CAUSE NO. C-1-CV-09-011504

MICHELE D. WEST, As Next Friend of SAMUELLE WEST, Minor,	§	**IN THE COUNTY COURT**
Plaintiff,	§	**AT LAW NUMBER ONE**
V.	§	
MELISSA ANNE HIGGINBOTHAM,	§	
Defendant.	§	**TRAVIS COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR SANCTIONS IN THE ALTERNATIVE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, SAMUELLE WEST, Plaintiff in the above-styled cause, who hereby files this Response to Defendant's First Amended Motion for Partial Summary Judgment, and in the alternative, Motion for Sanctions, and in support thereof, would respectfully show the Court as follows:

I.
FACTUAL BACKGROUND

Plaintiff brought this cause of action for personal injuries arising out of a motor vehicle collision caused by Defendant's negligence on or about August 29, 2008. Plaintiff's Original Petition was filed on or about October 26, 2009.

Defendant filed her Original Answer Subject to Motion to Transfer Venue on or about December 21, 2009. The motion to transfer venue was never set for hearing and that issue has since been waived by Defendant. Other than that, the Original Answer contained nothing but a standard general denial, pursuant to Rule 92 of the Texas Rules of Civil Procedure.

This cause is presently set for jury trial on March 7, 2011.

Defendant has filed, on January 19, 2011, her Motion for Partial Summary Judgment (hereinafter, "MPSJ"), alleging that recovery of medical expenses should be denied to Plaintiff because of some purported defect of wording in Plaintiff's Original Petition. After a telephone conference between the parties' counsel of record on January 25, 2011, Defendant has now filed, on January 26, 2011, a First Amended Motion for Partial Summary Judgment, on the same issue.

For the reasons that follow, Plaintiff would respectfully show that Defendant's motion should be altogether denied.

II.
ARGUMENT & AUTHORITIES

A. Standard of Review

The standard for appellate review of a summary judgment is that the Court must find that there is no genuine issue of fact and that the movant (i.e., Defendant) is entitled to judgment as a matter of law. *See Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990). All doubts as to the existence of a genuine issue must be resolved against the movant (Defendant). *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). All evidence and reasonable inferences are to be viewed in the light most favorable to the non-movant (i.e., Plaintiff), and all doubts are to be resolved in her favor. *See Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995). As the following analysis will show, Defendant cannot possibly meet this standard.

B. Defendant's Own Texas Supreme Court Case Undercuts its Position

Defendant argues in the MPSJ that because the suit was brought and styled as "Michele D. West, As Next Friend of Samuelle West, Minor," and not as "Michele D. West, Individually and As Next Friend of Samuelle West, Minor," the past medical expenses cannot be claimed by

Plaintiff (because she was a minor at the time of suit). *See* Defendant's MPSJ, at 1. Defendant goes on to argue that the mother's claim (i.e., Michele D. West) for the past medical expenses expired as of August 29, 2010, two (2) years after the date of the collision, and therefore medical expenses cannot be sought now. *See id.* at 2. Defendant cites a couple of cases for the proposition that medical expenses incurred by a minor are the obligation of the parent / guardian, and cannot be asserted by the minor in her own capacity. *See id.* at 1.

The first problem with this argument (and there are many, all of which are pointed out in the body of this response) is that it ignores clear law and reasoning by our judiciary. Plaintiff would point out that one of Defendant's own cited Texas Supreme Court cases in the MPSJ totally undercuts her argument, and eloquently demonstrates why the MPSJ should be denied as a frivolous attempt to exalt form over substance. Defendant cites, among its authorities for the proposition that a child has no right to bring a cause of action on her own, the case of *Gulf C. & S.F. Ry. Co. v. Styron*, 1 S.W. 161 (Tex. 1886). *See* Defendant's MPSJ, at 1-2. As a preliminary matter, Plaintiff is not arguing at all with that proposition; a child cannot bring a cause of action on her own, but must do so by and through an adult (e.g., parent) as next friend. This is precisely what Plaintiff did in the present case.

However, if Defendant is seriously arguing to this Court that because one word, i.e., "Individually," was missing from the case style of Plaintiff's Original Petition, that an entire category of damages (past medical expenses) are now to be denied (even though they were specifically pled in the original petition), then here is what Defendant's own cited Texas Supreme Court case has to say about such a frivolous argument:

> It is urged that the action should have been brought in the name of Millie Styron, by her next friend, and that it was not sufficient when brought by the next friend for the minor's benefit. The proposition is that Millie Styron, named as plaintiff, might prosecute the action by W. W. Styron, stated in the petition to be her next

> friend, but that W. W. Styron, professing to act as next friend for Millie Styron, setting out a cause of action inuring to her alone, and asking a judgment for her use and benefit, the action could not be maintained; that an action by W. W. Styron for Millie Styron could not be sustained, while an action in the name of Millie Styron by W. W. Styron could be. **This would seem to us to make the rights of parties to depend upon a mere formality which can be of no essential importance**. The minor's volition in no manner affects the right of any person to institute an action, based on facts which entitle the minor to relief, which will inure to her personally. The minor neither selects her representative nor controls his action. **The essential facts are that the action must be prosecuted for the use and benefit of the minor by some proper representative**. Any person who is permitted by the court to prosecute such an action is to be deemed a suitable person. When it appears with certainty, as it does in this case, that the action is based on the right of the minor; that the relief sought is such as the minor alone would be entitled to on the facts pleaded; and that this is sought for the use and benefit of the minor, then we are of the opinion that the minor is the real plaintiff, whatsoever may be the formula used. This is in accordance with what we understand to have been the effect of the rulings heretofore made in this state. … Such a rule commends itself to reason, and, as fully as would that insisted upon, secures the right of a minor, without prejudice to a defendant. **There is no doubt that cases may be found in which it has been held that the pleadings must show, in so many words, that the action is brought by the minor by next friend. Such rulings, however, seem to us to give effect to form rather than to substance. Whether the petition be worded in the one formula or the other, the adverse party and the court are equally advised of the cause of action, the right in which the recovery is sought, and of the person to whose benefit the recovery is to inure**.

Styron, 1 S.W. at 162-63 (emphasis added).

The eloquence and common sense of the Texas Supreme Court in this regard is so convincing and crushing to Defendant's argument, that no further elaboration is needed by Plaintiff on this particular point.

C. Defendant Had Fair Notice of Plaintiff's Claim for 15 Months, with No Objection

The next serious problem with Defendant's MPSJ is that it ignores rules of pleading and civil procedure, and is a motion that is both untimely and has been waived by Defendant's own pleadings history in this suit.

The exact wording of the style of the case (whether it states "Michele D. West, As Next

Friend…," or "Michele D. West, Individually and As Next Friend…") has no bearing on what the nature and underlying facts of the lawsuit are. Under our system of notice pleading in Texas, the purpose of a pleading (e.g., Plaintiff's Original Petition) is "to provide the opposing party with sufficient information to enable him to prepare a defense." *See, e.g.*, *Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 493 (Tex. 1988); *see also* Tex. R. Civ. P. 47(a) (stating that a pleading must simply give information and statements "sufficient to give fair notice of the claim involved").

Plaintiff has done so in the original petition in this case. She has, e.g., set forth the facts based on which negligence is being asserted against Defendant. *See* Plaintiff's Original Petition (filed on October 26, 2009), Section IV, at 2. She has also set forth the specific damages being sought for recovery. *See id.*, Section VI(a)-(f), at 3 (specifically listing, "Past and, in all reasonable probability, future medical expenses," among other damages). Accordingly, since October 26, 2009, Defendant has been on fair notice of what damages Plaintiff has been seeking to recover in this lawsuit.

Defendant evidently had no problem comprehending the nature of Plaintiff's claims or damages when she filed her original answer in this case. One appropriate method for Defendant to challenge Plaintiff's claim for damages as improper would have been to specially except to the claim for past medical expenses. However, there was no such special exception in Defendant's answer. *See* Defendant's Original Answer Subject to Motion to Transfer Venue (filed on December 21, 2009). Defendant's failure to file special exceptions to Plaintiff's Original Petition at any time over the past fifteen (15) months that Plaintiff's suit has been on file constitutes a waiver of that issue. *See, e.g.*, *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). Now that trial is just over a month away, it is altogether untimely for Defendant to raise this

issue. Furthermore, the courts allow a plaintiff to proceed to trial despite defects of form in her pleadings, in the absence of any timely special exception or objection by the defendant. *See, e.g.*, *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989). Defendant can claim no unfair surprise or prejudice whatsoever in the Court allowing Plaintiff to proceed with her past medical expense claim, because Defendant conducted full discovery on this issue almost a year ago, shortly after Plaintiff brought the suit. Defendant served her Request for Disclosure and her Requests for Production and Interrogatories to Plaintiff, on March 23, 2010. Included in that discovery were requests and interrogatories geared specifically toward the medical expenses:

> REQUEST FOR PRODUCTION NO. 5: For the incident made the basis of this lawsuit, please produce all medical records and bills in your care, custody, and control pertaining to the minor Plaintiff.
>
> INTERROGATORY NO. 6: Describe any injury or damage that resulted to minor Plaintiff or his/her property involved in the incident made the basis of this suit. Please include what steps have been taken to alleviate or repair any damages or injury and the expenses of same.
>
> INTERROGATORY NO. 7: Please itemize any medical bills, hospital bills, doctor bills, drug bills or related items claimed to have been incurred by minor Plaintiff as a result of the incident made the basis of this lawsuit.

See Defendant's Requests for Production and Interrogatories to Plaintiff, attached hereto as "Exhibit A."

Plaintiff timely responded to all these discovery requests, producing all medical records and itemized bills, and listing all itemized medical expenses in written interrogatory answers. Therefore, at no time was Defendant caught by any surprise or confusion as to what Plaintiff was claiming by way of medical expenses.

Interestingly, Plaintiff would point out that in her original answer, Defendant also seemed to treat the damage claims as asserted by both mother and daughter, further evidencing the point that this issue is one of meaningless form and not substance. In various places in the original

answer, Defendant referred to "Plaintiffs" in the plural:

> This suit has been filed by **Plaintiffs** against Defendant for damages arising out of a motor vehicle accident….

Defendant's Original Answer Subject to Motion to Transfer Venue, at 1 (emphasis added).

> If a cause of action exists in favor of **Plaintiffs** against Defendant….

Id. at 2 (emphasis added).

> Defendant denies each and every, all and singular, allegation contained in **Plaintiffs'** Original Petition….

Id. (emphasis added).

Clearly, Defendant had no problem understanding and accepting the nature of Plaintiff's damage claims (including and especially the past medical expenses claim) as a given.

Again, the first time Defendant raised any issue of this was in the original MPSJ and Defendant's First Amended Answer (filed concurrently, on January 19, 2011), with just over a month to go before jury trial. This is highly untimely, to say the least. The subsequent filing of Defendant's First Amended MPSJ and Defendant's Second Amended Answer (filed concurrently, on January 26, 2011), simply compounds the oversight, adds insult to injury, and further underscores Defendant's recognition of her own fifteen (15) months of delay in raising this issue, and the resulting waiver of it.

D. Defendant is Making a Capacity Claim Already Waived by the Original Answer

Another problem is that Defendant had appropriate means to assert this defense (i.e., that Plaintiff as a minor could not claim for her past medical expenses), and did not do so at the appropriate time. Defendant is essentially arguing that Plaintiff lacked capacity to bring suit for her own medical bills, under Rule 93 of the Texas Rules of Civil Procedure. The problem is, the rule requires that such a defense be raised by way of a verified denial:

> A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit:
>
> 1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.
>
> 2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.
>
> …
>
> 4. That there is a defect of parties, plaintiff or defendant.

Tex. R. Civ. P. 93(1)-(2), (4).

As Plaintiff has already pointed out, Defendant's original answer contained nothing of the sort; it was merely a Rule 92 general denial, with no raising of the capacity issue that it now asserts, and no verification / affidavit to the denial. *See* Defendant's Original Answer Subject to Motion to Transfer Venue (filed on December 21, 2009). Neither has Defendant raised the capacity issue or filed a verified denial for the fifteen (15) months that Plaintiff's suit has been on file. Only on January 19, 2011 (with just over a month to go until trial), did Defendant file her initial MPSJ and First Amended Answer (again, unverified and not properly raising the capacity issue).

In a subsequent telephone conversation on January 25, 2011 between the undersigned counsel for Plaintiff and counsel of record for Defendant, in which many items were discussed (including mediation, settlement, and other pre-trial issues), counsel for Plaintiff pointed out Defendant's waiver and failure to assert lack of capacity by verified denial in the original answer. In a breathtakingly cynical stunt, counsel for Defendant has now filed a First Amended MPSJ and Second Amended Answer (on January 26, 2011), <u>now for the first time</u> raising the lack of capacity claim and filing a verified denial in that Second Amended Answer. Again, with just over a month to go before jury trial, this is highly untimely, to say the least. The new

pleadings simply compound the oversight, add insult to injury, and further underscore Defendant's recognition of her own fifteen (15) month delay in raising this issue, and the resulting waiver of it.

Texas courts are quite consistent in stating that issues of capacity are waived if not timely asserted. *See, e.g.*, *Coastal Liquids Transp., L.P. v. Harris County Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001); *Murphy v. American Rice, Inc.*, No. 01-03-01357-CV, 2007 WL 766016, at *13 n.38 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("Lack of the plaintiff's capacity to sue can be waived if not timely raised."). Defendant raising this issue about a month before trial, when the suit has been on file more than fifteen (15) months, must be considered untimely, if that word is to have any meaning at all. Furthermore, Defendant raising this issue for the first time in a verified denial, pursuant to the requirements of Texas Rule of Civil Procedure 93, on January 26, 2011, and only after getting that idea from a conversation with counsel for Plaintiff a day earlier, evidences a bad-faith attempt to cover his tracks, hide his own delinquency, and try to portray to the Court that he is now in timely compliance with all rules.

E. Plaintiff is Now an Adult and Can Ratify Her Medical Bills Incurred as a Minor

Completely separate and apart from the rules of pleading, form, and civil procedure raised above, there is an entirely separate and substantive legal ground upon which Defendant's motion should be denied: Plaintiff, who was a minor at the time this lawsuit was filed, is now an adult and may legally ratify and assume the obligation for those medical expenses incurred as a result of this collision.

It is well-settled in Texas law that the contracts of a minor are voidable at the election of the minor. *See, e.g.*, *Dairyland County Mut. Ins. Co. of Texas v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973). However, certain contracts, such as contracts for necessaries (e.g., medical care),

are neither void nor voidable. *See, e.g.*, *Johnson v. Newberry*, 267 S.W. 476, 478 (Tex. Comm'n App. 1924, judgm't adopted). A contract to pay for necessaries is implied from the minor's acceptance and use of the necessaries. *See id.* Among the items traditionally deemed by our courts to be necessaries are: "[S]upport and maintenance, food, lodging, and clothing, medicines and medical attendance furnished him when his health or physical condition require them…." *Id.* at 479 (emphasis added).

Plaintiff Samuelle West clearly accepted and used the medical services rendered to her, as demonstrated in the itemized medical bills filed of record in this case. *See* Plaintiff's Notice of Filing Affidavits of Reasonableness and Necessity of Medical Bills (filed on January 18, 2011). Furthermore, such medical care is properly classified as "necessaries" for Plaintiff's care when she was a minor, as all the healthcare providers who treated her for her injuries from the automobile collision have testified to the medical care expenses being reasonable and necessary by sworn affidavit. *See id.*

Thus, an implied contract for those necessary medical expenses arises as a matter of law for which Plaintiff is responsible, in her own capacity and not merely through her mother, as Defendant mistakenly alleges and argues. Accordingly, as a matter of law, the claim by Plaintiff for her past medical expenses is valid. Alternatively, Defendant has failed to demonstrate that no genuine issue of material fact exists and that Defendant is entitled to partial summary judgment as a matter of law.

Furthermore, Plaintiff is no longer a minor. Her date of birth is November 22, 1992, and she therefore attained the age of majority, i.e., eighteen (18) years of age, on November 22, 2010. *See* Affidavit of Samuelle West, attached hereto as "Exhibit B." Plaintiff is now capable of ratifying her contracts for the necessary medical expenses, per Texas jurisprudence.

The elements of ratification are: (1) approval by act, work, or conduct; (2) with full knowledge of the facts of the earlier act; and, (3) with the intention of giving validity to the earlier act. *See, e.g.*, *Household Credit Servs., Inc. v. Driscoll*, 989 S.W.3d 72, 87 (Tex. App.—El Paso 1998, pet. denied); *Motel Enter., Inc. v. Nobani*, 784 S.W.2d 545, 547 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Jamail v. Thomas*, 481 S.W.2d 485, 490 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.). Ratification occurs when a party reaches majority, knows that the contract was not binding when made because of his or her minority, and nonetheless signifies the intent to be bound by the contract. *See, e.g.*, *Knandel v. Cameron*, 263 S.W.2d 184, 185 (Tex. Civ. App.—San Antonio 1953, rehearing denied) ("[O]nce the minor ratifies his contract after reaching majority, it is then beyond his control to disaffirm it."). The intent to be bound may be expressed by the spoken or written words, or by conduct that renders the intent manifest. *See, e.g.*, *Fletcher v. A.W. Koch Co.*, 189 S.W. 501, 503 (Tex. Civ. App.—Austin 1916, no writ).

Plaintiff has now expressed, with full knowledge of the meaning and consequence thereof, her clear intent to ratify those necessary medical expenses that she incurred as a minor for treatment of her injuries from the automobile collision. *See* Affidavit of Samuelle West, attached hereto as "Exhibit B." Defendant can do nothing whatsoever to prevent Plaintiff from ratifying and assuming the obligation for those medical bills now that she is an adult.

Accordingly, as a matter of law, Plaintiff has a valid claim for past medical expenses. Alternatively, Defendant has failed to demonstrate that there is no genuine issue of material fact and that Defendant is entitled to partial summary judgment as a matter of law.

F. In the Alternative, Defendant Should Pay Sanctions for Discovery Abuse

As a final matter, and in the alternative, if the Court should choose to grant Defendant's

motion (unfounded, untimely, and waived though it be), Plaintiff would respectfully urge the Court not to allow Defendant to profit by her own abuse of the rules of discovery.

In support of that position, Plaintiff would point the Court to Defendant's Responses to Plaintiff's Request for Disclosure, attached hereto as "Exhibit C." Defendant served those responses to Plaintiff's disclosure request on January 19, 2010. In all this time (more than a year since), there has been no supplemented disclosure response by Defendant. As the Court is well aware, Rule 194.2 of the Texas Rules of Civil Procedure puts an obligation on a responding party to disclose, in response to a properly served request for disclosure, all legal theories and factual bases of its claims or defenses. *See* Tex. R. Civ. P. 194.2(c). If one of Defendant's principal defenses to paying out on Plaintiff's claim was that a minor Plaintiff cannot assert past medical expenses, then Defendant has the obligation to disclose that defense, per the above-mentioned discovery rule. She did not do so. Defendant's response to Plaintiff's disclosure request 194.2(c) was merely this:

> Defendant has pled a general denial thereby contesting liability, causation, and damages, and further asserting it is Defendant's position that these are Plaintiff's burden of proof.

See Defendant's Responses to Plaintiff's Request for Disclosure, attached hereto as "Exhibit C."

At no time over the past <u>one year</u> has Defendant amended or supplemented that disclosure response to indicate a defense of Plaintiff's "capacity," "standing," or statute of limitations against the mother of Plaintiff. If the issue of a minor Plaintiff not being able to claim her own past medical expenses is so clear as Defendant would have this Court believe, then Defendant must have been well aware of this defense and its factual basis from very early on. Defendant had a duty to timely amend or supplement her disclosure response to assert this defensive theory. *See* Tex. R. Civ. P. 193.5. The effect of not timely amending or

supplementing is the exclusion of that argument at trial. *See id.* at 193.6.

Either Defendant did not timely assert this defensive theory out of unintentional neglect (in which case, it is waived, as argued above), or did so out of deliberate strategy, waiting for the purported "statute of limitations" to pass on August 29, 2010, as argued in the MPSJ. In the latter case, Defendant would be essentially "laying behind the log," waiting until that alleged statute of limitations passed on August 29, 2010, and only then asserting (just over a month before trial) that the minor Plaintiff could not claim for her own past medical expenses. This would be a flagrant case of abuse of the discovery rules governing Texas court practice, and Defendant should not be allowed to profit thereby. The only appropriate remedy in such instance is that Defendant be made to pay sanctions in the exact amount of the medical expenses at issue, i.e., $9,518.57. Thus, if the Court should grant Defendant's motion, Defendant would be correspondingly punished for tactics that brazenly flout the rules of discovery, and the parties would be placed back in an equitable position.

III.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendant's First Amended Motion for Partial Summary Judgment be denied, and that trial of this cause proceed forward with all of Plaintiff's claims for relief as pled in her petition.

In the alternative, if the Court should decide to grant Defendant's motion, Plaintiff moves that an order of sanctions be assessed against Defendant, in the exact amount of the past medical expenses at issue in this case, i.e., $9,518.57.

Finally, Plaintiff prays that the Court grant such other and further relief to which it finds Plaintiff justly entitled, at law or in equity.

Respectfully submitted,

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ALI A. AKHTAR
State Bar No. 24027271

ATTORNEY FOR PLAINTIFF

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared ALI A. AKHTAR, known to me to be the attorney whose name is subscribed above to the foregoing *Plaintiff's Response to Defendant's First Amended Motion for Partial Summary Judgment and Motion for Sanctions in the Alternative*, and being by me duly sworn, affirmed that all statements of fact contained in the motion were true and correct, to the best of his knowledge.

SUBSCRIBED AND SWORN BEFORE ME on this 27th day of January, 2011.

Notary Public – State of Texas

Notary Seal / Commission Expiry:

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this instrument has been served upon the following counsel of record, via facsimile, on this 27th day of January, 2011, pursuant to the Texas Rules of Civil Procedure:

Mark C. Carrabba
Clark, Miller & Campbell
1701 Directors Boulevard, Suite 920
Austin, Texas 78744

ATTORNEY FOR DEFENDANT

_____
ALI A. AKHTAR