NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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November 9, 2018

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Re: ***Ashley Brown v. Hunter S. Tashman, MD, et al.***
Case No. CL–2017–3852

Jason Brown v. Hunter S. Tashman, MD, et al.
Case No. CL–2017–10180

Dear Counsel:

The issue before the Court is whether, in pregnancy-related medical malpractice lawsuits, the lack of a personal injuries claim for a child is a bar to a parent's claim to recover medical expenses incurred on behalf of the child, where the tortious conduct occurred only while the child was *in utero*. That is, must the child bring his personal injuries claim before or simultaneously with the parent's claim for medical expenses, or may the parent's claim lie on its own? The Court holds the parent's claim to medical expenses for the child is derivative of the child's own claim for personal injuries, and the absence of the child's claim is a bar to the parent's recovery of those medical expenses. The Court sustains Defendants' Pleas in Bar and dismisses Count II of the Amended Complaint filed in CL–2017–3852 and the entirety of the Complaint filed in CL–2017–10180.

OPINION LETTER

I. FACTUAL OVERVIEW

Ashley Brown and Jason Brown, husband and wife, separately filed complaints against Dr. Hunter Tashman and Hunter Scott Tashman, M.D., P.C. The complaints allege Dr. Tashman, a licensed physician practicing in the fields of obstetrics and gynecology, negligently committed medical malpractice while treating Ashley during the pregnancy of the couple's second and third children. Compl., ¶¶ 3–4.[1] The cases were consolidated by order entered on October 19, 2018.

Following the birth of the second child, [redacted], in May 2009, Dr. Tashman elected not to administer a "Rhogham" injection to Ashley after discovery of the presence of certain antibodies in her immune system. Compl., ¶¶ 7–10. The complaints allege Dr. Tashman failed to disclose the risk of not receiving the injection—namely, the exposure of injury to a fetus in a later pregnancy. Compl., ¶¶ 11–13. More specifically, the complaints allege these antibodies could attack the red blood cells of the fetus, potentially causing injury to the fetus *in utero*, upon delivery, and thereafter during the life of the child. Compl., ¶ 18.

In late 2011, Ashley became pregnant with the couple's third child, [redacted]. Compl., ¶ 14. During the pregnancy, Dr. Tashman ordered testing, which revealed an allegedly "abnormal" presence of antibodies in Ashley's immune system. Compl., ¶¶ 16–17. Ashley and Jason claim Dr. Tashman failed to refer Ashley to a "maternal-fetal specialist" and failed to "render any care or treatment for the abnormal results." Compl., ¶¶ 19–20.

[redacted] was birthed by cesarean section, without complication. Compl., ¶¶ 21–22. After delivery, testing performed on [redacted] revealed abnormal antibodies in his immune system. Compl., ¶¶ 23–24. He also suffered severe respiratory distress. Compl., ¶ 25. He was transferred to a neonatal intensive care unit, where he was treated for seven days before release. Compl., ¶¶ 27–28.

According to the complaints, four injuries resulted "[a]s a proximate cause of Dr. Tashman's failure to treat [Ashley] for the abnormal levels of antibodies present." Compl., ¶¶ 29–30. First, the couple alleges '[redacted] [] sustained injuries in utero and at birth that are ongoing." 10180 Compl., ¶ 30. Second, as a result of [redacted]'s injuries, Ashley "suffered severe emotional distress." Compl., ¶ 29. Third, due to Dr. Tashman's negligence, Ashley "sustained physical injury to her body as well as emotional distress." Compl., ¶ 30.

Defendants demurred to Count II of Ashley's Complaint, which seeks the recovery of the medical expenses of [redacted] incurred during his minority as a result of Dr. Tashman's negligent conduct as detailed above. Compl., ¶¶ 36–38. Defendants also demurred to both causes of action set forth in Jason's Complaint. Count I alleges negligent conduct by Dr. Tashman and seeks recovery of [redacted]'s medical expenses. 10180 Compl., ¶¶ 31–35. Count II seeks to

[1] All citations to "Compl." are to Ashley's First Amended Complaint, filed in CL–2017–3852 on July 21, 2017. Citations to "10180 Compl." refer to Jason's original Complaint filed in CL–2017–10180 on July 24, 2017.

impose vicarious liability on Hunter Scott Tashman, M.D., P.C. for the conduct of Dr. Tashman. 10180 Compl., ¶¶ 36–41.

The crux of the demurrers is that Ashley's and Jason's claims for [redacted]'s medical expenses are derivative of a claim by [redacted] for personal injuries. Defendants contend that since no such claim is currently pending for [redacted], no claim can lie for Ashley and Jason. Defendants, in the alternative, asked the Court to sustain their defensive pleading as a plea in bar on the same grounds.

In a jointly filed opposition brief, Ashley and Jason respond that "Defendants' [position] has never been adopted by any Virginia court; rather, it has been outright rejected by a [Virginia] circuit court and a federal district court." *See Pancho v. Johnson*, 94 Va. Cir. 64 (Norfolk 2016); *Keene v. Yates*, 81 F. Supp. 2d 655 (W.D. Va. 2000). They argue this Court should follow suit and overrule the demurrers. In the opposition brief, Ashley and Jason concede, "[n]o lawsuit has yet been filed on behalf of [redacted] alleging medical malpractice for his personal injuries."

II. ANALYSIS

"[T]he purpose of a demurrer is to determine whether a complaint states a cause of action upon which the requested relief may be granted." *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 2018 Va. LEXIS 119, 5 (2018) (citations omitted). A demurrer is not the same as a plea in bar. "A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff's recovery." *Cole v. Norfolk S. Ry. Co.*, 294 Va. 92, 104 (2017) (citation omitted). "A demurrer tests the *legal sufficiency* of the facts properly alleged," *Terry*, 2018 Va. LEXIS 119, at 6 (emphasis added); whereas, "a plea in bar 'reduce[s] litigation to a *distinct issue of fact*,'" *Smith v. McLaughlin*, 289 Va. 241, 252 (2015) (emphasis added) (quoting *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008)).

Considering the nature of the relief sought, Defendant's Demurrers are in fact pleas in bar, not demurrers. Accordingly, as a preliminary matter, this Court must overrule Defendants' Demurrers. Given Defendants request in the alternative, this Court will nevertheless proceed to rule on Defendants' Pleas in Bar. Turning to the merits of this case, the question the Court must resolve is whether a parent may seek recovery of a child's medical expenses before the child seeks recovery of the his own personal injuries, if the tortious conduct occurred while the child was still *in utero*.

The most pertinent Virginia statute, Virginia Code § 8.01–36(A), does not require an action by the infant for personal injuries as a precondition to the parents' right of action for medical expenses. That subsection reads,

> Where there is pending any action by an infant plaintiff against a tort-feasor for a personal injury . . . any parent or guardian of such infant, who is entitled to recover from the same tort-feasor the expenses of curing or attempting to cure such infant

> from the result of such personal injury, *may* bring an action against such tort-feasor for such expenses, in the same court where such infant's case is pending, either in the action filed in behalf of the infant or in a separate action.

VA. CODE § 8.01–36(A) (emphasis added).

By using the word "may," the General Assembly makes permissive the joining of the two causes of action. *Cf. TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C.*, 263 Va. 116, 121 (2002) (explaining "'may' is primarily permissive in effect" (citation omitted)). That is, the statute "simply acknowledge[s] the parent's common law right of action for medical expenses and to permit that action to be tried jointly with the minor's personal injury action if they are pending at the same time." *Pancho v. Johnson*, 94 Va. Cir. 64, 67 (2016). This part of the *Pancho* court's interpretation of the statute is persuasive.[2]

Interpreting a prior version of Virginia Code § 8.01–36(A), the Supreme Court observed the provision "recognizes the common law rule that two separate causes of action arise out of an injury to an infant by wrongful act." *Moses v. Akers*, 203 Va. 130, 133 (1961) (discussing VA. CODE § 8–629 (1957)). The court further noted the predecessor code section "permit[ed] the infant's pending action and the action of the parent or guardian to be tried together at the same time. . ." *Id.* Notably, the Supreme Court did not conclude the subsection *requires* the infant's personal injury action and the parent's action be tried together at the same time, as Defendants now contend.

Defendants resort to other case law from the Supreme Court to support their contention that when injury is caused to a minor, the parent's claim for medical expenses is derivative of the child's cause of action for personal injuries. *See Norfolk S. Ry. Co. v. Fincham*, 213 Va. 122 (1972). In *Fincham*, following a minor's injuries caused by a railroad car, the minor brought an action for personal injuries and his father brought a separate action to recover medical expenses incurred on behalf of his son. *Id.* at 123. The jury returned a verdict for the father but not the son.[3] *Id.*

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[2] Insofar as the court in *Pancho* held "the language of [Virginia] Code § 8.01–36(A) does not . . . restrict [a p]laintiff's common law right of action for medical expenses," this Court concurs. 94 Va. Cir. at 67; *see also Keene v. Yates*, 81 F. Supp. 2d 655, 656 (W.D. Va. 2000) (reaching the same conclusion). However, for the reasons discussed in this opinion, this Court disagrees with the *Pancho* court's understanding of the common law, and therefore reaches an opposite result here in disposition of the pleas in bar. 94 Va. Cir. at 67. It cannot reconcile *Pancho's* discussion of the common law with *Bulala v. Boyd*, 239 Va. 218, 230 (1990). *Cf. Orantes v. Pollo Ranchero, Inc.* 70 Va. Cir. 277, 280 (Fairfax 2006) (explaining decisions of other circuit courts are not binding upon this Court). Since the issue in *Keene* was before that court on a motion for summary judgment, 81 F. Supp. 2d at 655, and the nature of summary judgment proceedings are inherently different than plea in bar proceedings, this Court expresses no view on that court's ultimate resolution of the motion in *Keene*.

[3] Admittedly, this summary is an oversimplification of the post-trial procedure in *Fincham*, but for purposes of this opinion, the simplified summary suffices. *Fincham*, 213 Va. at 127 ("Th[e post-trial] procedure was, to say the least, unusual.").

On appeal, the Supreme Court ruled it was error for the trial court to enter judgment for the father without a verdict in the son's case. *Id.* at 128. The court rationalized, "[t]he father's cause of action for medical and incidental expenses was a derivative action." *Id.* Therefore, the court explained, the jury was required to "return a verdict for [the son] before his father was entitled to recover." *Id.*

Fincham would be dispositive of the issue in the instant case had the tortious conduct causing [redacted]'s injuries occurred after he was born and directly to him. Effectively, *Fincham* would require Ashley and Jason to wait for [redacted] to bring his underlying personal injury action before they could bring their derivative action for medical and incidental expenses. *See also Mahony v. Becker*, 246 Va. 209, 212 (1993) ("A derivative claim is one having no origin in itself, but one owing its existence to a preceding claim." (quoting BLACK'S LAW DICTIONARY 443 (6th ed. 1990)). Here, however, Dr. Tashman's allegedly tortious conduct occurred while [redacted] was still *in utero*.

Ashley and Jason assert that this point of distinction makes a difference because injury to the fetus was a physical injury to Ashley. Indeed, "injury to an unborn child constitutes injury to the mother and [] she may recover for such physical injury." *Modaber v. Kelley*, 232 Va. 60, 66 (1986). As a general rule, where a mother alleges tortious conduct during a pregnancy, "recoverable damages are those which are the reasonable and proximate consequences of the breach of duty." *Miller v. Johnson*, 231 Va. 177, 183 (1986) (*citing Naccash v. Burger*, 223 Va. 403, 414 (1982)).

Ashley and Jason argue the underlying tortious conduct caused physical injury to Ashley, but not [redacted]. As [redacted]'s parents, the couple maintain they are entitled to recover damages for expenses incurred for his care and treatment. *See Naccash*, 223 Va. at 414. Generally, "when an adult is suing for personal injury . . . the expense of treatment is inseparable from his bodily injury and flows directly therefrom." *W.I. Watson & Capital Small Loan Corp. v. Daniel*, 165 Va. 564, 573 (1936). In the context of injuries caused during pregnancy specifically, a mother may generally recover for personal injuries, medical expenses, lost wages, and emotional distress damages. *See Miller*, 231 Va. at 184 (citation omitted).

Nonetheless, like the general principles elucidated in *Fincham*, the general principles providing support for Ashley's and Jason's position are not dispositive of the fact-intensive inquiry presently before the Court. As this Court ultimately concludes, the distinction relied upon by Ashley and Jason is a distinction without a difference where the tortious conduct occurs while the child is *in utero* and the child is born alive.

In *Naccash*, the Supreme Court held that parents who presented themselves for prenatal testing for a birth defect were owed a duty of reasonable care by health care providers to handle the testing and to provide the parents with reasonably accurate information. 223 Va. at 414. After finding a breach of that duty, the court further held, "parents injured as the [plaintiffs] have been injured are entitled to recover damages for expenses incurred in the care and treatment of their afflicted child." *Id.*

To be sure, *Naccash* is a wrongful birth case. In *Naccash*, the alleged injury was the deprivation of the opportunity to accept or reject the continuance of the mother's pregnancy. *Id.* By contrast, Ashley and Jason do not allege they would have aborted [redacted] had they known the risks of not administering the "Rhogham" shot. Rather, the underlying allegation concerning the child is that "[redacted] sustained injuries *in utero* that are ongoing." That said, like the plaintiff-parents in *Naccash*, Ashley and Jason do allege a breach of duty as a result of negligent conduct related to testing. Why then, should the parents in *Naccash* be able to recover the medical expenses for the care of their child but Ashley and Jason not?

In response to a similar inquiry from the Court at oral argument, counsel for Defendants referred the Court to *Bulala v. Boyd*, 239 Va. 218 (1990). There, a mother, father, and child brought separate actions against a doctor for failure to properly monitor a lack of oxygen immediately prior to birth, resulting in the child suffering cerebral palsy. *Id.* at 223. The mother claimed her own bodily injury and mental anguish arising from the birth. *Id.* "The father claimed damages from emotional distress." *Id.* "The child claimed her own personal injuries." *Id.*

Quoting *Kalafut v. Gruver*, 239 Va. 278, 283–84 (1990), decided the same day, the Supreme Court explained, "a 'tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for the harm to the child, if the child is born alive.'" *Bulala*, 239 Va. at 229. The court "drew the line between nonliability and liability for prenatal injury at the moment of live birth of the child, when the child became a 'person.'" *Id.* The court explained, "at the moment of live birth, the child became the patient . . . because she was a 'natural person' who, at the instant of birth, received or 'should have received' health care from defendant." *Id.*

The court held the mother could recover for her own personal injury and "would be entitled to recover for mental suffering resulting from the birth of a defective child." *Id.* (citing *Modaber*, 232 Va. at 66). The court held the child had a personal injuries claim. *Id.* Addressing the father's claim for emotional distress as a result of injury to the child and the parents' joint claim to recover medical expenses incurred on behalf of the child, the court ruled "both of those claims fall within the child's statutory cap, [as derivative of the child's personal injury claim,] under the circumstances of this case." *Id.* at 230. The court rationalized, "a parent's claim for emotional distress as the result of injury to the child is 'wholly derivative' of the child's claim."[4]

[4] This is a subtle, but important distinction. The court held the mother could recover emotional distress damages from the giving birth of a defective child, independent of the child's personal injury claim. *Bulala*, 239 Va. at 229. Recovery of these emotional distress damages inheres in the mother's independent claim for her own personal injuries. *Id.* By contrast, in *Speet*, the court ruled the mother's claim for emotional damages was wholly derivative of the child's personal injury claim because the emotional distress was "suffered as a result of the injuries negligently inflicted upon [the child]." 237 Va. at 292, 297–98. In *Bulala*, the court extended the principle in *Speet* by holding a father's claim for emotional distress damages arising from the wrongful birth of a child is derivative of the child's claim for personal injuries. 239 Va. at 230. The distinction is that a claim by either parent for emotional distress for injury to a child is derivative of the child's personal injury claim. However, the mother may also independently recover for emotional distress arising from giving birth to a defective child as part of her own personal injuries claim.

Id. (quoting *Speet v. Bacaj*, 237 Va. 290, 298 (1989)). The court also ruled the father's medical expenses claim was derivative of the child's claim for personal injuries. *Id.* (citing *Fincham*, 213 Va. at 128).

Partly, *Bulala* was an extension of the Supreme Court's earlier decision in *Modaber v. Kelley*, 232 Va. 60, 61 (1986), where the court "consider[ed] whether a mother [] sustained personal injuries, as well as mental anguish, due to the stillbirth of her child." The mother alleged negligent conduct during her pregnancy and at birth, resulting in a stillbirth. *Id.* at 62. Appealing an adverse jury verdict, the defendant doctor argued "the trial court erred by instructing the jury that the prenatal death of the fetus constitute[d] a direct physical injury to the mother." *Id.* at 65.

The Supreme Court held "that injury to an unborn child constitutes injury to the mother and that she may recover for such physical injury and mental suffering associated with a stillbirth." *Id.* at 66. Accordingly, the court ruled the trial court did not err by instructing the jury that injury to the fetus *in utero* constituted injury to the mother and by permitting the jury to assess damages for the injuries and mental anguish suffered by her as a result of the stillbirth. *Id.* at 67.

Asked to revisit *Bulala* a decade-and-a-half later, the Supreme Court doubled down. In *Castle v. Lester*, 272 Va. 591, 603 (2006), the court explained,

> [t]he decisions in *Bulala* and *Kalafut* collectively established that, when a fetus sustains injury and is subsequently born alive, the mother and the impaired child each have a claim for damages resulting from the negligently caused, in utero injury. Those two claims, however, encompass different elements. As the Court in *Bulala* uniformly accepted, a mother's claim is solely for her mental suffering arising from the birth of a defective child. Whatever disagreement existed in that case as to whom was a proper plaintiff turned on whether the child could assert her own claims for injuries she suffered prior to becoming a legal 'person.'

Synthesizing these cases, the Supreme Court of Virginia has established the following principles as applied to different causes of action arising out of differing stages of the child birthing process. On one end of the spectrum, when injury is caused solely to a minor, two causes of action arise: one on behalf of the minor for personal injuries, and a second derivative action on behalf of the minor's parents for expenses of treatment for the minor's injuries. *Fincham*, 213 Va. at 123; *Moses*, 203 Va. at 133; *W.I. Watson*, 165 Va. at 673.

At the other end of the spectrum, where the negligent conduct caused injury while the child was *in utero* and/or at birth, resulting in a stillbirth, the injury to the unborn child constitutes injury to the mother. In such circumstances, the mother is entitled to recover for her physical injuries, associated medical expenses, and emotional distress damages resulting from the birth. *Modaber*, 232 Va. at 66.

Coming in from the *Modaber* end of the spectrum, in cases of wrongful birth, where parents would have aborted the child but for the doctor's negligence, the parents "are entitled to recover damages for expenses incurred in the care and treatment of their afflicted child." Such parents may also recover emotional distress damages connected to the wrongful birth and to recover expenses incurred in the care and treatment of the afflicted child. *Naccash*, 223 Va. at 414, 416.

Continuing inward on the spectrum, where the injurious conduct occurs during a defective birth process with a live child, both the mother and the child are patients of the doctor. Accordingly, both mother and child have independent claims for personal injuries. The mother also has a claim for emotional distress damages resulting from the birth of a defective child. Either parent or both has a claim for emotional distress damages as a result of injury to the child, but that claim is derivative of the child's claims for personal injuries. Likewise, a claim for medical expenses by either parent is derivative of the child's cause of action for personal injuries. *Bulala*, 239 Va. at 229–30.

Finally, this Court holds that where the alleged tortious conduct occurred solely while the child was *in utero*, the same principles adopted by the Supreme Court in *Bulala* apply. "When a child is born alive, the argument that an unborn child is not a 'person' misses the point." *Kalafut*, 239 Va. at 285. A doctor whose tortious conduct occurred while the child was *in utero,* but which resulted in injuries to the child, is liable to both the mother—for any personal injuries caused to her independent of the injuries suffered by the child—and to the child. *Id.* at 284–85.

In other words, the Court holds, where the alleged tortious conduct occurred only while the child was *in utero*: (1) the mother and the child have independent claims for personal injuries; (2) the mother has an independent claim for emotional distress damages for giving birth to a defective child as part of her personal injuries claim; (3) both parents have a claim for emotional distress damages for injuries to the child, derivative of the child's personal injuries claim; and (4) both parents have a claim for any medical expenses incurred on behalf of the child derivative of the child's claim for personal injuries.

This resolution is logical. If parents could bring their derivative claims without the child bringing his or her underlying personal injury claim, ridiculous results could ensue. Consider a hypothetical case where parents recover against a doctor for medical expenses incurred on behalf of their child related to the birth defects. Subsequently, the child files suit for personal injuries against the doctor and loses because the doctor was held not liable for the child's injuries. Under such circumstances, the doctor would effectively be required to pay for medical expenses incurred as a result of an injury that, as a matter of law, he did not cause. This hypothetical highlights the underlying rationale as to why a parent's claim for a child's medical expenses is necessarily derivative of the child's claim for personal injuries. This was the conundrum faced in *Fincham*, causing the court to hold the father's claim for medical expenses was barred in the absence of a verdict in favor of the child for the underlying personal injuries.

Returning to Defendants' Plea in Bar, this Court must now resolve whether Defendants have "assert[ed] a single issue, which, if proved, creates a bar to a plaintiff's recovery.'" *Cole*, 294 Va. at 104 (citation omitted).[5]

At issue are Ashley's and Jason's claims for the recovery of the medical expenses of [redacted] due to tortious conduct that occurred while [redacted] was *in utero*. At the time of that conduct, a right of action inured to Ashley for personal injuries. Once [redacted] was born, a right of action to recover for any injuries resulting from Dr. Tashman's conduct inured to him. Meanwhile, Ashley's independent right of action for her own personal injuries maintained. *Cf. Kerns v. Wells Fargo Bank, N.A.*, 296 Va. 146, 2018 Va. LEXIS 120, 8 (2018) (distinguishing cause of action from rights of action).

Since [redacted] was born alive, and because Ashley and Jason do not allege a wrongful birth claim, any claim for medical expenses incurred by Ashley or Jason on behalf of [redacted] is derivative of [redacted]'s claim for personal injuries. [redacted]'s personal injury claim must be brought in his name by his next friend, VA. CODE § 8.01–8, and cannot be subsumed into a claim for personal injuries brought by Ashley, *see also Herndon v. St. Mary's Hosp., Inc.*, 266 Va. 472, 477 (2003) ("[Virginia Code § 8.01–8] does not plainly manifest an intent to authorize parents to bring a child's action in the parents' own name. . .").

The nonexistence of a personal injuries claim for the benefit of [redacted] is a distinct issue of fact, which, if proven, creates a bar to Ashley's and Jason's claims to recover medical expenses incurred as a result of those injuries. *Cole*, 294 Va. at 104; *Smith*, 289 Va. at 252. That is, as a derivative claim, a finding of liability against Defendants on [redacted]'s claim for personal injuries is a condition precedent to Ashley's and Jason's ability to recover [redacted]'s medical expenses. Since the facts affirmatively show no claim for personal injuries on behalf of [redacted] is currently pending, the Court must sustain the Pleas in Bar. In doing so, the Court must dismiss *without* prejudice Count II of Ashley's Complaint (CL–2017–3852) and the entirety of Jason's Complaint (CL–2017–10180).[6]

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[5] The complaints are devoid of an allegation that an independent claim for personal injuries on behalf of [redacted] is pending. And, at the October 19, 2018 hearing on this matter, Defendants presented no evidence demonstrating that no underlying claim for personal injuries on behalf of [redacted] existed. Yet, Plaintiffs admitted in their opposition brief that no claim is presently pending for personal injuries on behalf of [redacted]. This is a fact developed via the Plaintiffs' opposition to the Pleas in Bar, and it is determinative of the issue before the Court.

[6] "[T]he proper sanction for non-compliance [with a condition precedent] will depend on the circumstances of each case." *Primov v. Serco, Inc.*, 817 S.E.2d 811, 815 (2018) (citation omitted). "A dismissal of a suit 'without prejudice' is no decision of a controversy on its merits, and leaves the whole subject of litigation as much open to another suit *as if no suit had ever been brought*." *Id.* at 816 (emphasis in original) (citation omitted). "It does not prohibit the refiling of the action." *Id.* "[I]n the case of a plea in bar based upon a condition precedent to suit the party not in compliance could subsequently satisfy the condition precedent and file a new action or claim. . . . Thus, a dismissal without prejudice . . . would be the most suitable remed[y] for noncompliance." *Id.* at 817 (citations omitted). Here, because the condition precedent could be satisfied by the filing of a claim for personal injuries on behalf [redacted], the Court finds a dismissal without prejudice is the most suitable remedy.

III. CONCLUSION

For the reasons stated herein, the Court holds the absence of a child's personal injury claim is a bar to recovery in a lawsuit filed by that child's parents for the recovery of medical expenses incurred on behalf of the child where the alleged tortious conduct occurred while the child was *in utero*. Here, Ashley's and Jason's claims for medical expenses incurred on behalf of [redacted] are barred for want of the derivative foundation that is [redacted]'s personal injury claim. For those reasons, the Court sustains Defendants Pleas in Bar and dismisses without prejudice Count II of Ashley's Complaint (CL–2017–3852) and the entirety of Jason's Complaint (CL–2017–10180). The Demurrers are overruled as moot.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ASHLEY BROWN, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	CL–2017–3852
	)	CL–2017–10180
HUNTER S. TASHMAN, MD., *et al.*,	)	(consolidated cases)
	)	
	)	
Defendant.	)	

ORDER

THIS MATTER came before the Court on October 19, 2018 on Defendants' Demurrers and Pleas in Bar in the Alternative;

UPON CONSIDERATION of Defendants' Demurrer and Plea in Bar in the Alternative and Plaintiffs' Opposition thereto;

UPON HEARING oral argument of counsel on October 19, 2018 on the matter; and it

APPEARING that Count II of the Amended Complaint filed in CL–2017–3852 states a cause of action for the recovery of medical expenses incurred on behalf of a child;

FURTHER APPEARING that Count I of the Complaint filed in CL–2017–10180 states a cause of action for the recovery of medical expenses incurred on behalf of a child;

FURTHER APPEARING that no claim for personal injuries on behalf of [redacted] is currently pending in any court; it is hereby

ADJUDGED that the complaints state a cause of action for the recovery of medical expenses incurred on behalf of a child;

FURTHER ADJUDGED that Defendants' defensive pleading sets forth a single issue of fact that, if proven, creates a bar to Plaintiffs' recovery;

FURTHER ADJUDGED that, in pregnancy-related medical malpractice lawsuits where the tortious conduct occurs while the child is *in utero*, but where the child is born alive, the child and the mother both have independent causes of action for personal injuries;

FURTHER ADJUDGED that where a child suffers personal injuries, a parent's claim to recover medical expenses related to those injuries is a derivative claim, which must be filed before or simultaneously with the child's personal injury claim;

ORDERED Defendants' Demurrers are OVERRULED;

FURTHER ORDERED Defendants' Pleas in Bar in Bar are SUSTAINED as to Count II of the Amended Complaint filed in CL–2017–3852 and as to the entirety of the Complaint filed in CL–2017–10180;

ORDERED that Count II of the Amended Complaint filed in CL–2017–3852 and the entirety of the Complaint filed in CL–2017–10180 are DISMISSED WITHOUT PREJUDICE; and

DECREED that the Opinion Letter from the Honorable David A. Oblon dated November 9, 2018 is hereby adopted by reference into this Order as though it were fully restated herein.

[redacted]

Judge David A. Oblon

NOV 0 9 2018

Dated [redacted]

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.