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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appeal No. 2019-000574

Elizabeth Lofton,.....Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

RESPONDENT JOHN LUCAS TREE EXPERT, CO.'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondent John Lucas Tree Expert, Co. hereby moves this Court to reconsider its Unpublished Opinion, No. 2022-UP-089, filed March 2, 2022. This Court overlooked and/or misapprehended the facts that Plaintiff Elizabeth Lofton's Motion to Amend her Complaint was not ripe for decision because it was not properly before the Circuit Court at the time it granted summary judgment to Defendants. In addition, this Court overlooked and/or misapprehended the significance of the fact that Plaintiff has never attempted to provide any explanation of her unreasonable delay in taking any step to cure her standing problem. Finally, and in the alternative, this Court overlooked and/or misapprehended the fact that Plaintiff sought leave to amend her complaint in her late-filed opposition to summary judgment,

which the Circuit Court properly denied. Consequently, there is no need or justification for a remand.

Plaintiff made no effort whatsoever to address her standing problem until the afternoon of the November 26, 2018 hearing, despite Defendants having raised this issue in October 2016 and again in August 2018. Moreover, after conceding at that hearing that that her Motion to Amend was not properly before the Court, (R. p. 165:8-11), Plaintiff failed to even request a hearing on her Motion to Amend. Instead, she simply waited until after the Circuit Court granted the Defendants' summary judgment motions and then asserted her Motion to Amend was "properly before the court." (R. p. 141). Because the only motions set for hearing or decision in this case were Defendants' motions for summary judgment, Defendants have never responded to the late-filed Motion to Amend which, logically, became moot once summary judgment was granted.

This Court ruled that the Circuit Court erred by failing to decide Plaintiff's Motion to Amend her Complaint to name the Trust as the Plaintiff. However, this Court overlooked the fact that, at the same time Plaintiff argued on appeal that this failure constitutes reversible error, she also argued, as she had below, that no amendment is necessary because she possesses statutory standing. (App. Br. p. 4 ("it is appellants position that amendment is not necessary because of the statutory power granted to Trustees")) (R. p. 141 ("Plaintiff would also show that Amendment is not necessary…")). Thus, this Court's conclusion that the Circuit Court erred by failing to rule on Plaintiff's Motion to Amend and requires a remand conflicts with Plaintiff's repeated statements that such an amendment is not necessary. As this Court has observed, an appellant bears the burden of demonstrating that an error was prejudicial, and "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Either Plaintiff was prejudiced by the failure to allow her to amend her complaint,

or there is no prejudicial error in the Circuit Court's failure to allow her to amend. Plaintiff cannot have it both ways.

In any event, Plaintiff's counsel readily conceded at the November 2, 2018 hearing that her Motion to Amend, filed the afternoon of the hearing with no notice to Defendants, was not properly before the Court. (R. p. 165:8-19). Parties are bound by concessions made by their counsel. *See, e.g.*, *Pope v. Heritage Comm., Inc.*, 395 S.C. 404, 430-431, 717 S.E.2d 765, 779 (Ct. App 2011); *Smith v. Pearson*, 210 S.C. 524, 530-531, 43 S.E.2d 479, 481-482 (1947) (finding party was bound by its counsel's prior statement); *see also United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) ("statements by an attorney concerning a matter within his employment may be admissible against the retaining client"). And, while Plaintiff did argue in her Motion to Reconsider that she should be allowed to amend her Complaint to correct the named Plaintiff, "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). As a result, because she conceded that her Motion to Amend was not properly before Judge McCoy and, therefore, could not be properly raised in her Motion to Reconsider, this Court should hold that the Circuit Court did not err or abuse its discretion in not deciding her late-filed Motion to Amend.

Alternatively, Plaintiff argued in her late-filed Response to Defendant's Motions for Summary Judgment that a simple amendment would remedy the standing "defect" in her Complaint, asking "leave of the court to amend." (R. pp. 123-124). Thus, regardless of whether Plaintiff's Motion to Amend was properly before Judge McCoy, by granting Defendants' motions and rejecting Plaintiff's opposition to summary judgment, Judge McCoy, in her discretion, denied Plaintiff's unreasonably late request for leave to amend her complaint. (Supp.

R. pp. 21-24). Thus, this issue has been decided and there is no need or basis for this Court's remand.

The ruling in *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), on which this Court relies, is inapplicable to the instant case. In *Skydive*, the defendants moved to dismiss the plaintiff's complaint under Rule 12(b)(6), for failure to state a claim. Such motions necessarily are filed early in a case. Rule 12(b)(6), SCRCP ("[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted"). In contrast, here, Plaintiff's claim has been pending against Defendant John Lucas Tree since January 2016, discovery has been conducted, two separate rounds of motions for summary judgment based on Plaintiff's lack of standing to bring suit in her individual capacity have been filed, one before the case was removed from the docket pursuant to Rule 40(j), SCRCP, and one after it was restored. Unlike the plaintiff in *Skydive*, here, Plaintiff had clear notice of the standing issue and had ample opportunity to attempt to cure it. Instead, she did nothing, allowing years to pass, memories to fade and witnesses to become unavailable.

And, while it may be true that, when "a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal," *Skydive*, 426 S.C. at 179, 826 S.E.2d at 587, it is equally true, and more applicable to the procedural posture of this case, that "[e]very action shall be prosecuted in the name of the real party in interest," and shall be dismissed if, after "a reasonable time has been allowed, after objection," the plaintiff fails to attempt to cure the defect by ratification, joinder or substitution of the real party in interest. Rule 17, SCRCP. Here, unlike in *Skydive*, Plaintiff failed to even attempt to substitute herself in her capacity as Trustee within a reasonable time after Defendants

raised the standing issue. *Skydive* addresses the issue of whether allowing an amended complaint would be futile, but does not address Rule 17 or the requirement that an amendment to correct the real party in interest must be filed within a reasonable time after "objection."

Plaintiff took no steps to correct her standing problem within a reasonable time after Defendants objected. Plaintiff filed her First Amended Complaint in January 2016. (R. pp. 16-28).[1] In October 2016, Defendants moved for summary judgment based, in part, on her lack of standing. (R. pp. 53-79). The case was removed from the docket and later restored—by motion of the Plaintiff, again naming herself as Plaintiff in her individual capacity only—in January 2018. (R. pp. 80-90). In the more than seven months after the case was restored to the active docket, Plaintiff did nothing to address the standing issue. Defendant John Lucas Tree again moved for summary judgment in August 2018, raising Plaintiff's lack of standing, among other issues. (R. pp. 91-120). The summary judgment motions were scheduled for hearing on November 26, 2018. During the nearly three months between being served with Defendant John Lucas Tree's summary judgment motion and the hearing, Plaintiff again did nothing to address the standing issue. Not until the afternoon of the actual motions hearing did Plaintiff suggest she wanted to amend her complaint to address her standing problem. Such a lengthy delay in addressing the standing problem is not even arguably reasonable, particularly where, as is the case here, Plaintiff has never offered any explanation or excuse for her unreasonable delay.

Furthermore, *Skydive* addressed the unique problem faced by a plaintiff whose complaint has been dismissed pursuant to Rule 12(b)(6) with prejudice, leaving it no opportunity to attempt to amend—the only options available to Skydive were to appeal the dismissal or move to alter or amend the judgment which, as the Court noted, would be impracticable if the plaintiff

[1] Plaintiff's initial Complaint, naming only Berkeley County Electric Cooperative, Inc. as a Defendant, was filed on July 1, 2015. (R. pp. 1-11).

acknowledged a need to amend the complaint in order to state a claim. 426 S.C. at 181, 826 S.E.2d at 588. Here, Plaintiff was faced with no such quandary or appeal deadline. Instead, as noted above and in Defendants' Briefs, Plaintiff had over two years from Defendant John Lucas Tree's first motion for summary judgment in August 2016 to the date of the motions hearing in November 2018 to do something—anything—to correct the standing issue in her Complaint. She did nothing. As a result, *Skydive* is both legally and factually distinguishable from the instant case and does not require or justify a remand to the Circuit Court for consideration of Plaintiff's Motion to Amend.

In *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017), cited by this Court in support of its remand, the mother sued certain medical providers "as Next Friend of Alexia Lumpkin," her daughter. In April and May of 2013, the defendants moved for partial summary judgment. They filed their memoranda in support in July 2013, arguing that the mother, suing as the daughter's representative, could not recover the daughter's medical expenses incurred while she was a minor, because the parents were legally responsible to pay those expenses. In August 2013—a month later—the plaintiff not only opposed summary judgment but also filed a timely motion to amend her complaint. (Exh. A, relevant pleadings from the Record on Appeal in *Patton*). Here, in contrast, Plaintiff waited over two years to respond in any way to Defendants' assertion that she lacked standing to bring this case in her individual capacity, waiting until the afternoon of the summary judgment hearing. Thus, *Patton* does not support this Court's remand. Given that the standing issue was raised first in August 2016, there is no question that Plaintiff waited an unreasonable amount of time to address it. There is no excuse for Plaintiff's delay in attempting to correct a fundamental error that was raised to her early in this litigation.

Plaintiff's counsel did nothing for over two years after the issue of standing was first raised and has never provided any explanation for that failure. In *Crowley v. Spivey*, this Court admonished that, while motions to amend pleadings "are favored and liberally allowed, circumstances *such as inexcusable delay*, surprise to the adverse party, or the like, may justify refusal to amend." 285 S.C. 397, 414, 329 S.E.2d 774, 784 (1985). Plaintiff has provided no explanation for her undue delay in addressing the standing issue. Plaintiff's Motion to Amend was not filed within a reasonable time after Defendants objected to her standing to bring this case in her individual capacity. As a result, her Motion to Amend was inexcusably late under Rule 17, SCRCP, and no remand is necessary.

Finally, Defendant John Lucas Tree hereby adopts and incorporates by reference the arguments in Defendant Berkeley Electric Cooperative, Inc.'s Petition for Rehearing to the extent they are not inconsistent with the arguments set forth herein.

CONCLUSION

For the reasons stated herein, this Court should grant Defendant John Lucas Tree's Petition for Rehearing and reverse its remand to the Circuit Court for further consideration of Plaintiff's Motion to Amend. Plaintiff's Motion to Amend was never properly before Judge McCoy. Plaintiff had ample opportunity to file her Motion to Amend to correct her standing problem and failed to take any steps to do so until the very last minute. Alternatively, Judge McCoy denied the request for leave to amend in Plaintiff's opposition to summary judgment, leaving nothing to be decided on remand. Consequently, and as this Court did not find any other error with the Circuit Court's February 22, 2019 and March 6, 2019 Orders, this Court should dismiss Plaintiff's appeal with prejudice.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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March 15, 2022

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OCT 15 2015
S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2009-CP-46-5195

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

v.

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

APPENDIX

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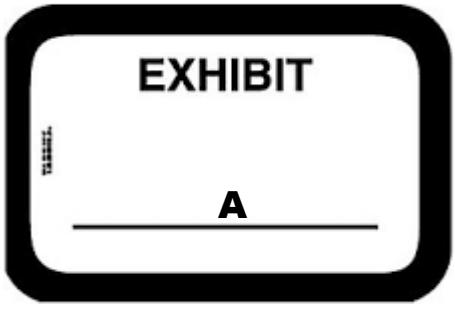

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Angela Patton, as Next Friend of Alexia Lumpkin, a minor, Plaintiff, v. Gregory A. Miller, MD, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, Defendants.	)	C.A. No.: 2009-CP-46-5195 **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.

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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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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

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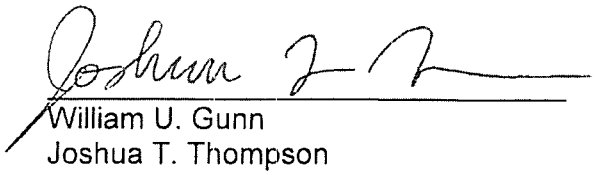
[2] Angela Patton was deposed in this matter on February 22, 2011, and Plaintiff's father, Antwon Lumpkin, was deposed in this matter on May 6, 2011.

HOLCOMBE BOMAR, P.A.

By: 

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July 15th, 2013

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT C/A NO.: 2009-CP-46-5195
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.	)	**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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2013 JUL 22 AM 9:15
CLERK OF COURT
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.[i] 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 necessaries doctrine. In South Carolina, a history of the necessaries 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 necessaries doctrine.

South Carolina utilized the necessaries 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 necessaries.[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 necessaries 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 necessaries 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 necessaries doctrine, the South Carolina Court of Appeals more recently stated:

> By allowing a creditor to look to both spouses for repayment, the necessaries 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 necessaries 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 necessaries 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 necessaries 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 necessaries 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.[xxviii] 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 necessaries doctrine is archaic and obsolete; (2) the limited tort recovery corollary to the necessaries 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 necessaries 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 necessaries 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), SCRCP, 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: _____

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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 necessaries 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, S 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 (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 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 necessaries 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 necessaries 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

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

[xxxii] 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); Gookin 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); Vachon 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. Ausborn, 249 S.C. 470, 154 S.E.2d 839 (1967).

[xxxiii] 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).

[xxxiv] 83 C.J.S. "Subrogation," § 14.

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT C/A NO.: 2009-CP-46-5195
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.	)	**MOTION FOR LEAVE TO AMEND COMPLAINT**

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2013 AUG 16 AM 11:41
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C.C.C.P.&G.S.
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) insomuch 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 Lumpkin[2], 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.

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[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
Florence, S.C. 29503
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. Dr. Gregory A. Miller, Rock Hill Gynecological & Obstetrical Associates, P.A. and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, Defendants.	)	**SECOND AMENDED COMPLAINT**

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 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 L. Graham
Post Office Box 550
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Attorney for Plaintiff

August 15, 2013

RECEIVED
Mar 15 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appeal No. 2019-000574

Elizabeth Lofton,.....Appellant,

v.

Berkeley Electric Cooperative, Inc. and
John Lucas Tree Expert, Co.,.....Respondents.

PROOF OF SERVICE

I certify that on the 15th day of March 2022, I served **Respondent John Lucas Tree Expert, Co.'s Petition for Rehearing** on the other parties to this appeal by emailing it to counsel of record as follows:

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s/Helen F. Hiser
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RECEIVED
Mar 15 2022
SC Court of Appeals

March 15, 2022

Via S.C. Courts E-Filing & U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Elizabeth Lofton vs. Berkeley County Electric Cooperative, Inc. and John Lucas Tree Expert, Co.
Civil Action No.: 2018-CP-10-00323 (Charleston)
Date of Incident: July 17, 2013
Carrier Claim No.: 20205054
MGC File No.: 20880.16001
Appeal No.: 2019-000574

Dear Ms. Kitchings:

Enclosed please find the original of Respondent John Lucas Tree Expert, Co.'s Petition for Rehearing, and the Proof of Service in the above-referenced matter. Pursuant to the Supreme Court's Order, 2021-08-25-03, Reduced Number of Copies Required in Appellate Matters, and Rule 267(f), SCACR, only one copy of Respondent's Petition is being submitted.

We will send our firm's check in the amount of $50 for filing the Petition via U.S. Mail with a copy of this letter.

Please do not hesitate to contact the undersigned if the Court requires additional copies and/or if you have any questions.

Very truly yours,

Helen F. Hiser

Enclosures
cc: Michael A. Whitsitt, Esq. (via Email only)
Jary J. Hulst, Esq. (via Email only)
John B. Williams, Esq. (via Email only)