
21 became known and the parent filed suit. The
22 suit was initially filed against the physician
23 and his obstetrics practice, and later an
24 amendment that included Amisub Hospital for
25 negligence alleged against its employees.

1 Your Honor held a hearing. We heard
2 arguments on the motion for summary judgment,
3 which Ed Graham attended and argued. Your Honor
4 reached its decision, after hearing oral
5 argument, on the basis that common law says the
6 Necessaries Doctrine precludes an infant from
7 recovering pre-majority medical expense in the
8 infant's own name.

9 Other arguments were raised in a memoranda
10 in response to the summary judgment. And at the
11 hearing, it is our duty to make sure that those
12 issues are preserved should we argue them
13 another day. So the purpose of the motion to
14 reconsider was, one, to see if your Honor would,
15 in fact, reconsider our argument that the common
16 law should be abrogated with respect to the
17 Necessaries Doctrine; but also, to get your
18 Honor's ruling on other matters as well that
19 were raised.

20 I have no intention of beating a dead
21 horse on the issue of abrogation of the
22 Necessaries Doctrine. Your Honor did reach a
23 decision on that, and I will move forward with
24 other arguments.

25 THE JUDGE: That's fine. I am not going

1 to change my ruling on that.

2 MR. RUFFIN: Sure. The first argument
3 that was made in response at the hearing
4 involved waiver and assignment. It is our
5 position that Angela Patton, Alexia Lumpkin's
6 mother, either waived or signed her right to
7 recover pre-majority medical expenses in favor
8 of her child. The theories are Implied Waiver,
9 which is permitted under South Carolina Law
10 pursuant to Lyles v. BMI, 292-SC-153.

11 The second is an argument of implied or
12 equitable assignment, which is permitted under
13 South Carolina Law pursuant to Player v. Player,
14 243-SC-274.

15 The first thing I will note is neither of
16 these cases involves application of this rule to
17 the Necessaries Doctrine in the particular facts
18 of this case. It is just that the theories
19 exist and they then apply in this factual
20 scenario in other jurisdictions as well as the
21 District Court in South Carolina and Federal
22 Court case.

23 The case that I am referring to that is
24 interpreting South Carolina Law is McNeill v.
25 United States.

1 THE JUDGE: Let me stop you a minute. I
2 know you were not here the first time so that is
3 something of a handicap. I have looked at the
4 memo that pertains to this business about
5 implied or equitable assignment and waiver or
6 estoppel. I don't remember that being argued.
7 I certainly have done a lot of cases between
8 then and now.

9 MR. RUFFIN: In the response to motion for
10 summary judgment, it highlighted on certain
11 pages that the argument was, first, complete
12 abrogation, but if your Honor does not wish to
13 go against the Court of Appeals, which, of
14 course, we understand. The second position is
15 waiver or estoppel. It wasn't an enormous
16 section. It wasn't the enormity of the
17 response.

18 THE JUDGE: What does that have to do
19 with an assignment?

20 MR. RUFFIN: Primarily, what we have seen
21 in other jurisdictions is implied assignment or
22 implied waiver. So the implied or equitable
23 assignment is more of an occurrence in equity.

24 THE JUDGE: Was that argued, though?

25 MR. RUFFIN: I don't know if those

1 particular words were used, but I do know waiver
2 and assignment, implied waiver and assignment
3 and estoppel, were referenced in the brief. In
4 my reading of the transcript was that the
5 arguments --

6 THE JUDGE: Okay. I will leave that to
7 Mr. Gunn.

8 MR. RUFFIN: Sure. With McNeill, it was
9 another situation where the child was seeking
10 medical expenses in her own name, and the Court
11 said the general rule, meaning the Necessaries
12 Doctrine, is not an absolute bar, is when the
13 parents do not assert a claim or have waived a
14 claim for these expenses. So that is
15 essentially what we are saying happened here
16 when Angela Patton, Alexia Lumpkin's mother,
17 filed suit on behalf of her daughter in her
18 daughter's name and sat on it and did not file
19 suit in her own capacity, in her individual
20 capacity, to recover these expenses. So in
21 application of what was done, or by analogy to
22 McNeill, we say the same was done here by
23 implied waiver by not exercising her right to
24 recoup medical expenses.

25 THE JUDGE: I read the business about the

1 fact that they didn't -- the lack of affirmative
2 defense, that is something else. How did they
3 in any sense rely on anything -- let me say it
4 again. For there to be an estoppel, there needs
5 to be some act on the part of the other party
6 inconsistent with the position they took. How
7 did that happen?

8 MR. RUFFIN: In terms of estoppel, if it
9 is application of estoppel in terms of this
10 argument against the mother, the mother is
11 estopped from arguing that she can recover
12 pre-majority expenses in her own name. The
13 argument is that there was an assignment or
14 estoppel or waiver and estoppel, and it is the
15 mother being estopped after it was impliedly
16 weighed.

17 THE JUDGE: How does that affect the
18 defendants though?

19 MR. RUFFIN: When it comes to the
20 defendants, when we discussed --

21 THE JUDGE: That would be a dispute
22 between the mother and child.

23 MR. RUFFIN: This is more along the lines
24 of implied waiver and that it was a transference
25 of the mother's rights to the child.

1 The way estoppel becomes an issue in this
2 is so that there is no double recovery. The
3 idea is that there is waiver and estoppel that
4 the child is recovering in her own name and the
5 mother cannot also recover in her own name so
6 that you don't have two parties claiming the
7 same damages. There is one recovery under
8 virtually all jurisdictions. You can't have a
9 double recovery.

10 The estoppel is estopping one party that
11 has transferred that right to another. It is
12 not necessarily an estoppel of defendants from
13 making an argument. We have a waiver of
14 argument which is if unsuccessful in our implied
15 waiver of the mother waiving her claim in favor
16 of the child, then argument two is that the
17 defendants by not raising affirmative defense
18 waived their ability to argue inability to
19 recover under the Necessaries Doctrine.

20 When it becomes waiver involving something
21 that the defendants did, that doesn't become a
22 part until argument Number Two.

23 THE JUDGE: Waiver and estoppel apply
24 only if one party makes a claim against another
25 party. In other words, it is between parties,

1 it seems to me.

2 I can't recover money from you if I have
3 waived my right to do so, or I can't recover
4 money from you if I am estopped for some other
5 reason for making such a claim. It doesn't have
6 anything to do with whether these defendants are
7 bound by that.

8 MR. RUFFIN: Sure. If your Honor would
9 like, we can throw away the term estoppel. For
10 the first argument, it rests upon theory or
11 assignment of waiver from mother to child. So
12 the word estoppel has been used in the other
13 cases that discussed this in terms of the mother
14 not being able to recover in her name if she has
15 transferred that right or waived it to her
16 child. So, you know, I can throw away the term
17 estoppel right now and focus on implied waiver
18 to the benefit of the child of the mother's
19 right to recover pre-majority medical expenses.

20 I guess the emphasis I am trying to give
21 this argument right now is that the mother in
22 one or two ways either waives or assigns her
23 right to recover pre-majority medical expenses
24 to her child.

25 THE JUDGE: And nobody contends that was

1 done expressly, right?

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

6 Under McNeill, the District Court case
7 accepted this as a means for transference and
8 said that the mother by not asserting her claim
9 and letting the statute of limitations run on
10 her claim but bringing suit, either as next
11 round or the bringing the claim in the child's
12 name, the child received the benefit of seeking
13 pre-majority medical expenses had enured to the
14 child through mother or father's waiver or
15 waiver or assignment to the child. So that's
16 our position at what happened here, that it was
17 impliedly waived either, one, when the mother
18 brought the claim as next friend of her
19 daughter; or second, when the mother's statute
20 of limitations ended.

21 THE JUDGE: This is a Federal District
22 Court case?

23 MR. RUFFIN: It is.

24 THE JUDGE: Where?

25 MR. RUFFIN: South Carolina District

1 Court.

2 THE JUDGE: When?

3 MR. RUFFIN: 1981. It is a Judge Anderson
4 opinion.

5 THE JUDGE: Ross Anderson?

6 MR. RUFFIN: Correct.

7 THE JUDGE: Okay.

8 MR. RUFFIN: I have a copy of it.

9 THE JUDGE: I don't need it. Has any
10 Federal Court ever certified a question to the
11 South Carolina Supreme Court on that issue?

12 MR. RUFFIN: On issue of implied waiver?

13 THE JUDGE: Yes, sir.

14 MR. RUFFIN: I have not seen it. There are
15 South Carolina cases which have recognized the
16 principles of implied waiver, but I have never
17 seen a South Carolina case where it was applied
18 to the Necessaries Doctrine; but presumably,
19 implied waiver is relevant to any ownership of a
20 claim.

21 THE JUDGE: Yes. But it is relevant
22 between the parties?

23 MR. RUFFIN: Correct. The waiver from
24 mother to child. I don't think it requires the
25 consent of defendants to transfer from one party

1 to the next?

2 THE JUDGE: Well, doesn't that sort of
3 open the door for anybody to say, oh, well, I
4 waived that. No, no, no, I didn't make a
5 mistake in the pleading. I just waived that.
6 We didn't mean to do it. We waived it.

7 MR. RUFFIN: It often doesn't come up
8 necessarily in the sense of a mistake. It
9 really only occurs in a small number of cases
10 where someone has brought a claim and brought
11 that claim on someone else's behalf.
12 Oftentimes, a number of years pass necessarily
13 before discovery of the injury.

14 THE JUDGE: And the party who claims
15 implied waiver then the resulting dispute is
16 between the party who claims the implied waiver
17 and the party who claims it wasn't waived.

18 MR. RUFFIN: Ultimately they will say --

19 THE JUDGE: Isn't that right?

20 MR. RUFFIN: Correct. To keep from
21 recovery of pre-majority medical expenses,
22 another party will presumably --

23 THE JUDGE: None of this has to do with --
24 the cases you are telling me about don't have to
25 do with pre-majority expenses, do they?

1 MR. RUFFIN: Lyles does not, Player does
2 not, McNeill does.

3 THE JUDGE: All right. Anything else?

4 MR. RUFFIN: On the issue of the waiver
5 and assignment, I have nothing further, your
6 Honor, unless your Honor has any questions.

7 THE JUDGE: No, sir.

8 MR. RUFFIN: Okay. The next issue --

9 THE JUDGE: Let's do them one at a time.
10 Gentlemen, either of you. Mr. Gunn.

11 MR. GUNN: Your Honor, yes, sir. Madam
12 Court Reporter, Billy Gunn on behalf of Amisub
13 of South Carolina.

14 If your Honor please, I looked at the
15 transcript, and Mr. Graham did mention the
16 implied waiver signed by the estoppel issue. He
17 called it an implied assignment, an implied
18 assignment by operation of law is what he
19 referred to. He raised that in his oral
20 argument.

21 THE JUDGE: All right.

22 MR. GUNN: If your Honor, please, with
23 regard to any purported assignment by operation
24 of law, I think the timeline is important. The
25 delivery in question took place on April 5th,

1 2007. My codefendant, Dr. Miller, was sued in
2 2009. The hospital was sued by the mother in
3 her representative capacity in September 2011,
4 more than 17 months -- the statute of
5 limitations had expired some 17 months prior to
6 the hospital being named as a defendant.
7 Procedurally, a separate lawsuit was brought, a
8 notice of intent to file suit was filed on
9 September 23, 2011, 17 months after the statute
10 ran. The hospital that was pre-suit mediation,
11 then that lawsuit was consolidated with the
12 already existing lawsuit with the 2009 case
13 number against Dr. Miller represented by
14 Mr. Davis.

15 THE JUDGE: That is this case?

16 MR. GUNN: Yes, sir. So it is very, very
17 clear in the record in this case that the
18 statute of limitations had expired when the
19 hospital was sued -- the statute of limitations
20 as to any purported claim by the parent had
21 expired 17 months before the hospital was sued.
22 Now, I understand it to be --

23 THE JUDGE: Are we arguing that motion
24 today? I don't have that on my list. You made
25 a motion for summary judgment on that basis?

1 MR. GUNN: No, sir. Summary judgment has
2 been granted. I am arguing this in resistance
3 to the implied assignment by operation of law.

4 THE JUDGE: Okay. I'm sorry. Go ahead.

5 MR. GUNN: Now, that timeline is important
6 because I think it is black letter law that the
7 rights of the transferee in an assignment can
8 rise no higher than the rights of the
9 transferor. So the transferee, the child
10 through mom in the representative capacity,
11 cannot renew the claim and wipe out the statute
12 of limitations defense that would exist as
13 against the mother. My point being, it would be
14 fatal, the assignment by operation of law would
15 not increase the possibility of recovery by the
16 child. So I think that is black letter law. I
17 think that is our case in a nutshell.

18 The Court has addressed all of the issues
19 and addressed them clearly. The Rule 59(e)
20 motion would not lie.

21 THE JUDGE: Okay. Anything on Dr.
22 Miller's behalf?

23 MR. DAVIS: No, sir, your Honor. Ashby
24 Davis for Dr. Miller and Rock Hill OB GYN. I
25 have little to add to that, and I would point

1 out, and this probably goes to the next motion
2 so I will hold on that, about affirmative
3 defenses, and we will talk about that in a
4 moment, I suppose.

5 The statute of limitations is the statute
6 of limitations. We are not responsible for
7 drafting pleadings for the plaintiff, we are
8 responsible for drafting the answers for the
9 defendant, and that's what we did. The defense
10 has no obligation to point out, arguably,
11 defective pleadings, I suppose, and had no
12 motion for partial summary judgment on this
13 issue been filed, we wouldn't be here. I don't
14 know of any law that has changed from the first
15 time we argued the motion for partial summary
16 judgment that has been changed or altered by our
17 appellate courts since the time that we were
18 here last and argued this initial motion. It
19 was our motion, Mr. Gunn and mine.

20 I would urge the Court to rule
21 accordingly. We feel very confident the law has
22 not changed. It is the same as it was when we
23 read the partial summary judgment on this issue
24 and I see no change in the law or theories of
25 the law to support change in your ruling. Thank

1 you.

2 THE JUDGE: Okay. All right.

3 MR. RUFFIN: Your Honor, may I briefly
4 respond?

5 THE JUDGE: I don't think it is necessary.
6 With the clarification I got about Mr. Graham
7 discussing that issue, I find no matter raised
8 which wasn't considered and argued. I have
9 ruled on it. Do you think I didn't rule on the
10 applied assignment issue?

11 MR. RUFFIN: Our position, one, is that
12 based upon your order as written, there is no
13 discussion of our explicit argument of implied
14 waiver.

15 THE JUDGE: I will rule on that right now.
16 I deny your relief based on that doctrine.

17 MR. RUFFIN: Okay.

18 THE JUDGE: That will be addressed in the
19 an order I get from Mr. Gunn and Mr. Davis.

20 Anything else that wasn't raised, that I
21 didn't discuss that was raised?

22 MR. RUFFIN: On that issue on implied
23 waiver, we are moving on from that. My next
24 argument is --

25 THE JUDGE: So there is nothing else with

1 respect to that?

2 MR. RUFFIN: With respect to implied
3 waiver, if your Honor has reached a ruling --

4 THE JUDGE: Or any other matter with
5 respect to Rule 59(e).

6 MR. RUFFIN: With Rule 59(e), it depends
7 on how you want to approach two other arguments.
8 I will let your Honor handle however he wishes.
9 The first is we ask the Court to allow us to
10 amend the complaint to change the capacity with
11 which the mother is bringing suit to include not
12 just as next friend but also in her individual
13 capacity.

14 It is our position that argument was also
15 raised but not ruled upon and it has been
16 pointed out also that -- I think the argument
17 has been a Rule 59(e) motion is that the means
18 by which to discuss an amendment to the
19 complaint, and in response to that we filed the
20 motion to amend as well.

21 So I am happy to discuss that later as if
22 it were its own motion or in the context of Rule
23 59(e), however your Honor prefers.

24 THE JUDGE: You are talking the motion
25 that was positive as a Rule 15(c) argument?

1 MR. RUFFIN: Correct. The motion to amend
2 the complaint and have the amended complaint
3 relate back to the initial filing.

4 THE JUDGE: All right. Was that
5 considered before? I don't remember that.

6 MR. GUNN: No, sir. This is totally --

7 THE JUDGE: That is what I thought. What
8 does that have to do with Rule 59?

9 MR. RUFFIN: It was mentioned in the
10 response motion and also mentioned at oral
11 argument that if your Honor rules against us
12 with regards to our argument for the abrogation
13 of the Necessaries Doctrine Order for one of the
14 exceptions of implied waiver to apply that we
15 ask your Honor to allow us to amend the
16 complaint.

17 THE JUDGE: So your concern is that
18 apparently wasn't expressly addressed in the
19 order?

20 MR. RUFFIN: Yes, your Honor. If your
21 Honor deemed that it should be, the alternative
22 is that your Honor may feel it should be argued
23 as a motion independently --

24 THE JUDGE: That's up to you. If I didn't
25 address it, I need to address it. If you didn't

1 address it, it is a new motion.

2 MR. RUFFIN: Fair enough. My position was
3 it was addressed in our response motion, it was
4 mentioned, and it was also mentioned at the
5 hearing. I believe the order may have said that
6 we were not going to get into whether or not the
7 mother's claim should be barred because the
8 mother wasn't a party. That was in the order
9 that your Honor issued in connection with the
10 motions.

11 Our position is that we ask the Court to
12 consider allowing an amendment to the complaint
13 and allowing that amendment to relate back to
14 that initial filing.

15 One point of note is that Amisub and the
16 physician should be looked at a little
17 differently one party to the next. For
18 instance, in the previous argument, Amisub is
19 right whenever they say, on this date if there
20 was a statute of limitations issue, you didn't
21 file suit against us until after three years.
22 With children, you can file it up to many years
23 after that because of a totaling allowed for
24 minorities, but that wouldn't necessarily be the
25 rule for the parent.

1 Our position is that against the defendant
2 doctor and the OB practice --

3 THE JUDGE: Let me stop you. Essentially,
4 what you are trying to tell me that I didn't
5 quite get, Mr. Gunn, was that the suit on behalf
6 for damages to the child is not barred.

7 MR. GUNN: Correct.

8 THE JUDGE: But if you construe -- if you
9 add the component of the parent claiming in
10 2012, that was already barred.

11 MR. GUNN: Correct.

12 THE JUDGE: And thus the child couldn't.
13 Okay. Go ahead.

14 MR. RUFFIN: Right. And I know we have
15 moved on.

16 THE JUDGE: I better understand that now.

17 MR. RUFFIN: Our position would be with
18 this next argument, that if we have a more
19 difficult time arguing that the amendment would
20 allow us to recover pre-majority expenses
21 against Amisub. However, suit was filed within
22 the statute of limitations against the defendant
23 doctor and the OB practice. It is our position
24 that your Honor should consider our motion to
25 amend because we have met the element required

1 to allow an amendment to the complaint. We have
2 met the requirements for there to be a relation
3 back, and I can go through those if your Honor
4 wishes.

5 THE JUDGE: It is your argument.

6 MR. RUFFIN: Sure. The first is for there
7 to be a relation back, the issues in dispute
8 must be out of the same transaction or
9 occurrence.

10 Here we are talking about change in
11 capacity of the mother so the mother is bringing
12 the claim in her own right as well as next
13 friend so we are still discussing medical
14 expenses from the same action --

15 THE JUDGE: Doesn't Rule 15(c) have
16 language so that it affects the party against
17 whom a claim is brought, amend to name a party
18 against whom a claim is brought, not the
19 plaintiff, not the same party that is making the
20 motion?

21 MR. RUFFIN: It's an area that has been
22 unclear. In an advisory note, bear with me for
23 a second. The notes on the Advisory Committee
24 for Rule 15(c), for the federal rules, and the
25 federal rules are similar to the state, said

1 that, you know, that silent on the issue of
2 changing a plaintiff or the plaintiff's
3 capacity, but that the same rule extends by
4 analogy to amendments changing plaintiffs.
5 That's in the advisory notes of the rule.

6 When you look at the rule itself, South
7 Carolina Law has discussed adding new plaintiffs
8 in context if there was a federal suit that had
9 been filed on a subject matter and the state
10 suit on the same subject matter. The federal
11 claim was dismissed and so you had, basically,
12 many plaintiffs that were trying to be named to
13 state court action as well in the court. That
14 case said this should not be permitted.

15 In our suit, that's not the case. What we
16 are involved with here is the changing of the
17 capacity of the mother so that she is not just
18 bringing suit in the capacity as next friend.

19 THE JUDGE: That is effectively adding a
20 party.

21 MR. RUFFIN: Our position is that it is
22 not.

23 THE JUDGE: How can it not be?

24 MR. RUFFIN: Because she is already a
25 named plaintiff.

1 THE JUDGE: No, she is not. She has no
2 interest in the litigation until we come to this
3 crossroads.

4 MR. RUFFIN: If that's your Honor's
5 opinion, position, then that's your Honor's
6 position. If she has no interest and she is not
7 a party then it is not a change of the capacity.

8 THE JUDGE: You cannot morph parties, you
9 can name parties.

10 MR. RUFFIN: Right. Well, one of two
11 things: Either we are naming her as an
12 additional party or we are changing the capacity
13 with which she is already a party.

14 THE JUDGE: So she is no longer going to
15 be suing for the child?

16 MR. RUFFIN: She would be suing in her own
17 name as well as --

18 THE JUDGE: That would be an add, wouldn't
19 it?

20 MR. RUFFIN: Well, it is still one person
21 in addition to the capacity of which she is
22 bringing the suit. If your Honor understands
23 that to be the addition of the party then we
24 argue the addition of the party should be
25 permitted under Rule 15(c), under the

1 interpretation of the federal rule which is
2 substantially similar to the state rule, and the
3 Advisory Committee notes that say by analogy new
4 plaintiffs may be added.

5 THE JUDGE: All right.

6 MR. RUFFIN: And running through the
7 requirements for Rule 15(c), addition of a party
8 and relation back, it must rise out of the same
9 transaction or occurrence which we assert it
10 does. Defendants must have been on notice
11 regarding the issues in dispute, which we say
12 they were because the suit had been filed
13 against him in this very matter, and defendant
14 must have known or should have known, but for
15 mistake, the damages would have been sought in
16 the appropriate manner. So in this case, the
17 mistake, since your Honor has ruled against us
18 on the first two, the mistake would have been
19 not filing in her individual capacity.

20 In this situation, when there is a mistake
21 that the defendant is on notice of, and they
22 were clearly on notice because they filed this
23 motion, then it is permissible to have the
24 complainant add a new party and for that
25 amendment to relate back to the initial party.

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

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

11 MR. RUFFIN: To Amisub, yes, that's my
12 position with that case. It is not my position
13 with regard to --

14 THE JUDGE: I understand.

15 MR. RUFFIN: The other element is
16 prejudice, which is clearly no surprise because
17 they knew we were asking for these pre-majority
18 medical expenses so it would be difficult for
19 them to argue that they hadn't anticipated an
20 argument for pre-majority medical expenses.

21 Your Honor, that's my position on the
22 amendment. I am happy to answer any questions
23 you may have.

24 THE JUDGE: There is no South Carolina
25 case or certification to a Federal Court on that

1 issue, right?

2 MR. RUFFIN: On the issue?

3 THE JUDGE: Of 15(c).

4 MR. RUFFIN: On the naming of an
5 additional plaintiff, not that I found. Our
6 rule recognizes -- let me take that back. On
7 the changing of capacity, one could argue that
8 on the additional plaintiff, that there would be
9 the existence of case law which could be
10 construed as saying you could not add a
11 plaintiff, a new plaintiff. It is our position
12 that the facts of that case are in opposite. I
13 am sure you will hear more about it from defense
14 counsel.

15 THE JUDGE: All right. Mr. Gunn, he has
16 kind of admitted that doesn't apply to you.

17 MR. GUNN: It sounds like I need not argue.

18 THE JUDGE: Mr. Davis.

19 MR. DAVIS: Rule 15(c) clearly allows for
20 the substitution of a defendant, not a
21 plaintiff. That's not addressed. If the Court
22 were to follow the plaintiff's argument and
23 interpretation, Alexia Lumpkin could be removed
24 from the lawsuit and replaced by her parents.
25 It is not the intent of the plaintiff. Rather,

1 they being substituted by her parents, the
2 plaintiff is attempting to add her mother as
3 party, as a plaintiff. We don't believe that
4 15(c) encompasses for envisions or lawfully
5 permits such substitution, not at this date.

6 If plaintiffs hypothetically had filed a
7 motion to amend their complaint by changing, as
8 they proposed to change now within the original
9 statute of limitations, we would have no
10 argument and we would probably consent to it
11 depending on our client.

12 THE JUDGE: That's one of the conditions
13 for even changing the defense.

14 MR. DAVIS: Yes, sir.

15 THE JUDGE: It has to be within the time.

16 MR. DAVIS: Yes, sir. We have had cases
17 where that has been done.

18 THE JUDGE: Within the period provided by
19 law for commencing the action against him, the
20 party to be brought in by amendment.

21 MR. DAVIS: Yes, sir.

22 THE JUDGE: And essentially the notice
23 compliant component of all that.

24 MR. DAVIS: Within the statute of
25 limitations of the alleged malpractice, which

1 there is not an issue of new or should have
2 known. They knew of this injury almost
3 immediately. So there is not a delay in the
4 discovery of the injury. It was probably within
5 the day or certainly within 30 days of the
6 birth. So there is really not that issue. So
7 the statute when it ran, plaintiff's ran out of
8 the time to amend the change and add a
9 defendant. And certainly, under Rule 15(c),
10 which is silent to this, by extension of a
11 plaintiff. That's essentially what they are
12 trying to do. Had they made this motion to
13 amend prior to the end of the three-year statute
14 of limitations, we would have no argument before
15 with this court or any court to have any
16 reasonable expectation that the Court would deny
17 plaintiff's ability and motion to amend and
18 change the plaintiff, change the defendant. We
19 would not have an argument. We do now. It is
20 not our responsibility to do the work of the
21 plaintiff when they draft pleadings.

22 I will be glad to get into the affirmative
23 defenses standards. It is under Rule 8(c).
24 There is no affirmative defense that the
25 defendant in any case is obligated to point out

1 any defectiveness in any of the pleadings of the
2 plaintiff apart from the enlisted affirmative
3 defense. This is not one of them. We didn't
4 waive anything. There is no statute of
5 limitations in our premium motion for partial
6 summary judgment. We bring it when we bring it,
7 and there is no rule in the rules that I am
8 aware of that requires us to do otherwise.
9 Thank you.

10 THE JUDGE: Mr. Ruffin, what about the
11 language in Rule 15(c) that says amendment
12 changing the party against whom a claim is
13 asserted unless it is assumed that can be a
14 plaintiff relates back if... within the period
15 provided by law for commencing the action
16 against him, the party to be brought in by
17 amendment and so on. This would fail anyway,
18 wouldn't it, because this motion, if granted --
19 this motion is made outside the period provided
20 by law for commencing of the action by the
21 plaintiff if we assume for the moment that the
22 plaintiff could be could be added under Rule
23 15(c).

24 MR. RUFFIN: Your Honor, our position is
25 the relation back is the relation back to the

1 date of the initial filing, date of the
2 pleadings, and the pleading was filed within the
3 statute of limitations.

4 THE JUDGE: That's not what the rule says.
5 The rule says within the period provided by law
6 for commencing the action against him. In other
7 words, three years. It doesn't say anything
8 about relating back to the pleading. It says if
9 the change of the party is made within or sought
10 within the period provided by law for commencing
11 the action against him. At least that's what
12 mine says.

13 MR. RUFFIN: Your Honor, whenever it
14 discusses the law in commencing the action
15 against the party, the action was commenced
16 against the party within the statute of
17 limitations, this is merely the relation back of
18 an element of damages.

19 THE JUDGE: Look at the subject of that
20 sentence. An amendment changing the party
21 against him claims a certain -- let's just make
22 it up. An amendment changing the party
23 plaintiff relates back if the foregoing
24 provision is satisfied and within the period
25 provided by law for commencing the action by

1 him.

2 MR. RUFFIN: Your Honor, if may. The
3 case of Thomas v. Grayson notes that the purpose
4 of Rule 15(c) is the salvage cause of action
5 otherwise barred by the statute of limitation,
6 and that's South Carolina law.

7 THE JUDGE: I understand that. It is like
8 if I name -- if I sue Ashby Davis, LLC to
9 collect a debt. When I find out it is Ashby W.
10 Davis, Inc. or Ashby W. Davis d/b/a lawyer,
11 that's what the purpose is. In that case, sure
12 enough, it salvages the claim from the statute
13 of limitations.

14 MR. RUFFIN: Your Honor, we are asking for
15 the exact same thing but with reference to the
16 plaintiff's side.

17 THE JUDGE: That's something you knew.
18 The other is based that you didn't know about
19 Mr. Davis if you use my example.

20 MR. RUFFIN: When you are dealing with
21 the issue of mistake, and you are right, it is
22 about knowledge, but it is the mistake and the
23 mistake in this case, because of your Honor's
24 ruling previously, is the mother not being named
25 in her individual capacity, if there is a

1 mistake.

2 In the other instance, where one defendant
3 is named and one defendant is not named, that's
4 still a mistake on the plaintiff's behalf. The
5 plaintiff didn't name the appropriate defendant.
6 So you are still dealing with two issues of
7 mistakes, it is just on the plaintiff's side.

8 So, your Honor, again, with that quotation
9 from Thomas v. Grayson, it is evident and clear
10 in South Carolina Law the purpose of Rule 15(c)
11 is to salvage causes of action otherwise barred
12 by the statute of limitation.

13 THE JUDGE: Who was brought in by Thomas
14 v. Grayson?

15 MR. RUFFIN: I am not certain.

16 THE JUDGE: That makes a lot of
17 difference.

18 MR. RUFFIN: It is our position that in
19 this case, even if there is no South Carolina
20 Case Law where a plaintiff has been added, that
21 it is declaratory to 15(c) as evidenced by the
22 advisory note tool 15(c) which says that
23 plaintiff may be added in the same manner as
24 defendants.

25 THE JUDGE: Anything else?

1 MR. RUFFIN: On that issue, no, sir.

2 THE JUDGE: Any other issues?

3 MR. RUFFIN: The final issue is regarding
4 the pleading of the affirmative defense. I
5 understand now it is defense counsel's position
6 that this is not, in fact, an affirmative
7 defense. Your Honor, I note that the
8 affirmative defense listed in Rule 8(c) is not
9 an exhausted list, and indication of that, our
10 Court has held that the failure to plead
11 charitable caps as an affirmative defense is a
12 waiver of that defense, and they have allowed
13 for recovery beyond statutory caps where it was
14 not affirmatively raised as a defense. That is
15 not listed in those defenses under Rule 8(c).

16 Rule 8(c), whenever it is discussing
17 affirmative defenses, says affirmative defenses
18 is any defense which even if you assume
19 everything the plaintiff says has been proven,
20 this is a bar to recover. That's exactly what
21 is happening in this case, your Honor. They are
22 saying even if you prove all of your elements to
23 causes of action, you have essentially waived or
24 barred from recovering pre-majority medical
25 expenses no matter how much evidence you may

1 present that there has been the occurrence of
2 pre-majority medical expenses, that this child
3 has incurred medical bills and will continue to
4 incur medical bills is of no element because of
5 this particular operation of law.

6 So it is our position that is an
7 affirmative defense in the same way that raising
8 caps is an affirmative defense in the same way
9 as raising latches or statute of limitations
10 issue is an affirmative defense.

11 THE JUDGE: If your complaint alleged the
12 rule as it did, in effect, that the minor was
13 entitled to be paid medical bills, pre-majority
14 medical bills, can't they address that by simply
15 denying that right?

16 MR. RUFFIN: I don't follow, your Honor.

17 THE JUDGE: Let's just say you alleged in
18 the complaint this minor is entitled to collect
19 medical expenses, pre-majority. Paragraph 2,
20 this minor is entitled to recover her medical
21 expenses, pre-majority. Can't they simply in
22 their answer say as to Paragraph 2, denied.

23 MR. RUFFIN: In this regard, because of
24 the nature of it, they are not saying that they
25 deny it and it didn't happen and they are not

1 submitting evidence to say, well, I know of a
2 slip and fall or some other case or auto
3 accident case where they say, oh, you are not
4 really hurt, or that's not the extent of your
5 damages, or you haven't really incurred these
6 damages, or you are going to go back to work.

7 Those are disputes about the facts, those
8 are which evidence is going to be admitted to
9 show the extent of damages. This isn't an
10 argument that the damages were or weren't
11 incurred. It is an argument by the operation of
12 law that no matter the extent of damages,
13 whatever they may be, you cannot recover them at
14 all because of this defense or this argument
15 that the mother's statute of limitations --

16 THE JUDGE: Well, they raise that by
17 motion.

18 MR. RUFFIN: Not with regards to the
19 Necessaries Doctrine. More importantly, under
20 Rule 8(c), affirmative defenses must be raised
21 and if they are not raised under South Carolina
22 Law, they are waived. In this case, by not
23 raising those affirmative defenses in their
24 answer, they waive their ability to argue it at
25 a later date.

1 THE JUDGE: Okay. Would that apply to
2 you as well, Mr. Gunn?

3 MR. GUNN: Well, your Honor, I don't know,
4 but if it does --

5 THE JUDGE: Anything else about that?

6 MR. RUFFIN: No, your Honor.

7 MR. GUNN: Well, the fact of the matter is
8 at the time we were sued, we were sued by the
9 minor mom as next friend, indeed statute of
10 limitations defense would have been improper.
11 It would have been subject to being stricken. I
12 would point out to your Honor that we did by way
13 of second defense state that the complaint of
14 the plaintiff fails to state facts sufficient to
15 constitute a cause of action, meaning on its
16 face the allegations has the pre-majority
17 medical expenses fails. So, I mean, I don't
18 know how we could be deemed responsible to think
19 about, well, you know, if they later on try to
20 bring some sort of suit in the individual
21 capacity for the parent for medical expenses, we
22 better go ahead and file an affirmative defense
23 raising the statute of limitations in the event
24 they do that. We can't do that.

25 THE JUDGE: All right. Mr. Davis.

1 MR. DAVIS: Your Honor, we answered the
2 complaint essentially as a general denial as to
3 the allegations of liability, negligence and
4 damages. It is a general denial. There is no
5 obligation I am aware of in a pleading and
6 answering a complaint as captioned. We have no
7 control over the caption of the case. We have
8 no control over who is the named plaintiff and
9 in what capacity.

10 We have the obligation to respond within
11 30 days. We did so with the general denial as
12 to liability and all damages that flowed from
13 any liability and any damages, and I think
14 that's sufficient to raise the plaintiffs -- if
15 they want to pursue something and they say,
16 well, gee, maybe we need to amend the complaint,
17 they are denying the damages, maybe we need to
18 amend it. That is totally outside of our
19 control. It doesn't rise to an affirmative
20 defense because they want it to be an
21 affirmative defense. It is curative reasoning.

22 They want to argue and persuade the Court
23 that we have to say, hey, you allege damages but
24 you the wrong plaintiff. You need to add mom as
25 the plaintiff. That is not an affirmative

1 defense. They would make it so, but that
2 doesn't make it so.

3 We think the motion to amend should be
4 denied. It is not within the statute of
5 limitations. It does not add a defendant. Even
6 arguing for sake of argument that the rule
7 explicitly says you can add a plaintiff, which
8 doesn't make sense, and I think that's why the
9 rule says defendant. The rule doesn't say that,
10 and even if it did, the statute is running. We
11 have no control of that. We file a motion when
12 we file a motion. There is no statute of
13 limitations, if you will, when we file a motion
14 of partial summary judgment. We think the
15 motion to amend should be denied.

16 MR. RUFFIN: May I respond briefly, your
17 Honor.

18 THE JUDGE: All right.

19 MR. RUFFIN: Just as they have no control
20 over how we draft our complaint, we have no
21 control over how they draft their answers. We
22 are not responsible for pointing out to them the
23 affirmative defenses they should have raised and
24 didn't. I understand it is not laid out in Rule
25 8(c) as a specifically noted affirmative

1 defense.

2 THE JUDGE: How would you describe this
3 affirmative defense?

4 MR. RUFFIN: The affirmative defense is
5 that under South Carolina Law the mother must
6 bring cause of action for this.

7 THE JUDGE: Well, doesn't that fall within
8 the purview of a 12(b)(6) motion if the complaint
9 doesn't state a cause of action that is afforded
10 the named party?

11 MR. RUFFIN: Your Honor, based on the
12 operation of what they are trying to do with
13 this --

14 THE JUDGE: I don't need to hear anymore.
15 I grant the motion -- I deny your motion to
16 amend. They get the relief is what I am trying
17 to say. That covers everything, doesn't it?

18 MR. RUFFIN: Your Honor, I think you have
19 fully heard all of my arguments and decided --
20 including on our argument of affirmative defense
21 -- and ruled against us. I have nothing
22 further.

23 THE JUDGE: Now, I need you gentlemen to
24 collaborate or somebody send me an order that
25 covers the matters that the plaintiff says I

1 didn't rule upon. One of those was the implied
2 waiver and implied assignment. As to the rest
3 of it, I deny. There is nothing new raised in
4 addition -- I'm talking 59 (e) now. There was
5 nothing new raised that wasn't argued,
6 considered, and ruled on or brought to my
7 attention and the order stands.

8 MR. RUFFIN: So I am clear in my
9 understanding. So your Honor has considered all
10 of the issues and has decided all of the issues
11 I raised on the merits thereof and has decided
12 that all those issues that I raised were
13 previously raised and addressed.

14 THE JUDGE: No. I am not deciding that.

15 MR. RUFFIN: I am trying to --

16 THE JUDGE: You will know what I decide
17 when you get my order.

18 MR. RUFFIN: Okay. I was trying to get on
19 the record what the reason was for the denial of
20 the argument for the affirmative defense.

21 THE JUDGE: There is no affirmative
22 defense required. If you deny that somebody is
23 entitled to damages at all based on the
24 allegations in the complaint, I think you
25 covered it. Besides which, what is the

1 affirmative defense? Affirmative defense
2 generally relates to the conduct of the party.
3 The only party in that lawsuit was this child
4 through her mother. So there was no affirmative
5 defense to assert. It was just a denial.

6 MR. RUFFIN: Very good, your Honor.

7 THE JUDGE: I know of no case holding
8 otherwise. They denied she was entitled to
9 damages. You alleged damages for medical
10 expenses, which are the pre-majority expenses in
11 part, and they denied it. I can't say where
12 they have to bring to anybody's attention the
13 fact that the minor -- they just denied it. If
14 you have a reason to deny it, you deny it.

15 Anything else?

16 MR. RUFFIN: No, your Honor.

17 THE JUDGE: As to the amendment to
18 complaint, I find, first of all, that any
19 amendment that would be made would not be within
20 the time permitted for commencement of the
21 action, in any event, under Rule 8(c) even if
22 you were to construe the rule contrary to its
23 language and include plaintiffs in the category
24 of people that could be added by the plaintiff.
25 It is a separate action.

1 MR. GUNN: Your Honor, would you want us
2 to submit one proposed order in editable form?

3 THE JUDGE: That's fine with me.

4 MR. GUNN: We will collaborate and do that
5 and send it to opposing counsel.

6 THE JUDGE: That's fine. In any event,
7 the rules says, and it isn't my position to
8 create new law. The rule says the party against
9 whom the action is brought, even if it were
10 timely. Any question about any of that?
11 Mr. Davis?

12 MR. DAVIS: No, sir.

13 THE JUDGE: Anything else?

14 MR. RUFFIN: No. Thank you.

15 (Whereupon, the above-entitled matter was
16 concluded.)

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C E R T I F I C A T I O N

STATE OF SOUTH CAROLINA
COUNTY OF YORK

I, Phyllis M. Campo, Official Court
Reporter for the Sixteenth Judicial Circuit of
the State of South Carolina, do hereby certify
that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings
at the time and place herein in the
above-entitled matter.

I do further certify that I am neither of
kin, counsel, nor interest to any party hereto.

Februray 14, 2014

Phyllis M. Campo
Official Court Reporter

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2009-CP-46-5195

Angela Patton, as Next Friend of
Alexia L., a minor,

Appellant,

v.

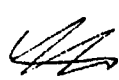
Dr. Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P. A.
and Amisub of South Carolina, d/b/a Piedmont Medical Center,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

October 22, 2014

 
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The undersigned, an attorney in this matter for the Appellant, certifies that I have this **22nd day of October, 2014** served copies of the Record on Appeal upon counsel of record for the Respondents by depositing them in the United States mail, first-class postage prepaid, addressed to:

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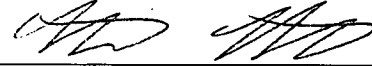
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