IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

BRENDA MARLENE SPAIN,	)	
Individually and as Next Friend	)	
For Samuel Ivan Spain, a Minor,	)	
	)	
Plaintiff,	)	**No. 02C-3021**
	)	
vs.	)	**JURY DEMAND**
	)	
BAPTIST HOSPITAL, INC. and	)	
BAPTIST HOSPITAL SYSTEM. INC.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSTION TO BAPTIST HOSPITAL'S MOTION FOR SUMMARY JUDGMENT

Baptist Hospital has moved for summary judgment on two grounds: (1) Baptist moves to dismiss the *individual* claims of Brenda Spain based upon the statute of limitations, and (2) Baptist seeks summary judgment on the claim on informed consent against Baptist based upon the use of the drug Cytotec. Plaintiff does not oppose (or disagree with) Baptist's motion for summary judgment on these two grounds *except* that Plaintiff maintains that any and all claims for medical expenses (especially the extraordinary medical, rehabilitation and educational expenses associated with his profound birth injuries) are not barred by limitations because the medical expenses claim is *derivative* (from the child); the medical expenses claims do not "accrue" for limitations purposes until they are incurred; and Ms. Spain's complete inability to pay for these expenses justifies treating the medical expenses claim as one for "necessaries" resting in her son.

ARGUMENT

Under Tennessee law when a tort is committed against a child the parents have a *derivative* cause of action for medical expenses resulting from the injury. In *Dudley v. Phillips,* 218 Tenn. 648, 405 S.W.2d 468 (1966) the Tennessee Supreme Court stated: "We hold a cause of action arising in favor of the parent resulting from a tort committed against the child is derivative in nature and such action is subject to the same defenses that are available in the action arising in favor of the child. *Id*. at 656 and 471.

Given the derivative nature of the claim for medical expenses is this claim tolled for the purposes of the one-year statute of limitations and three years statute of repose because that Samuel Spain is a minor? This is an open and undecided question under Tennessee law, however, there is strong reason to believe that *on these facts* the claim for medical expenses vests with the minor child, Samuel Spain, and not with his mother (Brenda Spain) or biological father, Sanford Cohen. In *Taylor v. Beard,* No. W2000-0278-COA-R3-CV, *slip op.*, 2002 WL 1751342 (Tenn. Ct. App., Feb. 6, 2002) the parents sued for injuries to their minor child and sought recovery of medical expenses. The trial court granted summary judgment on the parents' claims because the suit was filed more than one-year after the accident. On *appeal* the parents raised, for the first time, the argument that the claim for medical expenses was not barred because it was tolled "during Lindsay's disability as a minor because the Parents' claims are derivative of Lindsay's claims." *Id.* at * 2. The Court of Appeals, however, affirmed the summary judgment because there "was no indication" that this argument, proffered by the Parents for the first time on appeal., was "raised to the trial court below." *Id.* at * 3. Plaintiff herein, however, now raises the argument never considered by the appellate court in *Taylor v. Beard*, namely, that as a derivative claim the infancy of Samuel Spain tolls the statute, especially where there is no ability of the parents to pay for these necessaries.

The unsettled status of Tennessee law on this point was noted in a federal court decision in *McBride v. Shutt, slip op.*, 2002 WL 1477211 at * 5 (W.D. Tenn., July 2, 2002):

> This Court has been unable to locate any Tennessee cases holding that when a child is living with and being fully supported by her parents, the parents may assert a claim against the tortfeasor on behalf of the child for her own medical expenses. In the absence of any such authority, the Court declines to adopt the position urged by the plaintiffs. Therefore, the Court concludes that the claim purportedly brought on behalf of Nancy McBride for medical and medically-related expenses is properly designated as the claim of Cindy and Stuart McBride.

Plaintiff submits that *McBride* is not controlling because Samuel Spain is not "fully supported" by his parents. He is supported only from SSI funds and TennCare and his father, Sanford Cohen, never married his mother and has never provided formal child support. Moreover, the federal court in *McBride* overlooked a very significant case in Tennessee law. In *Gardner v. Flowers*, 529 S.W.2d 708 (Tenn.1975) the Supreme Court of Tennessee determined that a *child* was liable for hospital expenses she incurred as a result of an automobile accident. The Tennessee precedent on the doctrine of necessaries provided that "if the infant lives with his parent and is in his charge, custody, and control ... and the care and protection of the parent is duly exercised in his behalf, he cannot bind himself for necessaries." *Foster v. Adcock*, 161 Tenn. 217, 219, 30 S.W.2d 239, 240 (1930). The *Gardner* court distinguished that earlier precedent, noting that it was based on a presumption that since a parent is presumed to provide all of a child's necessities in life, a contract made by that child is presumed to be for non-necessaries. 529 S.W.2d at 710. The court further noted that this presumption did not hold true in the *Gardner* case, since the child's mother was financially unable to provide the needed hospital care for her daughter. *Id.* The court therefore held that "the inability of parents to pay for essential medical treatment for an infant renders such treatment a necessary for which the infant is liable." *Id*. 529 S.W.2d at 711.

In this case there is no question that there is a complete inability to pay for Samuel Spain's medical and life-care plan expenses. Samuel Spain (the minor) lives alone with his mother (who has been unemployed since his birth). Samuel was born out-of wedlock, receives no court-ordered child-support from his father, is on SSI his mother is unemployed, unable to pay for his medical expenses, subsisting on a mere $705 per month. *Deposition of Brenda Spain.* Although Mr. Cohen (the biological father) has paid about one hundred dollars a week (through an informal arrangement) he has never paid any medical bills for Samuel (which were paid, and are being paid, by TennCare). *Deposition of Brenda Spain,* pp. 92-93. Under similar circumstances, the Tennessee Supreme Court permitted a *child* to recover for medical expenses where the parents could not sue for those expenses (mother was deceased, father was *non compos*. *Wolfe v. Vauhgn,* 177 Tenn. 678, 152 S.W.2d 631 (Tenn. 1941). In so holding the court quoted with approval a section from *Corpus Juris* that notes that a parent may waive their separate claim and have the medical expenses claim proceed as the *child's* claim:

> In 46 C. J. 1301, 1302, it is said:
>
> "An injury to a minor child gives rise to two causes of action, one on behalf of the child for pain and suffering, his permanent injury, and impairment of earning capacity after attaining majority, the other on behalf of the parent for loss of services during minority, and expenses of treatment, and the damages peculiar to one of these causes of action cannot properly be recovered in an action based on the other in the absence of any waiver or estoppel. It has been held that the causes of action may either be joined or tried separately, but other authorities have held that the two causes cannot be joined. Where the actions are tried separately, a recovery in one will not bar a recovery in the other, although the parent by suing on behalf of the child may waive his right and be estopped to bring a subsequent suit on his own behalf.
>
> *A parent may waive or be estopped to assert his right to recover for loss of services, etc., by reason of injury to his minor child, and permit the child to recover the full amount to which both would be entitled, as where the parent as next friend brings an action on behalf of the child for the entire injury, or permits the case to proceed on the theory of the child's right to recover for loss of services and earning capacity during minority. In such case the parent treats the child as emancipated in so far as recovery for such damages is concerned, and cannot thereafter be permitted to claim that he, and not the child, was entitled to recover therefor."*

Wolfe v. Vauhgn, 177 Tenn. 678, 152 S.W.2d 631, 634 (Tenn. 1941) (emphasis supplied).

Well reasoned case law in other jurisdictions also supports the conclusion that in certain cases the medical expenses claim is not time-barred and may be considered the child's claim where, for example, the parent waives the claim in favor of the child (or as here sues for these expenses on the child's behalf) or where the parents are simply unable to pay for the expenses (a fact present here given that the mother does not work (because she can't afford care, even respite care for her handicapped child who cannot walk or speak) and where Ms. Spain lives on a meager $705 per month. *Brenda Spain deposition*, p. 60. For example, in *Garay v. Overhottzer,* 631 A.2d 429 (Md. 1993) the Maryland Supreme Court *relied upon Tennessee precedent* (*Gardner v. Flowers,* 529 S.W.2d 708 (Tenn.1975)) to hold that if the parents were unable to pay for necessary medical expenses, the child could recover them and that this claim was tolled from the expiration of limitations by the child's minority. Similarly, the Superior Court of Maine held that if the *facts* established that the child's parents could not pay for necessary medical expenses then an otherwise time- barred claim for medical expenses could be pursued in a products liability case as a proper claim of the child. *Woodbury v. Hammond Lumber, slip op.,* No. Civ. A. CV-02-03-034, 2003 WL 1665251 (Maine Super. Ct., March 10, 2003).

In conclusion, the motion as presented by Baptist Hospital is not opposed except insofar as Plaintiff wishes to make very clear that all claims for medical and life-care plan expenses (during and after minority) are not dismissed by reason of limitations and that only the separate and distinct (non-derivative claims) of Ms. Spain are time-barred.

Respectfully submitted,

DAVID RANDOLPH SMITH & ASSOCIATES

By: _____

David Randolph Smith #011905
Edmund J. Schmidt, III #021313
1910 Acklen Avenue
Hillsboro Village
Nashville, Tennessee 37212
(615) 742-1775
web: http://www.drslawfirm.com
e-mail: drs@drslawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of December 2003, a copy of the foregoing document has been served upon the following via first-class, U. S. mail, postage prepaid:

William S. Walton
MILLER & MARTIN LLP
1200 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219-2433
(615) 244-9270

Attorneys for Defendants Baptist Hospital, Inc. and Baptist Hospital System, Inc.

_____
David Randolph Smith